# REPORTS

OF THE

# SUPREME COURT

OF

# CANADA

REPORTER

**C. H. MASTERS, BARRISTER AT LAW.**

ASSISTANT REPORTER

**L. W. COUTLEE, B.C.L. ADVOCATE AND BARRISTER AT LAW.**

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1897.

# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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The Right Hon. Sir Henry Strong, Knight, C. J.

The Hon. Henri Elzéar Taschereau J.

" John Wellington Gwynne J.

" Robert Sedgewick J.

" George Edwin King J.

" Désiré Girouard J.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

The Hon. Arthur Rupert Dickie, Q. C.

" Sir Oliver Mowat, K.C.M.G., Q.C., LL.D.

SOLICITORS-GENERAL OF THE DOMINION OF CANADA:

The Hon. Sir Charles Hibbert Tupper, K. C. M. G., Q. C.

" Charles Fitzpatrick, Q. C.

## ERRATA.

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

Page 87. Reference to *Devanney* v. *Brownlee* in foot-notes. For "(4) [1891] 1 Q. B. 278" read "(2) 8 Ont. App. R. 355."

Page 282. In first and second lines of head-note. For "49 V. c. 51" read "R. S. C. c. 51."

Page 520. Foot-note (4). For "23 U. C. C. P. 116" read "7 U C. C. P. 116."

Page 565. Line 3. Strike out "of" and substitute a comma.

# A TABLE

OF THE

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## Mc.



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# CASES

DETERMINED BY THE

# SUPREME COURT OF CANADA

## ON APPEAL

FROM

## DOMINION AND PROVINCIAL COURTS

AND FROM

## THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

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THE CITY OF SAINT JOHN (DEFENDANT) ..... } APPELLANT;

AND

JANE CAMPBELL (PLAINTIFF).....RESPONDENT.

1895
*Oct. 31.

1896
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Municipal corporation—Repair of streets—Liability for non-feasance.*

In the absence of a statute imposing liability for negligence or non-feasance a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair. *Municipality of Pictou* v. *Geldert* ([1893] A. C. 524), and *The Town of Sydney* v. *Bourke* ([1895] A. C. 433) followed.

APPEAL from a decision of the Supreme Court of New Brunswick (1), setting aside a nonsuit granted at the trial and ordering a new trial.

The plaintiff, Jane Campbell, brought the action in this case for compensation for injuries incurred by

*PRESENT :—Sir Henry Strong C. J., and Taschereau, Gwynne, King and Girouard JJ.

(1) 33 N. B. Rep. 131.

1895

THE CITY OF SAINT JOHN v. CAMPBELL.

falling on one of the public streets of the city of St. John, N.B., her fall being caused, as she alleged, by the defective state of the street, either from the asphalted sidewalk having been constructed at a higher level than that of the private way adjoining, or from the said sidewalk having been negligently allowed to be out of repair.

The evidence established that years ago King Street in Carleton was asphalted, and that at what is known as the "Tema House," the line of the street was extended over private property some eighteen inches or two feet, making the street at that point to that extent wider than it should have been; that at the place where the accident happened—the "Tema House"—the street when asphalted was made some ten inches higher than the ground adjoining, and was given a gradual slope extending towards and over private property, in the direction of the "Tema House" entrance. The street with this extra width and asphalted slope was used by the public and the people going to and returning from the "Tema House" for many years.

The ordinary wear and tear, or the rain falling from the roof of the "Tema House" caused a break in the asphalt at this point some six or nine inches deep. This break had existed for some two years or more, and had gradually deepened and extended towards the line of the street. The plaintiff on the 24th of August, at about half-past nine in the evening, coming from the "Tema House" to the street over this private property, struck her foot against this break and fell on to the public street, causing the injury complained of.

At the trial before Mr. Justice Landry the plaintiff was nonsuited, the learned judge being of opinion that the city was not liable for not repairing the street, nor for injuries caused by the elevation of the sidewalk.

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On motion before the full court the nonsuit was set aside and a new trial granted. The city then appealed to this court.

*Pugsley* Q.C. and *Baxter* for the appellants. There is no statutory obligation on the city to keep the streets in repair and they are not liable because of negligence or non-feasance. *Municipality of Pictou* v. *Geldert* (1); *Municipal Council of Sydney* v. *Bourke* (2).

Raising the level of the sidewalk was not misfeasance. *Mayor of St. John* v. *Pattison* (3).

*Currey* Q.C. for the respondent. The neglect to repair in this case was misfeasance. *Borough of Bathurst* v. *Macpherson* (4); *Municipal Council of Sydney* v. *Bourke* (2).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—All the learned judges before whom this cause came in the Supreme Court of New Brunswick agreed that there was no proof of misfeasance on the part of the appellant. The case therefore altogether depends on the liability of the appellant for the non-repair of the street. The accident, according to the evidence, was caused either by the difference of level between King Street and an adjoining private way, or it was caused by a subsidence of the footway which had been allowed to get out of repair. The sidewalk of King Street had been asphalted by the corporation and so raised to a higher level than the private way. If the accident was caused by this difference of level there would be clearly no misfeasance. If, on the other hand, it was occasioned by the asphalt having been allowed to get out of repair, that would be mere negligence or non-feasance for which, according to the

(1) [1893] A. C. 524.
(2) [1895] A. C. 433.
(3) Cass. Dig. 2 ed. 173.
(4) 4 App. Cas. 256.

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decisions of the Privy Council, no action will lie by a person injured in consequence of such neglect. The decision in *Bathurst* v. *Macpherson* (1), as explained by Lord Hobhouse in giving judgment in *Pictou* v. *Geldert* (2), proceeded altogether upon acts of misfeasance for which the corporation was undoubtedly liable. The defendants there had dug holes in the highway which, if left open, constituted public nuisances. They covered these holes but not sufficiently, and the filling having given way the holes were left open, by which the accident was occasioned. Nothing of this kind can be said of the acts of the appellant here in respect of the asphalted footway. Granting that the corporation had laid down this asphalt way and was bound as a public duty to repair it, the accident, if it did occur on the public way, was, at most, occasioned by the mere neglect of the corporation to keep it in repair. Then, assuming that the city was bound as a duty towards the public to repair, a point on which I express no opinion as none is called for in the present case, the respondent clearly has no right of action. The cases of *Pictou* v. *Geldert* (2), and *Sydney* v. *Bourke* (3), are in this aspect of the case conclusive authorities against the respondent's right to recover, and the nonsuit directed by Mr. Justice Landry was entirely right.

The appeal must therefore be allowed with costs.

*Appeal allowed with costs.*

Solicitor for the appellants: *I. Allen Jack.*

Solicitor for the respondent: *H. A. McKeown.*

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(1) 4 App. Cas. 256.
(2) [1893] A. C. 524.
(3) [1895] A. C. 433.

THE SAINT PAUL FIRE AND MARINE INSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

HOWARD D. TROOP AND JOHN E. IRVINE (PLAINTIFFS) ..... } RESPONDENTS.

1895
*Oct. 31.
1896
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Marine insurance—Voyage policy—"At and from" a port—Construction of policy—Usage.*

A ship was insured for a voyage "at and from Sydney to St. John N.B., there and thence," etc. She went to Sydney for orders and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour and having received her orders by signal attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call, that ships going there for orders never entered the harbour, and that the insured vessel was within the port according to a Royal Surveyor's chart furnished to navigators.

*Held*, affirming the decision of the Supreme Court of New Brunswick, that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John.

APPEAL from a decision of the Supreme Court of New Brunswick (1), sustaining the verdict for the plaintiffs at the trial.

The facts of the case are sufficiently stated in the above head-note and more fully set out in the judgment of the court.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, King and Girouard JJ.

(1) 33 N. B. Rep. 105.

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THE SAINT PAUL FIRE AND MARINE INSURANCE COMPANY v. TROOP.

*Currey* Q.C. for the appellant argued that the limits of the port as defined by statute were meant by the policy citing *Hunter* v. *Northern Assurance Co.* (1).

*Pugsley* Q.C. for the respondents referred to *Lindsay* v. *Janson* (2).

The judgment of the court was delivered by:

KING J.—This action is on a policy of marine insurance made on 1st June, 1892, at St. John, N.B., on the ship *Minister of Marine*—" lost or not lost at and from Sydney, Cape Breton, to St. John, N.B., and thence to a point in the United Kingdom." The defence is that the policy never attached, either because the vessel never was at the port of Sydney, or because she was never there in a condition of physical safety.

At the time of effecting the insurance the vessel was on a voyage from Fleetwood, England, to Sydney, for orders. On the morning of the 4th June she arrived off Sydney harbour, and had shortened sail expecting orders but was still standing in with a free wind, when she received orders from the signal station at Flat Point to proceed to St. John, N.B. It was then attempted to put her about on her course to St. John, but owing to the vessel being light and with reduced sail, and the wind fresh, she missed stays, and was then wore around, and in the course of this manœuvre came inside the line of the two headlands, Flat Point and Cranberry Head, at the mouth of the estuary leading to the town of Sydney. She was then proceeding out in the usual course of outward bound vessels when the wind shifted and, again missing stays, she went ashore about three-quarters of a mile inside of Flat Point, and sustained a partial loss.

Upon the evidence before it the court (having power to draw inferences of fact) found that the vessel was at

(1) 13 App. Cas. 717. (2) 4 H. & N. 699.

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King J.

the port of Sydney in its commercial sense, the contention for defendants being that the entrance of the port was five or six miles further inland at what are known as the north-west and south-east bars.

The word "port" is not used in the description of the risk, but may be implied in the expression "at and from Sydney." The term, however, in commercial documents, such as charter-parties and policies of marine insurance, has not a fixed meaning, but is to be considered as used in its popular or commercial sense, *i. e.*, as applying to what would be so understood by shipowners, shippers and underwriters. *Sailing Ship Garston Co.* v. *Hickie* (1); *Hunter* v. *Northern Marine Ins. Co.* (2). In the latter case Lord Herschell says:

> In the absence of any common understanding (as to the limits of a particular port) how is the question to be determined? It appears to me that you must then consider what are commonly understood to be the characteristics of a port, and what are in general the tests for determining its limits, and apply the conclusions arrived at to the particular case. A port is a place where a vessel can lie in a position of more or less shelter from the elements with a view to the loading or discharge of cargo. The natural configuration of the land is therefore often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several situate on the same river, it is obvious that the natural configuration of the land is not of the same importance and does not afford the same guidance.

Further, it seems reasonable that where there is a known and recognized user of protected waters for purposes of security for a known commercial purpose other than for the loading and discharge of cargoes, the limits of a port may be considered (according to the subject matter of the contract and subject to the whole facts of the case,) as intended to be extended to include such protected waters. In other words the parties may be deemed to have contracted with reference to such user.

(1) 15 Q.B.D. 580. (2) 13 App. Cas. 726.

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King J.

From its geographical position at the mouth of the Gulf of St. Lawrence and the nearest port to Europe on the Atlantic coast of America, Sydney is a recognized port of call, and the fact may be assumed to have been known to defendants.

Then as to the configuration of the land, the two headlands, Flat Point and Cranberry Head, are (as already stated) at the mouth of the estuary which leads to the town of Sydney, Flat Point on the south-east and Cranberry Head on the north-west. At the mouth the width is about three miles, but it soon narrows and preserves a mean breadth of about one and a half miles for a distance of five or six miles, when by the projection of the north-west and south-east bars it is reduced to less than a mile. Passing these it widens again and divides into two branches called the north-west and south-west arms. The town of North Sydney is on the north-west arm just inside of the north-west bar. The town of Sydney is on the south side of the south-west arm about four or five miles inland from the bar. The port of North Sydney as defined for revenue purposes embraces the north-west arm and is limited towards the sea by the line of the north-west and south-east bars. For revenue purposes the port of Sydney embraces the south-west arm and extends to a line drawn from Point Edward, the tongue of land dividing the two arms, to the south-west bar. All the wharves are inside these lines and the lading and unlading of goods is carried on there.

A chart of Sydney harbour published in London according to Act of Parliament at the Hydrographic office of the Admiralty was in evidence. This chart was from surveys of Capt. Bayfield, R.N., and was first published in 1851, and was stated by witnesses on both sides to be authoritative and in general use. In this, Sydney harbour is shown to extend to

the headlands. In an illustration upon the face of the chart representing the entrance of the harbour, *i. e.*, its gate or beginning, as it appears from a vessel approaching it, Flat Point lighthouse is shown bearing west-south-west one mile, thus clearly representing that point as at the south-easterly entrance to the harbour.

When vessels are bound to Sydney for orders they never enter the port as defined for fiscal purposes. One of the defendants' witnesses says that it "would be taking money out of the owner's pockets by doing so." Accordingly such vessels are brought to anchor (where they require to anchor) at different points outside the limits of the statutory port. Usually they come in near the bars, both as being more protected and as giving better facility for communication with the shore.

Mr. Smith, a witness for defendant, a commission merchant, ship broker and insurance agent, residing at Sydney, was of opinion that the port extended only to the bars. As to the practice of vessels visiting the port for orders, he says that

> they come in and anchor at various points in the harbour for the purpose of receiving orders between a point extending from Low (Flat) Point to Cranberry Head and the north bar * * Whether a vessel would come to anchor up near the north bar or out close to a line between Flat Point and Cranberry Head, would depend very much on weather and circumstances * * the farther she comes the safer she is.
>
> Question by the court: Independently of the statutes where provision is made fixing the limits of the harbour for Customs purposes, where would you say the harbour would begin and end? Ans. I think there is a good bit of harbour outside of the line of the north bar.

Andrew Kenny, a witness for plaintiffs, a shipmaster, says that the two points forming the entrance to the harbour are Cranberry Head and Low Point, and that all the water inside these bounds is known among

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maritime men as Sydney harbour; that he has been there six times and always anchored outside the bars.

John McDonald, a witness for defendant, and a master mariner, residing at Sydney, says that

if he was anywhere inside the capes he would consider that he was in the entrance to the harbour * * For Custom-house purposes I had to go inside the bars, but in calling for orders the pilot has never taken me to the buoys. I anchored her always outside the buoys until I got my orders. If I was ordered to load there, of course I would come inside and have to pay my tonnage; if I was not, I would get my orders and go outside without paying any dues, only the pilotage.

Q. Whereabouts do you anchor outside these bars?—A. It depends on the number of ships in the roadstead from the buoys out. If I was beating in the harbour with a moderate westerly wind blowing, I would not hesitate to anchor anywhere inside the capes, but not to lay long. Q. How far inside the capes?—A. Well, even off the capes here * * I have seen them anchor all the way out pretty near to Cranberry Head, just according to the number of ships in the roadstead.

And on cross-examination:

Q. I understand you that for Customs purposes the legislature has created two ports inside the harbour?—A. Yes. Q. One being Sydney and the other North Sydney?—A. Yes. Q. And that is simply for Customs purposes?—A. Yes. Q. Well, among sea-faring men that is known to be simply for Customs purposes, is it not?—A. Yes, if I go inside that line I come under the Customs regulations. Q. But where your vessel is bound to Sydney for orders, you have over and over again stayed outside the bars?—A. Yes, where the vessel was bound there for orders I have never gone inside the bars. Q. In other words, in calling at Sydney for orders you have never gone within what is defined as the Customs port?—A. No, I would be taking money out of the owner's pockets by doing so.

Walter McLean, also called for defendants, a master mariner for 12 years, says that he had been in Sydney harbour about six times and only once went inside the bars, being then chartered to load there; that Sydney is a port to which a great many vessels go for orders; that in anchoring outside he always considered he was in Sydney harbour:

I would say, as we understand it, that this (pointing to the chart) is the entrance of Sydney harbour—Cranberry Head on one side and Low Point on the other. The customs people define the harbour away inside of that.

Richard Bradley, also called for defendants, a master mariner since 1878, had frequently been to Sydney for orders and always came to anchor between the headlands and the bars. He says that the place along there is, he supposes, called Sydney; that is where he was going for orders; that he has seen vessels anchored along there most anywhere. This on direct examination. On cross-examination, he was asked where he considers that the harbour line begins:

Ans. We always consider that a line between Cranberry Head and Low Point is the mouth of Sydney Harbour. There is no question about that. We consider then that we are in the harbour and exempt from pilots. If we get in there without pilots we don't have to take one.

Now this is indeed the testimony of navigators, rather than of shipowners and underwriters, but practices so uniform and reasonable and founded on consideration for the shipowner's benefit may fairly be presumed to be known to and approved of by them. Probably any master who should go inside the bars and so incur charges would very soon hear from his owner. Besides, the charts furnished by the owners to the vessels show the harbour line as claimed. Then this uniform practice of navigators might reasonably be known to persons engaged in the business of underwriting.

Having regard then to the recognized mercantile use of this port as a port of call, and to the natural configuration of the coast, to the admiralty charts of Sydney harbour, and to the testimony of all the witnesses as well for the defendants as for plaintiffs, it would seem that enough appears to support the finding of the court as to the area which served the purposes of the port in a commercial sense.

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This being so, it was not necessary that the ship should have come to anchor or be moored. The first arrival at the port is meant, and these words are implied and always understood in policies. *Motteaux* v. *London Ass. Co.* (1). It is held that the only qualification is that the vessel shall be there in a state of sufficient repair or seaworthiness to be enabled to be in reasonable security till she is properly repaired and equipped for the voyage. *Parmeter* v. *Cousins* (2); *Bell* v. *Bell* (3); *Haughton* v. *Empire Marine Ins. Co.* (4). If in such state the condition of seaworthiness is commensurate with the risk. Here the ship was clearly seaworthy in the fullest sense, and was in physical safety, and might have continued on further up the harbour without the least risk. The danger she met was in her attempt to get out of the harbour. It was therefore a peril of navigation subsequent to the first arrival in the harbour in safety.

In these views, the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Currey & Vincent.*

Solicitor for the respondents: *W. Pugsley.*

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(1) 1 Atk. 545.
(2) 2 Camp. 235.
(3) 2 Camp. 475.
(4) L.R. 1 Ex. 206.

HENRY F. COOMBS (SUPPLIANT).....APPELLANT; 1896

AND *Feb. 22.

HER MAJESTY THE QUEEN (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Railway Co.—Railway ticket—Right to stop over.*

By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. *Craig* v. *Great Western Railway Co.* (24 U. C. Q. B. 509); *Briggs* v. *The Grand Trunk Railway Co.* (24 U. C. Q. B. 516); and *Cunningham* v. *The Grand Trunk Railway Co.* (9 L. C. Jur. 57; 11 L. C. Jur. 107) approved and followed.

APPEAL from a decision of the Exchequer Court of Canada (1), dismissing the suppliant's petition of right.

The suppliant, Coombs, on March 31st, 1893, was in Moncton, N.B., where he saw posted up a notice by the Intercolonial railway authorities containing the following: "Excursion return tickets will be issued on March 30th and 31st and April 1st, inclusive, at first-class single fare. Tickets are not good going after April 1st." Wishing to go to Chatham Junction he bought an excursion ticket which had printed on its face "good on date of issue only," and "no stop-over allowed." He did not read what was on the ticket, and his attention was not called to it when he purchased.

He started from Moncton on March 31st, and when he got to Harcourt, about half way to Chatham Junction, he left the train and stayed there all night. On

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King, and Girouard JJ.

(1) 4 Ex. C. R. 321.

1896

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resuming his journey next day his ticket was refused by the conductor, and refusing to pay his fare again he was ejected from the train, for which he claims damages from the crown. His petition of right was dismissed by the judgment of the Exchequer Court, from which he appeals.

*Orde* for the appellant. The advertisement of the issue of excursion tickets at a reduced rate is a feature in the contract made with every purchaser of a ticket, and its terms are binding on the crown. *Parker* v. *The South Eastern Railway Co.* (1); *Watkins* v. *Rymill* (2); *Richardson* v. *Rowntree* (3).

The attention of the suppliant was not drawn to the conditions on the ticket, and he is not bound by them. *Bate* v. *Canadian Pacific Railway Co.* (4).

*Newcombe* Q.C., Deputy Minister of Justice, for the respondent, was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am not prepared to overrule cases of authority decided by the courts in Ontario which have stood unimpeached for many years, and are decisions of very able judges. In *Craig* v. *The Great Western Railway Co.* (5), where the right of a traveller to stop over on an ordinary ticket was in question, Draper C.J. says:

> Our conclusion is that the defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train of the defendants from the point of commencement, and entitling him, if the train in which he started did not go the whole distance mentioned in his ticket, to be conveyed the residue of that distance in some other train of the defendants, the whole journey to be completed within twenty days from the date of the ticket; and that the contract

(1) 2 C.P.D. 416.
(2) 10 Q.B.D. 178.
(3) [1894] A.C. 218.
(4) 15 Ont. App. R. 388; 18 Can. S.C.R. 697.
(5) 24 U. C. Q. B. 509.

did not confer on the plaintiff a right to stop at every or any intermediate station, though within the limited twenty days.

In *Briggs* v. *The Grand Trunk Railway Co.* (1) in which the same question came up on demurrer, the same learned Chief Justice says:

> The sole question presented is the right of the plaintiff upon this contract to break the journey into two or more parts, resuming and completing it at his own convenience. I have already expressed my opinion on this point in the case of *Craig* v. *The Great Western Railway Co.* (2), and shall not now further discuss it.

In the case of *Cunningham* v. *The Grand Trunk Railway Co.* (3), the Superior Court of Lower Canada had in the first instance decided the other way, on the ground that although it was the custom of the railway company to insist on a continuous journey they had recognized the act of their conductors in allowing passengers to infringe this rule, but this judgment was unanimously reversed by the Court of Queen's Bench, thus bringing the law of Lower Canada into accord with the Ontario decisions.

So there is perfect unanimity of opinion as to the law on this question so far as the two old provinces of Canada are concerned, and (speaking for myself only) I would not presume to overrule the decisions referred to. Moreover, on principle, apart from authority, when a person buys a ticket it is reasonable that it should only give him a right to a continuous journey, and in addition, in this case, the plaintiff had a plain warning on the ticket itself "good on date of issue only," in the face of which he should never have brought this action. The case is very different from that of *Bate* v. *The Canadian Pacific Railway Co.* (3), where there were very good reasons why the purchaser should not be bound by the conditions of the ticket she

(1) 24 U.C.Q.B. 516.
(2) 24 U.C.Q.B. 509.
(3) 9 L.C. Jur. 57; 11 L.C. Jur. 107.
(3) 15 Ont. App. R. 388; 18 Can. S. C. R. 697.

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bought, inasmuch as being unable to read from defective eyesight, she asked the ticket issuer for an explanation of the undertaking she was required to sign, and was told by him that it had reference to a matter entirely different from the condition relied on by the company. We therefore do not call upon counsel for the respondent. The judgment of the Exchequer Court was quite right, and the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *McKeown, Barnhill & Chapman.*

Solicitor for the respondent: *J. A. Belyea.*

EUGENE HAMEL.....APPELLANT; 1896

AND

*Feb. 18.
*Feb. 25.

AUGUSTE HAMEL ..... RESPONDENT.

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

*Appeal—Final judgment—Petition for leave to intervene—Judgment on—Interlocutory proceeding.*

No appeal lies to the Supreme Court from the judgment of the Court of Queen's Bench on a petition for leave to intervene in a cause the proceedings being interlocutory only.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court by which a petition by the appellant for leave to intervene in a cause before the court was dismissed.

A case of *Hamel* v. *Hamel* was pending in the Superior Court, the action having been brought by one executor of an estate to have the other removed. Eugene Hamel was brought into the cause as *mis-en-cause* and being desirous of taking proceedings for the removal of both executors he presented a petition to the court asking to be allowed to intervene in the cause. The court dismissed his petition holding that being already in the cause as *mis-en-cause* he could not come in as intervenant, but must bring a separate action for the relief he wished to obtain. The judgment dismissing the petition was reversed by the Court of Review but restored by the Court of Queen's Bench, and the petitioner having taken an appeal to this court a motion was made by respondent to have his appeal quashed.

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

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*Drouin* Q.C. for the motion. There is no appeal in this case. No amount is in controversy, and it is not a case which is appealable because future rights are involved. It is therefore exactly within the decision in *O'Dell* v. *Gregory* (1).

Moreover, the proceedings here were only interlocutory and there is no final judgment to appeal from.

*Belcourt* contra. The appeal is from a final judgment in a judicial proceeding which gives the court jurisdiction. It is a special proceeding and not governed by the money limitation. See *Ross* v. *Ross* (2); *Mitchell* v. *Mitchell* (3).

The judgment of the court was delivered by:

GIROUARD J.— This is a motion to quash an appeal taken from the judgment rendered by the Court of Appeal of the province of Quebec. The appellant filed a petition praying to be permitted to intervene in a case of *Hamel* v. *Hamel*, pending before the Superior Court at Quebec. It was allowed by Mr. Justice Andrews in the usual manner, but the *moyens* or grounds of intervention were never furnished as preliminary issues were raised by the plaintiff in the original suit. He attacked the petition for permission to intervene by several pleas alleging more particularly that Eugene Hamel, the petitioner, who was already in the case as *mis-en-cause*, had no right to intervene, and that his petition should be rejected. To save costs the parties filed an admission of certain facts—

pour les fins de l'issue sur la présente requête en intervention

and the following reservation was made—

et le demandeur se réserve le droit de faire une preuve contraire à ces admissions, sur les moyens d'intervention, si la dite requête est admise.

(1) 24 Can. S. C. R. 661. (2) Cass. Dig. 2 ed. 306.
(3) 16 Can. S. C. R. 722.

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The petitioner examined one witness, and the issue thus joined was argued before Mr. Justice Larue who dismissed the petition. The Court of Review reversed his judgment and allowed Eugene Hamel to intervene, and permitted "him to proceed to final judgment in the usual manner." The Court of Appeal reversed this judgment, and restored the judgment of the Superior Court.

All these judgments, it seems to me, are only of an interlocutory nature. The code of procedure of Quebec permits an appeal to the provincial courts from interlocutory judgment in certain cases, but the Supreme Court Act has not conferred the same jurisdiction upon this court. The policy of the Act is to prevent a multiplicity of appeals in the same instance and to limit our jurisdiction to final judgments only. The judgment appealed from is merely on a petition to be permitted to intervene, and is clearly interlocutory, and it is the well settled jurisprudence of this court that there is no appeal in such a case. The motion to quash is therefore granted with costs.

*Appeal quashed with costs.*

1895
*Oct. 5.
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*Feb. 18.

WILLIAM DRYSDALE (DEFENDANT).....APPELLANT;

AND

C. A. DUGAS (PLAINTIFF).. .....RESPONDENT.

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

*Nuisance—Livery stable—Offensive odours—Noise of horses.*

Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odour therefrom and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents the proprietor is liable in damages for the injury caused thereby. Gwynne J. dissenting.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court (1), in favour of the plaintiff.

The plaintiff Dugas owns two houses on St. Denis street in Montreal, and his action was brought in consequence of injuries alleged to have been caused to him by the erection by defendant of a livery stable near one of said houses. He claimed to have suffered from offensive and unhealthy odours emanating from the stable, from noise made during the night by the horses, and from urine and other fœtid liquids penetrating the basement of his house. The defendant pleaded that the stable was built to carry on a business not only allowed but indispensable in a large city; that it was constructed on the most improved and scientific plan and according to the municipal regulations and by-laws; and that it was provided with the best possible system of drainage and ventilation.

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

(1) Q.R. 5 S.C. 418.

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On the trial of the action it was found as a matter of fact that plaintiff's property had depreciated in value on account of the stable being placed so near it and defendant was condemned to pay $398 for damages already suffered and $4,000 for future damages unless the defendant should cease to use his building as a livery stable before a day named. The Court of Queen's Bench affirmed the judgment as to the past damages but reversed it as to the other, in which plaintiff acquiesced and took no cross-appeal to the defendant's appeal from that part of the decision which was against him.

*Greenshields* Q.C. for the appellant.

*Robidoux* Q.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Queen's Bench in favour of the plaintiff in an action brought to recover damages for a nuisance caused by the maintenance of a livery stable in the immediate neighbourhood of the respondent's property on St. Denis street, in the city of Montreal. The respondent is himself the occupant of one of the houses of which he is proprietor, number 122, and the other house, number 118, is occupied by a tenant. In 1890 and 1891 the appellant constructed a large stable in which he has since carried on the business of a livery stable keeper. This stable immediately adjoins the house number 118, and is about twenty-five feet distant from number 122. The respondent alleged that damage has been caused to him by reason of offensive odours emanating from the stable, and also by the noise caused by the horses, some twenty-eight or thirty in number, kept therein.

The appellant by his pleadings denied the fact of the nuisance and also pleaded that the stable was built for carrying on a business which was a necessity

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in a large city like Montreal; that the stable was constructed on the most approved methods as regards ventilation and drainage; and further, that the respondent acquired the property, number 118, subsequently to the erection of the stable.

Mr. Justice Gill, before whom the cause was heard in the Superior Court, rendered judgment for the respondent for $398 damages, $298 being for damages accrued in respect of number 118, and $100 in respect of number 122. Further, the judgment of the Superior Court awarded the additional amount of $4,000 for future damages unless before the 1st of May, 1895, the appellant should cease to use his property for the purposes of a livery stable.

The Court of Queen's Bench have varied this judgment by striking out the last clause; in other respects the judgment of the Superior Court was affirmed.

The fact that the stable did cause damage to the respondent has thus been found by the concurrent judgments of both the courts below, and these findings upon the evidence before us cannot be successfully impugned. It is established beyond question by the witnesses that the respondent suffered inconvenience and discomfort in the enjoyment of the house occupied by himself, by reason of offensive smells caused by the appellant's stable, and also that his property rights in number 118 have been depreciated from the same cause, and to some extent also from the noise caused by the horses, and that the rental received from that house has been thereby diminished. The law applicable to the case is of course that of the province of Quebec to be found in the Civil Code. Article 1053, expressing in general terms the law which the appellant invokes, is as follows:

> Every person capable of discerning right from wrong is responsible for the damages caused by his fault to another, whether by positive act, imprudence or want of skill.

This of course includes all abuses of proprietary rights, even the most absolute, for such rights must, according to the general principles of all systems of law, be subject to certain restrictions subordinating the exercise of acts of ownership to the rights of neighbouring proprietors; *sic utere tuo ut alienum non laedas* is as much a rule of the French law of the province of Quebec as of the common law of England.

My brother Taschereau has in his judgment stated and examined the French and Canadian (Quebec) authorities, and I concur in all he has said. I purpose only to add a few references to English authorities which, in my opinion, entirely support his view. Mr. Justice Jetté in his judgment in *Crawford* v. *The Protestant Hospital* (1), observes that the English and French law on the subject of nuisance are exactly alike, and the appellant, in his factum, has invited us to consider the English authorities applicable to the case before us.

As a general proposition occupiers of lands and houses have a right of action to recover damages for any interference with the comfort and convenience of their occupation. In applying the law, however, regard is to be had, in determining whether the acts complained of are to be considered nuisances, to the conditions and surroundings of the property. It would be of course absurd to say that one who establishes a manufactory in the use of which great quantities of smoke are emitted, next door to a precisely similar manufactory maintained by his neighbour, whose works also emit smoke, commits a nuisance as regards the latter, though if he established his factory immediately adjoining a mansion in a residential quarter of a large city, he would beyond question be liable for damages for a wrongful use of his property to the detriment of his

(1) M. L. R. 5 S. C. 79.

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neighbour. As Pollock C.B. in his dissenting judgment in *Bamford* v. *Turnley* (1) puts it:

> That may be a nuisance in Grovesnor Square which would be none on Smithfield market.

As Thesiger L.J. says in *Sturges* v. *Bridgman* (2):

> Where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner, not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.

In *St. Helen's Smelting Company* v. *Tipping* (3), Lord Westbury lays down the law substantially in the same terms; he says:

> If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in that shop.

In *Brand* v. *Hammersmith Railway Company* (4), Erle C.J. says:

> The cause of action, if any, lies in the excess of the damage beyond what is considered reasonable after taking into account the circumstances of the time and place, the quantity of annoyance and the relation of adjoining properties to each other.

In *Bamford* v. *Turnley* (1), in the Exchequer chamber, that court went even further than this. In that case it was laid down as the true doctrine applicable to cases of this kind, that:

> Whenever, taking all the circumstances into consideration including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie whatever the locality may be.

This proposition carried the law much further than it had previously been supposed to extend.

(1) 3 B. & S. 62.
(2) 11 Ch. D. 865.
(3) 11 H.L. Cas. 642.
(4) L.R. 2 Q.B. 246.

Now the locality in which the respondent's property was situated, appears from the evidence to have been a street occupied almost exclusively by private residences.

The house number 118 had not been acquired by the respondent until after the erection of the appellant's stable, though it had been built long before. This circumstance as to the date of the respondent's acquisition of title can make no difference in his rights to object to the nuisance. In *Tipping* v. *St. Helen's Smelting Company* (1), the facts were that the plaintiff had come to the nuisance (*i. e.* acquired his property) with a knowledge of the existence of the nuisance, and it was nevertheless held that he was entitled, not merely to damages, but to an injunction to restrain the further commission of the acts complained of.

Particular instances of the application of the law to cases resembling the present, *i e.*, nuisances caused by stables, are to be found in two cases which may be usefully referred to, *Ball* v. *Ray* (2), *Broder* v. *Saillard* (3). In both of these cases injunctions were granted to restrain the nuisance caused by the noise made by horses in the stables. In the latter case the Master of the Rolls, in his judgment, held that the noise so made by horses in a stable placed close to a dwelling house, in a town, which disturbed the sleep of the occupants, was interference with the ordinary and comfortable enjoyment of the owner, amounting to a nuisance. The case last mentioned is also an authority on another point, for the argument that stables were absolutely and indispensably necessary, and that the maintenance of one was a reasonable use by a man of his own property, was strongly pressed, but was repelled as no answer to the action.

It was much insisted upon at the argument here and in the courts below also, that the fact that the appel-

(1) 1 Ch. App. 66.
(2) 8 Ch. App. 467.
(3) 2 Ch. D. 692.

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lant acted with extreme care and caution in carrying on his business constituted a justification of the acts complained of. This contention is, however, met and shown to be entirely without foundation in *Bamford* v. *Turnley* (1), before referred to.

I have, therefore, no hesitation in coming to the conclusion that the disagreeable odours coming from the appellant's livery stable, in the present case, do constitute a nuisance just as much as did the noise made by the horses in the two English cases cited. Further, although it seems to be proved only by one witness (Mr. Desjardins, sr.), the same element of disturbance by the noise of the horses is established here as regards house number 118. There was, therefore, an interference with the personal comfort and enjoyment of the respondent as respects his own house number 122, entitling him to recover damages. And there was also a like interference with the enjoyment of house number 118 by the respondent's tenants which depreciated the respondent's property in that house by reducing the rental, for all of which damages were recoverable.

The sum of $298 awarded for the depreciation of the rental of number 118, and the $100 in respect of the damages sustained by the respondent in his personal occupation of number 122, seem to me reasonable amounts and warranted by the evidence.

The appeal is dismissed with costs.

TASCHEREAU J.—Cette cause m'a paru d'abord devoir présenter quelque difficulté,mais j'en suis depuis venu à la conclusion qu'après tout, elle est, telle qu'elle nous a été soumise sur cet appel, bien simple. Il est établi en fait par le jugement *a quo*, 1. Que les odeurs fétides qui se répandent de l'écurie de l'appelant aux maisons de l'intimé rendent l'habitation de ces maisons

(1) 3 B. & S. 62.

très désagréable, et lui causent un préjudice sérieux, et une diminution considérable dans la valeur locative des dites maisons. 2d. Que ces odeurs par leur continuité et leur intensité excèdent la mesure des incommodités ordinaires et inséparables du voisinage. Et la preuve au dossier justifie pleinement cette appréciation des faits. Il en étant ainsi, la cause ne présente plus de question de droit. Et la doctrine, et la jurisprudence s'accordent à donner, en pareil cas, un recours en dommages contre l'auteur du fait dommageable. Domat, liv. 1er. tit. 12, sec. 2, nos. 8, 10; Sirey, Code Ann. sous art. 1382, nos. 300 à 319; Clérault des établiss. dang. nos. 83, 125 et seq; Rendu, dict. des constructions, vo.Ecurie, no. 1670; Devilleneuve, dict. du cont. comm. vo.Etabliss. insalubres, nos. 53 et seq, 67 et seq; 2 Demol. des Serv., nos. 253 et seq; 6 Laurent, nos. 136 à 155; Sirey 85, 1, 69. Dans une cause toute récente *Garnier* v. *Touchois* (1), cette jurisprudence a été affirmée en termes non équivoques, et l'on trouvera, au bas de la page dans une note du reporter, une mention importante des causes décidées antérieurement.

Duvergier a soutenu le contraire (2), mais son opinion a été repoussée par les tribunaux. C'est en vain que l'appelant invoque la maxime *qui jure suo utitur neminem laedit.* Il a bien droit d'avoir un écurie sur son terrain, mais il n'a pas le droit d'en répandre (*emittere*) les odeurs dans les salons et les salles à diner de l'intimé, ou d'en vicier l'air atmosphérique de manière à l'incommoder gravement. Sirey, 58, 1, 305. Et il n'exerce son droit de tenir une écurie qu'à la condition de payer les dommages sérieux qu'il cause à ses voisins. Ce sont là les conséquences qu'il devait prévoir lorsqu'il a choisi le site de son établissement.

(1) Pandectes Françaises rec. men. 96, 2, 17.

(2) Rev. étrang. et franc. vol. X, pp. 425, 601.

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GWYNNE J.—I am of opinion that this appeal should be allowed and the action dismissed in the court below with costs. For the present judgment, if it should be allowed to remain, is in my judgment substantially equivalent to a judgment that it is illegal to maintain a public stable for horses anywhere within the limits of the city of Montreal, for it is impossible that any such stable could be more perfect in its construction and in its arrangements, and in the manner of its being conducted, than the stable of the appellant, which has been condemned, has been shown by the evidence to be. As we cannot pronounce it to be illegal to maintain a stable in the city of Montreal the appeal should be allowed.

SEDGEWICK, KING and GIROUARD JJ. concurred in the dismissal of the appeal.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Greenshields & Greenshields.*

Solicitors for the respondent: *Robidoux, Geoffrion, & Chênevert.*

THE AGRICULTURAL INSURANCE COMPANY (PLAINTIFFS).. } APPELLANTS; 1895 *Oct. 12.

AND

AMELIA SARGEANT, EXECUTRIX, ETC. (DEFENDANT) ..... } RESPONDENT. 1896 *Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Suretyship—Principal and surety—Continuing security—Appropriation of payments—Imputation of payment—Reference to take accounts.*

J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until on the 15th of October, 1890, one W. S. joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J.H.S. with premiums,&c., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of ther business, the note and its various renewals being also credited in this general account for cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On the 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note W. S. signed on 15th October, 1890, was payable four months after date with interest at 7 per cent, and the mortgage was expressed to be payable in four equal instalments of $312.50 each, with interest on unpaid principal.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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*Held*, Taschereau and Girouard JJ. dissenting, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *primâ facie* an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage: that in the absence of evidence of such intention it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account which included the debt secured by the mortgage; and that there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply and there should have been a reference to the master to take the account.

APPEAL from the decision of the Court of Appeal for Ontario affirming the judgments in *nisi prius* and the Chancery Division, by which the plaintiff's action was dismissed with costs.

The action was to recover the amount of a mortgage given by William Sargeant to secure $1,250, due by one J. H. Scriver up to 1st January, 1890, for arrears in his remittances of insurance premiums collected for the company.

The plaintiff's books show Scriver's account to have been kept as a continuous entry in their ledger for a number of years previous to this transaction and it was continued in the same way up to the time of trial. Scriver continued to act as agent, collecting premiums and transmitting moneys to plaintiff from time to time which were credited on the general account, and in the aggregate exceeded the amount covered by the mortgage. As the notes became due they were retired by the plaintiff and new notes taken in place of them

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were credited as cash in Scriver's account. Sargeant died on 5th December, 1891, leaving the defendant as his executrix, but there was no change made in the manner in which Scriver's account was kept, save that upon the maturity of the last renewal note plaintiff accepted new notes from Scriver alone, crediting them in the usual way.

As the amount due at the time of the trial was less than the indebtedness accrued since the security was given, defendant claimed that the mortgage had been satisfied and further that plaintiff, by giving time and accepting new notes for Scriver's indebtedness, had released the surety.

*Holman* for the appellants. The rule in Clayton's case cannot be applied in this case. See *Fenton* v. *Blackwood* (1); Munger on Appropriation of Payments (2); *City Discount Co.* v. *McLean* (3); and if not the surety has not been released. *Croydon Gas Co.* v. *Dickinson* (4); *Jenkins* v. *Robertson* (5); *Reade* v. *Lowndes* (6).

*Watson* Q C. for the respondent. As to appropriation of payments see *Green* v. *Clark* (7). *In re Sherry* (8); *Hooper* v. *Keay* (9).

The surety was discharged by the giving of time to the principal debtor. *Howee* v. *Mills* (10); *Rouse* v. *Bradford Banking Co.* (11); *Allison* v. *McDonald* (12).

TASCHEREAU J.—I dissent on the two points raised in the case of the application of payments, and the discharge of the suretyship by the delay given. I think that the appellant's action was rightly dismissed.

(1) L. R. 5 P. C. 167.
(2) P. 120.
(3) L. R. 9 C. P. 692.
(4) 2 C. P. D. 46.
(5) 2 Drew. 351.
(6) 23 Beav. 361.
(7) Cass. Dig. 2 ed. 614.
(8) 25 Ch. D. 692.
(9) 1 Q. B. D. 178.
(10) 10 U. C. C. P. 194.
(11) [1894] 2 Ch. 32.
(12) 23 Can. S. C. R. 635.

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Taschereau J.

I adopt Mr. Justice Maclennan's reasoning in that sense. If in 1893 the appellants had taken an action against Scriver what is the amount that they would have recovered? Clearly $1,009, and that alone, as the balance of his indebtedness incurred since Sargeant's death. What he owed in 1890 is paid, overpaid.

GWYNNE J.—For many years prior to the year 1890 one J. H. Scriver was acting as an agent of the plaintiffs, procuring insurance policies to be entered into with them and receiving the premiums thereon for transmission to the defendants.

On the 1st day of January, 1890, as appears in evidence, he was indebted to them, for premiums received by him upon policies issued by them through his agency and not remitted to them, in the sum of $1,632.37. Scriver continued to act as such agent of the plaintiffs as before, and on the 1st day of October they opened an account with him in their ledger, debiting him with the sum of $1,598.67.

One William Sargeant had been Scriver's surety to a certain amount for the due payment by Scriver to the plaintiffs of the premiums received by him for them, and upon the 15th of the said month of October, for the purpose of securing payment of $1,250, part of the above debit, he executed the mortgage which is the subject of the present suit, whereby it was provided that the mortgage should be void upon payment of the said sum of $1,250, with interest thereon at the rate of six per cent per annum, in manner following, that is to say, in four equal annual instalments of $312.50 each, with interest on the unpaid principal annually, together with each payment of principal. This mortgage was, by a clause therein, declared to be given as collateral security to a promissory note of $1,250, or any renewals of the same, the payment of

which, or any part thereof, to be considered as a payment upon the mortgage, each note being in the words following and made for the purpose of present discount:

TORONTO, 15th October, 1890.

Four months after date we jointly and severally promise to pay to the order of the Agricultural Insurance Co. of Watertown, at the office of the Bank of Toronto here, the sum of twelve hundred and fifty dollars with interest at seven per cent, value received.

Signed, { J. H. SCRIVER, WM. SARGEANT.

Sargeant died on the 5th December, 1891, and this action is brought against the executrix of his will, the plaintiff claiming the whole amount secured by the mortgage as still due. The defendant, in her statement of defence, alleges that the mortgage was executed for an amount larger than was then due by Scriver, and that the sum of $1,250 was inserted in the mortgage only for the purpose of covering the amount which upon the taking of the accounts should prove to have been due when the mortgage was executed; that ever since the death of Sargeant (her husband), she has repeatedly applied for a statement of the account but that none has been given to her, and she claims that the plaintiffs by giving time to Scriver since the maturity of the said note and by their course of dealing with him have released the estate of her husband from all liability under the said mortgage, and she claims to be entitled to an account between the plaintiffs and Scriver as to the present indebtedness if any there be upon the account between him and the plaintiffs as it stood on the 15th October, 1890, when the mortgage was executed; and she insists that in point of fact there is at present no such indebtedness if Scriver be credited with all the sums which he is entitled to be credited with, and she prays that if any sum should be found to be due to the plaintiffs

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the mortgaged lands should be ordered to be sold for the satisfaction thereof. Upon this statement of defence the plaintiffs joined issue and the case came down for trial when the plaintiffs produced the mortgage and an exemplification of the probate of Sargeant's will whereby the defendant appeared to be executrix and thereupon rested their case and thereby cast upon the defendant the burthen of proving the matters alleged by her in her statement of defence. The appropriate mode of inquiring into such matters would as it appears to me clearly have been by a reference to the master under the ordinary decree in a foreclosure suit, but instead of taking such a decree the defendant called as a witness on her behalf the plaintiffs' bookkeeper to produce and he accordingly produced the ledger in which the account opened of the date of the 1st October, 1890, with Scriver was kept, and she insisted that this account by application of the rule in Clayton's case showed upon its face that the old debt for part of which the mortgage was given was paid off.

Now upon the authority of the *City Discount Co.* v. *McLean* (1) and of other cases, the presumption that the earlier items of debit in a general account are extinguished by the earlier items of credit is a presumption which may be rebutted by evidence. Every case must be determined according to its own circumstances, and the evidence in the present case, which was necessarily the evidence of the defendant herself, shows that the rule in Clayton's case has no application in the circumstances of the present case. The first item in the account in the ledger is no doubt the debit entry of the date of the 1st October, 1890, of the sum of $1,598.67, of which the $1,250 secured by the mortgage constituted a part, but this sum of $1,250 was made payable in four equal annual instalments, the first of

(1) L. R. 9 C.P. 692.

which would not be payable until the 15th October, 1891. It cannot then be assumed to have been the intention of the parties that these deferred payments should be expedited and *eo instanti* extinguished by entries of credit in a current account. Some evidence of a contract to that effect would be necessary, and there is not only none such, but there is evidence having a directly contrary effect. On the 18th February, 1891, a renewal note for $1,150 at four months was given by Scriver and Sargeant in the precise form of the note for $1,250; this renewal note was taken up by the plaintiffs at maturity, and a new renewal note for $900 at four months given in like form, which was also taken up by the plaintiffs at maturity, and shortly afterwards, namely, on the 5th December, 1891, Sargeant died.

Now these renewal notes are clearly *primâ facie* admissions that at the respective times of their being given the amounts mentioned therein at the least were still due upon the security of the mortgage, but the evidence as to the reduced amounts named therein was that they were respectively so inserted upon promises made by Scriver, which, as is alleged, were never fulfilled, that he would pay the differences in cash. This may or may not be true, but even though it should not be true, the notes themselves afford at least *primâ facie* evidence that the amounts therein respectively named were, at the date of the respective notes, still due as part of the amount secured by the mortgage, and the evidence further is that these notes, which were made for the express purpose of being discounted by the plaintiffs, were taken up by them at maturity. Under these circumstances it seems impossible to hold, upon the authority of Clayton's case, or of any reported case, that the old debt existing on the 1st October, 1890, of which the $1,250 secured by mortgage formed

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a part, was paid off by reason of the entries of credit in the ledger account. But the evidence, further assuming it to be true, which for the purpose of the present inquiry we must do as it is uncontradicted, although no doubt it may be questioned upon further inquiry in taking the account before the master, but for the present, assuming it to be true, it appears to be very clear that the rule in Clayton's case has no application whatever to the present. For what is that rule? It is laid down thus in *City Discount Co.* v. *McLean* by Blackburn J. (1), and expressed by Lord Selborne in *Re Sherry* (2), in somewhat similar language:

> It has been considered a general rule since Clayton's case that when a debtor makes a payment he may appropriate it to any debt he pleases and the creditor must apply it accordingly. If the debtor does not appropriate it the creditor has a right to do so to any debt he pleases and that not only at the instant of payment but up to the very last moment as was decided in *Mills* v. *Fowkes* (3).

Now it is obvious that, to the application of this rule, one unbroken account is not the only one thing necessary. "It may be" (says Blackburn J. in his judgment in the above case),

> as a general rule in ordinary cases, and there is nothing to show a contrary intention, the items of debit in order of date and the half-yearly account rendered would constitute a fresh permit of departure. Clayton's case and other similar cases show that where a partner dies and there is a change of the partnership and the transactions with the new and old firms are all mixed up together in one account the law treats the whole as one entire account and applies the items of credit to those of debit according to date in favour of the estate of the deceased partner. But when the parties remain the same the question is whether the rendering of the account amounts to an appropriation of the items to one another in order of date.

Then applying these principles to the case then before him the learned judge proceeds:

(1) L. R. 9 C.P. 700 (2) 25 Ch. D. 702.
(3) 5 Bing. N.C. 455.

In such a case as this where the earlier items constituting the £5,000 were secured by a mortgage and a guarantee it never could have been the intention that they should be so appropriated; but it is contended that as a matter of law though there is no authority so deciding, or as an inference of facts though it is contrary to all probability, we are bound to hold that the £5,000 is to be considered as paid off; and if so paid off it follows that it must be treated as paid off in six months though by the terms of the guarantee a period of two years was contemplated. I cannot draw such an inference either as matter of law or of fact. The true rule is that laid down in *Henniker* v. *Wigg* (4), which is, that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary.

In the application of the rule in Clayton's case, besides its being necessary that the entries of debit and credit should all be in one unbroken account, it is also necessary that the debit entries should represent payments made by the debtor of money which the debtor paying it has a right in law to appropriate to the payment of any debt of his that he pleases; the payment must be of the debtor's own money, or at least of money over which he has the absolute power of appropriating as he pleases. Now the uncontradicted evidence is that of the items entered in the plaintiff's ledger to the credit of Scriver's account therein, not a single one was of any sum of money belonging to Scriver or over which he had any power of appropriation in payment of any debt of his. They were all moneys of the plaintiffs received by him as the plaintiffs' agent, and upon their account as and for premiums upon policies entered into by them through his agency, and the evidence is that when transmitted by Scriver to the plaintiffs they were respectively transmitted as the premiums paid on such policies, with the nos. of the policies to the credit of which they were respectively to be applied, and the evidence adds that this appears in other books of the

(4) 4 Q. B. 792.

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company than the ledger which was the only one the defendant called for and made use of. That account appears to have been kept for the purpose of showing how Scriver, the plaintiffs' agent, stood with them on current business; in it were entered the amounts received by discounts of the note for $1,250 and the renewals thereof, which were expressly made for discount purposes, and of other notes also given by Scriver alone for the accommodation of the plaintiffs and their banking purposes, all of which notes were protected by the plaintiffs on maturity. The practice was at the end of each month to insert the amounts transmitted in the month by Scriver as premiums upon new policies entered into by the plaintiffs through his agency and to charge him with the amount of such premiums as appeared to have been received by him and not transmitted. The result of these new transactions was that upon the 1st of January, 1893, Scriver was charged with a sum of $1,098.21 as for premiums received by him since the 1st January, 1890, and not remitted by him. This item was wholly apart from the sum of $1,250 secured by the mortgage as to which sum the evidence was that nothing whatever was paid on account thereof notwithstanding the reduced amounts for which the renewals were taken as before stated.

Upon the 31st July, 1893, the plaintiffs and Scriver seem to have had an accounting of some nature, for it appears that the plaintiffs then consented to deduct from their then claim for such premiums received by Scriver and not transmitted, the sum of $816 and the amount as then agreed by Scriver to be due by him, including the mortgage debt, was $1,926.22. How precisely this sum was arrived at did not appear, but it is apparent, assuming the uncontradicted evidence to be true, that the mortgage debt was not then paid

off. For this sum of $1,926.22 a new account was opened with Scriver in the plaintiffs' ledger, in which credit entries are made as in the former account, but which the plaintiffs allege are also entries of sums remitted by Scriver as premiums upon new policies entered into by the plaintiffs through his agency, and have no relation whatever to the debt secured by the mortgage. There seems no reason to suppose that these entries differ in any respect from the like entries in the previous account, but if they do, or if even any of the entries in the previous account should appear to be properly referable to the mortgage, the defendant will have the benefit thereof upon the taking of the account under the ordinary decree of reference to the master in a foreclosure suit. This, as it appears to me, was the proper decree to have been made in accordance with the defendant's statement of defence. Until the account shall be taken it is impossible to say that any of the moneys remitted by Scriver since the execution of the mortgage were attributable to the mortgage debt. The evidence adduced by the defendant has failed to establish this contention. The learned trial judge declared at the trial that he had no intention to take the account, and in that ruling counsel for the defendant entirely concurred; the result, however, has been that which could only be arrived at upon a taking of the account, and such result not being supported by, but being contrary to, the evidence as adduced by the defendant, all that can be done is to refer the account to be taken by the master, when it will be open to the defendant to adduce, if she can, evidence in support of her contention as stated in her statement of defence.

As to the contention that the estate of the testator Sargeant is discharged from the mortgage debt by time given to Scriver to the prejudice of the surety, Sargeant, there does not seem to be any foundation for this con-

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tention; it rests wholly upon the fact that between the 18th October, 1892, and the 27th January, 1893, Scriver gave to the plaintiffs four promissory notes, but all the evidence which has been given in relation to these notes shows them to have been accommodation notes made by Scriver to be discounted by and for the use of the plaintiffs, and to be retired by them, and that they all have been so retired by the plaintiffs. They don't appear to have had any reference to the mortgage debt, or to have tied the plaintiffs' hands in any respect whatever in relation to that debt. The appeal must, therefore, in my opinion, be allowed with costs, and the ordinary decree for taking the account in a foreclosure suit be ordered to be made.

SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Gwynne.

GIROUARD J.—I would dismiss the appeal for the reasons given by Mr. Justice Maclennan in the Court of Appeal.

*Appeal allowed with costs.*

Solicitor for the appellants: *John W. Kerr.*

Solicitors for the respondent: *Dumble & Leonard.*

WILLIAM H. A. ROOKER (DEFENDANT)..APPELLANT; 1895

AND *Oct. 19.

AMELIA HOOFSTETTER (PLAINTIFF)...RESPONDENT. 1896

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Feb. 18.

*Mortgage—Agreement to charge lands—Statute of frauds—Registry.*

The owner of an equity of redemption in mortgaged lands, called the Christopher farm, signed a memorandum as follows:—"I agree to charge the east half of lot no. 19, in the seventh concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively, upon the Christopher farm * * * amounting to $750 * * * and I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages."

*Held*, affirming the judgment of the Court of Appeal, that this instrument created a present equitable charge upon the east half of lot 19 in favour of the mortgagees named therein.

The solicitor of the mortgagee wrote the memo. on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side and he made an affidavit, as subscribing witness, to have it registered. Lot 19 having been mortgaged to another person, one of the mortgagees of the Christopher farm brought an action to have it declared that she was entitled to a charge or lien thereon, in which action it was contended that the solicitor was not a subscribing witness but only the person to whom the letter was addressed.

*Held*, affirming the judgment of the Court of Appeal, that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry the subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution, which did not make the registration a nullity.

*Held*, per Taschereau J., that the agreement did not require attestation and if the solicitor was not a witness it should have been indorsed with a certificate by a county court judge as required by R. S. O. (1887) c. 114, s. 45, and it having been registered the court would presume that such certificate had been obtained.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ

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APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court in favour of the defendant.

The material facts of the case are as follows:—

On the 30th day of December, 1886, William H. Christopher conveyed by way of mortgage the north-west ¼ of lot 16, in the 9th concession of the township of Storrington, to the respondent to secure the sum of $350 and interest.

On the same day the defendant, Hughson, gave the respondent a bond in the penal sum of $700, conditioned that Christopher should pay the mortgage.

Subsequently, on the 3rd day of April, 1888, Christopher conveyed his equity of redemption in said lands to the defendant, Hughson, for the sum of $2,500, subject to this mortgage, the assumption of which formed part of the consideration.

Between the defendant, Hughson, and Christopher it was understood that the former should pay the mortgage debt, and between themselves Christopher became the surety merely, and Hughson thenceforth the principal debtor.

On the 14th day of March, 1893, the mortgage being in default, the defendant, Hughson, signed the following memorandum:

"KINGSTON, March 14, 1893.

"I agree to charge the east half of lot number (19), in the seventh (7) concession of Loughborough, with the payment of the two mortgages held by G. M. Grant and Mrs. Hoofstetter, respectively, upon the Christopher farm, being the north-west ¼ of lot sixteen, in the first concession of Storrington, amounting to $750 and some arrears of interest, and I agree on demand to execute

(1) 22 Ont. App. R. 175.

proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages.

(Sgd.) J. H. HUGHSON."

(Sgd.) G. M. MACDONNELL.

The witness, Macdonnell, and Mr. John Mudie were members of a legal firm named Macdonnell & Mudie, and the memorandum signed by Hughson was written on their letter paper, which had the usual printed or lithographed heading giving the name and address of the firm, a blank for the date, and a lithographed "Dear Sir."

On the 3rd day of July, 1893, Mr. Macdonnell made an affidavit, which was annexed to the foregoing memorandum, as follows:

I, George Milnes Macdonnell, of the city of Kingston, in the county of Frontenac, solicitor, make oath and say:

1. I was personally present and did see the annexed instrument duly signed and executed by John H. Hughson at the city of Kingston aforesaid.

2. That I know the said parties.

3. That I am a subscribing witness to the said instrument.

Sworn before me at the city of Kingston, in the county of Frontenac, this 3rd day of July, 1893.

(Sgd.) G. M. MACDONNELL.

(Sgd.) J. MUDIE,

*A Commissioner, &c., in H. C. J.*

Upon this affidavit the memorandum was registered in the registry office of the county of Frontenac on the same day.

Afterwards, on the 15th day of the same month, Hughson conveyed the east ½ of lot 19, in the 7th concession, to Johnston, and Johnston mortgaged the said lands to the appellant. The respondent seeks to enforce

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the registered memorandum against the appellant's registered mortgage.

At the trial the Chancellor gave judgment for the plaintiff, which judgment was reversed by the Divisional Court. The Court of Appeal restored the judgment of the Chancellor.

*Smythe* Q.C. for the appellant. This writing does not constitute an agreement to charge lot 19 within the statute of frauds, the party with whom it was made not being disclosed; *William* v. *Jordan* (1); *Williams* v. *Lake* (2); and there being no consideration; Agnew on the Statute of Frauds (3).

It was a mere agreement to give a mortgage, and gave the persons named no right of action. *Wolverhampton Railway Company* v. *London & North-western Railway Company* (4); *Osborne* v. *Henderson* (5); *Re Clarke* and *Chamberlain* (6).

It is not shown that time for payment was given. *Ryan* v. *McKerral* (7); *Merchants' Bank* v. *Robinson* (8).

*Langton* Q.C. for the respondent. The parties sufficiently appear from the agreement. *Newall* v. *Radford* (9); *Morton* v. *Tewart* (10)

As to the instrument creating a charge on the land see *In re Beetham* (11).

TASCHEREAU J.—I would dismiss this appeal. I agree in my brother Gwynne's reasoning in that sense. I desire to add a single remark on the point urged by the appellant, of the invalidity of the registration if Macdonnell were a party and not a mere witness to the memorandum of the 14th March, 1893. Under sec. 45

(1) 6 Ch. D. 517.
(2) 2 E. & E. 349.
(3) P. 236.
(4) L.R. 16 Eq. 433.
(5) 18 Can. S.C.R. 698.
(6) 18 O.R. 270.
(7) 15 O.R. 460.
(8) 8 Ont. P.R. 117.
(9) L.R. 3 C.P. 52.
(10) 2 Y. & C. (Ch.) 67.
(11) 18 Q.B.D. 380, 766.

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of the Revised Statutes of Ontario, ch. 114, a document not attested, where attestation is not necessary as in the case of this document, may be registered, but then it must be indorsed with a certificate of execution by a county court judge; now, here, that certificate does not appear, but *omnia praesumuntur rite et solenniter esse acta donec probetur in contrariam*, and it must be assumed that the registrar would not have registered the document if not accompanied with the required certificate. Assuming, therefore, that Macdonnell's affidavit of execution as a subscribing witness was a nullity, and looking at the document as having been registered without Macdonnell's affidavit, the registration is not, upon that reason alone, to be held invalid. The proof of execution must be assumed to have been given before the county court judge.

GWYNNE J.—In the view taken by Mr. Justice Osler as to the form of the document upon which the question in this appeal turns and in his judgment thereon I entirely concur.

That document operated as a present equitable charge upon the lands mentioned therein to the amounts due under the two mortgages mentioned therein. That Hughson was bound thereby there cannot, I think, be any doubt, and if Hooker had actual notice thereof he would have been equally bound, and the document having been registered before Hooker acquired his interest he is by statute bound equally as if he had actual notice. As to the objections as to informality in the registration or rather in the mode of proving the execution of the document in order to obtain registration of it, I entirely agree with the judgment of Mr. Justice Maclennan that the appellant could not take advantage of any such informality if any there be. The statute makes the registration of certain documents as equiva-

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lent to actual notice to purchasers of the execution of such documents; and if any of such documents is executed so as to be binding upon the party executing it a subsequent purchaser from such person cannot set up a mere informality in the mode of proof for registration as nullifying the statutory effect which is given to the fact of registration. The object of the statute is to make every purchaser of an interest in lands in order to his own security to search the registry of titles, established by law. If he does do so and finds a document in point of fact upon the registry relating to the lands he is about acquiring an interest in, he seems to me to acquire thereby actual notice of such document by which he must be bound although he may discover some informality in the mode of proof which may have escaped the notice of the registrar or which he may have deemed immaterial, and therefore notwithstanding the informality registered the document, and if such purchaser fails to search the registry he must accept the fact of registration as equivalent to actual notice unless at least the objection taken constitutes an absolute defect in the proceeding, as for example the absence of any affidavit of execution would perhaps have to be held to be a defect constituting nullity in the registration.

SEDGEWICK, KING and GIROUARD JJ. concurred.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Smythe, Smith & Lyon.*

Solicitors for the respondent: *G. M. Macdonnell.*

JOHN P. MOWAT (PLAINTIFF).....APPELLANT; 1895

*Nov. 2.

AND

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THE BOSTON MARINE INSURANCE COMPANY (DEFENDANT)... } RESPONDENT. *Feb. 18

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Marine insurance—Goods shipped and insured in bulk—Loss of portion—Total or partial loss—Contract of insurance—Construction.*

M. shipped on a schooner a cargo of railway ties for a voyage from Gaspé to Boston, and a policy of insurance on the cargo provided that "the insurers shall not be liable for any claim for damages on * * * lumber * * but liable for a total loss of a part if amounting to five per cent on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memo. in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy.

*Held*, reversing the decision of the Supreme Court of New Brunswick, Taschereau J. dissenting, that M. was entitled to recover; that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss," referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract embodied in the terms of the policy.

*Held*, further, that the policy, certificates and memo. together constituted the contract and must be so construed as to avoid any repugnance between their provisions and any ambiguity should be construed against the insurers, from whom all the instruments emanated.

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*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, King and Girouard JJ.

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APPEAL from a decision of the Supreme Court of New Brunswick (1), in favour of the defendant on a special case.

The material facts of the case are thus stated by Mr. Justice Tuck in giving judgment in the court below.

A special case has been agreed upon and stated between the parties in order that this court may determine the rights of the plaintiff and defendant.

It appears that the plaintiff was the owner and shipper of 15,400 railway ties, which were shipped in August, 1893, from Douglastown, Gaspé, on board the schooner "Deer Hill," bound to Boston, and were loaded both on and under deck; that the schooner sailed from Douglastown on the 17th of August, 1893; that on the voyage to Boston a squall struck the schooner carrying overboard a part of the deckload of sleepers, namely, 4,158 pieces, which were wholly lost. That there were discharged from the under-deck of the vessel 6,704 ties, and from on deck 4,538, and there were lost overboard 4,158 sleepers, and the whole shipment was 15,400 pieces. Both the on deck and under deck cargo were insured with the defendant company, as hereinafter stated. As the whole cargo consisted of 15,400 pieces, and there were discharged from under deck 6,704 there must have been on deck 8,696 pieces. The on deck cargo was insured for $800, and if the plaintiff is entitled to recover as for a total loss, the amount he ought to receive is $382.52, or in the proportion that 4,158 bears to 8,696—$800 being the whole amount of insurance. The sleepers were worth at the place of shipment 13 cents each, and were insured under two certificates of insurance, which were under and subject to an open policy. The two certificates are set out in the case, and are alike in form, except that one insures $200 under

(1) 33 N.B. Rep. 109.

and $500 on deck, and the other $200 under and $300 on deck.

One of the said certificates reads as follows:—

"Grant, Oxley & Co., Insurance Brokers, Halifax, Nova Scotia.

"No. 134,234, $200 under
500 on deck

"Agency of the Boston Marine Insurance Company, Boston.

"Capital, $1,000,000.

"Rate, 1¼ per cent. 3½ per cent. Premium $20.00.

"This certifies that Grant, Oxley & Co. insured under and subject to conditions of open policy, no. 29,030, of the Boston Marine Insurance Company the sum of $700 on ——— general ——— under deck on board schooner *Deer Hill* at and from Douglastown to Boston. Loss payable to the order of J. P. Mowat. This certificate to be surrendered on payment of loss."

"J. TAYLOR WOOD, *Agent.*

"Halifax, Aug. 2nd, 1893."

Stamped across the face of each certificate in red ink in letters not exactly distinct, but very small, are the following words: "Free from partial loss unless caused by stranding, sinking, burning or collision with another vessel, and amounting to 10 per cent."

Mr. Palmer for the plaintiff contends that he had no notice of what is stamped in "red" on the certificate because of its indistinctness, and to the ordinary observer almost illegibility. There is no evidence as to want of notice. While the words stamped on the certificate are somewhat indistinct and difficult to read, yet I think the plaintiff's attention would naturally be called to them from the very fact that they are in red ink, and in a conspicuous place. They must be taken to be part of the contract.

The open policy is set out in the printed case. The only part I think material here is as follows:—Pro-

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vided that the insurers shall not be liable for any partial loss on salt, grain, fish, fruit, hides, hide cuttings, horns, hops or other goods that are esteemed perishable in their own nature, or the freight thereon, unless it amount to 7 per cent on the whole aggregate value of such articles, and be caused by stranding, nor for leakage of oil, molasses or other liquids or the freight thereon, unless it be occasioned by stranding or collision with another vessel, nor for any claim for damage on railroad iron or steel rails, lumber, dry goods, coal, marble, stone, slate or bricks, but liable for a total loss of a part if amounting to 5 per cent on the whole aggregate value of such articles."

According to the case the plaintiff claims $378.17 from the defendants. On the other hand, the defendant claims that by reason of the wording of the certificate, namely, "free from partial loss unless caused by stranding, sinking, burning or collision with another vessel, and amounting to 10 per cent," it is exempt from liability as the loss was not occasioned by stranding, sinking, burning or collision with another vessel. They contend also that if liable at all it is only for $323.90.

The plaintiff's contention is that the stamped words on the certificate, and the condition of the open policy above quoted, when taken together, do not show this to be a partial loss within the terms of the contract. When properly construed they show a total loss of part of the cargo as it amounted to more than 5 per cent of the whole, and further, the defendants contend that the legal meaning of the words "partial loss" is changed by the terms of the policy.

*Palmer* Q.C. for the appellant. If the memo. is a part of the contract it cannot control the terms of the policy. *Bell* v. *Hobson* (1); *Duncan* v. *Sun Ins. Co.* (2).

(1) 3 Camp. 272.

(2) 6 Wend. (N.Y.) 488.

If the language of the contract is doubtful it must be construed against the company. *Anderson* v. *Fitzgerald* (1).

*Weldon* Q.C. for the respondent referred to *McLaughlin* v. *Atlantic Ins. Co.* (2); *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assur. Co.* (3).

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Supreme Court of New Brunswick on a special case agreed upon by the parties. The facts are fully and accurately set forth in the statement with which Mr. Justice Tuck prefaces his judgment and need not be repeated here. As regards the law I entirely agree in the proposition laid down by Mr. Justice Tuck that, under the terms of the open policy *per se*, the loss would have been recoverable as for a total loss of part of the cargo insured "amounting to five per cent of the whole aggregate value" of such cargo. It was conceded on the argument that the railway ties, which formed the subject of insurance, came within the description of "lumber" in the open policy.

The law applicable to the case is stated in the judgment of the Court of Exchequer Chamber in the case of *Ralli* v. *Janson* (4), as follows:

Where memorandum goods of the same species are shipped, whether in bulk or packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils.

In Arnould on Marine Insurance (5) it is said:

There are three cases frequently occurring in practice, touching the insurance of memorandum articles: (1) where a cargo or quantity of

(1) 4 H. L. Cas. 484.
(2) 57 Me. 170.
(3) [1895] 1 Q. B. 500.
(4) 6 E. & B. 422.
(5) 6 ed. p. 1016.

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memorandum articles of the same species is shipped in bulk, valued in bulk, and insured in bulk; (2) where it is shipped in separate packages but not expressed in the policy, by distinct valuation or otherwise, to be separately insured: (3) where, being shipped in separate packages it is expressed by distinct valuation or otherwise to be separately insured.

Then, it is further said by the same writer that the first case is one which never admitted of any reasonable doubt, and the case of *Hills* v. *The London Assurance Co.* (1) is referred to. In that case wheat was shipped and insured in bulk by one entire insurance, and there was a loss of a quantity which was pumped up out of the hold during a storm and totally lost; it was held that this was an average not a total loss. The case of *Ralli* v. *Janson* (2), settled the law in the second case in favour of the underwriters. The case now before us would undoubtedly come under the first head and but for a particular clause in the policy clearly could not be treated as a total loss.

The parties may, however, so modify the terms of their contract of insurance as to take themselves out of the rule laid down in *Ralli* v. *Janson* (2) and acted on in *Hills* v. *London Assurance Co.* (1), by providing that such an entire loss or destruction of part of goods of the same species, shipped and insured in bulk, shall be treated as a total loss, and shall be recoverable for as a total loss. This is shown by the passage from the judgment in *Ralli* v. *Janson* (2), which I have quoted. Then, this has been done most explicitly by a clause in the open or covering policy under which this insurance was effected, and which is worded as follows:

> But liable for a total loss of a part of, amounting to five per cent on the whole aggregate value of such articles.

If, therefore, there had been nothing more than the terms of the open policy, there could be no difficulty

(1) 5 M. & W. 569. (2) 6 E. & B. 422.

in holding that the appellant was entitled to recover. It is contended, however, by the respondents, that the policy and the certificates given by the respondent's agents to the appellant's agents, when the insurance was effected, must be read as the final contract, and that the clause of the policy before set out is controlled by a memorandum written in red ink in the margin of the certificates.

This memorandum is as follows:

Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent.

The court below has held that this alters the terms of the policy and disentitles the appellant to recover. I am compelled to dissent from this opinion. I am led to the opposite conclusion by the consideration that the memorandum in question has reference only to a partial loss, and that this means not a partial loss in the abstract, under the general law applicable to a policy in the ordinary form, but a partial loss according to the contract between the parties embodied in the open policy. Then this policy, by the clause before set out, makes, in my opinion, express provision that the total loss of part shall not constitute a partial but a total loss. We must therefore construe the words "partial loss" in the policy as applying only to losses not coming within the terms of the policy providing for the underwriters' liability in the case of a total loss of part. The policy, certificates and memorandum together constitute the contract between the parties, and we must read them together as if they had been embodied in the same instrument, and doing this we are bound to construe them, so far as we reasonably can, in such a way as to avoid any repugnancy between the provisions of the several instruments in which the parties have thus formulated their entire contract. By adopting the construction in-

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dicated all the terms are reconciled and all repugnancy is avoided, but if we were to adopt the principle upon which the judgment under appeal proceeds, we should attribute to the parties an intention to enter into a contract which contained conflicting terms, which is never to be done unless such an intention is clear beyond doubt. Here I think we are safe in saying that it was not the intention to cut down the provisions of the policy in favour of the insured by the memorandum. If we were to say that they intended to annul the clause of the policy under which the appellant claims the right to recover, we should not only be attributing to the parties an intention which they have not clearly indicated, but we should be putting a forced construction on the word "partial" in the marginal memorandum, by making it include a loss which they had themselves expressly declared should not constitute a partial, but a total loss.

Further, on well established principles, the whole contract of insurance to be gathered from the policy, certificate and memorandum must, so far as there is any ambiguity, be construed as against the underwriters in whose language it is expressed (1), for all these three instruments emanated from them.

I am of opinion that the appeal should be allowed with costs, and judgment must be entered in the court below for the appellant for $382.52, with interest and costs.

TASCHEREAU J.—The judgment of the Supreme Court of New Brunswick appealed from was rendered upon a special case agreed to between the plaintiff, appellant, and the respondent, to settle their respective rights upon the state of facts described in the court appealed from, as follows:

(1) Arnould p. 295, and cases there cited.

It appears that the plaintiff was the owner and shipper of 15,400 railway ties, which were shipped in August, 1893, from Douglastown, Gaspé, on board the schooner "Deer Hill," bound to Boston, and were loaded both on and under deck; that the schooner sailed from Douglastown on the 17th of August, 1893; that on the voyage to Boston a squall struck the schooner, carrying overboard a part of the deckload of sleepers, namely, 4,158 pieces, which were wholly lost. That there were discharged from under deck of the vessel 6,704 ties, and from on deck 4,538, and there were lost overboard 4,158 sleepers, and the whole shipment was 15,400 pieces. Both the on deck and under deck cargo was insured with the defendant company, as hereinafter stated. As the whole cargo consisted of 15,400 pieces, and there were discharged from under deck 6,704, there must have been on deck 8,696 pieces.

The on-deck cargo was insured for $800, and if the plaintiff is entitled to recover as for a total loss the amount he ought to receive is $382.52, or in the proportion that 4,158 bears to 8,696, $800 being the whole amount of insurance. The sleepers were worth at the place of shipment 1 3cents each, and were insured under two certificates of insurance, which were under and subject to open policy. The two certificates are set out in the case, and are alike in form, except that one insures $200 under and $500 on deck, and the other $200 under and $300 on deck.

One of the said certificates reads as follows:—

Grant, Oxley & Co., insurance brokers, Halifax, Nova Scotia.
No. 134,234..... $200 under.
500 on deck.

Agency of the Boston Marine Insurance Company, Boston:—
Capital, $1,000,000.
Rate, $1\frac{1}{4}$, $3\frac{1}{2}$; premium, $20.00.

This certifies that Grant, Oxley & Co. insured under and subject to conditions of open policy, no. 29,030, of the Boston Marine Insurance

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Company, the sum of $700 on.....general.....under deck on board schooner "Deer Hill," at and from Douglastown to Boston. Loss payable to the order of J. P. Mowat. This certificate to be surrendered on payment of loss.

J. TAYLOR WOOD, Agent.

Halifax, Aug. 2nd, 1893.

Stamped across the face of each certificate in red ink and in letters not exactly indistinct, but very small, are the following words:

Free from partial loss unless caused by stranding, sinking, burning or collision with another vessel, and amounting to 10 per cent.

The material clause of the open policy is as follows:

Provided that the insurers shall not be liable for any partial loss on salt, grain, fish, fruit, hides, hide cuttings, horns, hops or other goods that are esteemed perishable in their own nature or the freight thereon, unless it amounts to 7 per cent on the whole aggregate value of such articles, and be caused by stranding, nor for leakage of oil, molasses or other liquids or the freight thereon, unless it be occasioned by stranding or collision with another vessel, nor for any claim for damages on railroad iron or steel rails, lumber, dry goods, coal, marble, stone, slate or bricks, but liable for a total loss of a part if amounting to 5 per cent on the whole aggregate value of such articles.

According to the case the plaintiff claims $378.17 from the defendant. On the other hand, the defendant claims that by reason of the wording of the certificate, namely—

free from partial loss unless caused by stranding, sinking, burning or collision with another vessel, and amounting to 10 per cent—

it is exempt from liability as the loss was not occasioned by stranding, sinking, burning or collision with another vessel. They contend also that if liable at all it is only for $323.90.

Was this loss a total loss of a part, or a partial loss of the whole?

If the loss of the 4,158 pieces, part of the deckload insured, etc., is to be considered within the terms of the insurance a total loss, the appellant is entitled to recover, but if it is only a partial loss then it is within

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the exception, and the appellant has no claim, as the loss did not happen by stranding, sinking, burning or collision.

The court below unanimously held that it was a partial loss and that the defendant is not liable. In this determination, the appellant has failed to convince me that there is any error.

GWYNNE, KING and GIROUARD JJ. concurred in the judgment prepared by the Chief Justice.

*Appeal allowed with costs.*

Solicitor for the appellant: *C. A. Palmer.*

Solicitors for the respondent: *Weldon & McLean*

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*Oct. 25.
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*Feb. 18.

EDWARD MAYHEW, ADMINISTRATOR DE BONIS NON OF ZACHARIAH MAYHEW, DECEASED (PLAINTIFF) ..... } APPELLANT;

AND

MARY JANE STONE (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND.

*Administrator—Payment of claim against estate—Death of administrator—Administration de bonis non—Unadministered asset.*

If an administrator, on competent advice, pays a claim *bonâ fide* made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back.

Per Taschereau J.—Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal and could not be considered by the appellate court.

APPEAL from a decision of the Court of Appeal in Equity of Prince Edward Island reversing the judgment of the Master of the Rolls in favour of the plaintiff.

The Chief Justice of the court below stated the facts as follows in his judgment:

This is an appeal from a judgment of the Master of the Rolls, decreeing the respondent a trustee for the appellant, as administrator *de bonis non*, of the sum of $1,000 received by her from the administratrix of the estate of Zachariah Mayhew, deceased, and also directing the transfer on request by the respondent to the

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

appellant of the sum named. Previous to the hearing of the case on the merits the Master of the Rolls granted an injunction restraining the respondent from withdrawing from the Dominion Savings Bank in Charlottetown the sum mentioned, which injunction is still in force.

It appears by the evidence given at the trial that Zachariah Mayhew was twice married. His first wife died many years ago, leaving nine children. In 1861 he married Sarah Stone, a widow, having four children, of whom the defendant is the youngest. Mayhew was a farmer in easy circumstances. He settled his sons comfortably on farms near him, and made ample provision for his daughters, who were all well married. The daughter who married most recently received from him in cash a portion equal to about $800. The children of his second wife resided with him, and his two stepsons were provided for in the same manner as his own children. One of his step-daughters married, and the defendant was the only one of the two families who remained with him. She was about 13 years old at the time of her mother's marriage. She resided with Mayhew for 32 years, working and attending continuously to his business, and for many years to the management of his farm which, until a year or two before his death, in March, 1893, was a somewhat large one.

In March, 1893, shortly after Mayhew's death, his wife administered to his estate, sold the movable property, and advertised for claims against the deceased. The defendant made a claim, and she and the administratrix went to Mr. Haszard, the latter's solicitor. The administratrix explained to Mr. Haszard that the defendant had a claim against her deceased husband's estate, and asked his advice regarding it. The solicitor advised her to pay it which she did about a month before

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she died. The plaintiff, who was appointed administrator *de bonis non* after her death, filed a bill to have defendant declared a trustee for the estate of the money so paid her and the master of the rolls gave judgment in his favour which was reversed by the Court of Appeal.

The defendant also gave evidence at the trial of an agreement by Mayhew to provide at his death for payment to her of her service on the farm.

*Stewart* Q.C. for the appellant. The defendant has not proved any agreement to pay for her services her evidence on that head being uncorroborated. The case is, therefore, distinguishable from *McGugan* v. *Smith* (1), and *Murdoch* v. *West* (2).

That being so the money was improperly paid to her and can be recovered back. *Fields* v. *White* (3) ; *In re Hulkes* (4).

*Davies* Q.C. for the respondent. This case cannot be distinguished from *McGugan* v. *Smith* (1), and *Murdoch* v. *West* (2). The evidence brings it also within the decision in *Walker* v. *Boughner* (5).

In the absence of fraud or collusion the money cannot be recovered back

TASCHEREAU J.—In this case we have unanimously come to the conclusion that the appeal should be dismissed. In fact, I would myself have done so at the hearing without calling on the respondent. My brother Gwynne will state the grounds upon which we have reached the determination of the appeal. To these reasons, as far as they relate to the law and facts of the case, I have nothing to add. But there is a feature of the appeal book which, as presiding over the court when the case was heard, I cannot allow to pass un-

(1) 21 Can. S.C R. 263.
(2) 24 Can. S.C.R. 305.
(3) 29 Ch. D. 358.
(4) 33 Ch. D. 552.
(5) 18 O.R. 448.

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noticed. It appears that, after the judgments had been delivered in the Court of Appeal in equity, and after notice of this appeal had been given and security thereupon had been allowed, the Chief Justice, who had given the judgment of the court, filed at the prothonotary's office a document styled "memorandum to be annexed to my judgment in this case, and to be considered in connection therewith." That document is nothing else but an answer to the judgment delivered in open court by the Master of the Rolls who had given a dissenting opinion. To this "memorandum" is attached an opinion of the Vice-Chancellor in the same sense, that is to say in answer also to the Master of the Rolls, though he, the Vice-Chancellor, had in court simply concurred with the Chief Justice without any remarks. Now, that these documents should not have formed part of this appeal book is self-evident. The Master of the Rolls however, who settled the case, not only allowed them to go in, though objected to, but further added to these glaring irregularities by himself putting upon the appeal book as part of the case a document in the shape of a replication to his colleagues' answers to his opinion. So that we have the opinion, the answer to it, and the replication. With all due respect for the learned judges, this last document, as the other ones it purports to answer, cannot be considered by this court as forming part of the case.

It is unnecessary here for me to say more than to quote the following two cases :—In *Brown* v. *Gugy* (1), two of the judges in the court below who had dissented from the judgment of the court, without expressing their reasons in court, had prepared written opinions after the appeal to the Privy Council had interposed. Upon an objection taken by one of the parties that these opinions should not have formed part of the printed

(1) 2 Moo. P.C. (N.S.) 341.

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record upon the appeal to the Privy Council, their Lordships said:

> We must say with all respect for those learned persons that the course so pursued by them appears to us open to great objection. We think that their reasons for dissenting from their colleagues should have been stated publicly at the hearing below, and should not have been reserved to influence the decision in the Court of Appeal.

In *Richer* v. *Voyer* (1), it appeared that one of the judges of the court appealed from had communicated to one of the parties notes purporting to be his reasons for his judgment, though the certificate of the court stated that he had merely expressed his concurrence in the judgment. Their Lordships refused to look at those notes. The following passage in Broom's Constitutional Law (2), which commends itself to my opinion, has, here, its application:

> A public statement of the reasons for a judgment is due to the suitors and to the community at large, is essential to the establishment of fixed intelligible rules, and for the development of law as a science. The expressed reason of a judgment is so important an ingredient in it that the practice seems reprehensible of altering the reasoning publicly avowed as the basis of a judgment, and handing privately to the reporter other reasonings in support of it which had not been specified in open court. A judgment once delivered becomes the property of the profession and the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.

In this court we do not as a rule read our judgments, for the reason that the large majority of the members of the profession interested in the cases are unavoidably absent when we render them. We did read them for a few years, but eventually found that it was mere waste of time. The publicity required of our opinions is, however, secured by the delivery thereof to the reporters, so that the parties, or any one desirous to do so, may obtain a copy thereof immediately after the judgment is rendered.

(1) L.R. 5 P.C. 461. (2) 2 ed., p. 147.

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GWYNNE J.—This action has been treated in the courts below and argued here as if it had been an action instituted by the respondent against the estate of Mayhew, deceased, to recover a sum of money claimed by the respondent to be due to her for services rendered to Mayhew in his lifetime. We do not think that is the light in which the case should be viewed, whatever might be the proper conclusion to be arrived at in such an action.

The respondent appears to have made a claim against the estate of Mayhew, deceased, for services which, whether or not an action would in law lie to recover compensation therefor, were undoubtedly rendered by her to Mayhew in his lifetime.

It is unnecessary to state the circumstances under which the services for which the claim was made were rendered. It is sufficient to say that the claim was made in the *bonâ fide* belief that it was a just and legal claim. As to the moral justice of it there cannot be, and never has been, any doubt, and as to the legality of it all that need be said upon that point is, that in view of the great difference of judicial opinion existing upon it in the courts below the respondent's belief in the legality of her claim, as well as in its moral justice, may be excused.

The administratrix of Mayhew's estate consulted able counsel upon the propriety of her paying the claim. Counsel, upon a statement of the facts made to him by the respondent and by the administratrix, who was well acquainted with all the facts of the case, and by a Mr. Ball, since deceased, who also professed to be well acquainted with all the particulars of the case and with the intention of the deceased Mayhew in respect thereof, advised the administratrix that the claim was a just one and proper to be paid, and upon his advice $1,000 was paid by the administratrix and

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accepted by the respondent in satisfaction of the claim, which was for a sum of money somewhat in excess of that amount. The administratrix of the Mayhew estate having since died letters of administration *de bonis non* of the estate of Mayhew, deceased, have been granted to the plaintiff by whom the present action is brought, and the sole question involved in the case is whether or not a sum of money so paid by the original administratrix to a person presenting a claim against the estate of which she was administratrix, can be regarded as an asset of the estate of Mayhew, deceased, not administered by the original administratrix, which has passed to the administrator *de bonis non*, and whether it can be recovered back by him as such administrator, and we are of opinion that it cannot. It is plain, we think, that the original administratrix upon payment of such a claim upon legal advice, could not afterwards, upon further advice taken, have recovered back money so paid upon the suggestion that the payment had been made under a mistake of law, and if she could not have recovered the money back the administrator *de bonis non* surely could not. In fine, we do not think that money so paid, however mistaken in law the payment may have been, as to which however we express no opinion, is an unadministered asset of the estate of Mayhew deceased, so as to vest in the plaintiff, as administrator *de bonis non*, a right of action to recover the money.

For this reason we are of opinion that the appeal must be dismissed with costs.

SEDGEWICK, KING and GIROUARD JJ. concurred.

*Appeal dismissed with costs.*

Solicitor for the appellant: *William S. Stewart.*

Solicitor for the respondent: *Francis L. Haszard.*

THE NOVA SCOTIA MARINE INSURANCE COMPANY (DEFENDANTS)..... APPELLANTS;

AND

L. P. CHURCHILL & CO. (PLAINTIFFS)..RESPONDENTS.

1895
*Oct. 29, 30.
1896
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Marine insurance—Constructive total loss—Notice of abandonment—Sale of vessel by master—Necessity for sale.*

If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss.

If the ship is in a place of safety, but cannot be repaired where she is nor taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore and the probability of great deterioration in value during the delay will justify the master, when acting *bonâ fide* and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the verdict for the plaintiffs at the trial.

This was an action on a marine policy insuring the schooner "Knight Templar" for twelve months. The plaintiffs claimed for a total loss of the schooner.

The main questions for decision were whether or not notice of abandonment was necessary, and if so whether a sale of the schooner by the master was justified so as to excuse the giving of such notice. The facts relating to the loss and the proceedings on the trial are fully set out in the judgment of the court.

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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The action was tried before a special jury and on their findings a verdict was entered for the plaintiffs which the full court refused to set aside.

*Macdonald* for the appellant. The sale by the master was not justified, the vessel neither being in imminent danger nor actually perishing. *Cobequid Marine Insurance Co.* v. *Barteaux* (1); *Gallagher* v. *Taylor* (2); *Phœnix Insurance Co.* v. *McGhee* (3).

The vessel must be a total loss before she can be sold. It is not sufficient that the master believes her to be such. *Kaltenbach* v. *Mackenzie* (4); *Leslie* v. *Taylor* (5); *Providence Washington Insurance Co.* v. *Corbett* (6).

*Ritchie* for the respondents: The court will not go behind the findings of the jury in favour of the respondents. *Aitken* v. *McMeckan* (7); *Council of Brisbane* v. *Martin* (8).

The circumstances created a necessity for the sale. *Lapraik* v. *Burrows* (9); *Read* v. *Bonham* (10).

TASCHEREAU J.—I would dismiss this appeal. I concur in the reasoning of Mr. Justice Graham.

GWYNNE J.—All difficulty in this case has arisen, I think, by reason of the answers given by the jury to some of the questions submitted to them which the circumstances of the case as in evidence did not require to be put. The evidence justified the jury in rendering a verdict that the injuries sustained by the vessel constituted an actual total loss, and this they have substantially found by their answers to some of the questions submitted to them, and that the sale by the master of the vessel as she was sold, was the only thing

(1) L.R. 6 P.C. 319.
(2) 5 Can. S.C.R. 368.
(3) 18 Can. S.C.R. 61.
(4) 3 C.P.D. 467.
(5) 10 N.S. Rep. (3 R. & C.) 352.
(6) 9 Can. S.C.R. 256.
(7) [1895] A.C. 310.
(8) [1894] A.C. 249.
(9) 13 Moo. P.C. 132.
(10) 3 Brod. & B. 147.

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that could have been done under the circumstances, for the benefit of all concerned. The evidence, I think, abundantly established that the sale was not only prudent, but a necessity, in order to realize anything, and was quite proper and justified. Upon the authority of the House of Lords in *Lapraik* v. *Burrows* (1), and of the Privy Council in *Cobequid Marine Insurance Company* v. *Barteaux* (2), the appeal must, therefore, be dismissed with costs.

KING J.—This is an action to recover for total loss on a policy of insurance for $2,800 upon the schooner "Knight Templar", valued at $3,200.

The vessel sailed from Grand Turk's Island, W. I., on 21st March, 1893, with a cargo of salt for Lockeport, N.S., where her owners resided. A few hours after sailing she ran into a heavy sea and sprung a leak. The leak increased through the night, and the next day she was put about and returned to Grand Turk. She was then nearly full of water. Men were engaged from the shore to assist in the pumping, but the water gained, and she was beached to prevent her sinking at her anchor. While at anchor she pounded somewhat on the bottom.

On the next day (23rd March) a survey was held, and it was recommended that cargo be discharged. This was done as far as then practicable, and on the 25th March the surveyors again examined her. She was then aground on her starboard side with the water on the deck nearly up to the main hatchway, and was found to be leaking about three inches per hour. The surveyors employed a diver to examine the port side from the keel up, and he reported all to be in good order except the garboard seam, from which he brought about eight feet of oakum from a point just abaft the

(1) 13 Moo. P.C. 144. (2) L. R. 6 P.C. 327.

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main rigging. The starboard side being in the sand could not of course be examined. The surveyors recommended that she be pumped out and the remaining portion of the cargo taken out, and that she be kept from going further ashore as she was lightened. They visited her again on the 27th March and found her afloat, but making six inches an hour. There were still 800 or 1,000 bushels of salt in the hold. On further examination they could see no sign of strain or other damage and recommended that she be hove out if possible, the seam reported in the port garboard streak caulked, and every other damage found repaired, and if it should be found impossible to heave her out, that she take in proper ballast and proceed to a convenient port of repairs. Grand Turk is an open roadstead without docks or other facilities for repairing underwater damage, and although smaller vessels had been hove out under favourable circumstances, it did not appear that a vessel of this size could be sufficiently hove out to make repairs so low down as at the garboard, although this is disputed. The vessel was therefore sent around under canvass to a fairly protected anchorage known as the "Hawks Nest," four or five miles from Grand Turk roadstead, and kept afloat by pumping. The owner was communicated with, but before answer was received the master was taken ill of fever, and was laid up for several weeks unable to do anything. Upon his recovery in the latter part of May he sent to a neighbouring island, about 25 miles distant, and hired the only submarine diver in the neighbourhood. The vessel was then brought back under sail from the Hawks Nest, and moved into the shallow water of Grand Turk riding ground to be examined. The diver, who was also accustomed to do ship work under water, and the only one in the locality who

could do it, reported as to the condition of the vessel's bottom, that

on both sides from about abreast the mainmast going all the way aft, the oakum of the garboard seam and of the next seam above it is either entirely gone, or hanging out in strips. In the next seam above the oakum is bulged out in several places. In a great many of the butts the plugs are gone from the spike heads, and in several places the ends of the treenails are below the surface of the plank a quarter of an inch or more. On the port side the strap connecting the keel and stern post is gone.

He added that the general appearance of her bottom indicated severe working and straining, and that he would not undertake to make her seaworthy.

His testimony in the case supports the statements of his report.

Then, upon the next day (May 30th) another survey was held with the following report:

The hull, as far as we could see above water, and the spars, masts, sails, rigging, etc., are in fair order. We sounded the pump, waited 30 minutes, then sounded again, when we found that she leaked about two inches an hour. From the submarine diver's report herewith the vessel's bottom is not in the state for us to recommend her as seaworthy. But we are of opinion that if she could be hove out the greater portion of damage reported by said diver could be repaired and she could proceed with proper ballast on her homeward voyage.

This report was signed by C. R. Hinson, merchant, S. W. Norton, master mariner, and J. S. Barker, shipwright. Mr. Hinson was on the earlier surveys as well. With him on the second survey (25th and 27th March) were Captain Gilchrist, a shipmaster, and a shipwright named Bond. Of these several surveyors, Norton and Gilchrist were masters of vessels and they soon afterwards left the island and their testimony was not available. Hinson and Parker gave evidence, and Bond of the second survey was not called, and it does not appear what became of him.

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It will be noted that while the second survey recommended that if the vessel could not be hove out she might proceed in ballast to a port of repairs (although she was then making six inches of water), the final survey (when she was found to be only making two inches of water), recommended as the only recourse a heaving out, if this could be done, and temporary repairs.

From the evidence of Mr. Hinson it is apparent that the reason of this was that, as he says, they thought from the diver's report that the damage was serious, and from it they concluded that the vessel ought to be hove out. By which I understand him to mean that in view of the diver's report this was essential if she was to proceed at all. He was still, however (although somewhat doubtfully), of opinion that she might have been sufficiently hove out.

> I do not see why she could not have been hove out. I think that the attempt should have been made. I cannot say if it would have succeeded. She could not have been hove out to her keel, but she might have been hove out sufficiently to see the extent of the damage at the garboard streak.

As the garboard streak is next to the keel this is not a very positive opinion regarding the feasibility of the operation.

The other party to the final survey was one Parker, a shipwright, who does the principal shipwright work at Grand Turk. He says that a vessel with her bottom in the state reported by the diver would go to the bottom before proceeding far, that there were no facilities at Grand Turk for heaving out a vessel of her size, nor indeed at any place to which she could be able to go, and that although the report which he signed said that the repairs could be made if the vessel could be hove out, he did not believe this latter could be done, although his co-surveyors thought it possible.

After receiving this report the master says that he made inquiries from all who would be likely to know, and came to the conclusion that the vessel could neither be hove out nor the repairs made under water. As to the latter he was told that Dunham, the diver, was the only person who could make such repairs, and he had already reported that he could not undertake them. Being then of opinion that the vessel ought to be sold for the benefit of all concerned, and thinking it inadvisable to incur the expense necessary to keep the vessel afloat until the owners could be further communicated with, he beached and dismantled her and sold the hull and materials at auction.

There is a lack of evidence as to the particulars of the sale, the prices got, &c., but it appears that the vessel was bought by a blacksmith, who broke her up where she lay, doubtless for the metal in her. The owners heard of the vessel being in trouble about the middle of April, but did not learn the extent of the damage or know that it was sufficient to warrant a notice of abandonment until the arrival of the master at Lockeport on June 24th, bringing with him the information of the sale and the papers connected with it. They at once sent to the company at Halifax copies of the surveys, diver's report, protest, vouchers, etc., referring to the disposal of the vessel, and in a letter inclosing the documents expressed a hope that the company would find them "in order and satisfactory."

All questions of fact were closely contested at the trial, including the possibility of heaving the vessel out, of making under-water repairs by submarine divers to be sent from the owner's and insurer's ports, and of navigating the vessel without repairs to a possible port of repair.

The jury after a charge which is not, and cannot well be, objected to, found for the plaintiff.

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A number of questions were submitted which (so far as answered or material now) are, with the answers, as follows:

3. Could she have been temporarily repaired at Turk's Island so as to enable her to reach a port suitable for making the repairs she needed to render her seaworthy? No.

5. Could she, in the condition she was in at Turk's Island, have been taken to a port or place where repairs could have been effected, and if so state whether the repairs capable of being made at such port would be temporary or permanent? No.

7. Could she have been repaired at a cost less than her value when repaired, having regard to her situation and the surrounding circumstances? No.

10. Was the sale by the master justified by necessity and was it made with a due regard to the interests of all parties? Yes.

11. Was the necessity for such sale urgent? Yes.

12. Would a prudent owner uninsured have sold under the circumstances in proof? Yes.

13. Could anything have been done to extricate her from the situation in which she was, and make her a sea-going ship? Yes, if cost were not considered, which cost would, in our opinion, exceed her value.

14. Was the action of the captain in selling the ship done in the exercise of an honest discretion, and did he act fairly for the benefit of all concerned? Yes.

A motion was made to the Supreme Court of Nova Scotia for a new trial and to set aside the above findings (excepting the 13th). The motion was dismissed. Full and able judgments were delivered by Mr. Justice Graham and Mr. Justice Weatherbe.

The defendants' contention before the Supreme Court of Nova Scotia (so far as renewed here) is that there was no notice of abandonment, and that the evidence was entirely insufficient to show a valid sale. The finding in the 13th question was relied on to show that there was not an actual total loss.

The plaintiffs contend that there was a valid sale in circumstances otherwise constituting a constructive total loss, by which the want of notice of abandonment was excused; and further, that there was an actual

total loss. It was also contended that there was a sufficient notice of abandonment.

The jury having found in answer to the 13th question that the vessel could have been extricated from her situation and be made a sea-going ship, if cost were not considered, but that the cost would exceed her value when repaired, the case is exactly within the terms of the rule expressed by Mr. Justice Willes in *Barker* v. *Janson* (1), which has ever since been regarded as correct, viz.:

> If the ship can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is notice of abandonment there is not even a constructive total loss.

Then coming to the question of the sale, the finding cannot be disputed here either as to the master's *bonâ fides*, or as to his having acted for the benefit of all concerned.

Then, with regard to the findings touching the damaged condition of the vessel, and as to what could be done with her in the way of rendering her seaworthy. First, as to the vessel being hove down. The surveyors who reported upon it (as already noticed) refer to it as doubtful, and the great preponderance of evidence appears to be against its feasibility. Much smaller vessels were indeed hove down at Grand Turk, but the master was not in default in not trying the costly and hazardous experiment which even Mr. Hinson, who recommended it, regards as doubtful.

Then as to the vessel proceeding as she was to a port of repair, there was the clear opinion of competent men that it was unsafe to attempt it if the report and testimony of the diver were correct as to her condition. The only alternative was to make such repairs to the bottom under water as might enable her to proceed to another port. A considerable body of evidence was

(1) L.R. 3 C.P. 303.

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given tending to show that submarine divers accustomed to make repairs under water could have been readily sent from near the home port of the vessel, who could have made the repairs at an expense much less than the vessel's value when repaired, if opportunity had been given to the parties interested to attempt to save the vessel. This view, however, was materially affected by an important question of fact, viz.: whether or not the planks had started from the timbers, as stated by Dunham, the diver. Some of the witnesses called for the defendants based their conclusions that the repairs might be made in the way suggested upon the assumption that Dunham was mistaken. The point as to the starting of the planks was much contested, and from the references to it in the charge of the learned judge the jury must have found in accordance with the plaintiff's view upon this point. It must be taken, therefore, upon the evidence coupled with all the findings, that it was impossible by any means to repair the vessel except at a cost exceeding her value when repaired, and that a prudent uninsured owner would have sold under the circumstances.

It results that there was a condition of things which, if it had been followed by notice of abandonment, would have constituted a constructive total loss. There was, however, a sale by the master, and this becoming known to the owner simultaneously with his obtaining certain knowledge of the state of the vessel he was excused from giving notice of abandonment provided there was a valid sale, for in such case he would have nothing that he could abandon.

Two ingredients of a right sale have, as already stated, been found, on clearly sufficient evidence, viz., that the master acted *bonâ fide* and for the benefit of all concerned.

Then as to the necessity that justifies. This is described as a stringent necessity, or as an extreme or urgent necessity. The appellants contend that in view of the evidence the finding that there was such urgent necessity is unwarranted. They contend that to justify a master in selling, without communicating with his owners, there must be a great and imminent danger that the vessel will actually perish as a ship before the owner can be heard from. The respondents on the other hand contend that, as to the necessity, it is *inter alia* enough that the vessel is so damaged or so situated that the cost of repairing or extricating her would exceed her repaired value.

In *The Gipsy* (1), a case between owner and purchaser, Dr. Lushington says:

> No one can say what may be all the circumstances which will constitute a case of necessity. Some, however, may be stated. First, that the ship cannot be repaired in the place where she is, save at a ruinous cost. Secondly, that the master, if the repairs can be done at a cost not destructive to the interests of his owners, has not the means of so doing without a delay equally injurious to his owners. Thirdly, that if he has no such means, there cannot be a communication with his owners and in due time without exposing their property to imminent risk.

In *Lepraik* v. *Burrows* (2), also a case between owner and purchaser, their Lordships say:

> The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity.

It was found as a fact in that case that the cost of repairs would have considerably exceeded the value of the vessel as repaired. But their Lordships went on to consider an objection that the owner should have been first communicated with, and say:

(1) 33 L.J. Ad. 195. (2) 13 Moo. P.C. 132.

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That argument wholly fails because, supposing the answer to be obtained in the shortest possible space of time, say in four months, the expenses during that period, it is obvious, would eat up the whole value of the ship, and it was impossible to have waited that period of time without the ship deteriorating to a very great extent in value, as well as incurring the great expenses which have been stated, *i.e.* the wages of the crew.

In the case of cargo the duty of communicating with the cargo-owner where practicable, and whatever the condition of the cargo, is explicit. *Australian Steam Navigation Co.* v. *Morse* (1) ; *Acatos* v. *Burns* (2). But, as stated in the former case, the practicability of the communication is to be determined by a consideration of all the circumstances of each case, including of course those which create the urgency for an early sale. It is also held that the rule as to the degree of necessity warranting a sale is more stringent as regards cargo than as regards the ship. *Tronson* v. *Dent* (3); *The Pontida* (4). But as the authority to sell the ship (as well as cargo) is created by law and founded upon necessity, the right of the owner to be consulted where reasonably practicable is fundamental.

Where a vessel is so much damaged that the cost of repairs would exceed the repaired value, but is in a place of safety, and neither subject to any material deterioration nor needing that substantial expense be incurred to preserve her, then, ordinarily, the rule of necessity would scarcely seem to require that the master should act at once without seeking the opinion of his owner. But where the case presented for the master's judgment is continually changing for the worse by the material deterioration in value of a vessel already not worth the cost of repairing, or by the necessity of incurring substantial expense to preserve

(1) L.R. 4 P.C. 222.
(2) 3 Ex. D. 282.
(3) 8 Moo. P.C. 420.
(4) 9 P.D. 102.

her, so that the owner, if he decides to act upon the master's judgment, will be materially deprived of the benefit of it by the delay, then it would clearly not be in the interests of the owner to delay. It could lead only to a material aggravation of the loss, and sound policy, which ordinarily would demand that the owner should have the chance of judging for himself where practicable, would in such a case call for immediate sale.

It is clear in the case before us that the vessel could only be kept afloat by pumping. A substantial expenditure was therefore requisite to prevent her perishing at once. We do not know the amount, but in the nature of things it would be considerable. Then, too, there was some risk of her being driven ashore, for although it was in the early summer months the protection was merely that afforded by low reefs, and the place could not be considered entirely safe. Besides, there was the probable deterioration (greater or less, but greater in the warm weather than at other seasons) from worms, the chances of which could not be altogether left out of account. There was, therefore, an urgency that the master should, without the delay of four or six weeks, proceed to carry into effect the judgment that he had honestly and (as appears by the finding of the jury) correctly formed.

So far the position of the insurer has not been alluded to. But (coming again to the facts of this case), if the vessel when repaired would not be worth the cost of repairs, a right sale which would bind the owners would of course excuse them from giving notice of abandonment, while if, for any reason whatever, the owners would not be bound the position of the underwriters would remain unaffected by the sale.

There was also a question as to whether the letter of 25th June amounted to notice of abandonment. The

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case is not as strong as *King* v. *Walker* (1). But *Currie* v. *Bombay Native Insurance Company* (2) is not very greatly different. It is not, however, necessary to decide the point.

The result, therefore, is that the appeal should be dismissed.

SEDGEWICK and GIROUARD JJ. concurred.

*Appeal dismissed with costs.*

Solicitors for the appellants: *MacDonald & Jones.*

Solicitors for the respondents: *Borden, Ritchie, Parker & Chisholm.*

(1) 3 H. & C. 209.

(2) L.R. 3 P.C. 72.

JAMES ISBESTER (DEFENDANT).....APPELLANT; 1895

AND *Oct. 22.

RAY, STREET & COMPANY (PLAINTIFFS)..... } RESPONDENTS. 1896 *Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Partnership—Judgment against firm—Liability of reputed partner—Action on judgment.*

Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.

In an action upon a promissory note against M. I. & Co., as makers, and J. I. as endorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had endorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note.

*Held,* in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or endorser.

APPEAL AND CROSS-APPEAL from the decision of the Court of Appeal for Ontario (1), which allowed the defendants' appeal from the judgment in the Queen's Bench Division (2), as to part of the claim, and dismissed the appeal in other respects.

The plaintiffs brought action against defendant and another, claiming that they were partners in the firm of Isbester & Co., and jointly and severally liable for the amount of a judgment recovered against the partnership in the firm name for a dishonoured note, and also for the amount of several other promissory notes signed by

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 12. (2) 24 O.R. 497.

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the firm. The defendant James Isbester had been previously sued as endorser of the first note, and the action against him failed on the ground that he had endorsed without consideration for the accommodation of the holder on a special agreement that he was not to be held liable by them. In the present case he pleaded the former judgment as a bar to the action so far as it related to the recovery of the judgment given against the firm, and further denied that he was a partner or liable to plaintiffs as a partner in the firm, and alleged that the plaintiffs, by their conduct in purchasing the bankrupt estate of M. Isbester & Co., and taking part in the sale and distribution of the assets thereof, were estopped from now claiming any liability as against him.

Malcolm Isbester did not defend the action, and the trial judge rendered a judgment against the defendant James Isbester for the amount claimed with interest and costs (1). Upon appeal the judgment in the court below was reduced by the amount claimed under the judgment (2). The appellant appealed from this decision except as to that part which reduced the judgment of the court below, and the respondents, by cross-appeal contended that the judgment of the Court of Appeal for Ontario should be varied by restoring the judgment in the trial court.

*McCarthy* Q.C. and *Code* for the appellant. The fact of appellant having been sued as endorser of the note on which the judgment was obtained is an admission that he was not a member of the firm as he could not be an endorser for himself. *Reynolds* v. *Doyle* (3).

The respondents have elected to look to the bankrupt estate of M. Isbester & Co. for judgment. See *Kendall* v. *Hamilton* (4); *Scarf* v. *Jardine* (5).

(1) 24 O.R. 497.
(2) 22 Ont. App. R. 12.
(3) 1 M. & G. 753.
(4) 4 App. Cas. 504.
(5) 7 App. Cas. 345.

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*Aylesworth* Q.C. and *Cameron* for the respondents: The former action did not decide that defendant was not a member of the firm, for that issue was never raised.

Nor does the recovery by defendant therein preclude us from now suing him as a maker. *Wegg Prosser* v. *Evans* (1).

As to the cross-appeal see *Brooke* v. *Haymes* (2); *Ex parte Morgan. In re Simpson* (3).

The judgment of the court was delivered by:

SEDGEWICK J.—This is an action brought by the respondents, Ray, Street & Co., against one M. Isbester and the appellant, James Isbester, both of whom it is contended were members of the firm of M. Isbester & Co., at the time when the causes of action herein respectively arose.

The causes of action are of two classes: First a judgment recovered by the respondent against the firm of M. Isbester & Co. in the High Court of Justice for Ontario, for the sum of $4,962.11 principal, and $24.02 costs, and secondly, six promissory notes, all of them dated in the month of March, 1890, made by M. Isbester & Co., due at the time of action and aggregating $20,000. The defendant Malcolm Isbester did not appear. The defendant James Isbester did, and set up as his main defence that he never was a member of the firm of M. Isbester & Co. and consequently was not liable either upon the judgment against the firm or by reason of the six promissory notes above referred to, signed by the firm. As evidence of this contention he produced a record of a judgment in an action previously brought by the same plaintiffs against him for the purpose of holding him liable upon a note dated 11th November, 1889, for the sum of $4,900, made by M. Isbester

(1) [1894] 2 Q.B. 101; [1895] 1 Q.B. 108.
(2) L.R. 6 Eq. 25.
(3) 2 Ch. D. 72.

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& Co. payable to the order of Adam Isbester & Brother, endorsed by Adam Isbester & Brother to him James Isbester, and endorsed by him to the plaintiffs, which action, having been tried by a jury, resulted in a verdict in his favour. He, the appellant, now contends that this judgment operates as an estoppel inasmuch as it conclusively shows that he, James Isbester, was not a member of the firm of M. Isbester & Company when the notes sued on were made, and, therefore, was not liable in the present action.

At the trial of this action the learned judge found in favour of the plaintiffs for the full amount claimed. Upon appeal it was determined that although the defendant James Isbester was not liable upon the note in respect of which the previous action had been brought, he was liable upon the six notes also sued upon, and that the judgment set up in the defence did not constitute *res adjudicata* so far as they were concerned. From that judgment two appeals have been asserted, one by the respondents upon the ground that the judgment of the trial judge should not have been interfered with, and the other by James Isbester upon the ground that the trial judge should have found in his favour, not only in respect to the judgment sued upon but also in respect to the notes.

I am of opinion that both appeals fail. The main question upon the principal appeal is this: Did the judgment in the first action resulting in a verdict in favour of James Isbester adjudicate upon the question whether he was a member of the firm of M. Isbester & Company? Or, in other words, was the contention that he was a member of that firm or held himself out as a member of that firm at the times when the notes in question were given, determined in his favour, or determined at all? If, as a matter of fact, there was an adjudication in his favour on that issue, then, in my

view, the matter would be *res adjudicata;* but, as I propose to demonstrate, no such issue was raised or determined and the doctrine of *res adjudicata* cannot possibly apply. As already stated the note sued on in that action was a note dated 11th November, 1889, purporting to be signed by M. Isbester & Company, and to be indorsed by Adam Isbester & Brother, and by the defendant James Isbester. So far as anything appearing of record is concerned, the action was brought against James Isbester, not as a member of the firm of M. Isbester & Company, or Adam Isbester & Brother, but solely as an endorser in his own name of the note. There is no allegation in the statement of claim, nor does it appear to have been brought forward at the trial, that he was or held himself out to be a member of either firm. He was proceeded against in his capacity as an individual endorser and not otherwise. In his defence he admitted the making of the note and its dishonour. He alleged that the two firms sued were composed of M. Isbester and Adam Isbester, but he did not either admit or deny that he was a member of either firm. He, however, claimed that he endorsed the note sued on, not as security for the firms, parties thereto, but for the accommodation of the plaintiffs themselves, with the understanding as between him and the plaintiffs that he should incur no liability in respect of it, and that was the question and the sole question which was submitted to the jury, and upon which they found in his favour.

The learned counsel for the appellant, at the hearing of this appeal, most ingeniously argued that by reason of the rules under the Ontario Judicature Act permitting a firm to be sued by its firm name, and allowing the question as to the parties composing such firm to be determined by subsequent proceedings, an alteration of the previous law had resulted and that it must be

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presumed that there was an adjudication upon the question as to the appellant's membership of the firms referred to. I have not been able to appreciate the force of his argument. It is perfectly clear that a person may be liable upon a promissory note both as maker and as endorser. *Wegg Prosser* v. *Evans* (1). At common law an action may be brought against him as endorser and fail, and a subsequent action may be brought against him as sole maker or as one of several makers and succeed; and I see nothing whatever in the rules to which he has referred which by any possibility can lead to the conclusion that the common law in this respect has been changed. The only substantial issue raised by pleadings in the action, the judgment in which is set up as a defence to this action, was as to whether the appellant was liable to the plaintiffs as endorser. That issue was found in his favour, but there was no finding either express or implied, or any judgment upon the question now raised, as to whether he was a member of the firm who were the makers of the note sued on. It is true the question might have been raised. The plaintiffs might have alleged in their statement of claim that he was a member of the firm of M. Isbester & Company, and liable as such maker as well as an endorser, but so far as I can see, even if the fact had been so, they were not bound to allege it or to prove it, nor was it necessary to their obtaining judgment, assuming that he was liable as an endorser, and I know of no principle of law or practice which absolutely precludes the plaintiffs from suing him as a maker if, having failed in holding him liable as an endorser, they subsequently discovered that he was a member of the firm who were the actual makers.

(1) [1894] 2 Q.B. 101.

I do not think it necessary in the present case to enter fully into the question of *res adjudicata*. There is no doubt that the judgment of a court of competent jurisdiction upon any point in issue is as a plea a bar, or as evidence conclusive, between the same parties upon the same matter directly in question in another court, but a judgment is only conclusive as to facts which appear to be found as facts by the record, or which must necessarily be presumed to have been proved or admitted as facts; in other words, a judgment is conclusive only upon facts which were material to the issue in controversy in the action upon which it is based. In the present case the record relied upon does not disclose a finding either directly or indirectly that the appellant was or was not a member of the firm of M. Isbester & Company, nor was it material or necessary that there should be a finding upon that point in order to establish his immunity from liability as an endorser of the note sued on, and if that be so, the only question which was to be determined by the trial judge in this action was: Was he or did he hold himself out to the plaintiffs to be a member of the firm of M. Isbester & Company at the time the notes sued on were given? The learned judge did not find that he was, as a matter of fact, a member of that firm, but only that he held himself out to the plaintiffs to be a member, and on that ground judgment was given against him. In this view I think the trial judge was right, and so far as the main appeal is concerned it must be dismissed.

For the reasons stated by Mr. Justice Osler, in his judgment in the Court of Appeal, I am also of opinion that the cross-appeal should be dismissed. There has been no finding to the effect that as a matter of fact he was a partner, but only that he held himself out to the plaintiffs to be a partner.

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In the judgment which is set up as a defence the record shows that, so far as the note sued on was concerned, it was given, so far as James Isbester was concerned, for the accommodation of the plaintiffs, and upon the express understanding that he was in no way (either, in my view, as maker or endorser) to be liable to them upon it, and therefore the judgment is conclusive in respect of his liability on that note.

I think both appeals should be dismissed with costs.

*Appeal and cross-appeal dismissed with costs.*

Solicitors for the appellant: *Code & Burritt.*

Solicitor for the respondents: *W. K. Cameron.*

JAMES GORMAN (DEFENDANT).....APPELLANT; 1896

AND *Feb. 18.

GEORGE DIXON (PLAINTIFF).....RESPONDENT. *Feb. 27.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

*Principal and surety—Giving time to principal—Reservation of rights against surety.*

Where a creditor gives his debtor an extension of time for payment a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. *Wyke* v. *Rogers* (1 DeG. M. & G. 408) followed.

Per Gwynne J. dissenting. The evidence in this case was not sufficient to show that the remedies were reserved.

An appellate court will not give effect to mere technical grounds of appeal, against the merits and where there has been no surprise or disadvantage to the appellant.

APPEAL from a decision of the Supreme Court of Prince Edward Island sustaining the verdict for the plaintiff at the trial.

The material facts of the case sufficiently appear from the above head-note, and are fully set out in the judgment of the Chief Justice.

*Stewart* Q.C. for the appellant. The surety was discharged by the bank giving time to his principal. *Bolton* v. *Buckenham* (1); *Devanney* v. *Brownlee* (2).

The remedy against the surety could not be reserved by an agreement to which he was not a party and of which he was ignorant. *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (3); *Bolton* v. *Buckenham* (1).

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

(1) [1891] 1 Q.B. 278.
(2) [1891] 1 Q.B. 278.
(3) L.R. 7 H.L. 348.

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*Peters* Q.C., Attorney-General for Prince Edward Island, for the respondent. An express agreement is not necessary to reserve rights against a surety when giving time to the principal. A general understanding that the surety is to remain liable will suffice. *Wyke* v. *Rogers* (1).

The judgment of the majority of the court was delivered by :

THE CHIEF JUSTICE.—This was an appeal from a decision of the Supreme Court of Prince Edward Island refusing to grant a rule *nisi* for a new trial. The action was brought to recover $160 as an unpaid balance on a promissory note for $200, dated the 18th of October, 1892, and made by the appellant, James Gorman and one John Gorman, his brother, jointly and severally, payable to the Merchants Bank of Halifax, three months after date. This note was discounted by the Merchants Bank for John Gorman who received the proceeds. James Gorman, the appellant, became a party to the note as surety for his brother.

When this note became due in January, 1893, it was dishonoured and remained in the bank unpaid. On the 31st January, 1893, the respondent as surety for John Gorman became a party to another joint and several note for $160 made by John Gorman and himself at three months which was also discounted by the Merchants Bank. The proceeds of this discount were retained by the bank, and in addition the sum of forty dollars was paid to the bank, together with the interest accrued on the first note and the discount on the second note, by John Gorman the principal debtor ; the first note, that for $200, was not however given up but was retained by the bank manager, Mr. Arnaud, who pinned

(1) 1 DeG. M. & G. 408.

it to the new note and put them away in the bill case. Mr. Arnaud's account of what occurred is as follows :

The arrangement made was that the old note should be left in the bank and that the new note be held as collateral security till the old one was paid. I undertook to hand back the new note to Dixon when the old note was paid. I took the two notes and pinned them together and put them away in the bill case. It is not the practice to retain the old note when a new one is given in payment or settlement. This was done after old note due. No reason otherwise to hold old note. I kept the two notes in the bank till the $160 became due. Dixon's solicitor paid the new note and I gave him both notes indorsing the old one to him. John Gorman and Dixon were both present and undoubtedly heard what I said. I don't remember John asking me for the old note, I pinned them together in his presence.

This evidence was to some extent contradicted by John Gorman. This transaction undoubtedly amounted to a giving of time to John Gorman the principal debtor in respect of the first note; the debt being, to the extent of $160 the same on both notes, and the interest on the second note having been paid in advance by Mr. Gorman, the bank was not in a position to sue him during the currency of that note (1). It is, however, the law that if the creditor giving time to the principal debtor reserves his remedies against the surety the latter is not discharged. The respondent insists that such a reservation is by the evidence of Mr. Arnaud proved to have been made in the present case. I am of opinion that the evidence of Mr. Arnaud does show that the remedies against the appellant were so reserved and it was therefore a question for the jury whether they would give credit to Mr. Arnaud's testimony or to that of the principal debtor John Gorman. No formal agreement is essential to effect the reservation of the right to sue the surety and thus to counteract the effect of giving time which would otherwise discharge the surety. This is well established by the case of *Wyke* v. *Rogers*

(1) *Blake* v. *White* 1 Y. & C. (Ex.) 420.

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(1), a case of the highest authority decided by Lord St. Leonards in 1852. There the principal debtor and the surety had joined in a joint and several bond and this bond having become due the creditor took from the principal debtor a promissory note for part of the money due, payable two months after date. The report of the case states that :

> The master found that there was a general understanding between the creditor and the principal debtor that the creditor's remedy on the bond was not to be taken away ; but he found that there was no written, nor beyond the general understanding before mentioned any distinct parol, agreement respecting the bond between the creditor and the principal debtor.

Upon this finding Lord St. Leonards held the surety not discharged, saying :

> The result has been to prove in the most distinct manner that it was understood between the parties that the defendant's remedy on the bond was not to be affected.

The jury in this case having, after a proper charge from the learned Chief Justice, found for the plaintiff must be taken to have given credit to Mr. Arnaud's evidence. The present case is therefore as regards the law on all fours with that of *Wyke* v. *Rogers* (1), and must be ruled by it.

An objection has been raised founded upon a point of pleading. At the trial the learned counsel for the defendant insisted that the plaintiff was not entitled to give evidence of the reservation of the rights of the bank against the appellant on the first note because there was no replication on the record setting up that answer to the plea of discharge by giving time. Strictly speaking this was matter of replication, but I am of opinion that we ought not to give effect to this objection now. All the evidence which could possibly throw light on the transaction

(1) 1 DeG. M. & G. 408.

was given, the only parties to it—the appellant, respondent and the bank manager—having been examined as witnesses, and it would not be in the interests of justice that we should now on appeal give effect to this highly technical point. The substantial merits of the case are with the respondent and the finding of the jury was warranted by the evidence. It is the practice of the Privy Council not to give effect to mere technical grounds of appeal where the merits are the other way, and there has been no surprise or disadvantage to the unsuccessful party.

Moreover, under the statute which regulates the procedure of this court (sec. 63 R. S. C. ch. 135) we are authorized or rather required:

> To make all such amendments as are necessary for the purpose of determining the appeal on the real question in controversy between the parties as disclosed by the pleadings, evidence or proceedings.

Under this provision we could, if it were necessary to do so, and if any useful purpose would be subserved thereby, now direct by way of amendment that a replication stating the reservation of remedies should be added *nunc pro tunc* as if made at the trial, and subject thereto dismiss the appeal. As this, however, would be a pure formality there is no necessity for such a proceeding.

It is to be hoped that some statutory amendment of the law may in the future prevent appeals to this court in cases of such very minor importance as the present, in which the amount in controversy is so greatly disproportioned to the expense of an appeal here.

The appeal is dismissed with costs.

GWYNNE J.—This action is brought by the plaintiff as joint maker with his brother John Gorman upon a promissory note bearing date the 18th of October, 1892,

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whereby the defendant and his brother John jointly and severally promised to pay the Merchants Bank of Halifax or order three months after date $200 which note the statement of claim alleges that the bank endorsed to the plaintiff.

To this action the defendant pleads, among other pleas, the following:

2. Payment before action.

4. That he made the note as a joint maker with his brother John, but for the accommodation of John and as his surety only to secure a debt due by John to the Merchants Bank of which the bank before giving time to John as therein mentioned had notice, and after the note became due the said Merchants Bank, without the consent of the defendant and for good and sufficient consideration, agreed with the said John Gorman to give to him and did give him time for payment of the note beyond the time when the same became due, of all which the plaintiff at the time of the endorsement to him had notice.

6. As in the 4th plea, that the defendant joined as maker of the said note for John's accommodation solely of which the bank at the time of taking the said note had notice, and afterwards and after the note became due the bank while holder of the note did, without the consent of the defendant and for good consideration, agree with John that he, John, should pay $40 on account of said note and should procure a new and approved negotiable note for the balance signed by himself and the plaintiff, payable three months after its date, which note was made, approved and accepted by the bank, and the bank gave the said John Gorman time until the maturity of the said last mentioned note.

8. Similar to the 4th, but concluding with the allegation that the plaintiff gave no value or consideration for the note sued upon.

Issue was joined upon the pleas, and such joinder of issue constituted the sole matters which the parties went down to try.

There is much contradiction in the oral testimony, but as to the following facts there is no contradiction whatever, and they are, in my opinion, abundantly conclusive upon the issues joined.

The note for $200 did not become due until the 21st January, 1893, and upon that day John Gorman paid the bank $40 on account, and the note or liability of John and James Gorman in respect thereof was entered in the books of the bank at $160, with a charge in addition of 45 cents. Upon the 31st January John Gorman and the plaintiff made their promissory note, whereby they jointly and severally promised to pay to the Merchants Bank of Halifax, or order, three months after date for value received, the sum of one hundred and sixty dollars. This note was, upon the 1st February, 1893, discounted for John Gorman and so entered in the bank's books, and in the past due bill account, in which the $160 was entered as overdue on the 21st January, the said overdue bill for the $160 was marked paid, and there is no other entry in the bank books except as above relating to the transaction. The bank books thus clearly show the note for $200, or rather the balance of $160 due thereon, to have been paid and satisfied upon the discount of the note which the plaintiff joined in of the 31st January. The discounting of that note for John Gorman, and the application of the amount secured by it in the books of the bank in payment of the balance due upon the note for $200, constituted, in my opinion, an absolute payment of that note by John Gorman and an absolute discharge of him from all liability thereunder; and as the transaction of the 31st January and 1st February, 1893, constituted an absolute discharge of John and a

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payment by him, it of necessity had the same effect as regarded his co-maker, the present defendant. But it is held that the rights of the bank against the present defendant were reserved, although John was discharged, but the discharge of John operated for the benefit also of his co-obligor, the present defendant. It is, however, contended that as between John and James the equitable relation of principal and surety existed the bank could reserve rights against him as if he was as to the bank a surety only and not a principal. As between the defendant and the bank the liability of the former was as co-principal with John, and although by reason of the equitable relation of principal and surety between him and John, the bank could not give time to John without the consent of the defendant without discharging the defendant, still I am not at all prepared to admit that it was competent to the bank so to ignore the relation to them which the defendant bore as a principal debtor with John, so as to reserve any right against the co-obligor James when the dealings of the bank with John discharged him. However no such case is made upon the pleadings, and for this reason the contention of the plaintiff cannot be maintained. For myself, I must say that even if such an issue were upon the record there is nothing in the evidence upon which it can be held that the bank in point of fact did reserve their right of action against the defendant. Such an agreement could not have been made without John Gorman having been a party assenting to it, and there is no evidence that he ever did, and indeed it is inconceivable that he could have assented to an arrangement which, in my opinion, could not in this case have been made without reserving the right of action against John himself also, which it is impossible to hold was done, or in the contemplation of the parties. The appellant was in my opinion

clearly entitled to have recovered upon the issue joined on the 2nd, 4th and 6th pleas above, which is sufficient for the determination of this case, and the appeal should therefore be allowed with costs.

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*Appeal dismissed with costs.*

Solicitor for the appellant: *James J. Johnston.*

Solicitor for the respondent: *Hector C. Macdonald.*

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*Feb. 26.

*Mar. 24.

THE WILLIAM HAMILTON MANUFACTURING COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

THE VICTORIA LUMBER AND MANUFACTURING COMPANY (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Warranty—Defect in construction—Satisfaction by acceptance and user—Variation from design—Demurrage—Evidence—Onus of proof—Expert testimony—Concurrent findings reversed.*

In an action where the defendants counter-claimed damages caused by the defective construction of a boiler for their steamer, which had collapsed.

*Held*, reversing the decision of the Supreme Court of British Columbia, that conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse, who were not present at the time of the accident; whose evidence was not founded upon knowledge but was mere matter of opinion; who gave no reasons and stated no facts to show upon what their opinion was based and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern which the evidence showed were in general use. The judgment therefore allowing the counter-claim was set aside though against the concurrent findings of two courts below.

APPEAL from the decision of the Supreme Court of British Columbia (1) affirming the judgment of the court below allowing damages upon the respondent's counter-claim for cost of repairs and varying the same by adding further damages for demurrage on their steamer "Daisy" while the repairs were being made,

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

(1) 4 B. C. Rep. 101.

the whole to be set off against appellant's principal claim to the extent for which judgment was recovered in the action.

The original action was brought by the appellants to recover the price of machinery furnished by them to the respondents, and on the admission of respondents judgment for $1,251 was rendered in their favour. The respondents, however, counter-claimed against the appellants for damages by reason of the defective construction of a marine boiler which they had ordered from appellants and paid for prior to the action. The damages claimed were for repairs to the boiler $979.03 and for demurrage on the steamer "Daisy" during the time she had been laid up for repairs, at the rate of $30 per day, $1,590, making a total of $2,569.03.

The respondents carry on a lumber manufacturing business at Chemainus, B.C., and employ their steamer "Daisy" for the towing of logs and conveying supplies to their lumber camps on the coast of Vancouver Island; they also have a passenger carrying permit. The facts as to the ordering of the boiler and the questions at issue fully appear in the judgment of the court pronounced by His Lordship Mr. Justice Sedgewick.

The trial judge found that the appellants had contracted to supply the boiler according to a design furnished by the respondents, that they had not followed the design in building the boiler, and that it collapsed in consequence of defective construction and not through any neglect of the respondents. He further found that a statement to the effect that the boiler would be "made all right" in discussing the changes in construction by the general manager and vice-president of the company, appellants, was an express warranty and allowed the cost of the repairs, but disallowed the claim for demurrage as being too remote. An appeal against this judgment was taken by the

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present appellants and also a cross-appeal by the respondents claiming the demurrage which had been thereby refused. The appeal was dismissed by the full court, and the cross-appeal allowed, the damages claimed for demurrage being fixed at $397.50 which appeared to be the profit which the "Daisy" would have made towing logs instead of another steamer which had been engaged for that purpose during the time she was idle.

*Aylesworth* Q.C. and *Dumble* for the appellants.

There were no specifications furnished, but only a plan or sketch of the proposed boiler drawn by the engineer or fireman of the respondents, and owing to defects observed in this plan one more in accordance with the style of boilers in general use was substituted. Respondents accepted it after full inspection and with knowledge of the deviations, and put it into their steamer.

There was no express warranty given. The "collapse" was not due to any variation in the design. There has been no breach of implied warranty. The accident more probably resulted from causes immediately under the control of those in charge of the boiler through contributory negligence, or from natural causes. No negligence or breach of warranty has been proved on the counter-claim. *Reynolds* v. *Roxburgh* (1); Beven on Negligence (2).

The appellants were justified in the changes made and cannot be charged with negligence for following the "beaten track" in preference to the most unusual style suggested in the sketch. Strict adherence to the sketch plan was waived by the acceptance and long use of the boiler. The unsupported theory as to a hypothetical cause of the burning is not sufficient to support the charge of negligence in the face of more probable and

(1) 3 O.R. 657. (2) 1 ed. 808, 809.

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well-known causes asserted by skilled witnesses. Mere inference of want of skill is not sufficient.

Respondents were bound to show negligence and consequent injury, they must take the case out of the realm of mere conjecture and place it within bounds of reasonable certainty. It is not sufficient if the evidence be equally consistent with presence or absence of negligence. There must be affirmative evidence in support of the claim sufficient reasonably to convince a jury of the facts sought to be proved.

The damages assessed upon the counter claim are excessive and should be greatly reduced. There was no necessity for such extensive repairs. The appellants are not liable for demurrage or loss of earning power in the boat during the time alterations were in progress; such damages are in any event too remote. The delay was not before the boiler could be made to work, but because of an accident months afterwards, and it is not reasonable to contemplate implied warranty as continuing over any length of time, however remote, or as rendering them responsible for loss of earnings. This court can judge of the facts and the value of expert testimony as well as the courts below, particularly when the bulk of the evidence was taken by commission and many witnesses were not heard orally in the court of first instance. *Chapman* v. *Walton* (1); *McQuay* v. *Eastwood* (2); *Fields* v. *Rutherford* (3); *Jackson* v. *Hyde* (4); *Metropolitan Railway Co* v. *Jackson* (5).

*Robinson* Q.C. for the respondents.

This appeal is upon mere questions of fact and the appellant must make his case sufficiently clear to justify the reversal of the concurrent findings of two courts below. *North British Ins. Co.* v. *Tourville* (6).

(1) 10 Bing. 57.
(2) 12 O.R. 402.
(3) 29 U.C.C.P. 113.
(4) 28 U.C.Q.B. 294.
(5) 3 App. Cas. 193.
(6) 25 Can. S.C.R. 177.

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The courts below have conclusively found breach of warranty. It is only under very exceptional circumstances that the courts will reverse against such concurrent findings on questions of fact. *Hay* v. *Gordon* (1). The suit here is for breach of warranty, not for negligence, and the respondents have negatived the charge of negligent use. The words "I will supply you well" were held to be warranty in *Jones* v. *Bright* (2). In this case the manager assured the purchasers that "if the boiler was not all right they (appellants) would make it all right." The government inspector was called in and only such repairs as he required were done, no unnecessary cost being incurred. There was breach of both implied and express warranty. The boiler collapsed while being used for the purposes for which it had been built. The respondents should recover both for repairs made and demurrage for loss of profit on the use and earnings of their vessel while the repairs were being done.

The following cases are in point: *Laing* v. *Fidgeon* (3); *Drummond* v. *Van Ingen* (4); *Randall* v. *Newson* (5); *Colonial Securities Co.* v. *Massey* (6).

*Aylesworth* Q.C. in reply.

The judgment of the court was delivered by:

SEDGEWICK J.—The appellant company had sued the respondent company in the Supreme Court of British Columbia for goods sold and delivered. At the trial before Mr. Justice Drake the amount due was agreed on and judgment was ordered to be entered accordingly.

The defendant company, however, in the same action made a counter claim against the plaintiffs, and upon that claim being investigated the learned trial judge

(1) L.R. 4 P.C. 348.
(2) 5 Bing. 533.
(3) 4 Camp. 169; 6 Taunt. 108.
(4) 12 App. Cas. 284.
(5) 2 Q.B.D. 102.
(6) [1896] 1 Q.B. 38.

found in its favour, awarding damages to the extent of $979 03 against the present appellants. Upon appeal to the Supreme Court in banc the damages so found were increased by the sum of $397.70, and it is from the judgment as a whole that this appeal is taken.

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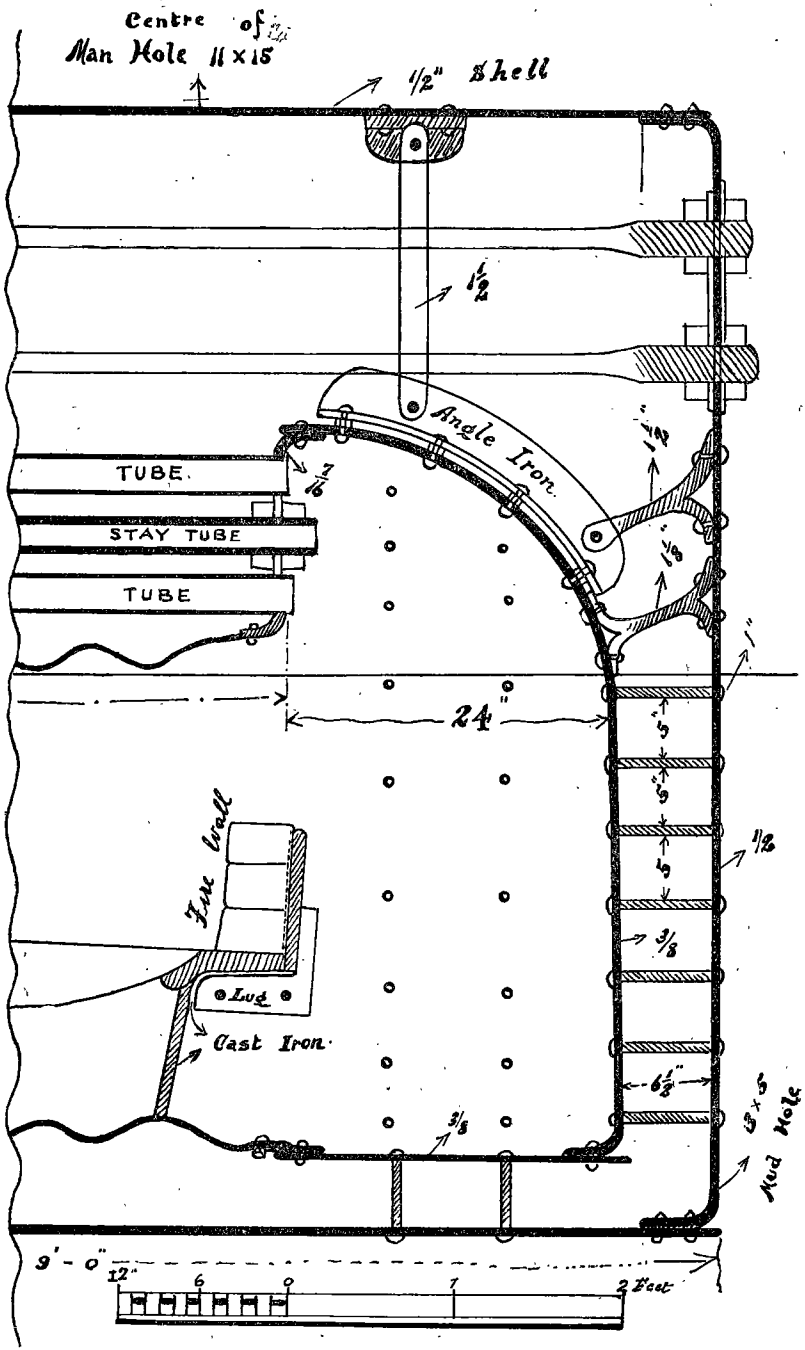
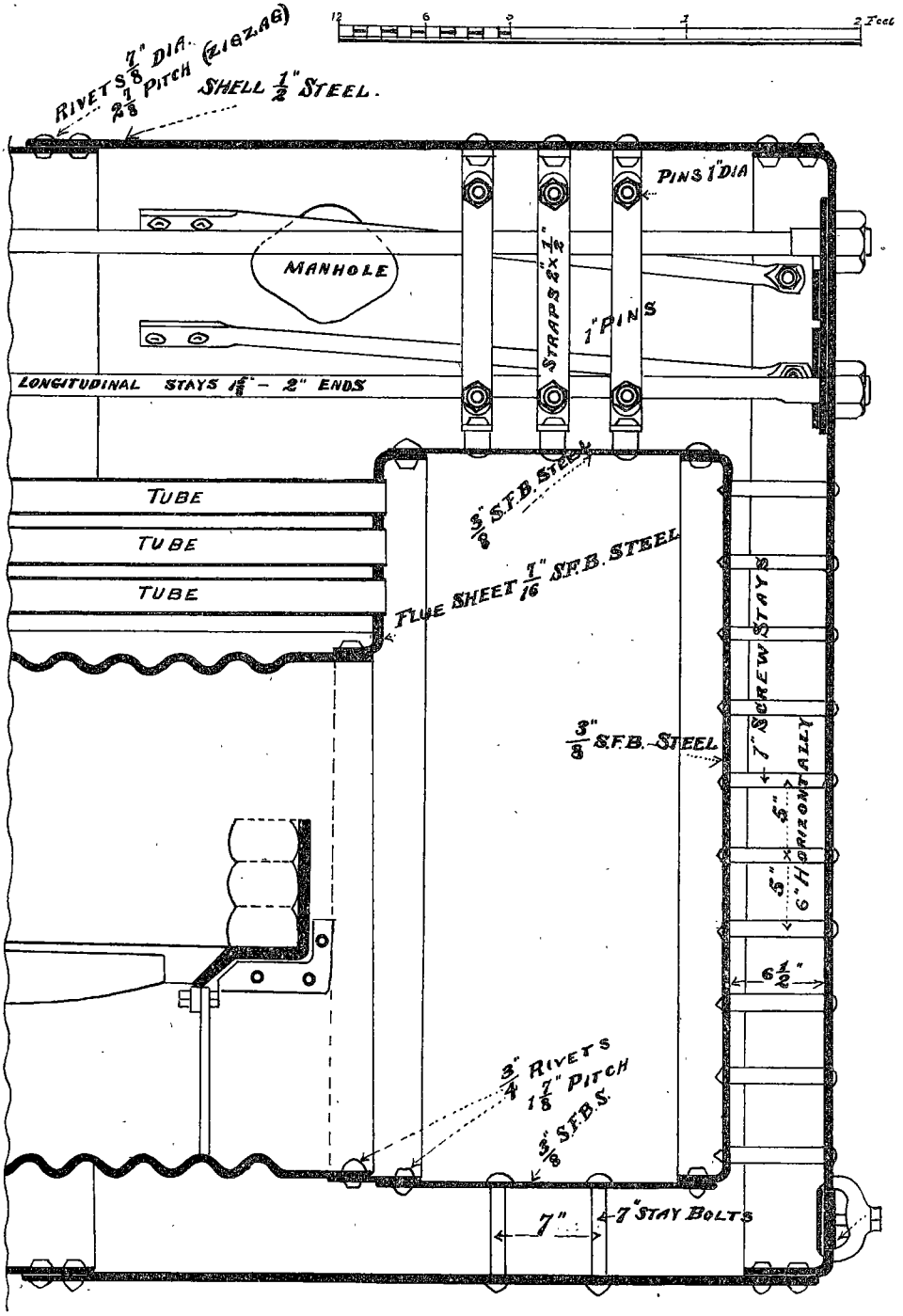
The plaintiffs are lumber manufacturers and own a steamer the "Daisy," which is used in towing lumber, &c., between the mainland and Vancouver Island. In May of 1890 Mr. Palmer, the president of the respondent company, gave an order to one William Hamilton, the president of the appellant company, for the construction of a boiler to be built at Peterborough, Ont., and to be forwarded to Vancouver, B.C., for the use of the "Daisy." There was no written contract, but with the verbal order was given a sketch or rough design of the proposed boiler, unaccompanied, however, by any detailed specifications or any details whatever except those that appear upon the sketch itself. This sketch was prepared by a Mr. Gill, who is not and never was a boiler maker, but who appears to have filled the joint offices of engineer and fireman on board the "Daisy." The sketch or design is as in diagram page 102. The appellants during the summer of 1890, in pursuance of the order so given, built a boiler and forwarded it to Vancouver for acceptance. This boiler was built according to the plan as in diagram page 103.

A comparison of the two sketches will disclose differences in the boiler as ordered and the boiler as constructed In the former, the back upper corner of the combustion chamber or fire box is not rectangular, but of a rounded or circular shape, while the back plate inclines slightly from the perpendicular towards the fire box. In the latter, the corner is rectangular and the plate perpendicular. The first does not, however, show, except perhaps by scale, the variation from the perpendicular in the back plate. It must nevertheless


Centre of Man Hole 11 x 15
1/2" Shell
1 1/2
Angle Iron
TUBE
7/16
STAY TUBE
TUBE
1 1/2
1 1/8
1"
24"
5"
5"
5"
1/2
3/8
6 1/8"
3/8
3 x 5
Mud Hole
Fire wall
Lug
Cast Iron
9' - 0"
12" 6 0 1 2 Feet


12 6 3 1 2 Feet
RIVETS 7/8" DIA. 2 1/8 PITCH (ZIGZAG)
SHELL 1/2" STEEL.
PINS 1" DIA
MANHOLE
STRAPS 2" x 1/2"
1" PINS
LONGITUDINAL STAYS 1 1/8" - 2" ENDS
TUBE
TUBE
TUBE
3/8" S.F.B. STEEL
FLUE SHEET 1/16" S.F.B. STEEL
7" SCREW STAYS
3/8" S.F.B. STEEL
5" x 5" x 6" HORIZONTALLY
6 1/2"
3/4" RIVETS 1 7/8" PITCH
3/8" S.F.B.S.
7"
7" STAY BOLTS

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be considerably less than one inch at the height of 4 feet 6 inches, if we are governed by the scale.

We are not without evidence as to why the change from the original design was made. That design was made, not as a working plan, but as indicative of the size and strength of the boiler required. It bore indisputable evidence that it was not the work of a skilled mechanician. It was proved that if built according to it with no more stays or bolts than therein specified, the plates at the point of curvation, instead of standing a pressure of 120 lbs. to the square inch, would stand a pressure of only 18 lbs. The manufacturers, therefore, took upon themselves the responsibility and risk of altering the design in order more fully to carry out what the owners of the steamer substantially wanted, a boiler of sufficient strength and capacity to do the required work.

The boiler was built under the provisions of the Steamboat Inspection Act, and when completed was examined by the government inspector, was submitted to the statutory hydrostatic test, showing a capacity to stand a working pressure of 128 lbs. to the square inch, and was duly certified under the statute.

The boiler arrived at Vancouver in September, and thereupon was inspected by the president of the respondent company and by Mr. Gill, who had made the design. The changes in the mode of construction were at once noticed, and thereupon these two gentlemen had an interview with Mr. Munro, the vice-president of the appellant company who happened to be at Vancouver at the time. There may be a question as to what actually took place at this moment, but I accept the respondents' contention and the finding of the trial judge, that the boiler was accepted and placed in the "Daisy" upon the faith of Mr. Munro's assurance "that if the

boiler was not all right they (the appellants) would make it all right."

In my view, whether this assurance was given or not, the appellants were under the implied obligation to provide a boiler suitable for its intended purposes, and if, after acceptance, it turned out that it failed in that regard liability would at once attach to the manufacturers. The purchasers probably might, when they found the machine was not built in the form specified, have refused to accept it on that ground without reference to its character as a machine, but having accepted it in its altered condition they can only recover—but they can recover—if they have established that there was some intrinsic defect in it, some negligence, whether in design or workmanship.

In September the respondents placed the boiler in position, and the vessel was operated with it continuously for eight months, the price of it having been paid in the month following its delivery.

For about six months after the boiler was in use it was operated at a pressure of between 80 and 90 lbs., the safety-valve then in use blowing off at that point, but for nearly two months afterwards she was run at a pressure of 120 lbs. more or less.

On the 24th of May, when the machinery was in charge of Mr. Gill and the steamer was towing a boom of logs on the waters of the Pacific, the accident which has caused this litigation occurred. The vessel had been running all right with a steam pressure of 120 lbs. at a certain time when according to Gill there was a pressure of 118 lbs.; he went from the engine room into the mess room, leaving no one in charge of the engine, and having fired up a few minutes previously. While away from his place he "heard a leak in the boiler." He then went back to his place of duty, lowered the steam down to 45 lbs., and at that pressure took the

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steamer with its boom of logs to harbour.

Upon examination it appeared that the leakage occurred by reason of the bulging out of the perpendicular plate at the back of the fire box, and the consequent breaking away or displacement of one or more of the rivets or stays which kept the fire box in position. In other words, the plate had become overheated or "burnt," and the pressure of steam in the water spaces was so great that the plate was forced out and the leakage occurred, the immediate cause of the accident, or the collapse as it is called, being the overheated plate. The only question therefore in controversy is as to the cause of this overheating. Was that overheating the result of some defect in construction which the manufacturers, by the exercise of ordinary care, might have provided against? If so, they are liable. And the affirmative of this proposition, the respondents assert, they have established and the courts below have so held.

Now, the allegation of the respondents in their counter claim was that

> the boiler and machinery was to be manufactured according to certain plans and specifications prepared by the defendants, but that the boiler and machinery was not constructed according to the said plans and specifications, and by reason of such defective construction the said boiler was not fit for the purposes for which it was required, and collapsed.

There was no suggestion of defective material or of carelessness or unskilfulness in workmanship. In fact it was conclusively proved, as well by the defendants' as by the plaintiffs' witnesses, that both the material and the workmanship were perfect. But it was contended, and that was the whole of the defendants' case, that if the boiler as constructed had had the slightly inclined plate with the circular corner, instead of the perpendicular plate and the right angled corner, the

overheating would not have taken place.

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To meet this contention a large number of witnesses were examined in the province of Ontario (their personal examination at the trial, owing to distance, was out of the question), and it was abundantly proved, not only by witnesses who had personally to do with the boiler's construction, but by many other experts as well, that the design was that in common use throughout the world; that boilers built upon Mr. Gill's design, if the inclined plate is in fact a part of it, were practically unknown; that the great steamships plying between Europe and this continent—the American liners—were built with the rectangular corner and the upright plate, and the suggestion was that the accident must have been the result, not of defective design, but of other causes.

When the case come on for trial the evidence taken in Ontario having been brought to the knowledge of the defendants, how was the case met? Only two witnesses gave any professional evidence, Mr. Gill the engine man who made the design, and Mr. J. C. Thompson, the government boiler inspector, of Victoria. They practically corroborated the evidence of the Ontario witnesses as to the unusual character of the Gill design. Gill himself said that of the one thousand steamships on the Pacific coast that he was acquainted with only two had a curved top at the back of the fire box, and Mr. Thompson's experience was about the same, but they persisted in their theory that the design of the boiler as built was defective inasmuch as the side plate was perpendicular, and that had it been slightly off the right angle the accident would not have happened. "I concluded," said Mr. Gill, "the perpendicular sheet stopped the circulation and it caused the sheet to overheat; the steam had to follow the sheet to get to the surface of the water." And in this con-

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clusion Mr. Thompson concurred. It was substantially upon this evidence, and upon this evidence alone, that the judgment in favour of the respondents was based, and we are now called on to say whether it was sufficient for that purpose.

In my judgment, it was not. These two men were not present at the time of the accident. Their evidence, so far as it related to the crucial point in controversy here, is not the evidence of knowledge but of opinion, and the weight that is to be given to it must largely depend upon the opportunity the witnesses have had to form a correct opinion, and of the reasons which have influenced them in coming to it. The onus of proving that the accident was caused by the faulty construction of the boiler was upon the respondents. They had to show that but for that fault in construction the collapse would not have happened, and they try to remove that onus by bringing two experts to testify that "in their opinion" it was the perpendicular plate. It is our duty to judge the value of that opinion and the weight to be attached to it. It does not appear from the evidence upon what facts or by reason of what investigation that opinion was arrived at. They do not explain why a perpendicular sheet has the effect of stopping the circulation in the water spaces. One might suppose that the sheet if inclined towards the fire box and thus brought more directly in contact with the heat waves would be all the hotter by reason of that inclination, but that is not explained.

The comparative merits of the two methods might have been tested by experiment. We have no evidence of this. There have been innumerable boiler explosions and collapses before. In the whole extended history of the science of engine building has it ever been suggested that the perpendicularity of a side plate was the occasion of accident?

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Whatever effect the deviation might have in a stationary boiler, one would suppose that in a marine boiler constantly changing its position, never at rest, but moving with the oscillations of the ship and the movements of the sea, the deviation asked for in the present case would be practically ineffective for any purpose, but the experts give us no aid on this point.

What are the actual facts which these experts really know upon which they base their opinion? They do not tell us. Now, in the absence of evidence and explanation of this kind, the statement by them of their opinion is not proof, and in my view no judgment can be based upon it. It is mere conjecture, or suggestion, or guess work, possibly true, probably not, upon which no verdict could safely rest.

In my view the respondents have not shown by evidence sufficient to reasonably satisfy the ordinary mind that the overheating in question was due to a mistake of construction. The evidence, such as it is, is singularly wanting in all these essential features which render expert testimony on a point like that of any value, and for my part I cannot give conclusive weight to it.

There is another view, too, which presents itself to my mind. As already stated, the boiler designed and built by the appellants here is substantially upon the same principle as that upon which the rest of the world's steamships are built. Almost universally the plate in question here is perpendicularly placed. To sustain the judgment in the present case would be to judicially declare that all boilers the world over so patterned and built are defective in design and faulty in structure. The evidence, to my mind, fails most signally to justify such a wide and far-reaching result.

In my view the appeal should be allowed, and the

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counter claim dismissed with all costs both here and below.

*Appeal allowed with costs.*

Solicitors for the appellants: *Russell & Godfrey.*

Solicitors for the respondents: *Bodwell & Irving.*

AUBREY KIRK (PLAINTIFF).....APPELLANT; 1896

AND *Feb. 20, 21.

DUNCAN C. CHISHOLM (DEFENDANT)..RESPONDENT. *Mar. 24.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Assignment for benefit of creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel mortgage—Statute of Eliz.*

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee* v. *Flint* (19 N. S. Rep. 487) approved and followed; *Archibald* v. *Hubley* (18 Can. S. C. R. 116) distinguished.

A provision in an assignment for the security and indemnity of makers and endorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.

An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.

A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part" will also avoid the assignment under the statute of Elizabeth.

Authority to the assignee not only to prefer parties to accommodation paper but also to pay all "costs, charges and expenses to arise in consequence" of such paper is a badge of fraud.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment of the trial judge in favour of the plaintiff.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

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The question for decision on this appeal was whether or not an assignment to the plaintiff for benefit of creditors was valid under the Bills of Sale Act of Nova Scotia (1), and the statute of Elizabeth relating to voluntary conveyances. The deed was attacked under the Nova Scotia Act on the ground that the affidavit of *bona fides* was defective. As against that ground of attack it was contended that under section 10 of the Act no affidavit was required.

The material portions of the assignment after the provision for payment by the assignee of the expenses attendant upon its execution and carrying into effect its trusts and powers were as follows :—

"In the next place, shall pay all debts due and owing by the said assignor to A. Kirk & Co., of Antigonish aforesaid, merchant, for and on account of any judgments, mortgages, promissory notes and bills of exchange made or drawn, accepted or endorsed by the said A. Kirk & Co., now due or growing due, book debts and all other debts or claims of the said A. Kirk & Co. against the said assignor, and also all interest upon or to accrue upon said debts, and all of them, for, during and until the same are realized, paid and fully satisfied at the rate of seven per centum per annum.

"In the third place, shall pay the indebtedness of the said assignor to Charles Matheson, of Antigonish aforesaid, tailor, which debt is one hundred and four dollars, in full.

"In the fourth place, shall pay share and share alike, ratably and proportionately and without preference or priority as between them all, and every claim upon which the following persons, to wit :—T. Downie Kirk, of Antigonish aforesaid, merchant; Allan Gillis, of Antigonish aforesaid, carpenter; Hugh McAdam, of Antigonish aforesaid, tailor; John J. Cameron, of

(1) R.S.N.S. 5 ser. ch. 92.

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Antigonish aforesaid, doctor of medicine; John J. McPherson, of Antigonish aforesaid, baggage master, may respectively become liable as makers or endorsers of any bill or bills of exchange, or promissory notes heretofore made or endorsed by the said parties for the accommodation of the said assignor and any costs, charges or expenses to arise in consequence thereof.

"In the fifth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall execute these presents within sixty days from the date hereof respectively and ratably and proportionately and without preference or priority as between them.

"In the sixth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall not execute these presents *pro rata* in equal proportions and without priority as between this class of creditors. And lastly, shall pay the surplus, if any, after payment of all the debts, claims, costs and charges aforesaid unto the said assignor.

"And it is further agreed that the said assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part."

This action was brought by the assignee against the sheriff of the county of Antigonish, who had seized under execution against the assignor some of the goods so assigned. On the trial the assignee had a verdict which was set aside by the full court.

*Mellish* for the appellant. An affidavit is not required for an assignment for the general benefit of creditors (1); and this is such an assignment. *Durkee* v. *Flint* (2); *McMullin* v. *Buchanan* (3).

(1) R.S.N.S. 5 ser. ch. 92 s. 10. (2) 19 N.S. Rep. 487.
(3) 26 N.S. Rep. 146.

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*Archibald* v. *Hubley* (1), is distinguishable. The assignment in that case did not, so far as appeared, provide for payment of all the creditors and so it was not for general benefit.

The assignment cannot be attacked under the statute of Elizabeth which has not been pleaded. Rules of Supreme Court of Nova Scotia, 1884, order xix, rule 15; *Tuck* v. *The Southern Counties Bank* (2).

The trial judge found against fraud, and the full court did not disturb his judgment on that ground. This court, therefore, will accept such finding as conclusive.

The provision that the assignee should only be liable for "gross negligence or fraud" does not alter his position, as that is all he would be liable for without it. *Whitman* v. *The Union Bank* (3).

*Ernest Gregory* for the respondent. An assignment containing preferences is not an "assignment for the general benefit of creditors" under sec. 10 of the Act. *Black* v. *Sawyer* (4).

If the deed will hinder or delay creditors it is void, even if actual fraud is not proved. *Hassells* v. *Simpson* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The assignment made by the execution debtor to the appellant contained declarations of trusts in the following words:

In the fifth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall execute these presents within sixty days from the date hereof respectively and ratably and proportionately and without preference or priority as between them. In the sixth place, shall pay off the debts and liabilities of the said assignor to all his other creditors who shall not execute these presents

(1) 18 Can. S.C.R. 116.
(2) 42 Ch. D. 471.
(3) 16 Can. S.C.R. 410.
(4) 2 Old. (N.S.) 1.
(5) Doug. 89n.

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*pro rata* in equal proportions and without priority as between this class of creditors.

In the court below Mr. Justice Weatherbe and Mr. Justice Ritchie held that the affidavit prescribed by the Revised Statutes of Nova Scotia ch. 92, s. 4, was not requisite to the validity of this trust deed inasmuch as it was not a bill of sale or chattel mortgage within that section. I am also of this opinion for the same reason, viz., that it was an "assignment for the general benefit of the creditors" of the assignor within the exception contained in the 10th section. That it was not such a chattel mortgage as is referred to in section 4 is apparent on its face, since it is not a chattel mortgage at all unless it is so in consequence of the fourth trust in the deed by which provision is made for indemnifying certain named accommodation endorsers and makers of promissory notes in respect of paper which might not then have reached maturity. If in this last respect the deed is to be considered a chattel mortgage it is so under section 5 of the Act, not under section 4. In the case of *Durkee* v. *Flint* (1), it was held first by Mr. Justice Thompson, the trial judge, and then by the full court on appeal, that an assignment for the benefit of creditors, although it contained preferences in favour of particular named creditors, was, if it included, subject to such preferences, a trust in favour of all the assigning debtor's creditors, "an assignment for the general benefit of creditors" coming within the exception contained in the 10th section of the Act. This case decided in 1886 directly overrules *Black* v. *Sawyer* (2), decided in 1865. In *Archibald* v. *Hubley* (3), it was held that an assignment not for the benefit of creditors generally, but upon a trust to realize the property assigned and apply the proceeds in payment of certain

(1) 19 N.S. Rep. 487. (2) 2 Old. (N.S.) 1.
(3) 18 Can. S.C.R. 116.

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named creditors, nine in number, it not appearing that these were all the creditors of the assignor, and then to pay any surplus to the assignor, was not such an assignment for the benefit of creditors generally as the 10th section exempts from the obligation imposed upon the grantees in bills of sale generally by the 4th section. *Archibald* v. *Hubley* (1) does not, as it appears to me, overrule *Durkee* v. *Flint* (2), or in any way interfere with it. It is desirable to uphold the last mentioned case inasmuch as during the nine years which intervened between its decision and the present time, many assignments must have been made in reliance on it. Moreover, I should have reached the same conclusion without authority. The words of the exception "the general benefit of creditors" are sufficient to include any instrument made with such an object whatever its other provisions may be. These words indicate not merely that the affidavit shall not be requisite as regards so much of the deed as provides for the general benefit of creditors, but that the whole of the assignment containing such a trust is to be excepted from the operation of section 4. To restrict the exception to such deeds as should not contain any preferences would be to read the Act as though the words had been assignments for the general and equal benefit of creditors, which would of course be wholly unjustifiable.

Mr. Justice Meagher considers the fourth clause of the assignment providing for the indemnity and security of the persons named therein who had undertaken liabilities for the assignor upon accommodation paper as a mortgage coming within section 5 of the Act. I cannot assent to this. The deed is in no sense "a chattel mortgage," the only form of security to which the fifth section applies. In the case of a mort-

(1) 18 Can. S.C.R. 116. (2) 19 N.S. Rep. 487.

gage the property is redeemable, and the mortgagor retains an interest in it. Here there is nothing of this kind; there is an absolute trust for sale of all the property, and the security is to arise from an application of the produce of the sale. This construction may, it is true, lead to inconveniences and may go far to interfere with the usefulness of the statute, but if so it is for the legislature to apply the remedy if it is desired to include other securities than "mortgages" which alone are the subject of the enactment in section 5.

Mr. Justice Ritchie and Mr. Justice Meagher have held the assignment void under the statute 13th Elizabeth, chapter 5, as tending to hinder, delay and defeat creditors, and I agree with their conclusions in this respect. The preferences alone do not of course render the assignment a fraud on creditors declining to execute it (1). An assignment for the benefit of creditors generally is, as has long been settled, free from impeachment under the statute of Elizabeth (2). If, however, such instruments contain provisions for the benefit of the assignor or for the personal benefit of the trustee, putting it in his power and making it his interest to hinder creditors, and evidently having a tendency to delay the prompt realization of the assets and their application to the satisfaction of creditors, the deed may be one which it would be unreasonable to require creditors to accept, and in that case they are manifestly entitled to insist on its avoidance under the statute.

I find several objectionable provisions in the deed before us, which, taken in connection with the way in which the assignee proceeded during the interval, nearly four months, between the execution of the trust deed and the lodging of the execution under which the

(1) *Holbird* v. *Anderson*, 5 T.R. 235. (2) *Pickstock* v. *Lyster*, 3 M. & S. 371.

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sheriff seized, indicate, in my judgment, an intent to delay and hinder creditors. In the first place the assignee is a member of a firm which are the largest creditors of the assignor. This firm is not only preferred before all other creditors as regards their debt due at the date of the deed (which by itself is, I concede, no objection to the assignment), but it is provided that upon the debts so due to the trustee's firm "for during and until the same are realized, paid and fully satisfied" interest is to run at the rate of seven per cent per annum. Then, the assignee never took more than formal possession of the stock in trade but permitted the assignor to carry on business with it just as he had done before the assignment, and, indeed, the assignee furnished new stock to enable the debtor to carry on the business. It is true that the deed permits the assignee to employ the assignor in winding up the business, but he has done more than this, he has assumed to carry it on without any apparent change in its management. Again, this by itself might not be fatal, but the continuance of the assignor in the same possession and control which he had before the assignment, though not conclusive in law to show the deed fraudulent, is always a circumstance to be considered by the tribunal having to decide on the fact of *bonâ fides*, but when accompanied, as it is here, with a first preference in favour of the assignee, which entirely secures and protects him, and a provision which makes it his interest, as does the allowance of interest at seven per cent, to prolong the winding up, thus directly conflicting with his duty to the general creditors to execute the trusts as speedily as possible, I am compelled to hold that this makes the deed void as against execution creditors.

But this is not all. The fourth trust declared authorizes the assignee not only to pay preferentially

parties to promissory notes negotiated for the accommodation of the assignor, but also all "costs, charges and expenses to arise in consequence" of the promissory notes which they have made or endorsed. This is to authorize payment to such persons of moneys which they could not have recovered from the debtor himself, and therefore is in effect to authorize the giving away to the prejudice of non-assenting creditors of a portion of the assets which may equal or exceed the amount of their debt. This I consider a badge of fraud. Then, the deed contains this clause:

And it is further agreed that the said assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part.

By this provision the trustee is exonerated from obligations which the general law imposes upon persons standing in his position. I find no English authorities on this head, probably for the reason that in England such care is taken in the preparation of deeds and in conveyancing generally that no one would think of exposing the validity of a deed of assignment to the risk of such a clause being held to vitiate it against non-assenting creditors. There are, however, numerous American authorities showing that such a clause avoids the deed. A text writer (1) deduces from the decided cases the rule to be:

That a reservation or restriction of the liability of the assignee to a degree less than that which the law imposes upon trustees renders the assignment void.

And in another passage the same writer (2) says:

A stipulation limiting the liability of an assignee or trustee to his own gross negligence or wilful misconduct, exonerates him from a great portion of the responsibility which the law attaches to his office, considered evidence of an intent to hinder, delay and defraud creditors, and has therefore been held to render the assignment void against them.

(1) Burrill on assignments, p. 340, 4 ed.

(2) Burrill, p. 339.

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In *McIntire* v. *Benson* (1), the Supreme Court of Illinois in a judgment delivered by the late Chief Justice Breese, had before it for adjudication the validity of a deed of assignment for the benefit of creditors, which contained a clause providing that the trustee should be responsible only for his actual receipts and wilful defaults. The whole of this judgment is instructive but I must content myself with making two short extracts from it. The court says:

> We think this clause makes the deed fraudulent and void for these reasons: that as trustee the assignee is bound to manage the trust property for the benefit of the creditors with all the care and caution and diligence of a prudent owner, and so far is this rule extended that however fully a discretionary power of management may have been given, yet if the trustee omits doing what would be plainly beneficial he will be answerable. * * The principle is a sound and safe one that every provision in a deed of assignment exempting the assignee from any liability he is by law subject to as assignee is, of itself, a badge of fraud.

The cases of *Finlay* v. *Dickerson* (2) and *True* v. *Congdon* (3), are to the same effect. These cases are cited in the respondent's factum. I may add a reference to the case of *Litchfield* v. *White* (4), where the provision was in the identical words of that in the present deed. The reasoning employed by the courts in these cases, independently of their weight as authorities, commends itself to our consideration and compels us to hold the present deed also void for this reason as unduly interfering with the rights of creditors by hindering and delaying them.

The Nova Scotia Statute ch. 18, sec. 9, of the Acts of 1889, re-enacting a clause of the English statute known as Lord St. Leonard's Act, has no bearing upon this

(1) 20 Ill. 500.
(2) 29 Ill. 9.
(3) 44 N.H. 48.
(4) 3 Sand. (N. Y. S. C.) 545; Affd. in Appeal 7 N.Y. 438.

question; the object of that section was merely to exonerate one of several trustees from liability for the wilful default of his co-trustees.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *C. F. McIsaac.*

Solicitor for the respondent: *Ernest Gregory.*

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*Feb. 24,25.

*Mar. 24.

GEORGE O'NEIL (PLAINTIFF).....APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA (INTERVENANT)..... } RESPONDENT.

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

*The Criminal Code, sec.* 575—*Persona designata—Officers de facto and de jure—Chief Constable—Common gaming house—Confiscation of gaming instruments, moneys, &c.—Evidence—The Canada Evidence Act,* 1893, *ss.* 2, 3, 20 *and* 21.

Sec. 5 5 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the city of Montreal. Girouard J. dissenting.

The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.

In an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the province of Quebec.

Per Strong C.J.—A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

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PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

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The high constable of the district of Montreal, (which includes the city of Montreal as well as a large territory adjacent thereto,) was appointed under a commission from the Crown in the year 1866, and has ever since then continued to hold that office. In 1885 he appointed a deputy, who thereupon took the oath of office, the attesting magistrate adding in the record of the oath the words "*jusqu'au 1er mai* 1886." The deputy was never re-sworn but has continued to act as such ever since then, and on the 14th October, 1893, in execution of a warrant issued on a report made by him by a police magistrate under the 575th section of the Criminal Code and addressed to him by name as "Deputy High Constable of the City of Montreal," he seized certain moneys and instruments in a common gaming house within the limits of the city of Montreal.

The section referred to empowers the magistrate to issue a warrant on receiving a report from "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence."

The plaintiff claims the money seized as his property which had been only temporarily deposited for safe-keeping in the vault in use in the rooms where the gambling was carried on, and brought action against the high constable and the clerk of the peace for the specific recovery of the moneys in their custody. The judgment of the court pronounced by His Lordship the Chief Justice contains a further statement of the case and the questions raised upon the appeal.

*Guerin* for the appellant. As the moneys are claimed under the legislative authority of the Parliament of Canada the law of evidence in this case would be subjected to the provisions of "The Canada Evidence Act, 1893." The court below improperly refused the plaintiff's testimony when tendered, and he is entitled to a new trial, and to be heard as a witness in his own

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behalf. Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.

The report and seizure were illegally made, the executing officer having no authority under sec. 575 of the Criminal Code, and no valid confiscation can be founded upon proceedings irregular and null *ab initio*. The strict interpretation called for in provisions leading to a forfeiture will not permit any officer to act unless specially designated. Only certain officers in cities and towns are mentioned and "high constables", or their deputies are not included. The additional definitions given in the 4th and 5th clauses of the section make this very clear. Moreover, the deputy who acted in making the report and seizure was not deputy high constable at the time as he had been appointed and sworn only for one year from the 1st May, 1885, and was never re-appointed or re-sworn, and it does not appear that he was even a peace officer.

The confiscation of the moneys was illegal as the provision in sec. 575 therefor is an interference with property and civil rights in the province. British North America Act, sec. 92.

So far as the plaintiff was concerned the judgment of the magistrate confiscating the moneys was not *res judicata*, for he was not a party or privy to the proceedings, and had no power to become a party or cross-examine witnesses in the prosecution of the keepers of the gaming house upon the information which led to the declaration of forfeiture.

The learned counsel cited the following authorities: Art. 1241 C. C.; *Casgrain* v. *Leblanc* (1); Pothier (2); Starkie on Evidence (3); Greenleaf on Evidence (4).

*Hall* Q.C. for the respondent.

(1) Q.R. 4 S.C. 350.
(2) Obligations no. 897.
(3) Pp. 217, 235, 237, 273.
(4) 14th ed. p. 537.

[The court stated that they only wished to hear argument as to the authority of the officer who made the report and seizure.]

The high constable is a common law officer holding his commission from the Crown and is the "chief" or "principal" constable or peace officer of the whole district, including the "city" of Montreal. He is an officer whose character and duties correspond exactly with the description of the officers mentioned in the 575th section of the code. The terms used in the section are merely descriptive of the character of the officer, and the particular title given in his commission is of no consequence. The code sets out, in the first place, the common law officers who may act, and by the 4th and 5th subsections certain municipal police officers are vested with similar powers The high constable holds original authority from the Crown under his commission, and also at common law, and may perform ministerial acts by deputy. The deputy need not be sworn, but in this case the deputy having once been appointed and taken the oath of office the memorandum that he was sworn merely until a certain date is immaterial; he could and did lawfully hold over in his office as such deputy and was at the time of the seizure both *de facto* and *de jure* a constable and peace officer within the meaning of the section. See Bacon's Ab. (1); Chitty Crim. Law (2).

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Queen's Bench which affirmed a judgment of the Superior Court rendered by Mr. Justice Delorimier.

The action as originally instituted was one against Adolphe Bissonnette, high constable of the district of Montreal, and Louis Wilfrid Sicotte, clerk of the peace

(1) Tit. Constable; Oath of office. (2) Vol. 1, p. 20.

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of the same district, to revendicate certain specific moneys remaining in the hands of the defendants, which had been seized under a warrant granted by C. Aimé Dugas, Esquire, one of the police magistrates of the city of Montreal. The money in question was, by an order or judgment of the police magistrate before named, dated the 18th October, 1893, ordered to be forfeited to the Crown for the public uses of Canada. The Attorney General of Canada having intervened in the action for the purpose of maintaining the adjudication of forfeiture the plaintiff contested his grounds of intervention, alleging that the money in question had been illegally seized and forfeited. The action was heard in first instance before Mr. Justice Delorimier in the Superior Court, who gave judgment for the Crown, and this judgment has been maintained upon an appeal to the Court of Queen's Bench by the unanimous judgment of that court. The reasons for the judgment of the Queen's Bench are fully stated in an opinion prepared by Mr. Justice Wurtele.

The Criminal Code, 1892, section 575, enacts as follows:

> If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting house * * * the said commissioners or commissioner, or mayor, or the said police magistrate, may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, * * * and to seize * * * all tables and instruments of gaming, and all moneys and securities for money * * * found in such house or premises.
>
> The police magistrate or other justice of the peace before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments

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of gaming * * * seized under this Act in any place used as a common gaming house * * * to be forthwith destroyed, and any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada.

On the 14th of October, 1893, Louis Seraphin Bissonnette, then acting as deputy high constable of the district of Montreal (which district includes the city of Montreal), wrote and delivered to C. Aimé Dugas, Esquire, a police magistrate for the city of Montreal, the following report or letter:

MONTREAL, 14th October, 1893.

To Mr. C. A. DUGAS,
Police Magistrate,
Montreal.

SIR,—I beg to report to you that there are good reasons for believing, and I do believe, that the room composing the second flat of the house bearing the civic number twenty-two of St. Lawrence Main Street, in the City of Montreal, is kept and used as a common gaming house as defined in part XIV, section one hundred and ninety-six of the Criminal Code of 1892, and this since the first day of May last, or about.

LOUIS S. BISSONNETTE,
Deputy High Constable of the City of Montreal, authorized to act in the absence of High Constable Bissonnette of the City of Montreal.

On the same day Judge Dugas issued his warrant directed to the same deputy high constable, commanding him to enter the premises referred to in his letter and amongst other things, to seize all moneys and securities for moneys, found in the rooms referred to.

Under the authority of this warrant the deputy high constable on the same day made an entry into the rooms in question, and seized therein, amongst other things, the moneys sought to be recovered in the present action. By his return to the warrant, also dated the 14th October, 1893, the deputy high constable certified and returned that he had seized in the premises mentioned in the warrant the moneys

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now in question. On the 18th of October, 1893, Judge Dugas, by an order or adjudication under his hand ordered "that the said moneys so found and described as aforesaid be forfeited to the Crown."

The appellant now insists that these proceedings were irregular and illegal, for the reason that Louis Seraphin Bissonnette, who acted as deputy high constable, was not an officer within the meaning of the section of the code before quoted.

Speaking for myself only I am of opinion that the judgment, by which the money was declared forfeited to the Crown, cannot thus be collaterally impeached in this action brought against the high constable and the clerk of the peace for the specific recovery of the moneys seized.

But, assuming that in point of law this is not so, and that the action is maintainable if it be shown that Louis Seraphin Bissonnette was not a deputy chief constable within the meaning of section 575 of the code, for the reason that proceedings would have been in that case wholly without jurisdiction and void, I am still of opinion that there is no error in the judgment of the court below, inasmuch as Louis Seraphin Bissonnette, who acted as the deputy of his father, the high constable, was an officer qualified to make the report of the 14th October, 1893, upon which the seizure and subsequent proceedings were founded.

There can be no doubt or question that Adolphe Bissonnette, the father of Louis Seraphin Bissonnette, had been duly appointed by the provincial government of the late province of Canada, under the authority of a statute, to be the high constable for the district of Montreal, which includes the city, and that his appointment had been regularly made by a commission from the Crown which was in full force at the time when the information was laid; the war-

rant issued, and the seizure under it made. That the elder Bissonnette came within the description of chief constable, contained in section 575, is too plain for doubt. It is not of course requisite that the exact title of an officer acting under the statute should be that given in the Act itself; it is sufficient that his functions and duties are such as to bring him within the designation used in the statute. Then, it is conclusively proved by the evidence and established by the provincial Act under which Adolphe Bissonnette was appointed, that he was the chief constable of the district of Montreal, and that although he was styled high constable he was also the chief constable of the district. Had the high constable himself acted there could be no doubt, in my opinion, that his acts would have been those of an officer within the words of the law, an officer *de jure*, and therefore everything he did would have been strictly legal. Adolphe Bissonnette was, however, absent from Canada at the time the proceedings which led to the seizure and forfeiture of this money were taken, and he had appointed his son Louis Seraphin Bissonnette to act as deputy high constable. This is shewn by the evidence of both the Bissonnettes, who have been examined as witnesses.

That the high constable, a ministerial officer, the chief peace officer of the district, having himself original authority from the Crown, and in no sense exercising a delegated authority, could legally appoint a deputy, is, I think, too plain to require argument (1).

A great deal has been made of the objection that Louis S. Bissonnette was not regularly sworn. But, in 1885, when he was first appointed to act as deputy high constable, he was duly sworn as such before Mr. Desnoyers, a judge of sessions, and one of the police

(1) Comyns Dig. 5 ed. Tit. Officer p. 194; Bacon's Ab. 7 ed. Tit. Officer p. 316.

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magistrates of Montreal, and the book in which his oath is recorded has been put in evidence. It is true that there is a memorandum added by the clerk, who does not appear to have been authorized to make the entry, that this oath was limited to 1st May, 1886. This limitation of the oath, whatever it may mean, is however quite immaterial; we have the undoubted fact that the younger Bissonnette had been appointed deputy high constable, and that he took the oath as such. Then, there is abundant evidence to show that he had continuously acted as such deputy, from the date of taking the oath up to the time of the proceedings against the gambling house. Mr. Desnoyer's evidence is decisive as to this Therefore, I hold Louis Seraphin Bissonnette to have been, not merely *de facto* but strictly *de jure*, the deputy chief constable for the district of Montreal, answering in all respects to the description of that officer in section 575 of the code.

But even were this not so, and if the appellant's contention that Louis Seraphin Bissonnette is only to be regarded as having been properly qualified to act as a regularly appointed and sworn officer for one year from 1st May, 1885, should be strictly correct in point of law, I should still hold that he *de facto* filled the office of deputy, and that being such *de facto* officer, the proceedings taken by him now impeached are not to be vitiated by reason of his not having annually renewed his oath of office. The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has

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been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and *a fortiori* to those appointed for the performance of mere ministerial duties such as a head constable. And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law (1). Under this state of the law which, as being part of the general public law, must, I think, apply to all officers mentioned in the Criminal Code which applies to the whole Dominion, and is also I conceive the law of the province of Quebec, I must hold that Louis Seraphin Bissonnette's acts were, even if those of an officer *de facto* only, such as to furnish a sufficient foundation for the proceedings which resulted in the judgment of forfeiture now sought to be avoided.

There is, however, another objection to the appellant's right to recover this money, which would be fatal to his action even if he had succeeded in showing that the judgment of forfeiture was an absolute nullity. In this action the onus is upon him to prove that the money seized belonged to him. It was not taken out of his possession, therefore no presumption of property arises in his favour from the fact of possession. The money was, at the time of seizure, in the actual possession of the persons who carried on the gambling establishment in the upper rooms of the house.

It has been argued that from the evidence we ought to conclude that the betting business carried on upon

(1) See as to *de facto* officers and generally, *O'Brian* v. *Knivan* Cro. Jac. 552; *Leak* v. *Howel* Cro. Eliz. 533; *Parker* v. *Kett* 1 Raym. 658. *Rex* v. *Bedford Level*, 6 East 356; *Margate Pier* v. *Hannam*, 3 B. & Ald. 266; *Parker* v. *Baker*, 8 Paige (N.Y.) 428; *Brown* v. *Lunt*, 37 Me. 423; *The State* v. *Carroll* 38 Conn. 449; Bac. Ab. (7 ed.) Tit. Offices & Officers; Comyns' Dig. (5 ed.) Tit. Officer D. 1, 2, 3.

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the ground floor was in no way connected with the gambling rooms upstairs, and that the appellant merely deposited his money in the safe for convenience. My conclusion would be the reverse of this. It is proved that the managers of the gaming tables were in the habit during the day time of acting as principals in the betting on horse-races, which the appellant claims to have been his exclusive business, and that the money which formed the capital for both the racing and the upstairs business was mixed together and dealt with as a common fund, from which both the traffic which the appellant managed, and that carried on in a more secret manner in the rooms above, were supplied with cash. Upon the whole I think the inference drawn by both the Court of Queen's Bench and Mr. Justice Delorimier as to the ownership of the money was entirely correct, and in the words of Mr. Justice Wurtele, "that the business which the appellant pretended to have carried on, and that carried on upon the premises used as a common gaming house, were both carried on for the benefit of the same parties."

The constitutional question as to the validity of the legislation applicable to the case is so destitute of any reasonable foundation that it calls for no observations. The same may be also said of the objection that the appellant was held to be incompetent as a witness in his own behalf, for there can be no doubt that the law of evidence to be applied was properly held to be that of the province of Quebec. Both these points were indeed disposed of by the unanimous opinion of the court upon the argument here.

The appeal should be dismissed with costs.

TASCHEREAU J. took no part.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

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GIROUARD J.—This being a case of confiscation the law under which it was made must be construed strictly. Article 575 of the Criminal Code of 1892 in certain cases authorizes "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence," to seize all tables and instruments of gaming and all moneys and securities for money. It seems evident to me that this article contemplates that the warrant of seizure should be made by a city or town officer, and not by a county or district officer, and this interpretation becomes clearer when we read paragraph 4 of the said article: "The expression chief constable includes chief of police, city marshal, or other head of the police force of any city, town or place." And paragraph 5 makes "deputy chief constable" include the deputies of the same officer.

The seizure and confiscation was made in this case by the deputy of the High Constable Adolphe Bissonnette, who is admitted to be "High Constable of and for the district of Montreal." In my opinion he is not "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence," within the meaning of article 575 of the code.

If I were without authority I might hesitate to come to that conclusion, but it seems to me that the point is clearly laid down in one or two cases. In *Freegard* v. *Barnes* (1), a warrant was directed to the constable of D., a parish in the county of W., and was delivered to the county constable of W. and executed by him. Held, that the warrant could not be executed by any other constable than by the constable of the parish, and consequently the execution by the county constable was illegal. This decision was affirmed in the case of *The Queen* v. *Sanders* (2). The

(1) 7 Ex. 827.

(2) L.R. 1 C.C.R. 75.

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warrant was issued directed to "the constable of Gainsborough," but was delivered to the superintendent of police for the district, and executed by one of the police constables under him. The question was: Was the arrest legal? The Court of Criminal Appeal decided that as the warrant "was directed to the constable at Gainsborough," that is the parish constable only, it could not lawfully be executed by any other person.

True, High Constable Bissonnette has jurisdiction in the city of Montreal, but he is not the officer named in art. 575 to execute the seizures therein referred to, and therefore the seizure made by him was illegal. In 1895 the Parliament of Canada amended art. 575 in that respect, but of course that does not apply to the present case. I am therefore of opinion that the appeal should be allowed with costs, and the seizure declared illegal.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Madore & Guerin.*

Solicitor for the respondent: *John S. Hall.*

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THE NORTHERN PACIFIC EXPRESS COMPANY (DEFENDANTS). } APPELLANTS;

AND

WILLIAM MARTIN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 29,
*Mar. 2.
*Mar. 24.

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

*Bailees—Common carriers—Express company—Receipt for money parcel—Conditions precedent—Formal notice of claim—Pleading—Money had and received—Special pleas.*

Where an Express Company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:

*Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the Express Company for failure to deliver the parcel to the consignee. *Richardson* v. *The Canada West Farmers Ins. Co.* (16 U. C. C. P. 430) distinguished.

In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action.

APPEAL from the decision of the Court of Queen's Bench for Manitoba (1), affirming the judgment for the plaintiffs at the trial.

Plaintiffs forwarded a package containing $2,000 in bank bills through the defendants' Winnipeg office to be delivered to their agent at Wawanesa to whom it was addressed. They claim that defendants did not deliver the package, and having made a demand for the

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

(1) 10 Man. L.R. 595.

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return of the money brought action for its recovery as "money had and received by the defendants for the use of the plaintiffs." To this action the defendants pleaded "payment and never indebted." Defendants produced a receipt for the money signed by the plaintiff's agent at Wawanesa, but the trial judge found upon the evidence that the plaintiff's agent did not in fact receive the money (1), and that the defendants must be deemed to have it still in their possession. The receipt given by the defendants in a "money receipt book" showed that they had undertaken that the money should "be forwarded subject to the printed conditions on inside front cover of this book" to the address of the consignee at Wawanesa, and one of these conditions was that the defendants should not be liable for any claim of any nature arising out of the receipt thereof, "unless such claim is presented in writing within sixty days from the date of loss or damage, in a statement to which a copy of this contract shall be annexed." It appeared that the demand was made twenty days after the date of the receipt but without a copy of the contract attached. The trial judge also held that as the claim was neither for loss or damage the condition in question did not apply, and entered a verdict for plaintiffs. On motion before the full court for non-suit or a new trial this judgment was affirmed by the decision now appealed from.

*McCarthy* Q.C. for the appellants.

This action is brought against a common carrier on the common counts, consequently the judgment in the courts below must rest upon those counts only. *Richardson* v. *Canadian Pacific Railway* (2); Bullen & Leake (3).

(1) 10 Man. L. R. 600. (2) 19 O.R. 379.
(3) 3 ed. p. 278.

The omission to take this ground in precise terms in the præcipe for appeal does not now preclude the appellants from urging that the verdict was against law and evidence, and that the evidence does not fit the pleadings. *The Queen* v. *Chesley* (1); *Cameron* v. *Milloy* (2); *North-west Travellers Assoc.* v. *London Guarantee Co.* (3).

The defendants are not liable as carriers. *Vineberg* v. *Grand Trunk Railway Company* (4). They made no conversion of the property. The material conditions upon which carriage was undertaken were not followed so as to render defendants liable. They had made a contract against liability and were entitled to have this condition strictly complied with. The plaintiffs were bound to comply with the strict form of demand and notice as a condition precedent. The condition covers the facts of the case in exact language. *Richardson* v. *Canada West Farmers Ins. Co.* (5), does not apply as there was no condition limiting liability in that case. The defendants gave notice of the arrival of the package, and obtained the consignee's receipt for same. This was good delivery by the company as carriers and if it remained in their charge afterwards they were merely gratuitous bailees, and they are not charged with such negligence as would make them liable as bailees. The trial judge rendered his verdict merely upon deductions from the circumstances proved, and from inferences. Even if he decided on facts this court could review the findings of the courts below. *North British Mercantile Ins. Co.* v. *Tourville* (6). Plaintiff must be bound by the strict terms of the contract he has entered into. *Colonial Securities Trust Co.* v. *Massey et al* (7); *McKercher* v. *Sanderson* (8);

(1) 16 Can. S. C. R. 306.
(2) 14 U. C. C. P. 340.
(3) 10 Man. L. R. 537.
(4) 13 Ont. App. R. 93.
(5) 16 U. C. C. P. 430.
(6) 25 Can. S. C. R. 177.
(7) [1896] 1 Q. B. 38.
(8) 15 Can. S. C. R. 296.

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*Hodkinson* v. *London & North Western Railway* (1); *McMillan* v. *Grand Trunk Railway Co.* (2).

*Ewart* Q.C. for the respondents. The receipt is not conclusive. There was no manual delivery. The defendants did not plead the condition requiring notice and cannot take advantage of it. Defences of this kind are invariably pleaded, even when conditions subsequent. *City of St. John* v. *Christie* (3); Bullen & Leake (4); *Simons* v. *Great Western Railway Co.* (5); *Lewis* v. *Great Western Railway Co.* (6); *Roper* v. *Lendon* (7); 2 Chitty on Pleadings 279.

The agreement for notice does not apply where defendants had not lost the parcel but were holding it wrongfully, and refusing to deliver it. *Scott* v. *Avery* (8); *Dawson* v. *Fitzgerald* (9); *Central Vermont* v. *Soper* (10).

The condition to carry the parcel and safely deliver it does not in any way depend upon the notice of loss. *Clarke* v. *Gray* (11). The distinction between a condition which is part of a contract and one which is collateral to it is well marked in *Parker* v. *Palmer* (12); *Richardson* v. *Canada West Farmers Ins. Co.* (13). Defendants make no proof that a proper notice was not given. *Henry* v. *Canadian Pacific Railway Co.* (14).

The condition only requires a notice when there has been a loss. There is no evidence that the package was lost; the defendants must be deemed to have it still in their possession. The action is not for loss or damage, but because the defendants having the plaintiffs' money will not give it to them. Theft by an

(1) 14 Q. B. D. 228.
(2) 16 Can. S. C. R. 543.
(3) 21 Can. S. C. R. 1.
(4) 3 ed. p. 551.
(5) 18 C. B. 805.
(6) 5 H. & N. 867.
(7) 1 E. & E. 825.
(8) 8 Ex. 487.
(9) 1 Ex. D. 257.
(10) 59 Fed. Rep. 879.
(11) 6 East 564.
(12) 4 B. & Ald. 387.
(13) 16 U. C. C. P. 430.
(14) 1 Man. L. R. 211.

officer of the company, or even by a stranger, is not loss within the meaning of the contract. *Hearn* v. *London & South Western Railway Co.* (1); *Harris* v. *Great Western Railway Co.* (2).

Notice is not necessary in cases of negligence. In the agreement the language means loss or damage "without negligence" of the company. *Fitzgerald* v. *Grand Trunk Railway Co.* (3). The courts will construe contracts under which carriers seek to escape liability strictly. *Goldsmith* v. *Great Eastern Railway Co.* (4). When carriers desire to free themselves from any part of their ordinary liability they should use clear and precise words for that purpose. *Gordon* v. *Great Western Railway Co.* (5).

Notice is unnecessary because plaintiffs' claim does not arise out of receipt of the package. It arises out of the fact that the company refuses to give it up.

*In jure non remota causa sed proxima spectatur* is thus paraphrased by Lord Bacon in Broom's Maxims, 6 ed. 211. "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." For examples of the application of this maxim see *Winspear* v. *Accident Ins. Co.* (6); *Lawrence* v. *Accidental Ins. Co.* (7).

If the company intended to say that it might lose or damage property even by glaring negligence, and that by keeping the fact concealed for 60 days and avoiding notice of claim it was not to be liable, it behooved the company to say so in very explicit terms.

(1) 24 L. J. (Ex.) 181.
(2) 1 Q. B. D. 515.
(3) 4 Ont. App. R. 601.
(4) 44 L T. N. S. 181.
(5) 8 Q. B. D. 44.
(6) 6 Q. B. D. 42.
(7) 7 Q. B. D. 216.

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The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—Very full statements of the facts are to be found in the judgments of Bain J. who tried the action, and of the Chief Justice on the appeal to the court *in banc*, and I need not repeat them.

We are all of opinion that the non-compliance with the fourth condition printed in the receipt book furnished to the respondents is applicable, and that non-compliance with it constitutes a defence to the action. This was the opinion of Mr. Justice Killam and we think his judgment is in all respects correct. The material portion of that condition was as follows:

> And it is further agreed that the Northern Pacific Express Company shall not be liable for any claim of any nature whatever arising out of the receipt of the property above mentioned, unless such claim is presented in writing within sixty days from the date of the loss or damage in a statement to which a copy of this contract shall be annexed.

This condition was not complied with. No claim in writing embodied in a statement to which a copy of the contract was annexed was ever presented to the appellants.

That this is a claim arising out of the receipt of the money is too plain to require any demonstration. The foundation of the respondents' claim is, of course, the receipt of the money by the appellants, a fact without proof of which no action such as this could be maintained. The case of *Richardson* v. *The Canada West Farmers Mutual Stock & Insurance Company* (1) relied on by the respondents, does not apply. Upon this case Mr. Justice Killam remarks (2), that:

> The decision was upon demurrer, and it might not improperly be considered that the plea did not show that in the proof the copy of the written portion of the policy was absolutely required to make it such proof as was a condition precedent to the existence of liability. Here the wording is different, and I cannot consider that there was the required notice unless it was given in a statement to which a copy of the contract was annexed.

(1) 16 U. C. C. P. 430. (2) 10 Man. L. R. 613.

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In these observations I entirely agree. Had the case however been in point I should have been unable to follow it. The parties have chosen to enter into a contract subject to a condition which the appellants have a right to insist on an exact compliance with. That they have suffered no disadvantage or inconvenience from the respondents' neglect to comply with it is of course wholly immaterial; the parties must abide by the terms of the contract they have chosen to make for themselves.

It is, however, contended by the respondents that the non-performance of this condition should have been specially pleaded as a defence to the action. I have had some doubt on this point. The respondents have adopted a form of action which might not have been considered adapted to their claim had the point been open, but any objection on that head is now shut out. Having thought fit to sue on the common count for money had and received, the respondents cannot complain that the defence is presented in a general form of pleading applicable to that action. To such a count non-performance of conditions need not be specially pleaded. The general issue of never indebted puts in issue all material facts necessary to be proved to establish the plaintiffs' right of action and I see no reason why any exception should be made in the case of a condition the performance of which must necessarily be considered as impliedly alleged by the common count in the usual form. I am therefore of opinion that the objection as to the insufficiency of the pleading to let in the defence fails, and that the appeal must be allowed and the action dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: *Archibald & Howell.*

Solicitors for the respondents: *Ewart, Fisher & Wilson.*

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*Mar. 2, 3,
*Mar. 24.

JOHN M. MARTIN (DEFENDANT).....APPELLANT;

AND

FRANK O. HAUBNER AND FRITZ W. HAUBNER (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Statute of frauds—Memorandum in writing—Repudiating contract by.*

A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the plaintiffs.

The action in this case was brought against the defendant Martin for the price of goods sold to him through his agent, one Silberstein, who was also made a defendant, the plaintiffs claiming alternatively as to him if it was found he was not Martin's agent as the latter alleged. All the courts below held that he was an agent, and he was not a party to the appeal. The defendant Martin, besides denying the agency, averred that the goods were never delivered to him, in answer to which the plaintiffs relied upon the following letter from Martin as constituting a memorandum in writing sufficient to satisfy the Statute of Frauds:

TORONTO, 13th September, 1894.

"L. D. HAUBNER, Esq.,

"521 West 45th Street, New York.

"DEAR SIR,—In reply to yours of the 5th inst. I have to say that Mr. Silberstein only had limited instructions

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 468.

to buy certain goods, and to a certain amount only. Your draft has not been presented, and cannot be accepted, as I do not want the goods purchased by Silberstein, and they are of no use to me. I am advised that the goods are here but have not interfered with them, and they are subject to your order so far as I am concerned. The goods shown by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want."

"Yours truly,
JOHN M. MARTIN

The defendant claimed that as this letter repudiated the sale it could not be relied on as satisfying the statute even though it contained all the necessary terms of a memorandum in writing under it. The trial judge gave effect to this objection, but his decision was overruled by the Divisional Court and the Court of Appeal.

*Robinson* Q.C. and *Macdonald* for the appellant. To satisfy the statute the writing must expressly admit the contract by the agent or with the principal. *Cooper* v. *Smith* (1); *Richards* v. *Porter* (2). *Bailey* v. *Sweeting* (3) is not opposed to this proposition. In that case the defendant expressly admitted the purchase and the opinions of their Lordships show that a mere recital of the contract would not suffice.

The reference to the invoice is not sufficient to identify the bargain, as the writing itself states that it does not show what the contract really was. *Buxton* v. *Rust* (4); *Wilkinson* v. *Evans* (5); are distinguishable.

*W. Cassels* Q.C. and *W. H. Blake* for the respondents. A writing may be sufficient to satisfy the

(1) 15 East 103.
(2) 6 B. & C. 437.
(3) 9 C. B. N. S. 843.
(4) L. R. 7 Ex. 279.
(5) L. R. 1 C. P. 407.

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statute though it repudiates liability. *Taylor* v. *Smith* (1); *Buxton* v. *Rust* (2).

The invoice referred to in defendant's letter may be identified by evidence. *Long* v. *Millar* (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—Upon the question of agency I see no reason to differ from the concurrent opinions of every one of the seven learned judges before whom this case came in the several courts below.

I had, it is true, originally, some doubts, but these were entirely dispelled by the able argument of Mr. Blake, who convinced me that there was ample evidence upon which a jury, if the action had been tried before such a tribunal, might reasonably and perhaps ought to have found that fact established. Moreover, I am of opinion that after the unanimous successive findings of all the courts upon this question of fact, it ought not now to be considered open upon this third appeal.

The remaining question is as to the sufficiency of the defence based upon the Statute of Frauds. I agree with Mr. Justice Street that there was no actual receipt of the goods or any part of them sufficient to take the case out of the statute. That there was a sufficient acceptance there can be no doubt. The selection and approval of the goods by Silberstein was clearly enough for that purpose. I am unable, however, to assent to the respondents' proposition that there was an actual receipt by Silberstein in New York when he took the goods with the respondents' assent to deliver them to a truckman for the purpose of conveying them to the place of business of the Merchants Despatch Transportation Company by whom they were to be

(1) [1893] 2 Q. B. 65. (2) L. R. 7 Ex. 279.
(3) 4 C. P. D. 450.

carried to Toronto. It is true that Silberstein paid the cartage, but it is also apparent from the evidence that the respondents never had the intention of parting with their property until they were actually paid the price, but on the contrary intended until then to retain their control both over the property and possession, as they showed by taking the shipping note in their own names and retaining it, thus withholding from the vendee the document of title without the production of which he could not procure delivery to himself. The intention of the parties is the proper test in such cases. Silberstein must therefore be considered as the respondents' agent in all that he did in handling the goods in New York for the purpose of transportation.

Upon the other question, however, that on which the judgments of the learned Chief Justice of the Common Pleas and of the Court of Appeal both proceeded, namely, that there was a sufficient memorandum of the contract in writing signed by the appellant to meet the requirements of the 17th section of the Statute of Frauds, I am of opinion that the respondents must succeed in maintaining the judgment in their favour. I have no doubt but that the letter of the 13th of September is such a memorandum. That letter refers to the invoice in these words:

> The goods shown by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want.

The cases of *Wilkinson* v. *Evans* (1); *Baumann* v. *James* (2); and *Taylor* v. *Smith* (3), referred to in the judgment of the Chief Justice of the Common Pleas, to which may be added *O'Donohoe* v. *Stammers* (4), are authorities amply sufficient to warrant the introduction of evidence identifying the invoice produced as that thus referred to in the appellant's letter. Then,

(1) L.R. 1 C.P. 407.
(2) 3 Ch. App. 508.
(3) [1893] 2 Q.B. 65.
(4) 11 Can. S.C.R. 358.

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from the invoice thus referred to, those particulars of the sale, the names of the parties vendors and vendee, the description of the goods sold and the price, which are required to be in writing signed by the party to be charged in order to come within the terms of the statute, are all plainly to be ascertained. The reference to the invoice is therefore just as effectual as if everything contained in it had been set forth in terms in the body of the appellant's letter.

The objection to this letter as constituting a sufficient memorandum within the 17th section, upon which Mr. Justice Burton has founded his dissenting judgment, is that a writing, though containing a statement of all the terms of the contract requisite to constitute a memorandum of the contract under the statute, cannot be used for that purpose if it repudiates the sale.

Upon both authority and principle I am of opinion that this objection cannot be sustained.

The authorities, which include the cases of *Wilkinson* v. *Evans* (1); *Bailey* v. *Sweeting* (2); and *Buxton* v. *Rust* (3), are referred to in the judgment delivered in the Common Pleas Division; and to which may be added the cases of *Leather Cloth Company* v. *Hieronimus* (4); and *Elliott* v. *Dean* (5); are all in favour of the respondent, and it would be impossible to allow the appeal upon this point without rejecting these decisions as authorities.

The text writers who on this branch of the law have furnished us with treatises of exceptional ability are of accord in approving these decisions. Blackburn on Sales (6); Benjamin on Sales (7); Campbell on Sales (8).

Upon principle also it would appear clear that the correct conclusion is that arrived at by the Court of

(1) L.R. 1 C.P. 407.
(2) 9 C.B.N.S. 843.
(3) L.R. 7 Ex. 282.
(4) L. R. 10 Q. B. 140.
(5) 1 Cab. & El. 283.
(6) 2 ed. p. 63-65.
(7) 4 ed. p. 228.
(8) 2 ed. p. 314.

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Appeal. Whatever opinion may have been formerly entertained, founded to some extent upon the difference in the wording of the 4th and 17th sections of the Statute of Frauds (the former section enacting that "no action shall be brought" and the latter that "no contract shall be allowed to be good"), it is now well settled, that the 17th, like the 4th section, applies only to the proof and not to the forms or solemnities of the contract. In *Maddison* v. *Alderson* (1), Lord Blackburn said :

> I think it is now finally settled that the true construction of the Statute on Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.

In *Britain* v. *Rossiter* (2), Brett L.J. says :

> In my opinion no distinction exists between the 4th and 17th sections of the statute.

See also Pollock on Contracts (3) ; Anson on Contracts (4).

The 17th section therefore is not to be in any way regarded as prescribing the formalities of the contracts to which it applies, but as enacting that in cases where there has been no part payment or acceptance and actual receipt the contract is only to be proved by written evidence of a particular kind, that is by a note or memorandum thereof in writing, signed by the party to be charged ; in other words, by an admission of its terms in writing under the hand of the party against whom the admission is to be used. The statute therefore must be taken to have been designed to make provision for what Best, in his Treatise on Evidence (5), calls preconstituted proof.

(1) 8 App. Cas. 488.
(2) 11 Q.B.D. 127.
(3) 6 ed. p. 628.
(4) 7 ed. p. 7
(5) 8 ed. pp. 17-18.

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Then, if this view is correct, it must follow that any form of admission, provided it contains all that the statute requires, which before the statute would have been admissible if made by parol, must still be admissible if it is in writing and signed by the party making it. Now, irrespective of the statute, it can scarcely be doubted that a statement by a party sued as a vendee of goods, to the effect that an alleged agent of the vendee had agreed to purchase from the vendor certain goods for a certain price, would be admissible as evidence against the vendee, although coupled with a repudiation of the authority of the alleged agent, and would be binding on him upon the agency being proved *aliunde*. No doubt the whole conversation in which such a statement might occur might be brought out by the party making the admission, but the repudiation of the agency could not be conclusive, and it would be open to the other party to controvert it by other evidence, and there could be no possible reason why the admissions made by the party to his own prejudice should not be used against him because coupled with a denial of his liability. If this could be done irrespective of the statute, then that enactment by requiring the admission to be in writing cannot have altered the law of evidence as to the admissibility and effect of admissions, which must be the same whether applied to written evidence required by the statute or to parol admissions in cases to which the statute is inapplicable.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Macdonald & Cronyn.*

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

WILLIAM D. WILSON (DEFENDANT).....APPELLANT; 1895

AND *Oct. 17, 18, 19.

THE LAND SECURITY COMPANY (PLAINTIFFS)..... } RESPONDENTS. 1896

*Mar. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Vendor and purchaser—Agreement for sale of land—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.*

An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified was subject to payments being made in advance of those dates under a proviso that—"the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each."

The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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*Held*, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement.

*Held* also, that though the course of dealing did not change the relation of the parties to that of that principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.

In a suit taken by the vendors against the vendee to recover interest overdue equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

APPEAL from the decision of the Court of Appeal for Ontario (1), reversing the decision of the Divisional Court in favour of the defendant.

The agreement between the parties for the sale of specified lots of land to the defendant was made on the 20th March, 1889, and the defendant paid the cash payment and the first instalment falling due six months thereafter, and on the 2nd December, 1889, took a bond of indemnity from and gave an assignment to one Henderson, who was added in action as a third party, of "all his interest in the agreement and the lands therein described." The assignment was drawn by the plaintiffs and registered in their books but there was no written consent by the plaintiffs to the assignment, although in their ledger account with the defendant they added the words "now Elmes Hender-

(1) 22 Ont. App. R. 151.

son." The plaintiffs and the third party then made a schedule of payments for the release of lots, without communicating with the defendant, basing the amounts on the supposed value of the lots respectively. The plaintiffs used this schedule as the rule of apportionment in the release of lots or half lots by the third party, and did not insist upon the payment of interest in arrear in some cases. Plaintiffs also received interest on account from the third party from time to time and in some instances allowed interest to remain in arrear, the third party being charged with and paying interest upon such interest, and later an extension of time was granted for the payment of other overdue interest. On 26th May, 1892, the plaintiffs demanded payment of interest then in arrear from the defendant, and brought the present action against him in March, 1893, for arrears of interest due under the agreement from 20th March, 1891, to the date of suit. The defendant sought to establish that the dealings between the plaintiffs and the third party had extinguished his original liability by novation, and obtained an order making the assignee a third party to the suit as having been substituted in his place as the plaintiffs' debtor. The defendant also claimed that the effect of the transactions which had taken place was to establish the relations of creditor, debtor and surety respectively as between the plaintiffs the third party and himself, and that he had been released as surety by the giving of time, the alteration of the terms of payment, the sales of portions of lots and the acceptance of redemption money according to the schedule instead of in proportion to the number of the lots mentioned in the agreement. The plaintiffs' action was dismissed by the trial judge on the ground that the defendant had become a surety and been released. On appeal the court held that even if the defendant had

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become a surety he was not wholly released through the plaintiffs' conveyances of parts of lots and extension of the time for payment of interest in arrear, but that he was merely released as to the interest in arrear when the lots were conveyed and the extension of time given, and was entitled to credit for the full proportion of purchase money of the lots of which parts only had been conveyed.

*Kerr* and *Rowell* for the appellant. The company agreed to accept Henderson as their debtor and Wilson was discharged. *Hart* v. *Alexander* (1); Lindley on Partnership (2); *Bank of Australasia* v. *Flower* (3); *Holden* v. *Hayne* (4).

If there was not a novation Henderson by the assignment became primarily liable to the company and Wilson his surety. *Shaw* v. *Foster* (5); *Muttlebury* v. *Taylor* (6); *Allison* v. *McDonald* (7); and being a surety he was discharged by the giving of time to his principal. *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (8); *O'Gara* v. *The Union Bank* (9).

*Kerr* Q.C. for the respondents: There was no agreement by the three parties that Henderson should take Wilson's place and be liable instead of him to the company. See *Harris* v. *Farwell* (10); *In re Head* (11); *Aldous* v. *Hicks* (12).

The relation of principal and surety could not be established without the assent of the company. *Swire* v. *Redman* (13); *Birkett* v. *McGuire* (14).

(1) 7 C. & P. 746.
(2) 6 ed. p. 255.
(3) L.R. 1 P.C. 27.
(4) 1 Mer. 47.
(5) L.R. 5 H.L. 321.
(6) 22 O.R. 312.
(7) 23 Can. S.C.R. 635.
(8) 7 Ch. App. 142.
(9) 22 Can. S.C.R. 404.
(10) 15 Beav. 31.
(11) [1893] 3 Ch. 426.
(12) 21 O.R. 95.
(13) 1 Q.B.D. 536.
(14) 7 Ont. App. R. 53.

Even if it did exist there was no such giving of time to Henderson as would discharge Wilson, the alleged surety. See *Davis* v. *White* (1).

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Osler in the Court of Appeal.

GWYNNE J.—The cases relating to the release of a surety by reason of the dealings of a creditor with the principal debtor have no application in the present case. The cases cited and relied upon do not, in my opinion, warrant the conclusion that upon the assignment by Wilson and Rankin to Henderson of their rights and interest in the contract between Wilson and the Land Security Co. for the purchase and sale of the lands therein mentioned, and in the said lands under that contract, Henderson became a principal debtor to the Land Security Company for the amount due to them under Wilson's covenant, and that Wilson became thenceforth surety only for the payment by Henderson as such principal debtor. The only question which remains, is whether, upon any other principle than that affecting the relationship of principal debtor, surety and creditor, the mode in which the land was dealt with by the Land Security Company and Henderson under the clause in the original contract with Wilson as to releasing parts of the land, discharges Wilson from all liability under his covenant now sued upon, and I am of opinion that it does not. If the dealings between Henderson and the Land Company as to releasing parts constituted any excess of the authority purported to be given in that matter by Wilson's contract with the Land Company, such excess, if any, in the absence of

(1) 16 Gr. 312.

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the relationship of principal and surety could affect Wilson's liability under his contract only to the extent of the damage, if any, which was sustained by Wilson by reason of the dealings of Henderson and the Land Company in the matter being in excess of the authority in that behalf contained in Wilson's contract with the Land Company.

There is nothing in those dealings, nor in the evidence, to justify the inference contended for by the appellant that a novation had taken place, and that the Land Company had accepted Henderson as their debtor in the place of Wilson.

While I entertain doubt whether the mode of dealing which Henderson and the Land Company adopted as to the release of parts of the land was not authorized by the terms of the contract with Wilson, I concur in the view taken by my brother King on that point, and that the appeal must be dismissed with costs.

SEDGEWICK J.—I consider that this appeal should be dismissed for reasons stated in the written notes prepared by Mr. Justice King.

KING J.—I think that the appeal should be dismissed, and for the reasons given in the opinions of Mr. Justice Osler and Mr. Justice Maclennan. As to the alleged novation by substitution of Henderson as debtor in Wilson's place, it would be very mischievous if loose conversations such as those relied on to prove a novation were to displace the obligations of a formal contract of purchase. The evidence wholly fails to establish an assent of the three parties to the extinguishment of Wilson's liability, and the substitution therefor of Henderson's. The alleged contract for the giving of time by the Company to Henderson, the assignee of Wilson, has also not been proved, and so

the contention on this point fails apart from any question as to the effect of it if there had been the contract in fact.

The learned counsel for the appellant directed his principal attack upon the judgment upon the point as to the effect of the Land Company dealing with Henderson in respect of the land in a way not directly in accordance with the terms of their contract with Wilson, and without his knowledge or consent.

The learned judges were of opinion that there was a variation from the terms of the contract, but thought that its effect was not to discharge Wilson entirely but merely to entitle him to certain relief.

It is claimed for the appellant that upon the assignment of the benefit of the contract to Henderson, and notice to the company, then the company, Henderson and Wilson stood to each other in the relation of creditor, principal debtor and surety.

The class of cases of which *Rouse* v. *Bradford Banking Co.* (1), is a most recent example, holds that:

> When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors.

In terms this is not applicable to the case of a vendor and vendee of land and an assignee of the vendee. Ordinarily there is no obligation of the assignee to the vendor to pay the purchase money. The vendor has a right to say to the purchaser or to any one in under him: "Either pay me the purchase money or lose the estate (2)." And this is what is done in a suit for specific performance, and what was done in *Holden* v. *Hayn* (3), cited by the appellant, and all that was

(1) [1894] 2 Ch. 32.

(2) *Lysaght* v. *Edwards* 2 Ch. D. 499.

(3) 1 Mer. 47.

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directly decided there was that under the circumstances and upon the allegations of the bill the original purchaser was an unnecessary party to the suit.

Still when the Company were informed that Wilson had assigned the benefit of the contract, and knew (as it is clear they did know) that as between the purchaser and the assignee the latter was to pay the purchase money, and that the land was their purchaser's security for the performance of the assignee's obligation to him, they became bound in any dealings that they might have with the assignee in reference to the contract behind the back of the vendee, to respect the known rights of their purchaser and not to affect his security or prejudice his interests in any question with his assignee.

Clearly they would have no right to do anything that might affect the value of the land as a security to him, or impede him in having recourse to it. He was entitled, as a plain matter of contract, to get the land as it was agreed to be given, subject to any dealings with Henderson respecting it that might have taken place in accordance with the terms of the original contract.

Now Henderson, as assignee, was entitled (as Wilson would have been) to a release of a whole lot or of half a lot on payment of the proper proportionate amount for the whole of a lot. But he was not entitled to claim a release of half a lot on payment merely of a proportionate amount for such half lot. Such an arrangement carried out as to all the lots might result in leaving one-half the purchase money charged upon an aggregation of half lots, which to the original vendee would manifestly be an inferior, and certainly would be a different, security from that contemplated, because a security upon different property.

But the agreement contemplated the apportioning of the charge upon the land and so a dealing with any lot differently from the terms of the original contract does not affect the rest of the lots.

Now the release of a half lot cannot be complained of. What is properly to be complained of is the attempt to enforce a charge greater than it should be under the provisions of the contract. Equitable considerations would seem to be satisfied by treating the company as having got from Henderson the full amount that they ought to have got from him on a release of an entire lot.

The result would be the same if the land were treated as a pledge in the vendors' hands and they were being charged for defaults in respect of it. Having regard to the provision for severing the charge the default would lie in releasing single lots at too small a sum.

The cases respecting the effect of an alteration of the original contract between a creditor and principal debtor without consent of a surety are not applicable, if for no other reason, because in point of fact there was no original contract between the Company and Henderson.

I agree with the direction that the Company is bound to treat the interest in arrear at the time of the transfers as having been paid. The purchaser could not claim the release of any portion of the property while in default in respect of interest.

Then as to the ratio of apportionment for the release of lots, clearly what was called for was a rule admitting of prompt and ready application. Market value would entirely fail in affording such a rule. In the absence of any sure indication in the instrument, the simple arithmetical rule is to be adopted as being upon the whole less objectionable than any other.

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I think, therefore, that the judgment should be affirmed, and the appeal dismissed.

GIROUARD J. concurred.

*Appeal dismissed with costs.*

Solicitors for appellant: *Kerr, Bull & Rowell.*

Solicitors for respondent: *Kerr, Macdonald, Davidson & Paterson.*

Solicitor for third party (by order): *N. Farrar Davidson.*

JOSEPH ADAMSON (ADMINISTRATOR) (PLAINTIFF)..... ..... } APPELLANT;

AND

ELIAS ROGERS (DEFENDANT).....RESPONDENT.

*Oct. 21.
1896
*Mar. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Lessor and lessee—Water lots—Filling in—"Buildings and erections"—"Improvements."*

The lessor of a water lot who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the works so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term.

*Held*, affirming the judgment of the Court of Appeal, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancery Division of the High Court of Justice and restoring the report of the Judge of the County Court

The action was brought against the assignee of the plaintiff's lessor to compel him to renew the lease of a water lot on the Esplanade at Toronto. When the case came on for hearing the claim for renewal was abandoned and by consent of the parties the case was referred to the Judge of the County Court for the County of York for trial of the remaining issues, the main question for decision being as to what compensation the plaintiff was entitled to under a proviso in the lease which was as follows:

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 415.

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"Provided always, that instead of granting such other lease it shall and may be lawful for the said party of the first part, his heirs or assigns, at the expiration of the term hereby granted, to take the buildings and erections that shall or may then be on the said demised premises at such price or sum as shall be fixed and determined on by three persons to be chosen in the same manner as above provided for the purpose of determining the increase ground rent of the said demised premises."

There was also a question as to the area of the property included in the lease. The plaintiff claimed payment for crib-work and earth-filling done upon the leased premises to raise the level to that of the Esplanade and make the property available for the construction of the buildings that could be used as sheds and warehouses.

The County Court Judge decided in the first place, that upon the premises actually leased there were no "buildings and erections" for which the plaintiff could claim payment within the meaning of the proviso in the lease, and secondly, that a certain extension or added portion of the property was not covered by the lease and consequently was not affected by the provisions therein as to payment for "buildings and erections" in any event.

The Chancery Divisional Court reversed this judgment upon both points, but upon appeal the judgment of the Chancery Division was set aside and the former decision affirmed.

A statement of the material facts will be found in the judgment of His Lordship Mr. Justice Gwynne on this appeal.

*Laidlaw* Q.C. for the appellant referred to Lloyd on Compensation (1); *London and Canadian Loan Co.* v. *Warin* (2); *Grier* v. *The Queen* (3).

(1) 6 ed., p. 24.

(2) 14 Can. S. C. R. 232.

(3) 4 Ex. C. R. 168.

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*Robinson* Q.C. and *Macdonald* Q.C. for the respondent.

TASCHEREAU J.—In my opinion this appeal should be dismissed, with costs, for the reasons given by Mr. Justice Burton in the Court of Appeal.

GWYNNE J.—On the 9th of September, 1828, a certain water lot in the Bay of Toronto, designated as lot letter I, was granted in fee simple by metes and bounds in the letters patent granting the same set out, to one Ulrich Howard in fee simple. This lot extended from a certain line on the shore described in the letters patent to the precise distance of ten chains in a southerly direction into the waters of the bay. This water lot became vested in one Sarah Ann Boulton in fee simple in June, 1840. In the month of February, 1840, all the land covered with the waters of the bay lying south of the southerly limit of the said water lot and of other water lots for which letters patent had been granted by the Crown to a line therein described as drawn across the bay from the late French fort west of Toronto garrison Common to Gooderham's windmill (since called the windmill line), was granted by letters patent from the Crown unto the corporation of the city of Toronto in fee simple upon certain trusts therein mentioned and among those upon trust that an esplanade should be constructed upon a line designated on a plan accompanying the said letters patent of such material and according to such plan as should be devised, ordered and directed by the mayor, aldermen and commonalty of the city of Toronto, in common council assembled; and upon trust further to convey and assure to the parties entitled to the water lots theretofore granted all that portion of land covered with water granted to the city which lay south of

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such previously granted water lots up to the said windmill line, subject however, to such general regulations as should affect the whole of the said land covered with water granted to the city, and to the provisos and conditions in the said letters patent contained as to the construction of the said esplanade and otherwise. The said letters patent have not themselves been produced, nor consequently the plan annexed thereto, but in lieu of the letters patent an extract therefrom sufficient for the purpose of the present case, and in lieu of the plan referred to in the letters patent a plan has been produced which has been sworn to be in precise correspondence therewith, and has been accepted as such, and also a copy of a plan registered in the Registry office, in the month of June, 1841, upon both of which the water lots granted previously to the letters patent of February, 1840, are designated by their respective letters placed on the northerly part of such water lots; and the pieces of land covered with water lying to the south of such previously granted water lots, and which were granted to the city by the letters patent of 1840, are designated by numbers placed at the southern extremity thereof on the windmill line; the piece so granted lying south of the said water lot, letter I, being numbered 26, while the letter I is put on the plan on the northerly extremity of the water lot as granted to Ulrich Howard. In the year 1853, the esplanade mentioned in the said letters patent had not yet been constructed, or indeed begun, and the corporation of the city of Toronto petitioned for and procured to be passed an Act, 16 Vic. ch. 219, whereby after reciting the said letters patent and that licenses of occupation had been issued to the city of certain other parcels of land covered with the waters of the said bay, under orders in council in the preamble of the Act mentioned, it

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was enacted that it should be lawful for the corporation of the city to contract with such persons or person as might be willing to erect and build an esplanade in front of and upon the water lots in the said city as described in the preamble of the Act and the letters patent and licenses of occupation therein recited, of such material and according to such plan as the corporation might have adopted or should adopt regarding the same, according to the provisions of the said letters patent. The Act then made provision for ascertaining the cost, after the completion of the esplanade, which each owner of a water lot should be chargeable with for the construction of the esplanade across his lot, and then by clause 7 it was enacted—

that so soon as the said esplanade shall be completed in the manner above mentioned, and the general regulations as to buildings and improvements under the direction of the corporation upon the system devised by them shall have been complied with, the mayor, aldermen and commonalty of the said city of Toronto shall forthwith convey to the several and respective owners of the said water lots entitled to the same under the said letters patent, the several and respective pieces, parcels and strips of land set forth and described in the said letters patent and designated on the map or plan thereto annexed.

The esplanade not having been yet completed, another Act was passed on the 10th June, 1857, 20 Vic. ch. 80, intituled

an Act to amend the Act conveying to the city of Toronto certain water lots, with power to the said city for the construction of an esplanade and to enable the said city to locate the Grand Trunk railroad and other railroads along the frontage of the said city,—

whereby it was among other things enacted in its 4th clause as follows:

And whereas the property directed by the letters patent of the 21st February, 1840, mentioned in the said Act to be conveyed to the said water lot owners therein referred to, was intended as compensation for the land which might be taken from them respectively for the esplanade and for the expense of making so much thereof as should be made on the land taken from them respectively. Be it

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enacted that the owners be charged with their respective shares of such expense, and if any such water lot owner or person having estate in any such water lot shall be dissatisfied with any such compensation, his claim to a further allowance shall, if not agreed upon, be determined by arbitration,

(as provided in the Act). Now, up to this time it is apparent that the owner of water lot letter I had acquired no estate in the land covered with water lying south of that water lot, which had been vested in the corporation by the letters patent of 1840. When, therefore, Mrs. Sarah Ann Boulton, by the indenture of lease in evidence, bearing date the 17th August, 1853, demised to George Carey and his assigns the water lot I in front of the "market square reservation" (the precise description by which the lot was granted in 1828 to Ulrich Howard), "together with the houses and buildings thereon erected," it is quite obvious that nothing beyond the said water lot as the same was granted to Ulrich Howard, together with the buildings thereon at the time of the execution of the indenture of lease of the 17th August, 1853, passed by the demise therein contained, and that neither George Carey nor his assigns acquired any interest in the land covered with water lying south of the said water lot I granted to the city of Toronto by the letters patent of 1840. This indenture of lease contained a covenant for a renewal lease of the said premises at the expiration of the term thereby granted for a further term at such increased ground rent as should be fixed by arbitration in the manner specified in said indenture; provided always that instead of granting such renewal lease it should be lawful for the lessor, her heirs or assigns to take the buildings and erections that should then be on the said demised premises at such price or sum as should be fixed by arbitrators in the same manner as was provided for determining the in-

creased ground rent. It also contained a covenant to convey the said demised premises in fee simple, free from encumbrances, to the lessee, his heirs or assigns, upon payment of $3,150 over and above all rent at any time within the first fifteen years of the term by the indenture of lease granted, subject to the condition following:

> Provided always, and it is hereby declared that time is the essence of this covenant to convey, that unless the said purchase money be fully paid within the first fifteen years of the said term the said party of the second part, his heirs and assigns, shall be absolutely deprived and foreclosed of all right to purchase the said premises, and shall have no claim or title either at law or in equity to acquire the fee simple thereof.

One A. M. Smith became possessed of the term granted by the said lease and entitled to the benefit of all the covenants therein contained by assignment of the said indenture, &c., from the said George Carey, bearing date the 18th April, 1857. Upon the 24th November, 1864, Sarah Ann Boulton the owner in her lifetime of the said lot letter I, and as such upon the completion of the said esplanade entitled to a conveyance from the city of Toronto, in fee simple, of the piece of land covered with water lying to the south thereof to the windmill line, under the provisions of the said letters patent of February, 1840, and of the said Acts of Parliament relating to the construction of the esplanade, being dead, the corporation of the city of Toronto by deed of the above date expressed to be made in pursuance of the statutes relating to the Toronto esplanade, granted and conveyed to the said A. M. Smith, describing him as "water lot owner or assignee and vendee of a water lot owner" over and across or in front of whose lot the esplanade has been built, and to his heirs and assigns, "the piece of land covered with water lying in front of the said water lot letter I, and between it and the windmill line."

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Smith was not then the owner of the said water lot letter I, and consequently was not entitled to have had the said piece of land covered with water lying to the south thereof conveyed to him, as he had not then availed himself of the right of purchase vested in him under the covenant in that behalf in Mrs. Boulton's lease to Carey assigned to Smith. The deed doubtless was made in favour of Smith because of that covenant, three years of the period within which the right if exercised must be exercised had yet to run, and because of the fact that Mrs. Boulton the owner of the lot I was then dead. In this deed the water lot letter I is erroneously stated to have been described and marked on a map or plan of the said water lot made by Thomas Young, architect, dated June, 1840, as lot no. 26. As already pointed out the piece that was so marked with the no. 26 was the piece lying south of the said water lot letter I granted to the city of Toronto by the letters patent of February, 1840, while on the same map or plan the lot as granted to Ulrich Howard is marked with its letter I. But it is quite plain from the deed that what passed thereby was the piece south of water lot I and between the south limit thereof and the windmill line. Smith did not within the fifteen years allowed by the covenant in the lease to Carey as to purchase and sale exercise his right of purchase, and such right by the express terms of the lease containing the covenant absolutely ceased and the covenant in relation thereto became null and determined upon the 1st June, 1868, and thenceforth at least, if not from the date of the conveyance from the city in November, 1864, Smith held the piece of land covered with water so conveyed to him upon trust for the owner in fee, of the said water lot I, whereof Mrs. Boulton was seized at the date of her lease to Carey. Upon the 20th November, 1872, the trustees of Mrs.

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Boulton's will by indenture of bargain and sale of that date conveyed to one John Boulton in fee the said water lot I by the description contained in the said lease of August, 1853, to Carey subject to the terms of that lease, and by indenture dated the 1st June, 1875, Smith who was then seized of the piece of land covered with water lying south of the said water lot I, in trust for the owner in fee of said water lot I, conveyed the same to the said John Boulton, the then owner in fee of said water lot I, in fee by the same description as is contained in the conveyance of November, 1864, from the city to Smith, and by the same description the said John Boulton by indenture of lease, dated the 2nd June, 1875, demised at a nominal rent of 20 cents the same piece of land covered with water lying south of water lot I, for a term of years terminating on the 1st day of June, 1893, subject however to the same right of renewal and covenants in respect of renewal as are contained in the lease of the 17th August, 1853, from Mrs. Boulton to Carey in respect of the piece of land thereby demised, and the lease contained this further provision, that the premises demised by this lease and the premises demised by the lease of August, 1853, for the purpose of determining the value of the increased ground rent to be paid on renewal and the value of the erections and buildings to be paid for in default of renewal should be regarded as one property and as if the whole had been demised by the lease of August, 1853.

Now by an indenture dated the 26th day of October, 1874, Smith demised to one James Adamson for a term terminating on the 28th May, 1893, so much of the said water lot I as lay to the south of the esplanade by the following description:

All and singular all that part of water lot I in front of the market square reservation in the said city of Toronto lying south of Espla-

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nade street having a frontage on Esplanade street of about sixty-six feet, more or less.

This indenture contained a covenant for renewal at an increased ground rent or instead thereof for payment of the value of all buildings and erections thereon in the precise terms contained in the lease of 17th August, 1853. Both Smith and Adamson are now dead and what they may have contemplated to be the premises covered by this instrument we have no means of knowing save by the expressions used in the instrument, and this indeed is what in any case must alone determine the construction to be put upon the instrument; and that as it appears to me clearly is that it is nothing more than a sub-lease of so much of the water lot demised by the lease of August, 1853, as lay to the south of the esplanade and that consequently it does not cover any part of the piece of land covered with water lying south of the water lot letter I granted to the city by letters patent of February, 1840, and conveyed by the city to Smith in November, 1864, and by Smith to Boulton the owner in fee of said water lot I in June, 1875, and then leased by Boulton to Smith. It cannot be assumed that Smith who in October, 1874, held the land covered with water lying south of lot letter I, without any beneficial interest himself therein but as trustee to convey it to the owner in fee of the water lot I, contemplated leasing that piece of land as if he was the beneficial owner in fee thereof. Even had he been such owner in fee he might have retained in himself the land covered with water south of lot I in its then condition as affording access by water to the lot I, and if that had been his intention the language of the lease of October, 1874, is admirably adapted to express such intention. Smith had no beneficial interest in the land covered with water south of the water lot I except under the lease from John Boulton of the date of

the 2nd of June, 1875, and as that piece of land covered with water was of no use to any one save only the occupant of the water lot I, Smith might well have permitted Adamson without objection to make what use of it he should think fit during the continuance of the sub-term demised to him of the water lot I; but however this may be we must, upon the construction of the instrument of 26th October, 1874, hold that it operated only as a sub-lease of so much of the water lot I granted to Ulrich Howard and described in the lease of August, 1853, as lay to the south of the esplanade.

Now it is here to be observed that by the plans produced and the scales therein stated as being the scales upon which the plans are drawn, the water lot I, as granted to Ulrich Howard, appears to have extended about 320 feet, but no more, measured along the eastern limit of the said water lot in a southerly direction from the south limit of the esplanade as it was constructed. Upon the piece of land covered with water lying south of the said water lot I, James Adamson appears to have erected in his lifetime some temporary structure on piles which was destroyed by fire, and a similar structure was erected in its place which was also destroyed by fire, and after his death the present plaintiff as administrator of James Adamson, deceased, in 1885, filled up with earth the land covered with water south of the water lot I to the windmill line and protected the same with crib-work filled with stone, which by a map or plan produced is shown to have been constructed in the waters of the bay south of the windmill line, and by an indenture dated the 27th day of May, 1887, purported to demise to one Lister Nicholls, for a term expiring on the 27th May, 1893, all that piece of land covered with water, "being part of lot number twenty-six, opposite water lot let-

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tered I, &c.," more particularly described in the said indenture by a description of which the point of commencement is stated to be 395 feet 10 inches measured in a southerly direction from the south limit of the esplanade along the eastern limit of the said lot; and from that point the piece demised is stated to extend southerly one hundred and eighty-eight feet and nine inches to the windmill line.

Now, although this indenture correctly describes the piece of land covered with water, which is expressed to be thereby demised as being part of a piece of land covered with water lying south of and opposite to water lot lettered I, yet strange to say the title of the lessor thereto is in the indenture recited to be the indenture of the 26th of October, 1874, which does not profess to relate to any land covered with water lying south of, or opposite to, the water lot lettered I, but only to so much of that water lot lettered I itself as lay south of the esplanade and nothing more. The rent reserved by this lease is $375 a year for about two-thirds of the land covered with water which was demised by John Boulton to Smith at 20 cents per annum. It is obvious that this rent of $375 is calculated upon the increased value of the water lot by reason of its having been filled in with earth and made dry land and in six years that rent would go far to pay, if it would not wholly pay, the expense of filling in the lot and making it dry land.

In this instrument the above plaintiff covenants that in case Smith, his heirs, executors, administrators or assigns, should refuse to renew the term granted by the indenture of the 26th October, 1874, then that Nicholls, his executors, administrators or assigns, should be entitled to receive from the plaintiff, his executors, administrators or assigns, or from the estate of the said James Adamson, deceased, the value of the improve-

ments made by Nicholls, his executors, administrators or assigns, and then standing upon the premises demised by the indenture of the 27th May, 1887, to the extent that Smith, his executors, administrators or assigns, shall be held bound to pay on account of or in respect thereof; so that if Smith or his assigns should not be liable to pay anything for such improvements by reason of the premises upon which they should be standing, not being comprised in the indenture of 26th October, 1874, as not being part of the lot lettered I thereby demised, then in the language of this covenant there would be no liability thereunder resting upon the plaintiff or the estate of James Adamson.

James Adamson in his lifetime by an indenture dated the 26th day of February, 1875, had demised to Christopher and Robert A. Wilson a piece of the water lot I included in the lease of the date of 26th October, 1874, being composed of the north-west corner of that part which lies south of the esplanade, measuring along the south limit of the esplanade about 39 feet and extending southerly along its western boundary line 62 feet.

Then by indenture dated the 20th December, 1887, the plaintiff as administrator of James Adamson purported to demise to one Ray for a term of years expiring on the 27th May, 1893, all the land lying adjoining upon the north to the piece described in the indenture of the 27th May, 1887, up to the southerly limit of the esplanade, exclusive of the piece described in the indenture of the 26th February, 1875. The south-eastern angle of the piece described, which is the north-eastern angle of the piece described in the indenture of the 27th May, 1887, is stated to be 595 feet 10 inches south of the esplanade. That point is fully 75 feet south of the southern limit of the water lot lettered I; to the extent of such 75 feet the land

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lying north of and adjoining to the piece described in the indenture of the 27th May, 1887, was not covered by the description in the indenture of the 26th October, 1874. The water lot lettered I extended on its eastern limit no further than 320 feet south of the esplanade; all south of that to the windmill line constituted what always had been known as a water lot lying south of the water lot lettered I, and which on the maps or plans referred to as made in 1840 was marked as an independent water lot known as no. 26, south of and opposite to water lot lettered I.

This indenture also contains a covenant by plaintiff that the lessees, their executors, administrators and assigns, shall be entitled to receive notice of the arbitration provided for in the indenture of the 26th of October, 1874, and to attend such arbitration and give proof of the value of their improvements and shall be entitled to receive the amount awarded in respect of such improvements—and thus their right to recover for their improvements is restricted to the limit of the liability of Smith and his assigns under the indenture of October 26th, 1874. All the interest of the lessees under the above indentures executed by the plaintiff as administrator of James Adamson, deceased, as also all the interest of the lessees under the indenture of the 17th August, 1853, and under the indenture of lease of the 2nd June, 1875, from John Boulton to Smith, are vested in the defendant who has either built himself or purchased at an outlay of several thousand dollars all erections and buildings standing upon the whole of the pieces of land and land covered with water comprised in the said several indentures, using the terms "erections and buildings" as relating to structures, of whatever nature they may be, erected upon the ground demised and not constituting part of the ground itself; and the sole question before us upon

this appeal is whether the plaintiff as assignee of all the estate and interest of Smith and subject to the liability incurred by him by his covenants in the indenture of the 26th October, 1874, is under those covenants or any of them liable to pay to the estate of James Adamson for filling in such part of the land covered with water as may have been filled in with earth and made dry land by James Adamson in his lifetime, if any there was, or by the plaintiff as administrator of his estate since his death; in other words whether such filling in and conversion of land covered with water constitutes an erection or building on the demised premises on the 28th May, 1893, when the term granted by Mrs. Boulton by the indenture of the 17th August, 1853, expired; and in my opinion, as already expressed, the indenture of the 26th October, 1874, does not affect any land or land covered with water south of the water lot lettered I, that is to say, it does not cover any part of the land granted by the letters patent of 1840; it operated simply as a sub-lease of so much of the land demised by the indenture of 17th August, 1853, as lay south of the esplanade; Smith's covenant therein, therefore, has no relation to any of the land covered with water granted by the letters patent of 1840, as being south of the said water lot lettered I.

But as part of the filling in of land covered with water and the conversion thereof into dry land may have been upon a part of the said water lot lettered I, that is, may have been done within about 320 feet of the south limit of the esplanade, it becomes necessary to determine whether such filling in and conversion of land covered with water into dry land constitutes an "erection or building" as those terms are used in the indentures of 17th August, 1853, and 26th October 1874. The language in both is identical, and although there are covenants in the former whose subject and

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context seem to put the question beyond all doubt if arising upon the indenture of August, 1853, against the lessor of that indenture, her heirs or assigns, still I think the construction of the covenants in both instruments relating to payment for "erections and buildings which may be on the demised premises" at the close of the terms granted must be the same, the language of both of those covenants being the same. In both instruments the above words must be construed in the ordinary acceptation of the terms "erections and buildings" and so construed no one would understand that the ground itself or any part of the ground upon which an "erection" or "building" or structure of any kind should be erected, should constitute the erection or buildings upon the ground, but the language of the covenants seems very plainly to exclude such a construction. For the purpose of determining the increased ground rent to be reserved upon a renewal lease the demised premises are to be valued in their then condition as if there were no "erections or buildings" thereon, and as the absolute property of the lessor out of which the rent to be reserved is to issue; then the lessor's covenant is that if he will not demise such his absolute property at the increased rent ascertained by arbitration he—

> will take the buildings and erections that shall or may then be on the said demised premises at a price to be fixed by arbitration

in the same manner as above provided for determining the increased ground rent to be reserved on a renewal lease of the ground, the lessor's absolute property. From this language it is apparent that the demised premises, that is to say, the ground in its then condition and the buildings and erections thereon are regarded as being wholly distinct from each other and are to be valued the one as the property of the lessor

and the other as the property of the lessee until paid for by the lessor. Being so distinct it is impossible to say that the ground or any part thereof which is the property of the lessor can be held to be part of the property of the lessee and as such to be paid for by the lessor.

The case I must say appears to me absolutely free from doubt.

We have been referred to a case of *Lavy* v. *London County Council* (1); it decides merely that a wall erected to the height of eleven feet is "a building structure or erection" within the meaning of sec. 75 of the Metropolis Management Act, 1862. That case obviously has no bearing upon the question raised on this appeal.

The appeal must be dismissed with costs.

SEDGEWICK, KING and GIROUARD JJ. concurred.

*Appeal dismissed with costs.*

Solicitors for appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for respondent: *Maclaren, Macdonald, Merritt & Shepley.*

(1) [1895] 2 Q.B. 577.

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*May 11.

*May 18.

THE MONTREAL GAS COMPANY (DEFENDANTS *en garantie*) ..... APPELLANTS;

AND

AMABLE ST. LAURENT, *ès-qualité* (PLAINTIFF), AND THE CITY OF ST. HENRI (DEFENDANT)..... RESPONDENTS;

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THE CITY OF ST. HENRI (DEFENDANT) ..... APPELLANT;

*v.*

AMABLE ST. LAURENT, *ès-qualité* (PLAINTIFF)..... RESPONDENT.

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

*Negligence—Obstruction of street—Assessment of damages—Questions of fact—Action of warranty.*

The Supreme Court will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it.

In cases of *delit* or *quasi-delit* a warrantee may before condemnation take proceedings *en garantie*, and the warrantor cannot object to being called into the principal action as a defendant *en garantie*. *Archbald* v. *deLisle* (25 Can. S. C. R. 1) followed.

APPEALS from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), District of Montreal, affirming the judgment of the Superior Court at Montreal which condemned the defendant, the City of St. Henri, as principal defendant to pay $2,122 for damages assessed and ordered the defendants *en garantie*, the Montreal Gas Company, to indemnify

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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the said principal defendant against the payment of such damages with interest and costs.

The action was brought by the plaintiff against the City of St. Henri claiming damages for injuries sustained by his minor son Joseph St. Laurent, through being thrown from a carriage while driving at night on Notre-Dame Street in the city of St. Henri, the carriage being upset, as alleged, through a heap of earth taken out of a cut made by the gas company in the street being negligently allowed to remain upon the highway so as to cause an obstruction in the street which could not be seen on account of the darkness, and without enclosure or signal to prevent accidents or give warning of the dangerous state of the thoroughfare. The particulars of plaintiff's claim were as follows:

| | |
|---|---|
| For loss of 12 weeks wages | $84 00 |
| For board during same period | 42 00 |
| For bills of doctor, nurse and druggist | 50 00 |
| For costs on appointment of a tutor to institute the action for damages | 19 25 |
| For risk and danger of paralysis, insanity and death by reason of the accident | 2,000 00 |
| | $2,195 25 |

The defendant called the gas company into the suit *en garantie* alleging that they had by contract agreed to be responsible for accidents resulting from the construction or repair of the system of lighting established by them to furnish gas to the citizens, and that the accident in question had been caused through the cut made in the street by them to repair gas pipes laid under the street and left unprotected by their fault and negligence. The principal action and the action *en garantie* were united and tried together in the Superior Court at Montreal.

On the principal action the trial judge found that the accident was caused by reason of the absence of

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light in the street and by reason of the negligence with which the cut had been filled; that Joseph St. Laurent had been unable to work during four months and since the accident had only worked at intervals on account of pains which he suffered in the head; that he was unable to follow his trade as a seamster; that after the accident he was subject to nervous attacks during which he lost control over his reason and was at times violent and threatened to kill his mother; that it was uncertain whether he would ever get better; that he was still subject to such attacks and according to the medical evidence he was exposed to insanity and paralysis. The court also found upon the action *en garantie* that the accident had occurred on the gas company's cut and condemned them to pay the amount of the judgment rendered against the principal defendant. This judgment was affirmed in the Court of Appeal, and the decision of the Court of Appeal is now appealed from by both the principal defendant and the defendant *en garantie*. The appeals were heard together.

*Bisaillon* Q.C. for the appellant the Montreal Gas Co.

There was no warranty. There was no by-law or resolution by either of the corporations whereby the gas company was made responsible for damages. There cannot be warranty against *delits* or *quasi-delits* and the gas company cannot in any case be called in as a warrantor in an action based on the *delit* or *quasi-delit* of the defendants.

*Armstrong* v. *Barthe* (1); *Corporation of Three Rivers* v. *Lessard* (2); *Mowat* v. *deLisle* (3); *Central Vermont Railway Co.* v. *The Mutual Insurance Co.* (4); *St. Jean* v. *Atlantic & North Western Railway Co.* (5); *Seguin* v.

(1) 5 R.L. 217.
(2) 10 R.L. 441.
(3) 25 Can. S.C.R. 1.
(4) Q.R. 2 Q.B. 450.
(5) Q.R. 4 Q.B. 66.

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*City of Quebec* (1); *Corporation of St. Joachim* v. *Valois* (2); *Lyman* v. *Peck* (3).

The item $2,000 being for future and conjectural damages could not be entertained. Sourdat (4); Art. 1075 C. C. There is no proof of damages *in praesenti*. The accident being due to carelessness in the maintenance and lighting of the street the municipal corporation must bear the blame. The gas company was not obliged to light the streets, or place watchmen on their cuts, and did all they were obliged to do by filling the cut they had made to repair their pipes.

In any case the damages are excessive.

*Madore* for the City of St. Henri appellant and respondent. We rely upon the charter of the gas company (5), as making them responsible for the neglect of their servants in leaving their cut improperly filled in and a heap of earth and rubbish on the street. The damages assessed are excessive and not justified by the evidence. The physician heard as a witness in speaking of damages based his opinion upon mere theory and mentioned no facts from which conclusions might be drawn.

*Geoffrion* Q.C. and *D'Amour* for respondent St. Laurent. The evidence showed actual damages sustained by the plaintiff not only on which to base the finding of the items aggregating $122 but also various ways in which the respondent was and would be humiliated and distressed in his feelings, and placed at a disadvantage with others in his struggle for a livelihood and the comforts and position to which he would otherwise have had a reasonable hope to attain on account of his actual condition, and from his risk of being incapacitated by insanity or stricken down by paralysis

(1) Q.R. 3 S.C. 23, 53.
(2) 7 L.C. Jur. 83.
(3) 6 L.C. Jur. 214.
(4) Responsabilité vol. I. p. 110.
(5) 10 & 11 Vict. ch. 79.

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no one would employ him in those occupations where the lives and safety of others are dependent, not only upon the employee's skill, but upon his physical condition and power of endurance. That provision for his future or the future of those dependent upon him, by means of life insurance or benefit societies would be debarred him, or secured only upon greatly increased rates of premium, that his chances of settlement in life by marriage would be seriously impaired, and in other ways, he sustains and will continue to sustain actual present damage even if the risk should never become a reality. The text of the judgments appealed from do not include an estimate of future or conjectural damages. Sutherland on Damages (1); *Lévi* v. *Reed* (2); *Cossette* v. *Dun* (3); *Gingras* v. *Desilets* (4).

The medical testimony is uncontradicted and moreover is corroborated as to the facts. Actual cases of similar accidental injuries were cited in support of the opinions expressed.

The judgment of the court was delivered by:

TASCHEREAU J.—These appeals must be dismissed. As to the amount of damages given by the judgment, we cannot interfere. *Cossette* v. *Dun* (3); *Ball* v. *Ray* (5); *Lévi* v. *Reed* (2). It certainly appears to be large, but, as the Court of Appeal says, there is evidence to support it, leaving out of consideration the evidence given as to problematic or uncertain future damages. As to the objection taken by the defendants *en garantie* against the right to an *action en garantie* in a case of *délit*, or *quasi-délit* it cannot now prevail. I refer to what I said for the court on that question in *Archbald* v. *deLisle* (6). The Court of Appeal itself in Montreal,

(1) Vol. 3 pars. 944, 952, 1251.
(2) 6 Can. S.C.R. 482.
(3) 18 Can. S.C.R. 222.
(4) Cas. Dig. 2 ed. 212.
(5) 30 L.T.N.S. 1.
(6) 25 Can. S.C.R. 1.

by its judgment in the present case, disposes of the contention that the jurisprudence in the province does not admit of such actions, whatever be the name given to them, in cases of *délits* or *quasi-délits*.

*Appeals dismissed with costs.*

Solicitors for appellant, The Montreal Gas Co.: *Bisaillon, Brosseau & Lajoie.*

Solicitor for respondent: *Amable H. Laurent.*

Solicitors for the City of St. Henri: *Madore & Guérin.*

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Taschereau J.

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SAMUEL S. CARROLL AND WILLIAM E. CARROLL (PLAINTIFFS).. } APPELLANTS;

AND

THE PROVINCIAL NATURAL GAS AND FUEL COMPANY OF ONTARIO (DEFENDANTS) ..... } RESPONDENTS.

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*Mar. 5, 6.

*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Subsequent deed—Inconsistent provisions.*

C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co. all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co. who immediately cut off from the works of C. the supply of gas and an action was brought by C. to prevent such interference.

*Held*, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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CARROLL v. THE PROVINCIAL NATURAL GAS & FUEL COMPANY OF ONTARIO.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by a divided court, the judgment of the Divisional Court in favour of the defendant company.

The material facts will sufficiently appear from the above head-note and are fully set out in the judgment of the court on this appeal.

*Aylesworth* Q.C. and *German* for the appellants. There is no superior instrument in this case. Both the earlier contract and the deed are in force and binding on the parties. *Palmer* v. *Johnson* (1). And see *Morris* v. *Whitcher* (2); *Smith* v. *Holbrook* (3); *Disbrow* v. *Harris* (4).

*McCarthy* Q.C. and *Cowper* for the respondents referred to Rogers on Mines (5); *Besley* v. *Besley* (6); *Allen* v. *Richardson* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—On and prior to the 6th of April, 1891, the appellants were the owners as the lessees or licensees under leases or licenses from several persons of the right to mine for and take natural gas over a large tract of country in the county of Welland. By an agreement entered into between the appellants of the one part and the Erie County Natural Gas and Fuel Co., dated the 6th of April, 1891, the appellants contracted to sell to that company all gas leases held by them in the townships of Humberstone and Bertie, in the county of Welland; and also all gas grants, leases and franchises issued to and then owned by them in the Dominion of Canada, and also the gas wells now on such leases, for the sum of $205,000 of the paid up

(1) 13 Q. B. D. 351.
(2) 20 N. Y. 41.
(3) 82 N. Y. 562.
(4) 122 N. Y. 362.
(5) P. 820.
(6) 9 Ch. D. 103.
(7) 13 Ch. D. 524.

capital stock of the company when the same should be increased as thereinafter provided for at its par value. And the appellants agreed that on the leases they would put down at their own expense five natural gas wells properly located. On the part of the purchasers it was by the same instrument agreed that they would at once take the necessary legal steps to cause its capital stock to be increased to the sum of $500,000 and that as soon as the stock was so increased it would issue to the appellants the sum of $205,000 of its paid up capital stock, in payment for the said gas leases, franchises, gas wells, and other property before mentioned. It was also further agreed that in case the company should not issue and deliver to the appellants the $205,000 of stock on or before the 20th of April, 1891, the appellants might declare the contract void, and it was declared that time was of the essence of the contract. After some other stipulations, which need not be particularly referred to, the agreement contained the following provision:

> It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property.

On or before the 20th of April, 1891, the day fixed for completion by the contract, the purchasers procured the capital of the company to be increased as they had agreed, and before or at the time of the execution of the deed poll hereafter mentioned paid up stock to the amount of $205,000 was issued to the appellants.

By a deed poll executed and delivered to the company on the 20th of April, 1891, the appellants transferred to the company all the leases and property specified in the contract, specifying a number of leases and declaring that the deed should pass not only those specified but all others held by them. The deed contained the following covenant:

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The Chief Justice.

And we agree that on the said leases we will put down at our own expense five natural gas wells properly located, said five wells to include the four wells already down so that when said wells are put down on said leases there shall be but five in all.

No reservation in favour of the appellants of any right to take gas for their own use such as they had stipulated for in the agreement of the 6th of April, 1891, was contained in the deed.

On the 18th of July, 1894, the Erie County Natural Gas and Fuel Company assigned to the respondents all the before mentioned leases and their rights under them, and immediately the respondents cut off from the plaintiffs' works the supply of gas which they had been drawing from them, though not without protests and interruptions at intervals.

The appellants thereupon brought this action to restrain the respondents from interfering with their supply of gas. The respondents by their pleading in defence deny the appellants' right to take any gas from any of the wells or under any of the leases assigned, and make a counter-claim for the value of the gas used by the appellants.

Upon the pleadings the only question raised which it is material to consider on this appeal is the right of the appellants to have the benefit of the reservation of the privilege of taking gas for their own use contained in the agreement of the 6th of April, 1891, notwithstanding its omission from the deed of the 20th of April, 1891. No case of error or mistake in the latter deed is made nor is any relief by way of rectification of the latter instrument sought

The foregoing statement is taken from the judgment of Mr. Justice Street by whom the action was tried without a jury, and by whom the action was dismissed, a reference being directed to assess the respondents' damages under the counter-claim.

From this judgment the appellants appealed to the Court of Appeal and the learned judges of that court being equally divided in opinion the appeal was dismissed.

The Chief Justice and Mr. Justice Osler were of opinion that the judgment of Street J. was correct and should be affirmed whilst Mr. Justice Burton and Mr. Justice Maclennan were of the contrary opinion.

Whatever reasons we may have for suspecting that there was some omission or mistake in the deed by which the contract of the 6th of April was carried into execution they can be of no weight and can have no influence in deciding this appeal, the sole question in which is whether the clause in the agreement reserving to the appellants the right to take gas for their own use continued in force after the deed or was superseded by it.

By the agreement of the 6th of April, 1891, the appellants contracted to sell and convey to the Erie Company all the rights to take gas which they had under the leases, with the exception of such gas as they reserved to take from the wells and lands covered by the assigned leases for their own use. By the deed poll they assigned the very same subjects without any such reservations. Surely it cannot be said that the continuance of this reserved right after the execution of the deed was consistent with the absolute terms of that instrument which conferred on the Erie Company the right without any reserve whatever In the case of an executory agreement to sell land reserving an easement in favour of the vendor, carried into execution by a purchase deed in which there is no such reservation, could there be a doubt that the deed would be conclusive and that the reservation would be superseded by it? Again, in the case of an agreement to sell land reserving the timber to the vendor

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and then a conveyance in execution of the agreement containing no reservation, could it be doubted that the grantee would be entitled to the timber? To say that in either of such cases the whole property as described in the deed completing the purchase did not pass, would be equivalent to saying that if by an executory contract it is agreed to sell a lot of land of one hundred acres, reserving one acre to the vendor, a conveyance purporting to convey the whole hundred acres would leave the reservation of the contract intact. That the parties in the present case were dealing, not with the property in the land itself, but with what may be called a dismemberment of the right of property can surely make no difference. To recognize the retention by the vendors of any such right would be to permit them to derogate from their own grant, for upon its face the deed is inconsistent and incompatible with the reservation claimed.

It was quite competent for the parties in the interval between the agreement and the deed to have changed their contract, by the abandonment by the appellants of the right reserved to take gas, and the terms of the deed require us to presume that there was such an abandonment.

I should have thought the judgment of Mr. Justice Street, founded as it is upon one of those principles of the law of property which it is of the utmost importance to conserve inasmuch as the security of titles to land depend on such conservation, required no authority to support it. I entirely agree, however, with Mr. Justice Osler that the case is covered by authorities some of which he quotes.

In *Clifton* v. *The Jackson Iron Co.* (1) the case which I have above suggested was actually presented for decision; the defendants had by a written agreement

(1) 74 Mich. 183.

contracted to sell land to the plaintiff reserving the timber, and subsequently a conveyance was executed containing no such reservation, the defendant supporting his contention upon arguments precisely similar to those urged by the appellants here, that the reservation of the agreement still continued in force and entitled them to cut down the deed accordingly, but the Supreme Court of Michigan held the contrary, Campbell J. in delivering the judgment of the court saying:

> Had no deed been made it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected.

In *Teebay* v. *Manchester &c. Railway Company* (1), there was a preliminary contract by which the plaintiff agreed to convey land to the defendants reserving by way of easement a right of access over the land which formed the subject of the sale. Subsequently a conveyance was executed which conveyed the property contracted for absolutely and without any reservation. The plaintiff brought an action claiming the benefit of the exception in the contract, but Vice-Chancellor Bacon unhesitatingly dismissed it, treating the conveyance as nconsistent with the agreement and holding that the vendor was bound by the deed which had been executed for the purpose of carrying out the sale. As it was put in argument by the defendants' counsel in that case the true rule governing all such questions is that

> where an agreement for purchase has developed into a conveyance, no previous contract or previous arrangement between the parties can be looked to in order to put any construction upon the conveyance, which is absolute and alone must regulate the rights of the parties.

(1) 24 Ch. D. 572.

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The Vice-Chancellor also distinguished the case from one asking relief on the ground of error in the deed. He says:

In this case if there had been a bill filed alleging that the deed of 1871 had been executed by mistake or inadvertence, or without properly attending to the rights of the parties then existing I might have listened to such a case. In such a case it is not necessary for me to say there might be a question as to the specific performance of the agreement or as to the rectification of the deed of conveyance, but no such case is presented to me.

In *Leggott* v. *Barrett* (1) the question arose how far the construction of a deed executed to carry out a prior executory contract might be influenced by the agreement, and James L.J. says:

I cannot help saying that I think it is very important, according to my view of the law of contracts both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself.

Brett L.J. in the same case says:

I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing and in the second case entirely by the deed, and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document.

Cotton L.J. also says:

If there is any difference between the agreement and the deed, the deed is that which the parties have thought it right to adopt as effectu-

(1) 15 Ch. D. 306.

ally protecting the rights of the purchaser under the previous contract of purchase and sale, and if there were any difference, as the Lord Justice has said, the deed must decide the rights of the parties (1).

Then a class of cases has been relied upon in support of the appeal which are plainly distinguishable from such cases as the present and those I have just quoted. In these cases I now proceed to refer to it has been held in England after some contrariety of opinion that a particular provision in a contract for the sale of land outlives the execution of the conveyance and is not superseded by it—the provision in question being that one ordinarily found in English precedents of conditions of sale by auction and preliminary contracts for the sale of land providing that in case there should eventually be found to be any deficiency in the quantity of land as described in the particulars of sale, the vendee shall be entitled to compensation in respect of such deficiency of acreage or contents. In the cases of *Bos* v. *Helsham* (2) and *Palmer* v. *Johnson* (3) the question was whether a conveyance not embodying a provision of this kind contained in the executory contract concluded the vendee's right to have the benefit of it, and it was held in both cases that the conveyance was not conclusive and that the purchaser was entitled to compensation. These decisions however proceeded upon a principle which is in no way inconsistent with the cases of *Leggott* v. *Barrett* (4) and *Teebay* v. *The Manchester &c. Railway Co.* (5), and the Michigan case before cited. It was held that the stipulation for compensation in the preliminary agreement related to something which it was not intended should be carried out by the conveyance, but to a matter altogether irrelevant and collateral to it. Thus we find

(1) See *Wheeldon* v. *Burrows* 12 Ch. D. 31.
(2) L. R. 2 Ex. 72.
(3) 13 Q. B. D. 351.
(4) 15 Ch. D. 306.
(5) 24 Ch. D .572.

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that the Master of the Rolls in *Palmer* v. *Johnson* (1) says:

> But *Bos* v. *Helsham* (2) has decided that this particular contract for compensation was one which was not to be carried out by the deed of conveyance and therefore it did not come within that principle of law and was not merged in the deed.

Lord Justice Bowen in the same case says:

> Suppose the parties should make a parol contract with the intention that it should afterwards be reduced into writing, and that that which is reduced into writing shall be the only contract, then of course one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract they might agree that that should exist notwithstanding it was not in the contract which was put into writing. In the same way when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract.

Lord Justice Fry says:

> In *Leggott* v. *Barrett* (3), Lord Justice James and the present Master of the Rolls laid down what is indubitably the law that when a preliminary contract is afterwards reduced into a deed and there is any difference between them, the mere written contract is entirely governed by the deed, but that has no application here for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger for the deed in this case was intended to cover only a portion of the ground covered by the contract of purchase.

It therefore appears very clearly that nothing decided in the case of *Palmer* v. *Johnson* (1) was intended in any way to affect the law as laid down in the preceding case of *Leggott* v. *Barrett* (3), and that as laid down in that case the law is that if you find any inconsistency between the deed and the contract which preceded it the deed is to be taken as conclusive.

That there is such inconsistency between the two instruments here is manifest when we find the first providing for the conveyance of the subject-matter of the purchase diminished by a reservation in favour of the vendors, whilst, by the deed itself, no such reservation is made.

(1) 13 Q. B. D. 351 (2) L. R. 2 Ex. 72.
(3) 15 Ch. D. 306.

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Therefore were we in the face of the deed to give effect to the claim of the appellants to withhold any part of that which it professes to convey we should be simply violating that fundamental rule of the law of property which forbids a grantor from derogating from his own grant.

There is no hardship in this construction for either the reservation was omitted from the deed by error and mistake or it was intentionally so omitted. If there was a mistake a plain simple remedy was open to the appellants, namely, an action in the nature of a bill in equity for rectification, but this remedy they have not thought fit to resort to. On the other hand it was quite competent to the parties to alter their contract in the time which intervened between the contract and the conveyance, and were we to concede the relief prayed by the appellants we should be assuming not only without evidence but against evidence that they had not done so, a very dangerous and unwarranted course to adopt.

I am of opinion that the judgment impeached is perfectly correct and should be upheld.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *German & Crow.*

Solicitors for the respondents: *Harcourt & Cowper.*

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*Mar. 6.
*May 18.

WILLIAM J. ROBERTSON, EXECUTOR OF THE WILL OF SAMUEL JUNKIN (DEFENDANT)..... } APPELLANT;

AND

JOHN JUNKIN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Will—Legacy—Bequest of partnership business—Acceptance by legatee—Right of legatee to an account.*

J. and his brother carried on business in partnership for over thirty years and the brother having died his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible."

*Held*, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency.

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

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

The trial judge held that the defendant had elected to take the bequest in the will and had no right to an account. His decision was affirmed by the Divisional Court but reversed by the Court of Appeal.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewic: King and Girouard JJ.

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*Aylesworth* Q.C. for the appellant referred to *Ramsay* v. *Margrett* (1).

*McCarthy* Q.C. for the respondent cited *Robinson* v. *Alexander* (2); Lindley on Partnership (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.– For upwards of forty years, from 1848 to March, 1890, the respondent, John Junkin, and his late brother Samuel Smith Junkin, carried on business in partnership. The latter died on the 18th of March, 1890, leaving a will which contained amongst other dispositions, the following bequest:

I will and bequeath unto my brother John Junkin all my interest in the business of John Junkin & Co., in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely for ever, and I advise my said brother to wind up the said business with as little delay as possible.

The testator appointed the appellant to be the executor of his will. Subsequently to the testator's death the respondent carried on the business, added to the stock, advertised the business for sale, and by his conduct may well have induced the appellant to infer that he accepted the legacy to which the executor may be taken to have given his assent. The respondent also employed a skilled accountant, a Mr. McCallum, to investigate the accounts which had been kept by the testator. This investigation resulted in a report by Mr. McCallum that the respondent was indebted to the firm. After this report by McCallum the respondent procured another examination of the books to be made by a Mr. Phelps whose conclusion was the reverse of that arrived at by Mr. McCallum, being to

(1) [1894] 2 Q.B. 18.
(2) 2 Cl. & F. 717.
(3) 6 ed. 587.

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the effect that the testator was indebted to the firm. The executor having been called upon to pay certain overdue paper held by a bank in St. Catharines brought an action against the respondent, upon the assumption that the respondent having accepted the legacy was bound to indemnify the testator's estate against the liabilities of the firm. This action was settled, according to the evidence of the appellant, by relations of the respondent giving security for the amount sought to be recovered from him. The respondent then brought this action for an account of the partnership dealings, to which the appellant pleaded as a defence that the respondent had accepted the bequest to him already stated. The action was tried before the learned Chief Justice of the Queen's Bench Division without a jury and resulted in a verdict for the appellant, and a judgment dismissing the action. The respondent appealed to the Divisional Court of Queen's Bench by which court the appeal was dismissed. This judgment was, however, subsequently reversed by the Court of Appeal and a decree entered directing the partnership accounts to be taken. From this last judgment the executor has appealed to this court.

The Court of Appeal has held that the respondent has done nothing which debars him from insisting on the right which he undoubtedly had at the time of the testator's death of having the partnership accounts taken. So far as the question of the acceptance of the legacy is one of fact the finding of the Chief Justice at the trial and of the Divisional Court have been against the respondent, and these findings, proceeding on sufficient evidence, ought to be conclusive unless it can be said to have been established that the adoption of the testator's gift proceeded from excusable error and ignorance of facts. I am of opinion that there can be no pretense for this as the respondent had in his own

hands the means of knowing, even if he did not actually know, the state of the accounts between the firm and the respective partners. In all cases in which acquiescence is relied on as binding a party a court of equity requires as an essential element that he should have had actual knowledge of, or the means of knowing, all the material facts. Here the respondent, having the books containing the records of the partnership transactions in his hands, could, if he had chosen to do so, have informed himself of all the facts which he afterwards acquired a knowledge of through the investigation made by Mr. Phelps before accepting the legacy. I agree therefore with the Chief Justice who tried the action, and the Divisional Court, that the respondent accepted the legacy and is in the same position as if his acceptance and the executor's assent had been expressly recorded in a formal written instrument.

I do not regard the case as one for the application of the equitable doctrine of election, which arises where a testator, while conferring a benefit on a legatee, assumes to give the property of such legatee to another person, in which case it is held that the first legatee cannot claim the benefit conferred upon him by the will whilst repudiating the testator's attempted disposition of his own property, except upon the terms of compensating the disappointed legatee out of the testator's gift to himself. The same doctrine is also applicable in the case of gifts by deed. Here, however, the facts do not present a case for the application of any such principle.

The acceptance of a legacy is, however, an act by which the legatee estops himself, and by which he becomes bound to carry out all the consequences which follow from the legacy becoming vested in him. This, however, is not an estoppel of the same nature as an estoppel by representation requiring proof of all the

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elements required to constitute an estoppel proceeding from a statement of particular facts, but it is one of those acts in pais which by themselves, independently of the consequence, are binding on the party. There is in such a case no necessity for proof of the fact that the executor was induced to alter his position; the law presumes that such was the case. Then it is a rule founded on the plainest principles of justice that a legatee who accepts the testator's bounty thereby undertakes and becomes bound to fulfil any condition coupled with it, and to bear any burden which may be imposed on the subject of the gift. Such a beneficiary cannot afterwards, by repudiating the bequest, exonerate himself from the performance of these obligations but is bound to indemnify the testator's estate against them. In other words, he is estopped from doing so (1). This was expressly held in the case of *Attorney General* v. *Christ's Hospital* (2), decided by Sir John Leach. The law is concisely stated in Jarman on Wills (3), as follows:

> When the legatee has taken his legacy with a legal condition of any kind annexed he is of course estopped by his own act from afterwards insisting on rights which by the terms of the condition he is bound to release, or from declining a duty he is thereby required to perform.

The proposition to be established by the appellant to entitle him to a reversal of the judgment he complains of must therefore be that by the terms of the will there is imposed on the respondent the obligation of indemnifying the estate of the testator against any liability for the debts of the firm in case the assets should be insufficient for that purpose.

The case thus resolves itself into a question of the construction of the will. Has the testator, by the terms of the gift, either expressly or by necessary implication,

(1) *Egg* v. *Devey* 10 Beav. 444. (2) Tamlyn 393.
(3) 5 ed. p. 904.

made it a condition of the legacy that the respondent shall indemnify his estate against liabilities to creditors in case of the insufficiency of the assets?

Immediately prior to the time of the testator's death the respondent had the right, the partnership not having been for any limited term but at will, to have determined the partnership and to have insisted on having the accounts taken and the business wound up. This would have involved accounts of the assets, of the outstanding liabilities, the realization of the assets and their application to the payment first of the creditors and then of the advances made by the testator, and the equal division of any surplus between the partners. If the assets should have been found insufficient for the payment of the debts, in other words, if the firm should have been ascertained to have been insolvent, the partners would have been bound to have contributed equally to the payment of creditors, and the respondent would have been liable to the testator for one-half of any deficiency of the assets to repay his advances.

Then what does the testator bequeath to the respondent? It is, in the words of the will, his, the testator's, "interest in the business together with all sums of money advanced by the testator to the business at any time." What is the meaning to be placed on these expressions? Manifestly it is that the testator by the gift of his "interest" gives the respondent his share of any surplus of the assets of the estate remaining after all liabilities have been satisfied, and further, by the subsequent expressions, exonerates him from any contribution to the payment of the debt due by the firm (regarded as a distinct personality from the individual partners as it would be in taking the accounts) to the testator for his advances. In terms no liability to pay the creditors in case the firm should

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prove to be insolvent is attached to this gift. Nor can it be said that any such liability is implied. If there is no surplus the respondent's legacy will be a barren one, the respondent will get nothing, but this is the utmost that can be said. Any deficiency in the assets to pay creditors must be made good in equal proportions by the respondent and the estate of the testator. The respondent, by the inclusion in the testator's gift of his advances to the firm, is exonerated from contributing beyond his share of the amount due to creditors what he would otherwise have had to make good, namely, one-half of those advances, just as he would have been if, in the case of the partnership having been wound up in the testator's lifetime, the respondent had been able to produce a release from the testator to himself of any right to call for such contribution to losses. Had this legacy, expressed in the same words, been left to a third person, no one could doubt that such a legatee could not be called upon to contribute to any deficiency of the assets to pay creditors, and this being so, there can be no reason why the construction should not be the same when the gift is not to a stranger but to the surviving partner. The respondent has not, therefore, by accepting the legacy, which was clearly intended by the testator as a benefit to which no burden or liability was attached, undertaken to indemnify the testator's estate against its *primâ facie* liability to contribute one-half of any deficiency of the assets to satisfy creditors.

By the acceptance of the legacy the respondent has not therefore lost the right which he would have had on a dissolution of the partnership in his brother's lifetime of having the accounts taken and the proportions of the respective liabilities of the partners ascertained. It is true that by the acceptance of the legacy the respondent has ceased to have a right to have

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the accounts taken for the mere purpose of ascertaining the amount of any surplus since no one but himself is now interested so far as there may be a surplus, but the legacy and its acceptance not having relieved the testator's estate from contributing to any deficiency of the assets to satisfy creditors the respondent is still entitled to enforce the right which he originally had, and has never lost, to have the accounts taken to that end. That the accounts may be difficult to take and may involve great expense is no argument against the claim of the respondent. The testator was to blame for allowing the partnership accounts to remain open and unsettled during the long series of years from 1848 to his death in 1890. I need not say that the Statute of Limitations did not begin to run until the dissolution on the death of the testator.

It may, however, be well for the respondent to bear in mind that should it appear that the assets were sufficient at the date of the dissolution to pay creditors, he will probably be considered as having enforced at great expense a useless accounting of which he may be compelled to bear the costs.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *W. B. Gilleland.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*

FRANÇOIS LACHANCE (CONTESTANT)..APPELLANT;

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AND

*May 5.
*May 6.

LA SOCIÉTÉ DE PRÊTS ET DE PLACEMENTS DE QUÉBEC (CLAIMANTS)..... ..... ..... } RESPONDENTS.

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

*Appeal—Amount in controversy—Pecuniary interest of appellant—Arts.* 746 747 *C. C. P.*

L. having proved a claim of $920 against an insolvent estate contested a claim for which respondents had been collocated against the same estate amounting to $2,044.66. The contestation having been decided in favour of respondents L. appealed to the Supreme Court.

*Held*, that to determine whether or not there was a sufficient amount in controversy to give jurisdiction to the Supreme Court the pecuniary interest of the appellant only could be taken into consideration, and his interest being under $2,000 the appeal would not lie, although the consequence of the appellant's contestation might result in bringing back to the insolvent estate a sum of over $2,000.

MOTION to quash an appeal from the decision of the Court of Queen's Bench for Lower Canada (appeal side), sitting at Quebec, reversing the judgment of the Superior Court in the District of Kamouraska.

The company, respondents, proved a claim for $2,718.22 against an insolvent estate based upon an obligation by the insolvents in their favour affecting certain lands by hypothec as security; the contestant held from the insolvents another hypothec upon the same lands under which they proved a claim of $920 against the estate. Upon the sale of the lands the net amount of $2,044.26 was realized for distribution by the curator and he made thereupon his second

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

report of distribution, collocating the whole of the balance in his hands to the respondents on account of priority of their hypothec.

The appellant contested the report alleging that the hypothecs were void and constituted no privileged claim upon the lands and claiming that the balance so remaining in the curator's hands ought to have been distributed proportionately amongst all the creditors of the estate, whose claims altogether aggregated $10,-393.07.

The respondents joined issue and judgment was rendered by the trial judge in favour of the contestant, setting aside the collocation and ordering the curator to make another report distributing the balance for distribution in his hands irrespective of the hypothecs and treating the hypothecary creditors as chirographic claimants only. Upon appeal this judgment was reversed with costs and the report of distribution and collocation made by the curator maintained and from this decision an appeal was sought to the Supreme Court of Canada. The respondents moved to quash the appeal on the ground that the pecuniary amount of the contestant's interest was not sufficient to give jurisdiction to the Supreme Court.

*Turcotte* on behalf of the respondents for the motion. Only the appellant's interest can be looked at to determine the amount in controversy. See *Flatt* v. *Ferland* (1); *Kinghorn* v. *Larue* (2).

*Geoffrion* Q.C. for the appellant contra. Under art. 742 C.C.P the appellant represents all the creditors of the insolvent estate and the amount in controversy is the value of respondent's claim of which the estate would get the benefit if the contestation succeeded.

The judgment of the court was delivered by:

(1) 21 Can. S.C.R. 32.

(2) 22 Can. S.C.R. 347.

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LACHANCE
v.
LA SOCIÉTÉ DE PRÊTS ET DE PLACEMENT DE QUÉBEC.

Taschereau J.

TASCHEREAU J.—This motion must be allowed. It is the well settled jurisprudence of this court that in cases where our jurisdiction is based on the pecuniary amount in controversy it is the pecuniary interest of the party appealing that has alone to be taken into consideration. *Flatt* v. *Ferland* (1); *Kinghorn* v. *Larue* (2). See *Allan* v. *Pratt* (3). Here, the appellant's interest does not amount to $2,000, and consequently we have no jurisdiction. True it is that the consequence of the appellant's contestation of the respondent's collocation might result in bringing back to the insolvent's estate a sum of over $2,000, but our jurisdiction does not depend on the possible consequence of a possible judgment. *Rodier* v. *Lapierre* (4). Mr. Geoffrion, in answering the motion, endeavoured to support the appeal on arts. 746 and 747 of the Code of Procedure. But these articles have not that effect. There is only one contestation here of the order of collocation, and we have not to determine whether the result of this motion would be different or not if there had been more than one contesting party, the united interests of whom would amount to $2,000. It will be time enough to determine that point when such a case comes up. Here this appellant, having a pecuniary interest to an amount less than the appealable amount, has no right to invoke other parties' rights to support his appeal. It is impossible to entertain it without overruling the jurisprudence of the court, a result which he cannot expect.

*Appeal quashed with costs.*

Solicitors for the appellant: *Pouliot & Pouliot.*

Solicitor for the respondent: *H. A. Turcotte.*

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(1) 21 Can. S.C.R. 32.
(2) 22 Can. S.C.R. 347.
(3) 13 App. Cas. 780.
(4) 21 Can. S.C.R. 69.

HARRIET MURRAY, ADMINISTRATRIX &c. AND MERRITT A. CLEVELAND (PLAINTIFFS)..... } APPELLANTS;

1896

*Mar. 3.

*May 18.

AND

HER MAJESTY THE QUEEN (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*

A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, stating the value of such work and that it had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient. In an action for 90 per cent of work done the Exchequer Court gave judgment for the Crown because the required certificate had not been given. On appeal the defence of want of certificate was waived by the Crown.

*Held*, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer.

*Held* also, that the contractors could sue for monthly payments without waiting the final completion of the work.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

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MURRAY v. THE QUEEN

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the Crown.

The plaintiffs now represent the late firm of Murray & Cleveland, contractors for building locks and other work on the Galops Canal. The engineer of the works at the outset was Mr. Page who had, under the powers given him by the contract, directed that a dam for holding the water in the locks should be made considerably deeper than was contemplated originally, and to obtain the necessary earth the excavations from the locks were used. Mr. Page having died his successor, Mr. Trudeau, certified for payment to the contractors of the extra earth used at the contract price and also for the cost of carrying away the earth excavated from the locks. When Mr. Schreiber took charge on the retirement of Trudeau he had the work remeasured and re-classified considering that the contractors should not have been paid for the excavated earth under the two heads and he deducted a certain amount from what was due the contractors as representing such overpayment. The main question for decision on the appeal was as to Mr. Schreiber's right to review his predecessor's work, and another question was as to the contractor's right of action on a progress estimate.

The sections of the contract affecting the case, and the other material matters, are fully set out in the judgment of the court.

*McCarthy* Q.C. and *Ferguson* Q.C. for the appellants.

*Hogg* Q.C. for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—This is an appeal from the judgment of the Exchequer Court rendered on the 23rd of

(1) 5 Ex. C.R. 19.

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November, 1895, setting aside a judgment of that court given on the 14th of December, 1894, which latter judgment declared the claimants entitled to the full amount of their claim, viz.: $8,907.30, and costs.

On the 14th of November, 1888, the claimant firm entered into a contract with the Crown, represented by the Minister of Railways and Canals, for "the construction of a lift-lock, guard-lock and supply weir, also the deepening and widening of the upper or western end of the "Galops Canal" on the St. Lawrence River, the works under the contract being still in progress but nearly completed.

The contract was not for a specified lump sum, but contained a schedule of prices to be paid by the Crown for work done and materials provided by the contractors. The 25th clause was as follows:

25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction and stating the value of such work computed as above mentioned—and upon approval of such certificate by the Minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractors to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained till the final completion of the whole work to the satisfaction of the Chief Engineer for the time being having control over the work, and within two months after such completion the remaining ten per cent will be paid. And it is hereby declared that the written certificate of the said engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractors to receive or be paid the said remaining ten per cent or any part thereof.

And the 8th clause:

8. That the engineer shall be the sole judge of work and material in respect of both quantity or quality, and his decision on all questions in dispute with regard to work or material, or as to the mean-

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ing or intention of this contract, and the plans, specifications and drawings shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractors be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractors to be paid therefor.

And the 5th clause:

5. The engineer shall be at liberty at any time, either before the commencement or during the construction of the works or any portion thereof, to order any extra work to be done, and to make any changes which he may deem expedient in the dimensions, character, nature, location, or position of the works, or any part or parts thereof, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done, or the cost of doing the same, and the contractors shall immediately comply with all written requisitions of the engineer in that behalf, but the contractors shall not make any change in or addition to, or omission, or deviation from the works, and shall not be entitled to any payment for any change, addition, deviation, or any extra work, unless such change, addition, omission, deviation, or extra work shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid for any addition or extra work shall have been previously fixed by the engineer in writing, and the decision of the engineer as to whether any such change or deviation increases or diminishes the cost of the work, and as to the amount to be paid or deducted as the case may be in respect thereof, shall be final, and the obtaining of his decision in writing as to such amount shall be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration constitutes, in the opinion of the said engineer, a deduction from the works, his decision as to the amount to be deducted on account thereof shall be final and binding.

And item 6 of the schedule of prices reads as follows:

6. EARTH EXCAVATION.—Over water-line for the widening of canal on the north side from a point 100 feet east of present guard-lock to end of section, including all kinds of materials (solid rock and boulders containing one-fourth of a cubic yard excepted), hauling the same across canal and for a distance of 700 feet to 3,600 feet to form a dam of round bay shoal to enclose space for lock, per cubic yard, $0.50.

The demand which the appellants now seek to enforce is for a balance alleged to be due for work done

and materials furnished under the contract between the 1st of February and the 31st of August, 1893. They allege that the work done during these months as certified by the departmental engineers amounted in value to the sum of $88,541.53 ; that they were entitled to be paid under clause 25 above set out that amount, less 10 per cent, viz., $79,687.38, but that they were paid but $70,790, leaving the difference still due. Leaving out of view in the meantime certain technical defences as to the form of certificates and the approval of the Minister, the Crown substantially admits the truth of these allegations, but claims the right to deduct from that sum an equivalent amount under the following circumstances (and which I take in substance from the appellants' factum, admittedly correct in these particulars) : This counter-claim relates to 39,500 cubic yards of earth used to form a certain dam described in the specifications. This dam was for the purpose of enclosing after the manner of a cofferdam the space covered by water to be occupied by the new locks. The evidence shows that the dam was originally intended to be of a depth of about seven feet below the natural bed of the river ; that it was contemplated that all the material necessary for it would be obtained at McLaughlin's Point, as described in clause 12 of the specifications, and that the claimants were to be paid 50 cents per cubic yard for this material as mentioned in item 7 of the schedule of prices. After the commencement of the work, however, the then Chief Engineer, Mr. John Page, decided, owing to the soft nature of the material in the river bed, to increase the depth of the foundation of the dam to about 23 feet below the river bed. This decision was carried out, the result being that a great deal more of material was required for the dam. The contractors exhausted all that was to be got at McLaughlin's Point, and thereupon they

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were directed by the Chief Engineer to utilize for the dam so much of the material excavated from the lock pits and the entrances thereto as would be found suitable for the purpose, and were told that they would be paid for putting it on the dam at the same rate as if they had taken it from McLaughlin's Point, that is to say 50 cents per cubic yard, in addition to the prices mentioned in items 8 and 13 of the schedule for excavating it, it being contemplated according to the specifications and schedule that all the material taken for the lock pits and entrances would have been wasted in Round Bay. 39,588 cubic yards of material taken from the lock pits and entrances were found suitable for the dam and carried over and put into it instead of being wasted in Round Bay. This was done principally in the summer and autumn of 1889 and the spring of 1890. The evidence is meagre on the point, but so far as it goes it establishes that the expense of removing material from the excavations to the dam was in excess of the expense of removing it to Round Bay. As will be seen later on Mr. Page and his successor, Mr. Trudeau, allowed 50 cents per cubic yard for this excess of expense, and Mr. Schreiber, the present engineer, was willing to allow 25 cents for it.

In the estimates that were prepared in 1889 and in the spring of 1890 no allowance was made by the resident engineers for this work so far as putting the material into the dam was concerned, no formal instructions having been given them by Mr. Page, but the appellants were paid for the excavation of it under items 8 and 13 of the schedule.

Mr. Page died in July, 1890, not having included in the estimates up to that time the work in question. In September, 1890, on the contractors' application and after investigation and inquiry, the resident engineer, Mr. Haycock, as directed by the then Chief

Engineer, Mr. Trudeau, with the approval of the then Minister of Railways and Canals returned it one-half in the October estimate and one-half in the November estimate for 1890, under item 6 of the schedule of prices at 50 cents a cubic yard—the same as the material taken from McLaughlin's Point.

These estimates were signed by the Chief Engineer, Mr. Trudeau, and approved of by the Minister, and the amount estimated, less proper deductions, paid over to the contractors, and from month to month thereafter, until March, 1893, the works progressed and estimates were periodically issued and the moneys certified as due thereunder paid.

In December, 1892, Mr. Trudeau ceased to be Chief Engineer and was succeeded by Mr. Collingwood Schreiber, C.E., who certified the monthly estimates for December, 1892, and February, 1893, there being none for January. After this last estimate it would seem that Mr. Schreiber caused a new examination and measurement of the work to be made and no subsequent estimate was made until September, 1893, when one was made numbered 45, to which special reference must be made. By this examination and re-measurement Mr. Schreiber, having ascertained that the contractors had been paid for excavating the 39,588 cubic yards according to the prices partly of item 8 and partly of item 13 of the schedule, and also at 50 cents a cubic yard for carrying it over and putting it into the dam, formed the opinion that they should not have been paid for it under both of these classifications and reported that the 50 cents a cubic yard should be taken back from them as having been improperly paid. This action of Mr. Schreiber was communicated to the contractors and resulted in the estimate no. 45 above referred to being made, by which 25 cents a yard was allowed to the contractors for the

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39,588 cubic yards as "estimated extra cost of depositing it (the material) according to order in dam" instead of the 50 cents a cubic yard which had been previously allowed and paid under the estimates for October and November, 1890.

The contractors refusing to accept the 25 cents for the 50 cents a cubic yard the same order in council directed a reference to the Exchequer Court to determine whether the 50 cents had been regularly and properly allowed under the provisions of the contract, and whether even if it had not been so regularly and properly allowed the Department could set up these irregularities and take advantage of them after payment, or whether these irregularities had not been thereby waived, and also whether Mr. Schreiber had the right to revise the former estimates in this respect and reduce the price from 50 cents to 25 cents a cubic yard. The reference was in due course made to the Exchequer Court and the case was tried upon such reference upon the examination of witnesses, but without pleadings; and we are now called upon to decide whether upon the evidence and the admissions of counsel there should be judgment for the contractors or for the Crown.

It is, I think, to be regretted, that in the present case there are no formal pleadings. At the argument before us, when the case was presented, it was difficult to apprehend all the points upon which the Crown might or intended to rely as a defence to the claim. For instance, the contract provided that the whole work was to be completed on or before the 15th of June, 1891, and that time was to be considered as of the essence of the contract. Did the Crown rely upon these stipulations? The contract provided (see clause 25), that before any payment could be made there should be a certificate that the work had duly been executed to the satisfaction

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of the Engineer. No such certificate, in terms, had ever been signed, although, without detriment to the public interest, large amounts had been paid under it. The estimate and certificate of September, 1893, had been acted upon by the Department, and the contractors had obtained the moneys thereby appearing due, although no evidence appeared upon the face of the document that the Minister of Railways and Canals had approved of it, and although the contract had made his approval a condition precedent to payment. Clause 25 of the contract required that there should be as a condition precedent to payment so far as the September, 1893, estimate is concerned a certificate in substantially the following form, signed by the Chief Engineer and countersigned by the Minister, viz.:

I certify that the work for or on account of which the certificate is granted, viz.: for the months of February, March, April, May, June, July and August, 1893, has been duly executed to my satisfaction, and I state the value of such work computed according to the contract schedule of prices to be the sum of $88,541.53.

.....

Approved. Chief Engineer.

.....

Minister of Railways and Canals.

No such certificate was ever signed, but as a substitute for it, and (as I suppose) in intended compliance with the provisions of the contract there was this document attached to a detailed statement of all work previously done under the contract:

I hereby certify that the above estimate is correct, that the total value of work performed and materials furnished by Messrs. Murray & Cleveland up to the 31st August, 1893, is $722,592.53, and the drawback to be retained $72,252.53, and the net amount due $650,340.00 less previous payments.

(Sgd.) E. DENIEL,
TOM S. RUBIDGE.,
Suptg. Engineer.

Engineer's Audit Office,
Department of Railways and Canals.

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Total amount certified on this contract $722,592.53. All previous payments to be deducted.

(Sgd.) COLLINGWOOD SCHREIBER,
Chief Engineer.

Examined and checked,
(Sgd.) GEO. A. MOTHERSILL.
27th Sept., 1893.

Progress and final Estimate Sheet.

Ottawa, 27th September, 1893.

It was manifest that a certificate of this character did not comply with the terms of clause 25 of the contract, although it was doubtless sufficient for the purposes of audit. There was no certificate, in terms, that the work had been executed to the satisfaction of the Chief Engineer; there was no approval by the Minister of the certificate of the Chief Engineer; there was no specific statement in the certificate itself of the value of the work done since the issue of the last previous estimate. These and other minor objections presented themselves to us as conclusive reasons, if urged and relied on, why the contractors could not as a matter of technical law (though not of natural justice) maintain their action, and there being no pleadings Mr. Hogg, Q.C., the learned counsel for the Crown, was asked by members of the court to define what apparent defences were waived, with a view of ascertaining some idea of the substantial defence of the Crown. The following is the minute of the admission of the Crown counsel as noted by the learned Chief Justice in his note-book and read to counsel and assented to by them (and which admission, I think, was under the circumstances most properly made):

Crown does not raise any purely technical formal objection that certificate does not state (shew) on its face that there was no approval of Minister, and also no objection that certificate does not state work done to the satisfaction of the Engineer in so many words, and further (admits) that certificate and estimate are sufficient in form.

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With this admission before us only two questions would seem to arise on this appeal. First, whether we can gather from the certificate and from the estimates to which it is attached (and which estimates must be considered as forming part of it) the value of the work done between 1st February and 31st August, 1893. If so, under the admission, that amount may be considered as having been certified by the Engineer and approved by the Minister. In other words, we will have a certificate such as I have above suggested as the proper one under clause 25 of the contract with the value of the work done in those months filled in, and that sum less 10 per cent will be the amount payable to the contractors.

And the 2nd question will be: Assuming the certificate shews the value of the work in respect of which it is given, can the Engineer in the present case go behind a previous decision either of himself or his predecessor and make the deduction which is here sought to be made?

As to the first question. The estimate we have to consider is that of 31st August, 1893, numbered 45, and it is to that estimate that the certificate I have set out above is attached. That certificate states that the estimate is correct. If then we can gather from it the amount of work done during the months in respect to which it relates we have a certificate under the admissions substantially as required by clause 25 of the contract. Now these estimates shew that the amount of such work was $88,541.53. That abundantly appears from an intelligent perusal of the documents themselves as well as in a statement in the case prepared by the Railway Department, where it is in effect admitted that the estimates shew the value of the work in question to be the sum stated. All that portion of the certificate which relates to the total value of the work

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done and to the amount of total deduction made is no necessary part of a certificate to a monthly estimate. It may be convenient for departmental purposes; it may be accurate or inaccurate; but it is not required under the contract; the contractors are not bound by it, and as to them it is mere surplusage.

The result is that so far as the certificate is concerned there has, under the admissions. been a substantial compliance with the requirements of the contract, and the contractors have shown themselves entitled to the amount so certified, less the ten per cent d eduction.

The further question remains: Can the Crown give effect to the Chief Engineer's proposal that the contractors refund one-half of the amount received by them upon the certificate of the late Engineer approved as it was by the Minister, for the 39,588 cubic yards of excavated material?

I am of opinion that it cannot. There had been a question as to the character of that work, as to its classification and its value, and that question had been determined by the then Engineer. Under clause 8 above set out he was made the sole judge and his decision was declared to be final. This was one of these very cases for which clause 8 was intended to provide. The Engineer did decide, the Minister approved, and the money was paid. I do not think that in the absence of fraud a decision so come to and acted upon can be re-opened or reversed by a succeeding engineer, or be regarded otherwise than as final and conclusive as between the contractors and the Crown. See the case of *Jones* v. *Jones* (1), cited in Emden on Building Contract (2) in support of the proposition that when a certificate had been given by an architect he was *functus officio*.

(1) 17 L. J. Q. B. 170. (2) 2 ed. p. 126.

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Apart, however, from the purely legal question the merits as disclosed in the evidence would appear to be with the contractors. There was, as already pointed out, some evidence that there had been an overcharge but that evidence was far more than balanced by the evidence the other way. The onus was on the Crown to prove the fact of overpayment. It has signally failed to do so, and as the case at present stands it would appear that the original classification was proper and the payments made under it justly due.

In expressing this opinion I am not to be understood as holding the view that monthly estimates under this contract may not be revised. Under clause 25 the monthly measurements are not intended or expected to be exactly accurate; they are mere approximations coming as nearly as may be to the reality, but always subject to the final measurement when the work is completed and the balance due the contractors has to be determined.

But I am of opinion that when in such a case as the present a classification of a specified work has been made under clause 5 or 8 of the contract, and a price fixed and the money paid, such a determination is final, and in the absence of fraud cannot under this contract be reviewed either by the engineer who made it or by his successor.

One further point remains. The Crown contends that the contractors are not in any event entitled to proceed by action upon a progress estimate. A simple perusal of clause 25 which contains an unqualified covenant on the part of the Crown to pay the sum less 10 per cent thereby certified for will show that such contention is untenable.

In my opinion the appeal should be allowed with costs, including the costs of the rehearing below, and the original judgment of Mr. Justice Burbidge restored

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It need only be added that had the case come before that learned judge in the same way as it was presented to us his judgment would manifestly have been the same as ours.

*Appeal allowed with costs.*

Solicitor for the appellants: *A. Ferguson.*

Solicitors for the respondent: *O'Connor & Hogg.*

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*May 18.
*May 21.

ISAIE DUFRESNE *et al.* (DEFENDANTS)..APPELLANTS;

AND

ALFRED GUÉVREMONT (PLAINTIFF)..RESPONDENT.

*Appeal from Court of Review—Appeal to Privy Council—Appealable amount—Addition of interest—C. C. P. arts.* 1115, 1178, 1178*a*—*R. S. Q. art.* 2311—54 *&* 55 *V. (D.) c.* 25, *s.* 3, *ss.* 3—54 *V. (P.Q.) c.* 48 *(amending C. C. P. art.* 1115*).*

Under 54 & 55 V. (D.) c. 25, s. 3, ss. 3, there is no appeal to the Supreme Court of Canada from a decision of the Court of Review which would not be appealable as of right to the Privy Council.

Art. 2311 R. S. Q. which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered if they are different" applies to appeals to the Privy Council.

Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal. *Stanton* v. *Home Ins. Co.* (2 Legal News 314) approved.

MOTION to quash an appeal from the decision of the Superior Court sitting in review at Montreal, affirming the judgment of the Superior Court, district of Richelieu, which condemned the defendants to pay the

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*PRESENT:—Sir Henry Strong C. J. and Taschereau, Sedgewick, King and Girouard JJ.

amount claimed by the plaintiff's action with interest and costs.

The plaintiff sued on the 26th December, 1893, for $2,150 with interest at 8 p. c. per annum from date of action till paid, with costs. The action was brought for the recovery of the balance due under a written contract for the construction of an engine and other machinery for which defendants had agreed to pay $3,000 on terms therein mentioned, and upon trial of the cause the issues were found in favour of the plaintiff and the defendants were condemned by the judgment rendered to pay the plaintiff $2,150, with interest as claimed from the institution of the action and costs. This judgment was affirmed with costs against the defendants upon their appeal to the Superior Court sitting in review. The amount of the judgment in dispute with interest added as claimed from the date of action to the 15th of May, 1896, when the appeal was filed, was $2,559.96.

*Ouimet* Q.C. and *Emard* for the respondent, moved to quash the appeal on the ground of want of jurisdiction, and cited C.C.P. arts. 1178 and 1178a; 54 & 55 Vict. (D.) ch. 25, sec. 3, subsec. 3.

*Fleming* Q.C. and *Germain*, for the appellants, contra. The jurisdiction of this court depends upon whether there would be an appeal allowed from the judgment now in question to the Judicial Committee of the Privy Council. The practice of the Privy Council has been to add interest when necessary in order to raise the sum recovered to the appealable amount. *Boswell* v. *Kilborn* (1); *Macfarlane* v. *Leclaire* (2); *Gooroopersad Khoond* v. *Juggutchunder* (3); *Quebec Assurance Company* v. *Anderson* (4); *In re Marois* (5). The Privy

(1) 12 Moo. P. C. 467.
(2) 15 Moo. P. C. 181.
(3) 13 Moo. P. C. 472.
(4) 13 Moo. P. C. 477.
(5) 15 Moo. P. C. 189.

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Council also exercises its inherent power of granting appeals although not provided for by provincial statute. The jurisprudence of the Privy Council must govern appeals to that court, and where the jurisdiction of this court depends upon whether or not an appeal would lie to the Privy Council the same rules should be followed in determining the rights of the parties, and the court ought to take into consideration that the condemnation asked for by the demand and awarded by the judgment appealed from imposes upon the appellants liability for both capital and interest amounting in all to over £500 sterling. The questions involved have arisen under a contract for $3,000.

TASCHEREAU J.—This case comes up on a motion to quash. It brings up a question upon which this court has not yet passed, though it was noticed by some of the judges in *Couture* v. *Bouchard* (1). The point to be determined is whether under subsec. 3 of sec. 3, of 54 & 55 V. c. 25, an appeal lies to this court from the Court of Review in cases where no appeal lies from the Court of Review to the Privy Council. We find no difficulty in holding that it is impossible to construe that subsection otherwise than it has been done in the case referred to of *Couture* v. *Bouchard* (1), by Gwynne and Patterson JJ. If the party aggrieved by the judgment has no right of appeal to the Privy Council he has no right of appeal to this court. But the appellant, who is condemned by the judgment of the Court of Review to pay a sum exceeding £500 stg., by adding to the amount claimed in first instance the interest accrued before the judgment, contends that under the decisions of the Privy Council such interest given by the judgment as part of the demand should be taken into consideration, when the right to appeal

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

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depends upon the amount in controversy. That would appear to be so as a general rule where the right to appeal depends upon the amount in controversy on the appeal. *Gooroopersad Khoond* v. *Juggutchunder* (1); *The Quebec Fire Assur. Co.* v. *Anderson* (2); *Bank of New South Wales* v. *Owston* (3); *Quebec, &c., Railway Co.* v. *Mathieu* (4). But does this apply to appeals to the Privy Council in the province of Quebec, wherein it is enacted in express terms (art. 2311, R. S. Q). that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different"? These are plain words, susceptible, it seems to me, of but one construction, that one given to it by the Court of Appeal in *Stanton* v. *The Home Ins. Co.* (5). There the amount claimed was for the very same amount of $2,150 claimed in the present case, and the appellant, as here, to support his right of appeal to the Privy Council, contended that the interest accrued since the institution of the action gave him the statutory right of appeal. But the court held that under the statute (now art. 2311 R. S. Q.) that contention could not prevail. Here are the *considérants* of the judgment refusing leave to appeal:

Considering that it is provided by sec. 25 of ch. 77, C. S. L. C., that whenever the right to appeal from any judgment of any court is dependent on the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different.

And considering that the amount which the appellant demanded in and by his declaration in this cause, was less than £500 sterling, to wit, a sum of $2,150, and that according to law and the practice of this court, the interest accrued since the action was served and returned into court cannot be added to the principal sum demanded in order to determine the right of appellant to appeal from the judgment ren-

(1) 8 Moo. Ind. App. 166; 13 Moo. P. C. 472.
(2) 13 Moo. P. C. 477.
(3) 4 App. Cas. 270.
(4) 19 Can. S. C. R. 426.
(5) 2 Legal News 314.

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dered in this cause; the court doth reject the motion of the appellant for leave to appeal to Her Majesty in Her Privy Council, with costs.

The application for leave to appeal was made, it is true, in that case by the plaintiff, whilst here, the appeal is taken by the defendant, but there is no room that I can see for the contention that the statute does not apply to both cases. *Laberge* v. *The Equitable Life Association* (1). And in *Grand Trunk Railway Co.* v. *Godbout* (2), the Court of Appeal applied the rule to an appeal by the defendant. See also *Richer* v. *Voyer* (3).

It might perhaps be argued here, as we are not bound by those decisions, that this enactment does not apply to appeals to the Privy Council. But as said by Dorion C.J. in that same case of *Grand Trunk Railway* v. *Godbout* (2), the words of the enactment do not admit of such contention. They apply to *all* appeals in the province, and in the Consolidated Statutes of 1860 they are to be found in the same statute that provides for the appeal to the Privy Council. And that statutory right of appeal to the Privy Council over which the province has a legislative control, not only never questioned by the Privy Council itself, but expressly recognized in all the cases from the province wherein the question came up before their Lordships, (without, of course, interfering with Her Majesty's prerogative rights on the subject) cannot, by any rule of construction that I know of, be excluded from it. That being so this appeal must be quashed, as the appellant has no right of appeal to the Privy Council.

It is needless to say that we do not lose sight of the ruling of the Privy Council in *Allan* v. *Pratt* (4), and that line of cases, but, as remarked by Dorion C.J. in the case of *Stanton* v. *The Home Ins. Co.* (5) the attention of the Privy Council does not appear to have been drawn to this particular enactment.

(1) 24 Can. S. C. R. 59.
(2) 3 Q. L. R. 346.
(3) 2 R. L. 244.
(4) 13 App. Cas. 780.
(5) 2 Legal News 314.

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As for *Monette* v. *Lefebvre* (1) in this court, and our decisions in the same sense, they have no application. The Quebec statute (art. 2311 R. S. Q.) though applying to the appeals to the Privy Council, does not apply to appeals to this court, though now we have subsec. 4 of 54 & 55 V., c. 25 in the same sense.

The appeal should be quashed, but without costs, as the point is a new one, and the judgment is not founded upon precisely the same grounds as were urged by the respondent at the argument of the motion.

*Appeal quashed without costs.*

Solicitors for appellants: *Germain, Olivier & Désy.*

Solicitors for respondent: *Ouimet, Emard & Brousseau.*

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ALPHONSE CHARLEBOIS AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

J. B. DELAP AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Nov. 6, 7, 8, 9, 11, 12, 13, 14, 15.

1896

*Mar. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Joint Stock Company—Ultra vires contract—Consent judgment on—Action to set aside.*

A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as are reasonably incidental thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.

If a company enters into a transaction which is *ultra vires* and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding upon the parties as one obtained after a contest and will not be set aside because the transaction was beyond the power of the company.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 16 Can. S. C. R. 387.

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Chancellor who set aside a judgment by consent in favour of the defendant Charlebois.

This action was brought by the Great North-west Central Railway Company to set aside two judgments obtained by the appellant Charlebois against the company, in an action by Charlebois to recover a balance claimed to be due to him upon a contract for the construction of a section of that company's line of railway.

The Great North-west Central Railway Company was a company organized for the purpose of constructing a line of railway from some point on the Canadian Pacific Railway in Manitoba at or near Brandon in a north-westerly direction to Battleford. Another company under two different names had previously been in existence for the purpose of constructing the same railway, but had been unable to do so.

The Souris & Rocky Mountain Railway Company was incorporated by an Act of the Parliament of Canada, passed in the year 1880, and in the year 1884 the name of the company was changed to The North-west Central Railway Company. Construction was commenced and carried on during the summer and autumn of the year 1883, and the then contractors (who were the present defendants, McDonald and Preston) claimed to have expended a large sum of money and that a balance was due to them, amounting to $126,000.00 and upwards by the old company. This company failed to carry on the work, and in 1886 by an Act 49 Vict. ch. 11, the Governor in Council was authorized to grant to the North-west Central Railway Company, or to such other company as should undertake the construction of the railway, Dominion

lands to the extent of 6,400 acres for each mile of railway, for a distance of 450 miles.

The Governor in Council was also authorized to grant a charter for the incorporation of a new company, which upon being published in the Canada Gazette should have force and effect as if it were an Act of the Parliament of Canada.

The defendants Clemow, Charlebois, Allan, Murray and one Charles T. Bate, since deceased, in 1886 made application for a charter, and a charter was granted pursuant to the power given by the last mentioned Act, and was published in the Canada Gazette of the 6th November, 1886.

In September, 1889, the other shareholders of the company agreed to transfer their shares to Charlebois, who entered into an agreement with one Codd, who had a claim against the original company, and one Stevens, an English solicitor, who professed to represent English capitalists. In form the agreement was with Codd, and by it Charlebois undertook to carry out a previous arrangement which had fallen through whereby fifty miles of the road was to be completed and transferred to Codd for £200,000 sterling, £50,000 to be paid on the transfer of the shares and execution of a construction contract. Stevens's connection with the agreement was by an endorsement signed by him guaranteeing the payment to the satisfaction of Charlebois' bankers.

In pursuance of the above, all the shareholders of the company transferred their shares to Stevens and four others named by him, who became the directors of the company, and a construction contract was entered into with Charlebois for the building of the fifty miles of road. In September, 1891, Charlebois, claiming to have completed the work, brought an action against the company in Ontario for recovery of a balance due

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to him therefor in which by consent of counsel a judgment was entered in his favour, the material portions of which are set out in the judgment of Mr. Justice King on this appeal. By its terms the company was given immediate possession of the railway and was allowed six months to pay Charlebois on condition that the whole of the bond issue should be deposited within one month with a deposit company in England. It also directed that the sum payable to Charlebois should be charged in favour of certain subcontractors and others having claims against the company under former contracts for construction of the road.

The plaintiffs Delap and Mrs. Mansfield had agreed with Codd and Stevens to advance money to enable them to acquire the road under the agreement of September, 1889, and had made advances on security of the bonds of the company. In 1893 they brought an action to have the consent judgment set aside, alleging that the agreement of September, 1889, was *ultra vires;* that Codd and Stevens had entered into an agreement of partnership to share the profits made by the transaction; and that Charlebois had taken the proceedings he did take to harm the company and had been guilty of fraud against the company and these plaintiffs. The case was heard by the Chancellor, who ordered the judgment to be set aside, and his judgment was affirmed by the Court of Appeal. Charlebois, and the other defendants interested in the distribution of the moneys recovered by the judgment, appealed to the Supreme Court.

*McCarthy* Q.C. and *Chrysler* Q.C. for the appellant Charlebois. The contract having been executed by Charlebois it will not be set aside except upon terms which will do justice to all parties. See Brice on *Ultra Vires* (1); *Webb* v. *Shopshire Railway Co.* (2).

(1) 3 ed. pp. 693, 697, 700. (2) [1893] 3 Ch. 307.

The fact that a judgment enforces *ultra vires* terms of a contract is not a reason for setting it aside. *Ashbury Railway Co.* v. *Riche* (1); *In re South American & Mexican Co. Ex parte The Bank of England* (2).

A judgment by consent in the presence of the court is *res judicata* as completely as a judgment *in invitum*. *In re South American & Mexican Co.* (2). *Nashville Railway Co.* v. *United States* (3); *United States* v. *Parker* (4).

An action will not lie in Ontario to set aside a judgment. *Dumble* v. *Cobourg, &c., Railway Co.* (5).

*W. Nesbitt* for the appellants, The Crossen estate and others, contended that however the judgment might be dealt with as against Charlebois it could not be disturbed as against these appellants who were to share in the distribution of the moneys citing *The Bellcairn* (6); *Huddersfield Banking Co.* v. *Lister* (7).

*Robinson* Q.C. for the appellants, The Union Bank, The Commercial Bank and others, referred to *Hammond* v. *Schofield* (8).

Lewis followed for the Union Bank and Nugent for Schiller and McDonald, sub-contractors.

*W. Cassells* Q.C. and *Howland* Q.C. for the respondent Delap. The judgment ordered the road to be sold piecemeal which it should not have done. *Henderson* v. *The Bank of Hamilton* (9); *British South Africa Co.* v. *Companhia de Mocambique* (10). And see *Grand Trunk Railway Co.* v. *Bickford* (11).

A judgment by consent is never *res judicata*. *Huddersfield Banking Co.* v. *Lister* (7).

(1) L. R. 7 H. L. 653.
(2) [1895] 1 Ch. 37.
(3) 113 U. S. R. 261.
(4) 120 U. S. R. 89.
(5) 29 Gr. 121.
(6) 10 P. D. 161.
(7) [1895] 2 Ch. 273.
(8) [1891] 1 Q. B. 453.
(9) 23 Can. S. C. R. 716.
(10) [1893] A. C. 602.
(11) 1 Can. S. C. R. 696.

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The contract sued upon was *ultra vires*. What is not expressly or impliedly permitted by a company's charter is prohibited. *Ashbury Railway Co.* v. *Riche* (1); *Attorney General* v. *Great Eastern Railway Co.* (2).

*Arnoldi* Q.C. and *Brisiol* for the respondents, the bondholders, referred to *Wheatley* v. *Silkstone Coal Co.* (3); *In re Land Credit Co.* (4); *Bargate* v. *Shortridge* (5).

*McCarthy* Q. C. in reply.

TASCHEREAU J.—I am of opinion that we should allow the principal appeal with costs. I adopt my brother King's reasoning. The cross-appeal by the plaintiffs should be dismissed with costs. The incidental appeals of the Banks, the Crossens, Schiller and Preston, Allan, Devlin and others should all and every one of them be dismissed with costs. These appeals were quite unnecessary, and I should have been disposed to give treble costs against these appellants had it been in our power to do so. I agree with what my brother Gwynne says on these incidental appeals.

GWYNNE J.—However much we may sympathize with the plaintiff Delap, and what upon the evidence does certainly appear to be the cruel way in which he has been involved to the extent of some ninety thousand pounds expended in the construction of this road, we must bear in mind that we are not adjudicating upon a case wherein his right to redress against any persons for the injuries of which he may have reason to complain are submitted to the court for adjudication thereon. The action is not one instituted by Delap against the railway company for the purpose of having any question as to his rights and in-

(1) L. R. 7 H. L. 653.
(2) 5 App. Cas. 473.
(3) 29 Ch. D. 715.
(4) 4 Ch. App. 460.
(5) 5 H. L. Cas. 297.

terest in certain bonds of the company in his hands determined by the judgment and decree of the court. Whether Delap is or is not a holder of bonds of the company in the only right in which he claims to hold them, namely, as a pledge and security for certain advances made by him to the company, is a matter of no importance in this suit, as the company are acting in concert with him as co-plaintiffs in seeking relief against a consent judgment obtained in an action instituted by the now defendant Charlebois as plaintiff against the now plaintiffs the railway company, upon the ground that such judgment was obtained solely as is charged upon the fraudulent consent thereto of the then president of the company; and upon the ground further that the judgment contains certain declarations and directions as assented to by the company which were *ultra vires* of the company to assent to and of the court to decree. True it is that the statement of claim contains an allegation, wholly unnecessary as it appears to me, to the effect that Delap is a holder of bonds in the company and stating the circumstances under which and the consideration for which he became such holder, but he does not (and framed as the suit is he could not successfully) claim any special relief as such bondholder. No relief is prayed different from that which is prayed by the company. Whether Delap is or is not the holder of the bonds of which he claims to be holder would have been a question of importance in this suit if he was sole plaintiff claiming a right as bondholder to set aside the consent judgment upon the ground of its being for any reasons fraudulent or *ultra vires* as against the holders of bonds, but no such question arises here for whatever irregularity if any there was in the first institution of the suit by Delap claiming relief upon behalf of himself and all other shareholders except those excepted, there

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can be no doubt that the railway company are now plaintiffs and are upon the record co-plaintiffs with him, and the company have no doubt a right to the relief prayed if a case warranting such relief being granted is established. The courts below have determined, in which I concur, that Delap's joinder with the company as a co-plaintiff if objectionable originally cannot now be a matter of any importance whatever, and the conclusion from such adjudication in my opinion is that the judgment of the Court of Appeal at Toronto which has assumed to declare—

> that the bonds mentioned in the suit were not validly pledged by the company to the plaintiff James Bogle Delap and that the plaintiff Delap was not entitled to hold the £465,000 face value of bonds in his control brought into court in this action by him, for all or any moneys owing to him, and that the said bonds were not nor were any of them pledged by the said company to him for the repayment of all or any moneys owing to him by the company and that the claim of the respondent Delap to enforce the same should be dismissed without costs here or below—

must be set aside as an adjudication upon a matter for adjudication upon which the suit is not framed and in respect of which no relief is prayed. As already pointed out, the suit is not framed for any such purpose. The only relief prayed is the setting aside of the consent judgment for the reasons stated in the statement of claim. To the whole of the relief prayed the plaintiffs the railway company are entitled if the case as it is presented should be established. The 17th, 18th and 19th paragraphs of the learned Chancellor's judgment must in my opinion be expunged for a like reason from his judgment for the learned Chancellor therein pronounces a judgment affirming the validity of the pledge of the bonds to Delap which as already observed was a declaration not warranted by the frame of the suit any more than was the judgment of the Court of Appeal for Ontario negativing such pledge and all

right of Delap to the bonds by way of pledge or otherwise. By the erasure of these paragraphs from the learned Chancellor's judgment the parties interested, that is to say, the company and Delap as having actual possession of the bonds will be able to settle between themselves their respective rights. Until they shall differ upon the matter and shall submit their difference to the court it will be expedient to withhold the expression of a judicial opinion upon the subject. As to the residue of the learned Chancellor's judgment I do not think it necessary to refer to any of the matters in evidence further back than the 7th September, 1889, for I agree with the view taken by Mr. Justice Burton that upon that day the evidence shows clearly that the agreement of April, 1889, which was the *sine quâ non* foundation of the agreement of July, 1889, which Delap, by the advice of his solicitors the Messrs. Stevens & Co. entered into with Codd was entirely put an end to and absolutely abandoned. Thereupon, as the evidence also shows, Charlebois entered into an agreement with all of his co-shareholders in the company for the purchase at a fixed price of their respective shares upon which 30 per cent had been paid up and expended by the company. He then entered into negotiations with Codd and Stevens, who were then acting in concert as co-adventurers or co-partners, for the sale and transfer to them and their nominees of the whole of the shares which had been subscribed for and taken in the capital stock of the company including his own, and so to make such transferees of the stock sole members of the reorganized company who when so reorganized should give him a contract for building 50 miles of the railway of the company at the price or sum in the whole of £200,000 sterling equal to $973,133. These negotiations were finally reduced to a contract which substantially was as follows, that Charlebois should be

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paid £50,000 sterling=$243,333, upon the execution of the contract or certain other sums for rails during the progress of the work and the balance upon the completion of the 50 miles. Out of this balance, however, when paid there was an agreement between Charlebois and Codd that the former should pay to Codd $173,133 being the difference between $800,000 and £200,000 sterling for his the said Codd's personal use and benefit. Now, Charlebois's contract being for a fixed price for the transfer of the shares and for building of the road, it is manifest that he must acquire all the shares not held by himself by purchase from the persons holding the shares, and this manifestly was known to Codd and Stevens with whom he was contracting, and he must also transfer his own shares and cause all the shares owned by the other shareholders to be transferred to them and their assignees before the contract with the company for building the 50 miles of road could be executed; this also was well known to Codd and Stevens, who together with their nominees, claiming under them, were to constitute the company to execute the contract with Charlebois, and as the persons with whom Charlebois was negotiating and their nominees were to be sole members of the reorganized company to enter into a building contract with him in their corporate capacity, I cannot see that it was a matter of any importance to Charlebois how such persons when constituted into the reorganized company should arrange between themselves as individual shareholders and themselves as constituting the corporate body as to the manner in which the sum to be paid to Charlebois should be apportioned and entered in the books of the company; that was a matter easy of adjustment between themselves with which Charlebois had nothing to do. Neither the reorganized company nor the persons forming it had any concern

with the amount Charlebois might have to pay to his co-shareholders to procure the transfer of their shares as he had agreed to do; nor as to the manner in which or as to the funds out of which he should pay such amount, although it must have been well known to Codd and Stevens that the amount so to be paid by Charlebois must naturally constitute an element in his determining the amount to be paid to him, in case his proposal should be accepted; nor had they any concern with the amount of profit which Charlebois might probably derive from the contract if his proposal should be accepted further than to consider whether the amount demanded by him was in their judgment so large that they must decline acceding to it. It might be that the amount necessary to be paid to his co-shareholders for their shares would be more than he was prepared to pay in cash and he might possibly require to have the payment deferred until he should build the 50 miles of road and should receive the full amount then to be paid to him. It is apparent that the company was one of these companies formed, as is not unusual in this country, for the purpose of constructing railroads, not as purely commercial undertakings and not constructed wholly or chiefly with subscribed capital, but chiefly upon the security of government or municipal subsidies or both. In the present case the subsidy was a government land grant which could not be obtained by the company until they should enter into a contract for building 50 miles of road to be completed by a fixed date. A question has been suggested whether Charlebois's proposal was that he should procure the shares to be assigned and transferred as paid up in full or that he should transfer or procure them to be transferred as they then were with 30 per cent paid thereon, but I cannot see how any question upon this point, if any such does exist, between the parties to the transaction can affect the present case.

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Assuming the payment of 75 per cent upon the amount of stock which had been subscribed for prior to the 16th February, 1889, to be by force of the resolution of the old company payment in full of these shares, the amount necessary to pay such 75 per cent was very little short of the £50,000 sterling, and the evidence shows that upon that day Stevens, although it was with Delap's money, paid that amount to the company as originally organized upon the subscribed shares severally and respectively so as to make them to be actually and truly paid in full in conformity with the resolution of the company as formerly constituted. If Charlebois had agreed with Stevens to pay the shares up in full so as to transfer them as shares paid up in full it is plain that he did not do so unless Stevens paid the money upon the shares as a loan to Charlebois and upon his promise to repay Stevens the amount, which promise Charlebois has fulfilled. Of this we have no evidence, nor is it necessary that we should have any evidence upon the point in this case, for if Charlebois agreed with Stevens to pay up the shares in full and has not done so, it is Stevens who alone can call him to account for the nonfulfilment of his promise.

What the evidence establishes beyond all doubt is that on the 16th September, 1889, before the company was reorganized by the transfer of the shares to Codd and Stevens and their nominees, the shares were actually and truly and *bonâ fide* paid to the company to the amount of 75 per cent; and to that amount, or if that amount did under the resolution aforesaid constitute payment in full, then these shares in whosoever hands they now are must be held to be to all intents and purposes shares paid up in full or at least to the amount of 75 per cent, which amount the company has actually received and enjoyed the full benefit thereof. There

seems to be no foundation whatever for the suggestion that the payment of the money by Stevens on the 16th September, 1889, was merely fictitious. He paid the money, beyond all question, upon the shares and to the company who have applied it to their own purposes; no part of the money so paid has ever been returned; it is impossible therefore to say that the proceeding was in any respect fictitious or any thing else than an actual payment upon the shares and to the company. With any controversy between Delap and Stevens as to the propriety of the application in such a manner of Delap's money by Stevens this suit is not concerned.

There is not in my opinion any ground whatever for imputing fraud to Charlebois or to any person as regards the amount paid by Charlebois for the shares or for avoiding the contract entered into with him by the company as *ultra vires* in whole or in part by reason thereof or by reason of his having reimbursed himself therefor by the amount promised to him in that contract to be paid by the company. The company have in virtue of that contract acquired the government subsidy and they must in all justice abide by the terms of the contract with Charlebois in virtue of which they have acquired the subsidy, to the extent at least of $800,000 which appears to be the whole of the amount to be paid to, or which was asked by, Charlebois for his own benefit. In so far therefore as the learned Chancellor's judgment has reduced the consent judgment in respect of the moneys comprised in the £200,000 sterling as representing the value of the shares, it is in my opinion erroneous and must be reversed, but as to the $173,133 which was agreed to be paid to Codd and as security therefor was also included in the £200,000 sterling mentioned in the contract executed by the company, that amount being so imposed as a liability

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upon the company, constituted in my opinion a manifest fraud upon the company, and as the consent judgment appears to have been obtained solely upon the consent of the president Codd, the person to be benefited by that fraud, the consent judgment must be set aside at least *quoad* that amount which cannot be reduced by reason of any part thereof having been already paid by Charlebois to Codd or by reason of Charlebois having accepted any charge purported to be imposed by Codd upon the amount. It is Charlebois's misfortune, for which the company cannot be made responsible, that he should have paid to Codd any part of that sum before himself receiving it. As regards this $173,133 the learned Chancellor's judgment must in my opinion be maintained.

Now by deducting from the principal sum of $600,226 this sum of $173,133, we arrive at the sum of $427,093, or the precise sum which, if the whole work had been finished as provided for in the contract would have been then due to Charlebois in respect of $800,000 the whole of the sum named in the contract, which was really payable to him for his own benefit; but it is contended that in point of fact the whole work was not finished and therefore upon this point the learned Chancellor has directed a reference to the master. I should be very glad to be in a position to be able to determine this question without a reference for the enormous expense of this suit which already cannot be short of 25 per cent of the whole claim makes it extremely desirable to prevent if possible any further delay and the incurring the expense of an inquiry before the master. Perhaps the parties may be able to agree upon this point without prosecuting the reference which otherwise would be necessary.

The substantial variance which I thus make in the judgment of the learned Chancellor requires also vari-

ance in its form, and I think it should be varied as follows: Let the 1st, 2nd. and 3rd paragraphs remain. Expunge the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 14th, 16th, 17th, 18th, 19th, 25th, 26th and 27th paragraphs, and substitute therefor the following:

4. Insert for 4th paragraph the 11th paragraph of the learned Chancellor's judgment.

5. Insert for 5th the 12th paragraph of the learned Chancellor's judgment.

6. Declare that in so far as relates to the sum of $173,133, that sum being part of the sum of $200,000 named in the contract of the date of 16th Sept., 1889, and being made part of such sum for the sole benefit of the defendant, John Arthur Codd, the defendant, the said Charlebois, had no right to recover the same or any part thereof against the said company, and declare that by reason of that sum being included in the calculations whereby the sum of $622,226 mentioned in the consent judgment was arrived at the said consent judgment was and is fraudulent as against the said company and should be for such fraud, and the same is hereby therefore, vacated, annulled, reversed and set aside

7. Declare that at the date of the consent judgment the defendant Charlebois was entitled to have judgment against the company for no greater sum than the sum of $427,093, together with so much of the $22,000 of interest as was attributable to the said sum of $427,093, less the amount of the work and materials which were contracted for by Charlebois to be finished and supplied if any there were not then finished and supplied.

7a. Refer it to the master to take an account of the amount if any which should be charged to Charlebois for the non-completion of the work if the master shall find it not to have been completed and declare that

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such amount, if any, shall be deducted from the said sum of $427,093, and thereupon enter judgment *nunc pro tunc* as of the date of the consent judgment for the said sum of $427,093 and the proportion of the said sum of $22,000 by way of interest as the master shall find to be properly attributable to the said sum of $427,093, less such sum, if any, as upon the taking of the account aforesaid he shall find to be chargeable to Charlebois in respect of such unfinished work or unsupplied material.

8. Declare that the persons and corporations mentioned in the 10th paragraph of the learned Chancellor's judgment shall have the like charge upon the amount to be recovered by the judgment hereby ordered to be entered *nunc pro tunc* as by said the consent judgment they were declared to have upon the amount therein mentioned; declare this by recital of the provisions of the judgment as to these parties in full as therein and declare that the judgment hereby ordered to be entered *nunc pro tunc* shall be subject to the like provisions.

9. Declare the defendant Charlebois to have a like lien for the amount of the judgment hereby ordered to be entered *nunc pro tunc* as he is in the 13th paragraph of the learned Chancellor's judgment declared to have. In framing this declaration, adopt simply the language of the 13th paragraph of the learned Chancellor's judgment to the judgment hereby ordered to be entered *nunc pro tunc*

10. Adopt paragraph 15 of the learned Chancellor's judgment.

11. Adopt paragraph 20 of the Chancellor's judgment.

12. " " 21 " "

13. " " 22 " "

14. " " 23 " "

15. " " 24 " "

16. Reserve further considerations and further costs.
17. Adopt paragraph 28 of the Chancellor's judgment.

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I confess that I have not been able clearly to determine the precise mode in which the amount $600,226 was arrived at which so precisely to a cent corresponds with the amount recoverable assuming Charlebois's contract price to have been $800,000 and that his contract had been fully completed. If there should be anything in the exhibit 26 or elsewhere in the exhibits which may appear to require consideration other than is covered by the above directions it may be spoken to on the minutes but it must be understood that no allowance can be made in favour of Mr. Charlebois in respect of the item of $50,000 spoken of in the exhibit 26 as "bonus" nor in respect of any payment or loan to Codd upon or in respect of the $173,133 above mentioned.

I should have preferred directing an ordinary judgment as in an action upon a covenant to pay money to be entered for Charlebois in the judgment hereby substituted for the consent judgment without burthening the judgment with charges in favour of his creditors not parties to the suit which was instituted by him against the company, but I presume there was some reason for the adoption of that course which is certainly not usual and as the learned Chancellor has adopted the same course I have also adhered to it, and the judgment as above varied seems to me to give to the defendant Charlebois the utmost that he was entitled to when the consent judgment was entered.

As to the costs of this appeal I think that the proper order to make will be that as between the plaintiffs and the defendant Charlebois, they must respectively bear their own costs; and as to the appeals of the defendants who claim under the defendant Charlebois these appeals were wholly unnecessary and never should have been prosecuted, and as the appellants

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had no interests distinct from those of Charlebois, their appeals must be respectively dismissed with costs to be paid to the plaintiffs by them respectively.

Upon the judgment being varied as above the appeal of Charlebois and the cross-appeal of Delap should be dismissed without costs.

SEDGEWICK J.—I concur in the judgment of Mr. Justice King.

KING J.—A company incorporated for definite purposes has no power to pursue objects other than those expressed in the Act or charter, or such as are reasonably incidental thereto. *Ashbury Railway Carriage Co.* v. *Riche* (1); *Attorney General* v. *Great Eastern Railway Co.* (2). The assent of every shareholder makes no difference.

The same is the case in respect to the powers exercisable by such a corporation in attainment of authorized objects.

I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

Per Lord Watson in *Wenlock* v. *River Dee Co.* (3).

Then as to the application of the company's funds to purposes other than those so as above authorized, Lord Herschell in *Mann* v. *Edinburgh Northern Tramways Co.* (4), says of this:

No approval of those who may happen to be directors at the time when the company is formed, or of those who may happen at that time to be all the shareholders in the company, can possibly give it validity, because it is something which the company itself cannot do, and which it cannot be authorized to do either by its then directors or by its then shareholders.

(1) L. R. 7 H. L. 653.
(2) 5 App. Cas. 473.
(3) 10 App. Cas. 362.
(4) [1893] A.C. 69.

In the present case the charter of the company (which by Act 49 Vict. c. 11 (D.) is declared to have the force of an Act of Parliament), after providing that the capital stock shall be two millions of dollars to be divided into shares of $100 each, declares that:

> The money so raised shall be applied in the first place to the payment of all expenses and disbursements connected with the organization of the company and other preliminary expenses, and making the surveys, plans and estimates, connected with the works hereby authorized, and all the remainder of such money shall be applied to the working, completing and equipping and maintaining of the said railway and other purposes of this charter and no other purpose whatever.

The purpose named in the charter was the construction of a railway from a point on the Manitoba and North-western Railway, or from Brandon on the Canadian Pacific Railway, to Battleford, a distance of about 450 miles.

A contract for the construction of the first 50 miles was entered into between Charlebois and the company on the 16th September, 1889.

The alleged *ultra vires* character of the contract lay (as was contended) in the improper inclusion in the contract price of the price of shares transferred by Charlebois to some of the directors, and of a bonus or commission of $173,000 to one of them.

The whole of the subscribed stock amounted to $500,000 in 5,000 shares, which up to the 16th September, 1889, were held by Messrs. Charlebois, Clemow, Allan, Devlin, and Murray, and upon which 30 per cent, representing $150,000, had been paid up. These gentlemen were also the directors of the company.

In 1888 the shareholders had entered into an agreement with a Mr. Codd to sell him their shares (*i.e.* all the subscribed shares) and to complete 50 miles of road then under construction for the sum of £200,000 sterling, Codd to pay £50,000 on the transfer of the shares

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within a month, and the balance on completion of the 50 miles within several months thereafter. And the shareholders agreed (as they well might, for they were not purporting to bind the company) that upon payment in full they would allow to Codd for commissions, etc., the very considerable difference between $800,000 and £200,000 sterling. Codd was not able to make his financial arrangements within the time named and the matter remained in suspense.

In 1889, however, he fell in with the person he was looking for, a wealthy gentleman named Delap, a client of a firm of London solicitors, Stevens, Bawtree & Stevens, who agreed to advance £50,000 sterling to Codd to enable him to carry out the agreement. Delap was (*inter alia*) to have transferred to him £90,000 of the shares of the company as security.

Early in September Codd came to Canada accompanied by Stevens, who came out in the interest of Delap and who was supplied by him with the £50,000. Soon after arrival they met Clemow, Allan, and Charlebois at Toronto. The parties for some reason failed to come to terms. Upon this happening Charlebois proposed to his fellow shareholders to buy them out, naming a price. After Messrs. Clemow and Allan had the opportunity of conferring with their associates, the four agreed to sell to Charlebois their 4,300 shares for the sum of $226,000.

In anticipation of the assent of the others Charlebois entered into an agreement with Codd on the 9th September, by which he agreed to carry out the agreement of the year before with modifications, one of which was that on the completion of the 50 miles he was to be paid an additional $50,000 or, at Codd's option, its equivalent in stock. Afterwards, Codd, in consideration of Stevens having obtained the £50,000 to enable him to purchase the shares, agreed to transfer

to the latter one-half of the shares; and all profits of the undertaking were to be divided equally. Any moneys coming to Codd out of the £200,000 were to belong to him absolutely. And, until all moneys advanced or which might be advanced by Stevens or any of his clients should be repaid, Stevens was to hold 90 per cent of the paid up shares of the company as security for such repayments.

Interviews and negotiations took place between the several parties during the week preceding the 16th of September, and on that day the directors met to carry out what had been agreed upon. Two main things were to be done; there was to be a transfer of all the shares to Stevens or his nominees, and (upon the installation of the new board of directors) a contract between Charlebois and the company for the construction of the first 50 miles. At request of Charlebois, Messrs. Clemow, Allan, Devlin, and Murray were to transfer direct to Stevens or his nominees.

The price to Charlebois for the 4,300 shares of his associates was, as stated, $226,632. Adding a proportionate amount for his 700 shares, the price to the purchasers for the whole would be about $263,000.

These shares were transferred as "fully paid up." How they came to be so will be stated presently. If Delap's money in Stevens's hands were to be paid out for shares on which 30 per cent only had been paid up, the holders of the shares would be subject to the contingent liability of 70 per cent, and Delap's security might be inadequate.

The plan was then adopted of using the £50,000 in fully paying up the shares; and (then having thus guarded against future liability, etc., and having put the company in funds), of using these funds through the medium of a construction contract to pay Charlebois for the shares of himself and his associates.

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It seems difficult to wholly acquit any of the parties of some connection at least with this plan.

The retiring shareholders at the meeting of 16th September helped to pave the way. By resolution they recited that they had offered to pay their stock in full, less a discount of 25 per cent, and under clause 10 of the charter declared such discount expedient and reasonable. They also directed that such certificates be issued upon such payment being made, and adopted a form of transfer for paid up shares.

It is clear from the minutes that certificates of paid up stock were then immediately issued. Mr. Allan then made a transfer of his paid up stock, and it was resolved "that Mr. Allan having sold and assigned his stock in the company and tendered his resignation as a director of the company, his resignation be accepted, and that Mr. Stevens being duly qualified, be elected a director in his place."

Then the other shareholders one by one sold and assigned, and were succeeded as directors by their transferees. Stevens was then elected president and after loaning the company $15,158.33 (the balance of the Delap money left after fully paying up the shares) it was resolved that a construction contract be entered into with Charlebois. This contract, which was at once executed, was for £200,000 sterling of which £50,000 were to be paid down. Then four assignments by Charlebois in favour of Messrs. Clemow, Allan, Devlin, and Murray, amounting in all to $100,687.84 of the moneys first thereafter payable under the contract, were presented to and accepted by the company. Payment to Charlebois of the £50,000 ($243,333.33) under the contract was then ordered and the meeting closed. Out of this $243,333.33 Charlebois paid to his associates $129,945, an amount about equal to the 30 per cent paid up by

them. The balance was provided for through the four assignments just alluded to.

It ought to have been stated that Stevens had deposited to the credit of the company, out of the £50,000, the 45 per cent required (with the allowed discount) to fully pay up the shares.

It is contended by Mr. McCarthy that this was merely a piece of book-keeping, or at most, a device of Stevens's for his own purposes, and that in reality the $243,333.33 were paid by Stevens for the shares. He contended that Stevens had no authority from Charlebois or his fellow shareholders to pay up the shares on their behalf. It seems to me that this contention overlooks the resolutions. They say in these that they propose to pay up and they direct stock certificates to issue upon such payment. They certainly had no intention of paying out of their own moneys, nor did they do so; and yet they obtained and transferred fully paid up shares. We must conclude therefore that they adopted the means by which they were enabled to do what they did. Some of them probably, possibly all of them, at one time thought that the transaction might be carried out differently. But before they got through they must have understood that the real effect of what was being done was to make use of the company (as a temporary expedient at least) to carry the transaction of the purchase of the shares. Mr. Charlebois could scarcely have a doubt that the company was the paymaster for the price of the 5,000 shares sold by him. It is not, however, a question of good faith. The question is not, whether in what they did they intended to do wrong, but whether they have between them attempted to accomplish an illegal thing.

Mr. Justice Maclennan, while admitting that the effect was to cast upon the company the burden of paying for the 5,000 shares to the extent of about $245,000,

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expresses the opinion that the only effect as against Charlebois would be to give the company (had it acted promptly) the right to elect to avoid the contract on the ground of the equity between the company and its directors with knowledge of which Charlebois was affected. But as the burden was cast upon the company by means of a contract, how could the contract be made use of to compel the payment of moneys which the Act forbids to be so made? The transaction seems to me to be clearly *ultra vires* (at least *pro tanto*), and I fully agree with what the learned Chief Justice of Ontario has said about it.

But now we come to a wholly different question. Charlebois is not suing upon the contract. That has become merged in the judgment rendered upon it, and the present proceedings are to set aside that judgment or to restrain its enforcement.

The proceedings in which the said judgment was obtained are stated in the record as follows:—

The original action was commenced by Charlebois in the High Court of Justice, Chancery Division, on the 11th September, 1891, to recover the balance claimed to be due upon his contract, and to establish his lien upon the property of the company until payment, in accordance with his contract.

An Interim Injunction Order was obtained on behalf of Charlebois to restrain the company from encumbering or selling their land grant, or from dealing with or disposing of their bonds.

The railway company had previously, on the 9th September, 1891, commenced an action against Charlebois for damages for non-completion and other alleged breaches of his contract to construct.

Affidavits were filed, upon the injunction motion, and the president of the company was cross-examined upon the affidavit filed by him.

No pleadings were filed, because the motion for injunction when renewed was turned into a motion for judgment, and after about a week's discussion a settlement or compromise was arrived at, by which Charlebois obtained the judgment of the 28th September, 1891, and the action of the company was withdrawn and dismissed.

The judgment declared that Charlebois had a lien on all the property of the company for $622,226 which the company was ordered to pay within six months, in default of which Charlebois could exercise over the property the full rights of a mortgagee, with judgment for a sale. The company was to be entitled to immediate possession and retain it until default, and all the bonds issued were to be deposited with a deposit company in England and not to be pledged except to pay Charlebois, and the contracts held by Charlebois for further construction of the road were to be transferred to a nominee of the company, Charlebois to retain the plant. These directions were complied with, except that the bonds were not deposited. The judgment contained also this provision:

The said sum of $622,226 is at the request of the said plaintiff declared to be payable to the following persons in the following order of priority, and the said fund is charged accordingly in favour of such persons:

(*a.*) To Macdonald & Schiller, the sub-contractors on the road, $60,640, and $3,789 for interest on the said sum to date, in all $64,429, which sum includes the order for $20,000 dated the 10th June, 1890, accepted by the defendants, and now in possession of Frank S. Nugent, Esq., which lien the said parties represented herein by their solicitor and counsel, the said Mr. Nugent, agree to accept as cash, and to credit the same in the suit now pending in the courts of Manitoba by the said Macdonald & Schiller against the said plaintiff as if paid into court in the said suit. The said sum is paid as the amount found due by the final certificate of J. H. E. Secretan, civil engineer, the plaintiff's engineer, with interest as agreed upon, the said Macdonald & Schiller being at liberty to continue their action in the province of Manitoba

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for the recovery of any alleged balance that may be claimed by them against the plaintiff.

(*b.*) To W. A. Preston, fencing contractor, $7,810, and for interest $590, in all $8,400, the said Preston hereby accepting the provisions of this judgment by the said solicitor and counsel, the said Nugent, consenting thereto in full of his claims against the said plaintiff.

(*c.*) To the Crossen estate or company for their judgment and costs against the plaintiff, $39,000. The three preceding claims are to rank as between themselves *pari passu*, and these claims are payable by the defendant company in six months from this date with interest on their respective sums of principal money from this date. And these parties accepting the provisions hereof do so in full of all other liens now claimed, and deliver up possession of the said railway and all the property thereof to the defendants.

(*d.*) The second charge on the said fund is to be the sum of $380,397 with interest at six per cent on $271,555, and at four per cent on $108,842, which is payable to the plaintiff for his own use or for the use of any person or corporation to whom he may have heretofore assigned the moneys payable to him or a portion thereof under his said contract, according to their several present priorities if any, payment to any holder of any such order or orders to be considered as payment to the plaintiff by the defendants.

(*e.*) The third and last charge on the said fund is to be the residue, namely, the sum of $130,000, with interest thereon to date, payable to Daniel McMichael, Esq., Q.C., as trustee, in full satisfaction of all claims under a certain order or agreement for the payment of a sum stated therein at $173,333.33 in full adjustment of all matters in dispute between the said parties hereto, J. A. Codd, the said D. McMichael, trustee, the defendants, and all other persons, waiving and declaring all personal claims against the plaintiff under the said order or agreement as satisfied and discharged.

The learned Chancellor was of opinion that the judgment has no greater validity than the contract, because it was determined by consent, and the company could not validly give a consent to treat as valid what was *ultra vires*.

The learned Chief Justice of Ontario, however, draws no distinction between a decree by consent and one otherwise determined. "It seems just the same," says His Lordship, "as if on plaintiff stating all his claims, lawful and unlawful, the company either says nothing

against them in case of judgment, or formally confesses them to be well founded. The suit was simply for moneys alleged to be due which stand admitted by the defendants."

In the case of *In re South American and Mexican Coy.* (1), decided subsequently to the Chancellor's judgment, it is held that a judgment by consent creates an estoppel to the same extent as a judgment where the court has exercised a judicial discretion. Lord Herschell says, at p. 50:

> The truth is a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court, after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought out again in a subsequent action.

In *Huddersfield Banking Co.* v. *Lister* (2) an order in the course of winding-up proceedings was made by consent, and had been completed and acted upon, but without affecting interests of third parties. The order was set aside on the ground of common mistake, and it was held that a consent order can be impeached upon any grounds which would invalidate the agreement it expresses.

The case of *Jenkins* v. *Robertson* (3) merely decided (touching the point here) that where the public at large may be bound by the result of an action brought by an individual, the result will not so bind unless it was arrived at after judicial consideration, and that it would not bind the public if arrived at by consent. This is so referred to by Vaughan Williams, J. in *In re South American and Mexican Co.* (4).

Such being ordinarily the effect of a judgment by consent, is it different where the cause of action arises

(1) [1895] 1 Ch. 37.
(2) [1895] 2 Ch. 273.
(3) L. R. 1 H. L. Sc. 117.
(4) [1895] 1 Ch. at p. 46.

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on a transaction *ultra vires* of the defendant company? If in an action the defence of *ultra vires* is raised and the decision is against the defence, the company is certainly in no better position than an individual to raise again a decided issue.

On principle it does not differ, apart of course from fraud or collusion, if the company for one reason or another abstains from raising the question of *ultra vires*. It is the company that is in court, and the company is to be bound the same as others by what it does and by what it leaves undone. Between the same parties or privies, and in respect to the same cause of action, the judgment binds not only as to defences in fact raised, but as to such as might have been raised. It would seem against all reason to leave it open to a company, upon a change of management, to re-open litigation. If the judgment binds the company when recovered, it binds notwithstanding any change in the constitution of its governing body. Otherwise you could never get to the end of litigation with an incorporated company, and no one would be safe in acting upon a judgment against such a company. The effect of a judgment must be the same whether the claim sued on is *ultra vires* or not. The judgment forms a new obligation having a character of its own, and it is not *ultra vires* for a company to pay the amount of judgment recovered against it. *Balkis Consolidated Company* v. *Tomkinson* (1).

Then if a company being in court gives its consent to a judgment being rendered against it, it is as mischievous to allow questions that were really involved in the action (here, the question whether the company owed Charlebois a certain amount) to be fought out again in a subsequent action as if the action were against individuals. The learned Chief Justice was

(1) [1893] A. C. 407.

impressed by the possible result of enabling directors to do wholly unlawful acts and then agree to a judgment against them to make such acts valid. But the same thing might be said of judgments by default. And besides such a course of conduct as that supposed would amount to fraud and collusion, and vitiate any judgment so obtained.

It has been said that judgments obtained on *ultra vires* contracts operate by way of ratification. I think this hardly the proper ground on which to put it. The necessity in the administration of justice of reaching a point where there shall be an end of litigation—*interest republicæ ut sit finis litium*—which is perhaps the weightiest consideration operating to give to judgments recovered the effect which in all jurisprudence they are admitted to have, seems to be as pressing a necessity in a case where company is a defendant, and where the question is as to its power to contract, as where the defendant is *sui juris*.

Apart altogether from fraud or collusion, there is, however, in the case of all judgments, the right upon sufficient and proper grounds to maintain a suit in equity for relief against the judgment, either to set it aside wholly or in part or to restrain the execution of it.

Fraud is of course one ground for relief, *i.e.*, not fraud as to the cause of action, for that is a matter which should have been raised in the original action, but fraud in the obtaining of the judgment. Collusion is another ground. There are other grounds for relief, as where a party without fault of his own is shown to have been prevented from fairly presenting his case.

Now, here, none of the learned judges have found fraud or collusion in respect of the obtaining of the judgment, and this ought not to be found by us at this stage.

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Nor was the company, without its fault, prevented from presenting its case. The transactions relative to the contract were known to all the shareholders, and there is no reason to suppose that any defence which the then shareholders or the company at that time desired to make was omitted to be made.

The company, however, is entitled to show the facts as to Codd's breach of duty, and to claim that the amount secured to him by the judgment shall be declared to belong to it. This would not be to contradict the judgment to which Codd was not formally a party, but is wholly collateral and merely proceeds upon the ground that the company is beneficially entitled to the amount secured through Charlebois to him by the judgment. Moreover, there has been no appeal by Codd.

The learned Chancellor thought that the stock should be charged with the amount of the price of Charlebois' shares, and that Mr. Delap should be considered liable to Charlebois for the amount. As Mr. Delap is manifestly the person who would chiefly profit by the relief asked for so far as regards the price of the shares, it would seem as though (in the view of the whole case taken by the learned Chancellor) the fulfilment of Mr. Delap's declared obligations might very well have preceded the enforcement of the equitable relief sought for.

As to the matter of the lien and its validity I do not think it necessary from my point of view to do more than refer to the judgments of Mr. Justice Burton and Mr. Justice Maclennan.

Then as to the issue of the bonds, the same observation may be made. The issue to Mrs. Mansfield seems scarcely to rest on stronger grounds than those which the Court of Appeal thought insufficient in the case of Mr. Delap.

The result is that the appeals should be allowed and the action be dismissed except so far as the judgment relates to the sum of $130,000 payable to the defendant Codd, which sum is to be deducted and not to be recoverable upon the judgment.

Inasmuch as the conduct of Mr. Charlebois and his associates in reference to the contract was the occasion of all this litigation it seems proper that they should not have their costs. The others who claim through him must also bear their own costs. Accordingly there will be no costs to any party, either here or below.

GIROUARD J. concurred.

*Appeal allowed without costs.*

Solicitors for the appellants Charlebois and others: *Chrysler & Lewis.*

Solicitors for the appellants Macdonald and Shiller and others: *Robinson, O'Brien & Gibson.*

Solicitors for the appellants Crossen estate and others, *Beatty, Blackstock, Nesbitt, Chadwick & Riddell.*

Solicitors for the respondents: *Howland, Arnoldi & Bristol.*

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*Feb. 27,28.
*May 18.

JAMES DINNER AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

v.

WILLIAM HUMBERSTONE (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Constitutional law — Municipal corporation — Powers of legislature— License—Monopoly—Highways and ferries—Navigable streams—By-laws and resolutions—Intermunicipal ferry—Tolls—Disturbance of licensee—North-west Territories Act, R. S. C. c. 50, ss. 13 & 24— B. N. A. Act s. 92, ss. 8, 10 & 16—Rev. Ord. N. W. T.* (1869) *c. 28—N. W. Ter. Ord. no. 7 of* 1891-92, *s. 4.*

The authority given to the Legislative Assembly of the North-west Territories, by R. S. C. c. 50 and orders in council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature" (and perhaps as to license for revenue) within the Territories includes the right to legislate as to ferries.

The town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N. W. T. c. 28) can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor in Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary.

A "club" or partnership styled "The Edmonton Ferry Company" was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The club supplied their ferryman with a list of membership and

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights.

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*Held*, that the establishment of the club ferry and the use thereof by members and others under their club regulations, was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement.

APPEAL from the decision of the Supreme Court of the North-west Territories, sitting in *banc*, which awarded the plaintiff damages for the disturbance of a ferry by the defendants and reversed the judgment rendered by the trial judge dismissing the action.

On 19th December, 1893, the municipality of the town of Edmonton, by writing under the corporate seal of the municipality, which recited that the municipality was by ordinance vested with all the rights, powers and authorities of the Lieutenant-Governor in Council or of the Lieutenant-Governor or of the Clerk of the Legislative Assembly, under the Ferries Ordinance, so far as regarded ferries operated to or from the north-westerly edge of the North Saskatchewan River, one of the boundaries of the municipality, agreed with the plaintiff to grant to him upon terms therein mentioned an exclusive license for the season of 1894 to establish and use two ferries upon said river between the north or north-westerly banks within the limits of the municipality, and the opposite side of said river which was beyond the limits of the municipality, and to authorize him to collect tolls, and afterwards, in pursuance of said agreement, issued a license under the corporate seal granting the plaintiff exclusive rights to ferry within the limits and during the time specified. No formal by-law was passed by the council, but the agreement was authorized by resolution. The Saskatchewan River at Edmonton is a navigable river. The plaintiff maintained the ferries under said agreement and license. While plaintiff's license was still

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in force the defendants established another ferry near one of those of the plaintiff, and maintained it without any license.

The plaintiff brought suit to restrain the defendants from operating or using the ferry so established by them, or any other ferry within the municipality during the time limited by the plaintiff's license, and claimed damages for the violation of plaintiff's rights by using such ferry.

Amongst the defences set up were the following:

That the municipality did not issue any license.

That it granted no exclusive privilege.

That it had no power to grant the alleged license.

That no by-law was passed to authorize the agreement or the issue of any license.

That the plaintiff had no authority to make any charge for ferrying across said river; and that the defendants' ferry was their own private property and was used only for the carriage of the defendants and their goods, and in doing so defendants were not interfering with any rights of the plaintiff.

The defendants had formed themselves into an association to establish and maintain the ferry complained of. There was no regular partnership agreement drawn up between them. Any person could join the "company" by signing the list of the association and taking at least one share of $5, which entitled him to 100 ferry tickets. Shareholders were entitled to as many hundred tickets as they held shares. When a member had consumed all his tickets he could buy more shares and get more tickets. He was not confined to any number of shares. The money was paid sometimes before members got their tickets, sometimes when they got them and sometimes afterwards. Although the ferryman employed by the defendants had orders not to ferry any but members, those

orders were not strictly adhered to and others crossed at various times.

"The Ferries Ordinance" was passed under the authority of the order in council of 26th June, 1883, made under provisions of "The North-west Territories Act of 1880," similar in effect to sec. 13 of "The North-west Territories Act," R. S. C. ch. 50. That order in council authorized the Legislative Assembly to legislate as to municipal institutions, subject to any legislation by Parliament theretofore or thereafter enacted, and generally, matters of merely a local or private nature. The statute provided that the powers of legislation conferred by any order in council should not at any time be in excess of those conferred by the 92nd and 93rd sections of "The British North America Act."

The section of the ordinance incorporating "The Ferries Ordinance" in the charter of the town of Edmonton is quoted in the judgment on this appeal.

The learned trial judge held that sec. 2 of "The Ferries Ordinance" which provides for the granting of exclusive rights to ferry upon navigable waters was *ultra vires* and therefore that the municipality could not grant the exclusive right to ferry on the Saskatchewan River because it is a navigable stream. He also held that the council had no power to authorize the collection of tolls without passing a by-law, and gave judgment for the defendants with costs. This judgment was reversed by the decision now appealed from and as the parties had agreed that, in the event of the appeal being allowed, the damages should be $500, the plaintiff was declared to be entitled to judgment for that amount with costs.

*Armour* Q.C. for the appellants. The plaintiff had no title to a ferry, but was entitled only to use the highway in common with other carriers.

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The ferry is outside the limits of the municipality. The municipality cannot act without a by-law. No tolls can be taken except when authorized by by-law.

The jurisdiction of each council is confined to controlling and licensing ferries authorized by them within their jurisdiction, and to passing by-laws allowing the collection of tolls thereon for periods not exceeding five years. Rev. Ord. N. W. T. ch. 8, ss. 57 and 60.

In *Hodge* v. *The Queen* (1) the regulation of the License Commissioners was held to be a law of the province. A resolution of a council can have no force as a binding enactment.

*Bernardin* v. *North Dufferin* (2) does not justify the decision of the court below. In that case there was no power and no practical way to put the parties *in statu quo;* here, money compensation would do so. There, the agreement was executed; here, it is executory as regards others than the parties. Here there is the creation of a right. Primarily, the sovereign could by letters patent have granted the right, and it would have been created and passed to the grantee by the same Act. The sovereign had and has no other way of creating franchises or making binding inhibitions unless authorized by statute. In the legislature an Act would have been necessary, and in a municipality a by-law. *Jones* v. *Fraser* (3); *Hill* v. *Tupper* (4).

The grant of a ferry differs essentially from a private right granted by the owner of the soil. The essence of the whole grant of a ferry is that all others than the grantee are thereby prohibited from exercising their common law right of carriage by water; and the grant

(1) 9 App. Cas. 117.
(2) 19 Can. S. C. R. 581.
(3) 6 O. S. 426.
(4) 2 H. & C. per Pollock B. at p. 127.

must, therefore, be in the form of a binding law. *Mayor of Nottingham* v. *Lambert* (1).

In the case of *The Abbot of Strata Mercella* (2), it appears that the sovereign does not possess as distinct properties all the ferries that lie in his grant, but can by his grant create a ferry, and it then becomes a franchise. The municipality must, therefore, properly establish a ferry by a binding legislative act, and then may grant license and control it, but they cannot act by agreement and license. Particularity should be observed, because a ferry is a monopoly in derogation of the common public right to navigate a river, and the instrument granting the right must be strictly construed. *Letton* v. *Goodden* (3).

The incorporating ordinance does not expressly give power to establish a ferry outside the town limits. See *Macleod* v. *Attorney General of New South Wales* (4); *Shields* v. *Peak* (5). A ferry, being a highway, must be totally within the limits of the municipality, otherwise it cannot be established or controlled by the council, except by special authority. *Re McDonough* (6). The town of Edmonton could not control or pass by-laws or regulate, except as to the landing on the Edmonton side. The control must cease where the authority ceases. *Kerby* v. *Lewis* (7). Control is concurrent and commensurate with the right of authorization and license; the right of authorization and license is tested by the right to control and the right exists only within the limits of the municipality.

The town of Edmonton could not establish a toll road extending into another municipality or crown or public lands, nor create a highway on water which lies outside its limits. Courts are jealous of claims to levy tolls. *Truman* v. *Walgham* (8).

(1) Willes 111.
(2) 9 Rep. 24*a*.
(3) L. R. 2 Eq. 123.
(4) [1891] A. C. 455.
(5) 8 Can. S. C. R. 579.
(6) 30 U. C. Q. B. 288.
(7) 6 O. S. 211.
(8) 2 Wils. 296.

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The ferry is a highway, and thus not within the jurisdiction of the local legislature, nor properly established if it is. See *Letton* v. *Goodden* (1); *Hopkins* v. *Great Northern Railway Co.* (2); *Pain* v. *Patrick* (3); *Dixon* v. *Curwen* (4); Woolrych on Waters (5). By 38 Vict ch. 49, s. 7, s.s. 4, power was given to the Lieutenant-Governor in Council to make ordinances respecting highways, but by 40 Vict. ch. 7, s. 3, section 7 of that Act was repealed, and the topics of legislation were thereafter defined by order in council. All the topics in the Act are not included in the order in council, and highways have been omitted. By 43 Vict. ch. 25, the North-west Territories Acts were consolidated and amended, and the power to legislate was continued to be regulated by order in council. Now, although the order in council was then in force assigning municipal institutions to the local legislature, there appear in the Act of 1880, special provisions respecting highways by section 91. The management and sale of public lands has never been assigned to the territories, and the retention of the lands by the Dominion necessitated the retention of the power to lay out and establish highways thereon.

Parliament never gave power to the local legislature to open, close, or establish a highway, and the local legislation is *ultra vires* in so far as it professes to establish a new highway, or to prohibit the public from using an existing one except on payment of toll, and the Lieutenant-Governor had no right to delegate his authority to the legislature or to a municipal council. *Mayor of Nottingham* v. *Lambert* (6).

It is clear from the British North America Act, secs. 91 and 92, that ferries are neither of a local nor private

(1) L. R. 2 Eq. 130.
(2) 2 Q. B. D. 224.
(3) 3 Mod. 289.
(4) W. N. [1877] 4.
(5) 2 ed. p. 363.
(6) Willes 111.

nature, nor within municipal institutions, if the special clause sec. 92, s.s. 10, applies to ferries. A matter of a "local or private nature" sec. 92, s.s. 16, is not a "local work or undertaking" under s.s. 10, and the same remark applies to s.s. 8, respecting municipal institutions. If the power to deal with ferries is included in the power of making ordinances respecting local works and undertakings, then that power was never given to the local legislature.

By the British North America Act, 1871, the Parliament of Canada was given power to "make provision for the administration, peace, order and good government of" the territories, and has thus equal power with the Imperial Parliament, and is not bound to observe the division of legislative authority observed in the British North America Act. In the enactment providing for the government of the territories, the powers to be allotted by order in council shall not be in excess of those conferred by the ninety-second section of the British North America Act, 1867, upon the legislatures of the several provinces. By section 91, s.s. 13, British North America Act, "ferries between a province and any British or foreign country, or between two provinces," are assigned to the Parliament of Canada; while by section 92, s.s. 10, "local works and undertakings other than such as are of specified classes, are assigned to the local legislatures." In the Territorial Act of 1875, and the orders in council under succeeding Acts, the topics assigned to the territorial legislature are taken *mutatis mutandis* from those enumerated in section 92 of the British North America Act, but the local works mentioned in subsec. 10 are not included. Ferries primarily fall within navigation, and the retention of the power by the Dominion is clear. This agrees also with Dominion legislation as to highways in the territories.

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The appellants' operation of their own boat is not a disturbance of the plaintiff's ferry. They formed a syndicate to acquire a boat for their own use. All members subscribing shares were entitled to cross in the boat, and admitted by tickets. A list was given to the ferryman so that he could identify the owners. Tickets were also issued to members. A stranger crossed on the boat but did not pay anything. Orders were given not to allow strangers to cross, but some persons who came dowu the grade to the river and could not turn back were carried free. Defendants were not plying for hire, but carried themselves and their own goods only, although some persons were accidentally carried free. Under the circumstances that is no disturbance. *Ives* v. *Calvin* (1). Every one may use his own boat for crossing the river. The essence of a ferry is not to prohibit others from navigating a river, but that the owner may prevent others plying for hire within a reasonable distance and to the same points. *Newton* v. *Cubitt* (2); *Dixon* v. *Curwen* (3).

*Taylor* Q.C. for the respondents. No one of the appellants was interested in the business of any other of the appellants in connection with which such appellant used the club ferry.

The legislature has jurisdiction as to "municipal institutions in the territories," and on all local or private matters. Ferries are necessary parts of municipal institutions. See *Reg. ex rel. McGuire* v. *Becket* (4).

The words "municipal institutions" in the provinces include all powers vested in municipalities at the time of confederation, with the power to extend, vary or alter the laws passed under those powers

(1) 3 U. C. Q. B. 464.
(2) 12 C. B. N. S. 32.
(3) W. N. [1877] 4.
(4) 21 O. R. 162.

*Re Harris and The City of Hamilton* (1); *Three Rivers* v. *Sulte* (2).

The power to authorize municipalities to license is unrestricted. *Russell* v. *The Queen* (3). See also subclause 4 of the order in council of 26th June, 1883.

The interpretation is established by sec. 91, British North America Act, s.s. 13, exactly as the *Citizens' Insurance Co.* v. *Parsons* (4) limits "Regulations of Trade and Commerce." See *Longueuil Navigation Co.* v. *The City of Montreal* (5).

The exclusive license insured better service and was a regulation in the public interest. This view is upheld in *Poulin* v. *City of Quebec* (6); *Griffith* v. *Rioux* (7); *Blouin* v. *The City of Quebec* (8).

A prohibition is a regulation. *The City of Fredericton* v. *The Queen* (9).

The words "navigation and shipping" mean only "the right to prescribe rules and regulation for vessels navigating the waters of the Dominion," being the sense in which they were used in the several Acts of the Imperial Parliament relating to navigation and shipping. Allen C.J. in *McMillan* v. *Southwest Boom Co.* (10). The words "navigation and shipping" cannot refer to ferries, otherwise s.s. 13 of sec. 91, British North America Act, would not have been inserted.

But a ferry such as that in question, with a cable fastened on mainland on each side of the river, is not a part of "navigation and shipping" in any sense of these words. It is a local matter or institution. Taschereau J. in *Queddy River Driving Boom Co.* v. *Davidson* (11);

(1) 44 U. C. Q. B. 641.
(2) 5 Legal News, 330.
(3) 7 App. Cas. 836.
(4) 7 App. Cas. 96.
(5) 15 Can. S. C. R. 566; M. L. R. 3 Q. B. 172.
(6) 7 Q. L. R. 337; 9 Can. S. C. R. 185.
(7) 6 Legal News, 211.
(8) 7 Q. L. R. 18.
(9) 3 Can. S. C. R. 505.
(10) 1 P. & B. 715.
(11) 10 Can. S. C. R. 222.

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*Regina* v. *Mohr* (1); *Macdougall et al.* v. *The Union Navigation Co.* (2); *Normand* v. *The St. Lawrence Navigation Co.* (3).

A by-law is necessary only when legislation is necessary. Beach on Public Corporations (4). See "Ferries Ordinance" secs. 11, and 3, 4, &c. The 59th and 60th sections, Revised Ordinances ch. 8, read together embrace only a class of ferries within the limits of municipalities and not requiring a special statute to pass their control to the municipality such as was required in respect to the ferries in question. Section 60 does not state by what means licenses can be granted. This ferry is within the control of the Lieutenant-Governor not being wholly within any municipality. The powers of the Lieutenant-Governor and Assembly with respect to the same have been transferred without reference to the municipal ordinance, and form a distinct subject in a distinct statutory position, a special municipal power and duty limited, not by the municipal ordinance, but by "The Ferries Ordinance," which constitutes a sufficient by-law in itself. Action by by-law is permissive, not imperative. *Bernardin* v. *Municipality of North Dufferin* (5), particularly at page 618, per Gwynne J. There is nothing which prohibits the council from exercising their jurisdiction in any other way. The agreement and tariff is under the corporate seal with signatures of mayor and clerk. This was a by-law of itself for any resolutions or orders under the corporate seal and signatures of mayor and clerk are by-laws Beach on Public Corporations (6). Harrison's Municipal Manual (7); *Wilson* v. *West Hartlepool Railway Co.* (8).

(1) 7 Q. L. R. 183.
(2) 21 L. C. Jur. 63.
(3) 5 Q. L. R. 215.
(4) Vol. 1, p. 484 and notes.
(5) 19 Can. S. C. R. 581.
(6) Vol. 1, p. 551, sec. 541; p. 553, sec. 542.
(7) 4th ed. p. 212, notes.
(8) 11 Jur. N.S. 124.

The tolls are a necessary incident to the ferry. Washburn Real Property (1).

The ferry is an infringement of the respondent's ferry, a contiguous and injurious occupation; *Newton & Cubitt* (2); and it is of no avail to show that they carried gratuitously. *Burford* v. *Oliver* (3); *Blissett* v. *Hart* (4); *Newton* v. *Cubitt* (2).

To evade payment of toll is a disturbance. *Mayor af Brecon* v. *Edwards* (5); *Ives* v. *Calvin* (6), was decided upon a provincial Act, which accords any individual the special privilege to use his own boat or ferry for his own use and that of his business, a privilege not given here.

The judgment of the court was delivered by:

KING J.—The respondent who claims an exclusive ferry across the North Saskatchewan at Edmonton, brought his action to restrain the appellant from disturbing him in his right, and also sought to recover damages for past disturbance.

The appellants contended that they had, in point of fact, only carried their own property, etc., and further contested the right of respondent upon two principal grounds; first, that the municipality of Edmonton, through whom the respondent claimed, did not have the power of granting exclusive ferry rights either at all or at least in respect of the ferry in question; and secondly, that if they had the power, they had not exercised it according to law.

The learned judge before whom the case first came decided in favour of the appellants, upon both of these latter grounds. Upon appeal to the Supreme Court of the North-west Territories in *banc*, the judgment was

(1) 4 ed. vol. 2, p. 307.
(2) 12 C. B. N. S. 32.
(3) Draper 9.
(4) Willes 508.
(5) 1 H. & C. 51.
(6) 3 U. C. Q. B. 464.

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set aside upon all grounds; and, it having been agreed during the hearing that in case of the appeal being allowed the plaintiff's damages should be fixed at $500, judgment for that amount was entered for the plaintiff below, the present respondent.

From this judgment there is an appeal to us, which was argued by Mr. Armour Q.C. for the appellants, and by Mr. Taylor Q.C. for the respondent.

The ferries in question were two ferries between the north or north-westerly edge of the North Saskatchewan River where it forms the southern boundary of the town of Edmonton, and the opposite side of the river. These ferries were operated during the open season of 1893, by the respondent, under license from the municipality, and were what are known as cable or wire ferries. In such ferries the vessel is propelled by the force of the current acting upon her while held at an oblique angle to the current, by ropes leading from the two ends of the vessel to travellers running upon the main wire or cable stretched across the river. For the ferry privilege the licensee paid a license fee to the town of about $600.

In December, 1893, the respondent applied for a license for 1894, and an agreement was entered into by which, for certain considerations, the municipality agreed to license an exclusive ferry to respondent, who on his part agreed to run the ferry. Afterwards a formal license under the corporate seal for the year 1894 was granted to respondent, in terms of the agreement which was annexed to the license, and to it also was annexed, as part of it, a tariff of tolls passed by the municipality. The respondent duly performed his part. No by-law was passed by the municipality establishing a ferry, granting the license, or authorizing the tolls, but what was done as above stated was done by resolution of the municipal council and by the

formal agreement and license referred to, which were entered into by resolutions of the town council.

It will be convenient first to consider the question raised as to the power of the municipality to grant licenses for exclusive ferry privileges, either at all, or in the particular case.

Ordinances of the Legislative Assembly of the North-west Territories have in terms conferred this power upon the municipality in certain cases. The appellants' contention upon the point is twofold. First they say, that this particular case is not within the authority, and next, that the legislative assembly has not the power in any case to legislate upon the subject of ferries in the way of giving exclusive rights.

As to the second point first. The legislative powers of the assembly are derived through the Parliament of Canada. By the North-west Territories Act (1), the Governor General in Council was authorized to confer upon the Legislative Assembly of the Territories powers of legislation, provided that the same should not be in excess of those conferred upon the provinces by ss. 92, 93 of the British North America Act.

Under this authority orders in council were passed, conferring upon the Legislative Assembly of the Territories the power to legislate (amongst other things) respecting municipal institutions in the territories, subject however to any legislation by the Parliament of Canada theretofore or thereafter enacted, and generally respecting matters of merely a local or private nature in the territories. Power was also given to legislate respecting the issue of shop, auctioneer and other licenses in order to the raising of a revenue for territorial or municipal purposes. It may fairly be considered that, *primâ facie*, terms taken from sec. 92 of the British North America Act to denote the sub-

(1) R. S. C. ch. 50.

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jects of legislative authority of the territories bear the like meaning as in that Act.

Mr. Armour contended that as ferries ordinarily lie in the sovereign's grant, they are not to be deemed as coming either within the terms "municipal institutions" or "matters of a local or private nature." It is clear that under the British North America Act the right of establishing ferries is vested in the provinces, excepting ferries between a province and any British or foreign country, or between two provinces, which, by subsec. 13 of sec. 91, are expressly named as subjects of Dominion legislation. *Longueuil Navigation Co.* v. *Montreal* (1), per Fournier J. The power, therefore, must dwell in some of the clauses of sec. 92 of the British North America Act. Mr. Armour thinks it amongst the "local works and undertaking" of subsec. 10 of sec. 92, a subject that is not included amongst the powers conferred by order in council upon the Legislative Assembly of the Territories.

Possibly provisions for working a ferry might be brought within the exercise of such a power, but it does not follow that this or the subject of a ferry license might not be more suitably found under other branches of legislative authority. If an organized ferry may be a local work and undertaking, why may not the right of ferriage be a matter of a local nature? I see nothing more incongruous with the proper notion of a ferry in the one case than in the other. If the fact that a ferry *primâ facie* lies in the sovereign's grant prevents it being a proper subject of municipal concern, or a matter of a local nature, it would equally seem to prevent it from being a local undertaking.

In a country such as this, and the same applies with greater force to the sparsely settled territories, it would seem to be a very pressing matter of local concern, that

(1) 15 Can. S. C. R. 566.

ferry privileges should be given to induce persons to provide the necessary facilities for crossing the numerous rivers that exist.

That the term "navigation" as used in sec. 91 of the British North America Act does not extend to all exclusive rights of ferriage (as supposed by Mr. Justice Rouleau) appears manifest from the special reference to certain ferries as subjects of Dominion legislation under subsec. 13 already referred to.

Then it is argued that as ferries are forms of highways, the retention by the Dominion, in its legislation, of certain powers over highways in the territories extends to the ferries as well. Assuming that the powers of the Dominion over the highways of the territories are as contended for, ferries are a kind of highways which have their peculiar incidents, and one would expect to find them dealt with in a way to indicate that they were included under the designation of highways if it was intended to except them from a general grant of power. I conclude therefore that under the Dominion Act, and the orders in council thereunder (also perhaps under power to license for revenue) the legislative assembly has power to legislate on the subject of ferries.

Next, as to the contention that the ordinances of the legislative assembly have not authorized the municipality of Edmonton to grant an exclusive ferry across the Saskatchewan.

To understand this, it is necessary to recollect that the town is bounded on the river by its northern bank, and that the river is not at all within its territorial limits. It is contended that the power of the municipality to license ferries is confined to ferries within its limits.

By the ordinances of the North-west Territories, it is declared that "municipalities may control and license

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ferries and bridges erected or authorized by them within their jurisdiction," etc. And this provision of the general municipal law is by reference incorporated in the ordinance incorporating Edmonton. But, besides this, there is by the Ferries Ordinance power given to the Lieutenant-Governor in Council to issue licenses for the establishment of ferries upon any river or stream or navigable water in the territories granting the exclusive right to ferry over the same. Certain conditions and duties are imposed, which will be hereafter referred to. Sec. 4 of the ordinance incorporating the town is as follows:

> Immediately after the coming into force of this ordinance all the rights, powers, authorities, duties and privileges of the Lieutenant-Governor in Council or of the Lieutenant-Governor under and by virtue of the Ferries Ordinance * * shall become and be vested in the municipality hereby erected in so far as regards any ferry or ferries now or at any time hereafter operated to or from any place or places on the north or north-westerly edge of the North Saskatchewan River where it forms one of the boundaries of the municipality.

It therefore seems clear that, in addition to the ordinary ferry rights and powers given by the general municipality ordinance to this and other municipalities, to control and license ferries authorized by them within their jurisdictions, there is the further power given to the important municipality of Edmonton to possess and exercise all the rights, powers and authorities and privileges of the Lieutenant-Governor in Council, or of the Lieutenant-Governor in respect of ferries to or from any place or places on the north or north-west edge of the river, and therefore outside of the territorial limits of the town, while at the same time the municipality is made subject to all the duties of the Lieutenant-Governor in Council or Lieutenant-Governor in respect of the same.

In view of these express powers the argument from the restricted words of the general municipality Act

entirely fails. Mr. Armour sought to limit the ferries which the municipality might license under these added powers to ferries having both terminal points upon the northern side of the river in front of the town limits. This would be a very strained construction of what on the face appears to have been designed as a liberal and useful concession, and would deprive it of all practical value, and besides (as pointed out by Mr. Taylor) cable or wire ferries are mentioned in the ordinances, and such ferries admit of operation only across rivers. The result as to this is, that there was power in the municipality to grant a license of an exclusive ferry across the Saskatchewan having a terminal point at the southern boundary of the town.

The remaining question, and the one of most doubt, is as to whether the town exercised its power in a way to confer the right.

It is contended by Mr. Armour, in an argument of much force, that a license of exclusive ferry, in waters open as of right to all, imports not only a grant of privilege to the licensee, but also a restraint upon, or prohibition of, the right of all others, and he contends in effect that at some stage in the creation of the ferry or granting of the license there must be a legislative act to take away the public right.

Granted; but the legislative act is found in sec. 4 of the ordinance incorporating the town of Edmonton read in connection with the provisions of the ferry ordinance therein referred to.

By the ferry ordinance the legislative assembly gave to the Lieutenant-Governor in Council the power to issue ferry licenses, giving the exclusive right to ferry in any of the waters of the territories; and then the legislative assembly transferred these powers in the fullest way, and by a variety of expressions covering all shades of meaning, to the municipality of

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Edmonton, so far as regards ferries on the Saskatchewan that were or might be operated to or from any place or places on the north or north-westerly edge of the river where it forms one of the boundaries of the municipality, *i.e.* ferries going or coming from or to the town. What are transferred are "all the rights, powers, authorities, duties and privileges" of the authorities referred to in reference to such ferries.

It seems to me that all that the municipality needed to do under this was to do what the prior authority might have done, *i.e.* to issue the license, observing of course the conditions which the ordinance imposed upon licenses issued by the Lieutenant-Governor in Council, amongst which was that the time and the particular limits of the ferry should be described in the license, and it was also provided that a maximum rate of tolls should also be expressed in the license. It has not been contended that there was a failure in any of these particulars, but it is urged that the tolls ought to have been established by by-law. Of course the municipal council would need to exercise its judgment as to the limits of the particular ferry, the tolls, &c., but the ordinance does not say that this should be done by by-law, but upon the contrary, declares a mode of procedure, viz., that it be expressed in and through the license It is sufficient to get the authenticated act of the municipality. The ordinance, by transferring the powers of the Lieutenant-Governor in Council, places all public rights in question under the control of the municipal council, to be exercised in a certain manner which has been complied with.

The argument founded on the terms of sec. 60 of the Municipal Ordinance, as to the establishment of ferries and fixing the tolls, seems no stronger on this point than it was in reference to the restricting of the

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ferries to such as might be within the territorial limits of the town.

It is only necessary upon this branch of the case to point out that this ferry came within the terms of sec. 4 of the incorporating ordinance as a ferry then "operated," because it had in fact been operated all throughout the navigable season of 1893.

Then, as to the disturbance in fact. I cannot add to what Mr. Justice Scott has said upon this point. As that learned judge says, if the appellants' contention is correct, they might have effected the same thing equally by making the payment of a single fare and admission to membership continuing only during the transit.

The merits of the case throughout are with the respondent, and it is satisfactory to be able to agree with the learned judges who have upheld his right.

In the result, if this is correct, the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitor for appellant: *John C. F. Bown.*

Solicitors for respondent: *S. S. & H. C. Taylor.*

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*Feb. 20,
*May 18.

LEMUEL C. OWEN (DEFENDANT).....APPELLANT;

AND

HENRY C. OUTERBRIDGE (PLAINTIFF.....) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

*Ships and shipping—Chartered ship—Perishable goods—Ship disabled by excepted perils — Transhipment — Obligation to tranship—Repairs—Reasonable time—Carrier—Bailee.*

If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight.

The option to tranship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch or otherwise the owner of the cargo becomes entitled to his goods.

*Quære.*—Is the ship owner obliged to tranship?

If the goods are such as would perish before repairs could be made the ship owner should either tranship, deliver them up or sell if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship owner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty.

APPEAL from a decision of the Supreme Court of Prince Edward Island sustaining the verdict for the plaintiff at the trial.

The facts of this case, which are fully set out in the judgment of the court, may be briefly stated as follows: The plaintiff Outerbridge chartered the "Claribel," belonging to the defendant, to carry a mixed cargo of

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

oats, potatoes, &c., from Charlottetown to Bermuda for a lump freight. The vessel was loaded and towed out of the harbour but afterwards got on a reef and had to be towed back. The defendant refused to tranship the goods, but endeavoured to get the vessel taken to a port of repairs but was unable, owing to the advanced season, to do so. The charterer then demanded his goods, which was refused except on payment of full freight, and a portion of the cargo was sold in spite of protest by the plaintiff. In the spring the vessel was repaired and sailed to Bermuda with the balance of the cargo, which was sold there. The charterer then brought an action claiming that by the refusal of the defendant to deliver up the goods, or to tranship, he had lost the market in Bermuda. The courts below held he was entitled to recover.

*Davies* Q.C. for the appellant. The defendant was entitled to freight before delivering up the goods. *The Norway* (1); *Robinson* v. *Knights* (2); *Merchants Shipping Co.* v. *Armitage* (3).

It is only when the owner has declined to repair or to tranship that he is bound to give up the cargo without payment of freight. *The Bahia* (4).

The damages were excessive. *The Parana* (5); *The Notting Hill* (6).

*Peters* Q.C., Attorney General of Prince Edward Island, for the respondent, referred to *Hunter* v. *Prinsep* (7).

The judgment of the court was delivered by:

KING J.—This is an appeal by the defendant from a judgment of the Supreme Court of Prince Edward

(1) 3 Moo. P. C. [N. S.] 245.
(2) L. R. 8 C. P. 465.
(3) L. R. 9 Q. B. 99.
(4) B. & L. 292.
(5) 2 P. D. 118.
(6) 9 P. D. 105.
(7) 10 East 378.

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Island, refusing to set aside a verdict for plaintiff and enter a nonsuit or grant a new trial.

The action was brought by the owner of cargo shipped at Charlottetown for Bermuda at a lump sum freight against the shipowner for refusing to deliver up the goods at a port of distress. The cargo consisted in good part of perishable goods, including 1,100 or 1,200 barrels of potatoes.

The vessel proceeded to sea on the 2nd of December, 1890, and put back four days afterwards in a damaged and leaky condition, having been rescued from a perilous situation by a tug sent out by defendant. It is admitted upon the pleadings, and clear upon the facts, that she was compelled to put in by stress of weather, and was unable to proceed through being in a damaged condition, but it is claimed by plaintiff that in consequence of alleged unreasonable delay in repairing he became entitled to a return of the cargo upon demand.

There are two counts in the declaration. The first, after setting out the shipment, and the entering upon the voyage and the putting back in a damaged and leaky condition by stress of weather, whereby the vessel was unable to proceed, avers that the plaintiff after waiting a reasonable time in order that

> defendant might repair the ship and proceed with the voyage (and defendant having neglected to repair within such time) demanded the goods so shipped, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle plaintiff to delivery, yet defendant neglected and refused, etc.

The second count was similar, with the additional averment that defendant refused to deliver without payment of freight which plaintiff refused to pay.

The pleas denied that a reasonable time had elapsed at the time of demand, or that defendant neglected to repair within a reasonable time. It was also pleaded

that defendant used all diligence to repair and did repair and complete the voyage and deliver the goods. Issue was joined upon these pleas. The jury found that a reasonable time had elapsed before the plaintiff made the demand, and that the defendant had prior and up to the demand neglected to repair within a reasonable time.

When the vessel was taken in tow she could have been taken to Pictou, according to the testimony of the tug owner, if the tug had had a sufficient supply of coal, and had been otherwise prepared for the service. No blame, however, is to be imputed to defendant that the tug was not so prepared, because the vessel was in such immediate peril that it had to go to her at once.

Besides, the necessity of putting back is admitted, and indeed is manifest upon the evidence. The differences between the parties relate to what took place afterwards and the effect of it.

If a ship be disabled by excepted perils from completing the voyage the shipowner does not necessarily lose the benefit of his contract, but may forward the goods by some other means to the place of destination, and thus earn the agreed freight. It has not been decided that there is an obligation to tranship, as seems to be the case in the United States. But the option is to be exercised, if exercised at all, within a reasonable time. *The Bahia* (1); *The Soblomsten* (2). In case repairs are decided upon they are to be effected with all reasonable despatch in view of the circumstances, otherwise the cargo owner becomes entitled to his goods. *Hunter* v. *Prinsep* (3).

In this case the potatoes were being sent to Bermuda for seed with the object of raising early crops for the

(1) B. & L. 61. (2) L. R. 1 A. & E. 293.
(3) 10 East 378.

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New York market. The profit lay in getting them there before the month of March.

In *Jackson* v. *Union Marine Ins. Co.* (1), where by a charter party a vessel was to proceed with all possible despatch to a port of loading and there take a cargo which in the contemplation of the parties was a commercial adventure which would be wholly frustrated unless the loading took place within a reasonable time, it was held that there was an implied condition precedent that the vessel should arrive at the port of lading within a reasonable time and hence that if she was detained beyond this, whether by excepted perils or howsoever, the contract was at an end.

In *Dahl* v. *Nelson* (2), Lord Blackburn, who had taken part in the above decision, referring to it, repeated what he had previously stated in the somewhat similar case of *Geipel* v. *Smith* (3).

Very different considerations arise when the cargo is already on board, or, as in *Hadley* v. *Clarke* (4), is already on the voyage.

Where cargo is shipped the shipowner has a lien upon it from that time for the freight which he is proceeding to earn. So long as he is proceeding to earn the freight and retains possession he is entitled to the possession. But if for any reason the contract comes to an end the right ceases, and if he, in terms or in effect (as, for example, by unreasonably delaying necessary repairs) declines to proceed, the other party may rescind the contract.

The case of perishable goods is in some respects exceptional.

If the repairs at the port of distress would take so long that the cargo cannot endure the delay, but would in all probability perish before it could arrive by the ship at the port of destination, then as the shipowner

(1) L.R. 8 C.P. 572; 10 C.P. 125.
(2) 6 App. Cas. 38.
(3) L. R. 7 Q. B. 404.
(4) 8 T. R. 259.

would in that event not earn freight in respect of the goods not arriving in specie the reason for the lien would not continue to exist, and in the adjustment of relative rights on the happening of the misfortune to the vessel the interests of the shipper should govern. It would be unreasonable that the shipowner, having (for instance) unloaded the goods for the repairs, should retain and reship them in his own vessel to perish on the way, to the almost certain and unnecessary loss of the cargo owner, when the law clothed him with a power for his own protection of saving himself, or at least mitigating his loss by transhipment. In such case his duty would be (according to circumstances) either to tranship, if practicable, or deliver up, or to sell (if the owner does not object), the decision (except in case of sale being objected to) being left to the master or shipowner as a skilful and prudent person.

The same result is reached by regarding the shipowner's, or master's, duty as bailee of the goods. The law gives to him the power of transhipping. If he will not save the cargo when that is the only reasonable way of doing so, he ought not to allow it to perish by depriving the cargo owner of the chance of transhipping.

It seems to me that the case is the same where a portion of cargo severable from the rest is perishable.

In *Notara* v. *Henderson* (1), a portion of the cargo was damaged by sea water and could have been rendered fit to go on by being unladen and dried. It was however carried on in a wet state and further damaged. In the Queen's Bench it was considered that the drying could not have been effected during a time for which it was reasonable that the vessel should remain, but that the goods ought nevertheless to have been taken out and dried, and either sent forward by another conveyance or delivered up.

(1) L. R. 5 Q.B. 346 ; 7 Q.B. 225.

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In the Exchequer Chamber it was considered that the goods could have been unladen and dried without unreasonably delaying the ship and that it was therefore the duty of the shipowner to take active steps to preserve them.

Mr. Maclachlan says (1):

> If the cargo be of a perishable nature, or so damaged as to become perishable, it cannot be retained for any length of time even at best; and he (the master) may be compelled to give it up to the charterer or his agent, or in the absence of both to sell it on the spot.

Then as to the facts.

It was the imperative duty of the shipowner to exhaust every reasonable means of getting his vessel away before she became frozen in. He knew that this was likely to happen at any time, and he certainly seems to have taken every means to proceed. The vessel was making six inches of water an hour, and the portwarden (one of the surveyors) stated upon the trial that she was unseaworthy to proceed herself, but was fit to go to sea in tow. Charlottetown did not furnish facilities for repair, the nearest port of repair being Pictou, and he could get there only by aid of a tug. There was but one tug owner in Charlottetown. Defendant first designed to go to Pictou, but found by telegraph that he could not get in there owing to ice on the cradles of the marine slip; then, following the recommendation of the surveyors, he endeavoured to induce the tug people to take him to Halifax, but they very reasonably declined to go so far at that season of the year. Then he agreed with them that they should tow him to Port Hawkesbury for $500 and the tug owner spent the day in preparing for the work. All this took place on the day next following the night on which the vessel returned to port. But on the next day the tug owner changed his mind and refused to

(1) Maclachlan on Shipping 4 ed. p. 449.

undertake it. On the trial he stated that his reason was that the navigation was virtually closed, and the ice rapidly forming, and he says that he would not touch her. As a matter of fact the harbour did close that night and remained so for two days when the weather became milder and vessels passed in and out. The tug owner, however, says that although he did some work afterwards it was only by seeking out some soft places in the ice. I think the clear conclusion is that he would not afterwards have ventured to go to Port Hawkesbury.

A survey was again held on the 8th in consequence of the master having reported that he was unable to get towage to proceed to Halifax, as before recommended, and the surveyors now recommended that the vessel be towed up to a wharf. This was done, and soon the ice set and she remained till the spring. The plaintiff had an agent at Charlottetown cognizant of what was being done and active in plaintiff's interests, yet it does not appear that he, or any one else, suggested that something else might be done to get the vessel away. So far, it is difficult to say wherein the owner ought to have acted differently in the way of getting the vessel out.

What is claimed is that the cargo might have been, and ought to have been, sent forward by other means.

Soon after the vessel was laid up at the wharf and the weather moderated a vessel came in that offered to take the cargo or the perishable part of it on, and plaintiff's agent requested defendant to let him have the goods to tranship, stating that the plaintiff had sold the potatoes to arrive at a profit, but defendant refused to give up the cargo in whole or in part unless the whole freight was paid.

On 20th December plaintiff arrived from Bermuda and he also asked for the goods and received the same

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answer. At this time the only mode of conveyance was by rail to Souris or Georgetown, and from thence by steam or sailing vessel direct to Bermuda or *via* New York, or some other United States port.

On the 28th December plaintiff, finding that he could do nothing, left for home, and before doing so attempted to abandon to the underwriters. Hearing that the defendant was likely to sell the potatoes he protested against it, but left directions to his agent to buy them in and ship by Farquharson's steamer in case of a sale. The potatoes, 1,100 or 1,200 barrels, were sold, but plaintiff's agent did not buy them in because Farquharson's boat had not arrived. The potatoes realized $419 net. Some of them were sent to Bermuda by the routes referred to.

The jury have found that there was no urgent necessity for the sale, and that it was made without plaintiff's knowledge or consent. For such conversion of property the defendant is liable, but it is contended that the declaration does not cover such a cause of action.

On the 16th February the plaintiff, through Mr. Peters, again claimed the cargo, but was refused except on terms of payment of entire freight.

In April navigation opened and the vessel was towed to Pictou, where she was unloaded, repaired and reloaded, and then proceeded on her voyage, and arrived at Bermuda on the 6th of June and delivered her cargo in poor condition. The freight was demanded, and plaintiff paid the lump sum less a deduction in respect of some horses carried on deck and landed at Charlottetown, and was credited with the proceeds of the potatoes in defendant's hands.

It is contended by plaintiff that by the improper sale the defendant in effect declined to repair and so left it open to plaintiff to rescind, which he did by the request of Mr. Peters on 16th February.

The effect of a partial breach of contract as warranting a rescission by the other party is considered in *The Mersey Steel & Iron Co.* v. *Naylor* (1). The conclusion is that upon the whole facts it must appear that the conduct or words of the party making the breach must evince an intention not to be bound further by the contract. Here I am inclined to think that such an interpretation cannot be placed upon defendant's words or conduct.

But however this may be, as it must be taken upon the case presented by both sides that the potatoes could not endure the delay of awaiting the repairs of the vessel, the defendant, by, in effect, saying "these goods cannot be carried forward in the original ship and I will sell them," announced as to them that he did not intend to carry them on, and as he did not within a reasonable time exercise his option of sending them forward by another reasonably practicable means of conveyance, the effect was that as to these goods at least the plaintiff was entitled to have them freight free. The defendant's conduct was contrary to his duty as a carrier and as a bailee, and I think the declaration sufficiently wide to cover such a failure of the carrier's duty as is above indicated.

As to the damages, the plaintiff would be entitled to what the potatoes were worth to him over the amount realized (for which he has been allowed) and upon the evidence the damages awarded do not exceed the proved value of the potatoes to him if he had received them either at Charlottetown (or at Bermuda) at the time of the breach of duty.

For these reasons I think that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *L. H. Davies.*

Solicitor for the respondent: *Arthur Peters.*

(1) 9 App. Cas. 434.

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*Feb. 28, 29,
*May 18.

ST. GEORGE JELLETT (DEFENDANT) ..... APPELLANT;

AND

DANIEL R. WILKIE AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

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ST. GEORGE JELLETT (DEFENDANT)..... APPELLANT;

AND

THE SCOTTISH ONTARIO & MANITOBA LAND COMPANY (PLAINTIFFS)..... RESPONDENTS.

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ST. GEORGE JELLETT (DEFENDANT)..... APPELLANT;

AND

ROBERT W. POWELL (PLAINTIFF).....RESPONDENT.

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ST. GEORGE JELLETT (DEFENDANT)..... APPELLANT;

AND

JACOB ERRATT (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Real Property Act—Registration—Execution—Unregistered transfers—Equitable rights—Sales under execution—R. S. C. c.* 51; 51 *V. (D.) c.* 20.

The provisions of sec. 94 of the Territories Real Property Act (49 V. c. 51) as amended by 51 V. (D.) c. 29 do not displace the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers.

APPEAL from a decision of the Supreme Court of the North-west Territories reversing the judgment at the trial in favour of the several defendants.

The plaintiffs respectively purchased lands from the Edmonton and Saskatchewan Land Company of Canada on 7th March, 1891, for valuable consideration and the said company then executed and delivered to them respectively transfers of the lands so purchased executed under "The Territories Real Property Act" (1). The plaintiffs neglected to register the transfers and on the 20th of June, 1893, the sheriff had in his hands a writ of execution against the lands of the said company issued by the defendant Jellett, and filed a copy of the writ of execution against the said lands as being the lands intended to be charged thereby with the registrar of the registration district within which they are situate, and a memorandum thereof was made in the registry of the said lands of which the said company still appeared to be the registered owners under uncancelled certificates of title.

On the 14th December, 1893, the plaintiffs registered the transfers of the said lands to them from the company, but the registrar refused to issue certificates of ownership to the plaintiffs except marked as being subject to the execution, and accordingly certificates of ownership in favour of the plaintiffs were issued, but marked as affected by the writ under the pro-

(1) R. S. C. c. 51.

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visions of the amended sec. 94 of "The Territories Real Property Act."

The defendant Jellett maintained the execution in force and directed the sheriff to advertise the lands for sale.

The actions asked for declarations that the execution was a cloud on the plaintiffs' titles; that the entry of the execution should be cancelled and removed from the register, and for an injunction restraining the sale of the lands and for damages.

*Taylor* Q.C. for the appellants. Difficulty may arise by reading sections placed for a distinct purpose under one heading, with sections placed for different purposes under different headings of the Act. To get the correct bearing, each section must first be considered with reference to the particular purpose it is intended to serve under the heading where it is found. *Eastern Counties Railway Co.* v. *Marriage* (1); *White* v. *Neaylon* (2); for otherwise we may legislate an intention into the statute. *Lawless* v. *Sullivan* (3); Bowen L. J. in *The Queen* v. *Liverpool Justices* (4); Willes J. in *Abel* v. *Lee* (5); also Lord Coleridge in *Coxhead* v. *Mullis* (6): "It is better to suppose that Parliament meant what Parliament clearly said." Under "The Territories Real Property Act" unregistered transfers create nothing, and form the basis of no equities to defeat executions prior in registration.

Registration alone causes a transfer to create or pass an interest; sec. 3, subsec. *c*. See also secs. 41, 59 and 60. *McEllister* v. *Biggs* (7); *Registrar of Titles* v. *Patterson* (8). *Taylor* v. *The Land Mortgage Bank* (9).

(1) 9 H. L. Cas. 41.
(2) 11 App. Cas. 176.
(3) 3 Can. S. C. R. 117.
(4) 11 Q. B. D. 649.
(5) L. R. 6 C. P. 371.
(6) 3 C. P. D. 442.
(7) 8 App. Cas. 314.
(8) 2 App. Cas. 110.
(9) 12 Vic. L. R. 748.

Transfers would not, apart from the Act, pass any title. The Act substitutes a new method of passing title, and must be complied with to give the transferee the benefit of the Act. McGuire J. in *Re Rivers* (1); *Re Herbert and Gibson* (2).

In *White* v. *Neaylon* (3), the learned judge deals with the absurdity of the idea that unwritten equities would be stronger than written ones, but says, as Parliament excluded written ones from protection, and said nothing about unwritten ones, the court would conclude that it meant to leave them unprovided for. See Hagarty C. J. in *Peterkin* v. *McFarlane* (4), where he strongly upheld the same theory.

*Foy* Q.C. and *Chrysler* Q.C. for the respondents. The execution bound only the beneficial interest of the debtor. *Eyre* v. *McDowell* (5); *Morton* v. *Cowan* (6). This law has not been changed by "The Territories Real Property Act," which recognizes the creation and existence of equitable or beneficial estates as distinguished both from the legal estate and from a mere personal right against the registered owner. See sec. 3*a* as substituted by 51 Vict. ch. 20, sec. 3 and other sections. Jones, Torrens System 82, 128 and cases cited.

Equitable mortgagees can be protected. *Re Maloney* (7); *Colonial Bank of Australia* v. *Pie* (8); *Cunningham* v. *Gundry* (9); *Re Massey and Gibson* (10) explaining *Herbert and Gibson* (2).

The respondents were the beneficial owners of the land and the execution debtors owners of the bare legal estate in equity. Upon the delivery of the trans-

(1) 1 N.W.T. Rep. part 4 p. 66.
(2) 6 Man. L. R. 192.
(3) 11 App. Cas. 176.
(4) 9 Ont. App. R. 443; 13 Can. S. C. R. 677 *sub nom. Rose* v. *Peterkin*.
(5) 9 H. L. Cas. 619.
(6) 25 O. R. 529.
(7) 14 Can. L. T. 240.
(8) 6 Vic. L. R. Eq. 186.
(9) 2 Vic. L. R. Eq. 197.
(10) 7 Man. L. R. 172.

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fers the lands ceased to be exigible under any subsequent execution against the plaintiffs. *Parke* v. *Riley* (1); *Watson* v. *The Royal Permanent Building Society* (2); *Britain* v. *Rossiter* (3); *Maddison* v. *Alderson* (4); *Huntley* v. *Huntley* (5). Concurrently with the old rule of law was admitted the rule of equity, that the estate did pass if the intention was clearly indicated. The same rule of equity still exists concurrently with the provisions of section 59. *McElister* v. *Biggs* (6); *Mathieson* v. *The Mercantile Finance and Agency Co.* (7).

Section 59 must be read also in conjunction with section 64, and restricted by the words "as against any *bonâ fide* transferee." "Transferee" probably includes "encumbrancee" but an execution creditor is neither.

A writ of execution filed under section 94 is not an "instrument" within the meaning of the Act.

Sections 63, 103 (*d*), 104, 105 and 124, place a *bonâ fide* purchaser for value in a distinct category. This interpretation fulfils the object of the Act. *Gibbs* v. *Messer* (8). As to priority between instruments filed without production of certificate, see *Re Bentley and Morris* (9).

Secs. 60, 61 and 62 are for the benefit of the registered owner, in whose hands the certificate is conclusive evidence *sub modo* as against persons claiming interests or estates adversely to the certificate, *i.e.* in the sense of attacking its validity, but not as against persons claiming under the very title evidenced by the certificate, as the respondents claim. Jones, Torrens System 80, 81, 82, 100, 101. *Cunningham* v. *Gundry* (10).

(1) 12 Gr. 69; 3 E & A. 215.
(2) 14 Vic. L. R. 283; Hunter's Cases 185, 192.
(3) 11 Q. B. D. 123.
(4) 8 App. Cas. 467.
(5) 114 U. S. R. 394.
(6) 8 App. Cas. 314.
(7) 17 Vic. L. R. 271.
(8) [1891] A. C. 248.
(9) 12 Can. L. T. 119.
(10) 2 Vic. L. R. Eq. 197.

This filing of the execution operates as a caveat merely and a caveat is not an "instrument" within the meaning of the Act (sec. 3, subsec. *b*). *National Bank of Australia* v. *Morrow* (1); *Giles* v. *Lesser* (2). *Massey and Gibson* (3) is followed in *Ontario Bank* v. *McMicken* (4), where the converse of the point involved in this case is established, viz., that the beneficial interest of a *cestui qui trust* is exigible under an execution filed under the Act.

The certificate can only be evidence when produced, and in favour of him who produces it. The purchasers had it in custody when they received their transfers, and the appellant never had it and cannot appeal to it as evidence in his favour. *The Shamrock Co.* v. *Farnsworth* (5). Moreover, a certificate cannot be conclusive evidence of more than appears on its face, namely, that at its date the title was in the person named.

The sheriff has been properly and of necessity made a party. See *Ontario Industrial Co.* v. *Lindsey* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This appeal involves a question of law arising upon undisputed facts. Four actions brought by different plaintiffs against the same defendant have been consolidated, the substantial question being the same in each. The plaintiffs in the three several actions of Wilkie, the Scottish Ontario & Manitoba Land Company, and Powell, were each the purchasers of certain lands from the Edmonton and Saskatchewan Land Company, who had obtained transfers of the lands respectively purchased by them, against which the appellant, Jellett, an execution creditor of the last named company had, subsequent to the trans-

(1) 13 Vic. L. R. 2.
(2) 5 Vic. L. R. Eq. 38.
(3) 7 Man. L. R. 172.
(4) 7 Man. L. R. 203.
(5) 2 Vic. L. R. Eq. 165.
(6) 3 O. R. 66.

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fers, but before their registration, procured his writ of execution to be registered under section 94 of "The Territories Real Property Act" as amended by 51 Vict. ch. 20. Erratt, the plaintiff in the remaining action, is also a purchaser for value from the execution debtors under an unregistered contract, prior in date to the registry of the appellant's execution. The questions are the same in all the four cases, viz., whether the registrar was right in refusing to register the transfers and contract except subject to the lien or charge of the execution, and whether the appellant is entitled to sell the lands so as to cut out the titles of the respondents. The consolidated actions having been heard in the first instance before Mr. Justice Rouleau, who dismissed them, were brought by way of appeal before the Supreme Court of the North-west Territories in *banc*, which court reversed the judgment of Mr. Justice Rouleau and entered a judgment for the respondents declaring the writs of execution clouds upon the respondents' titles and directing the registrar to cancel the entry of the executions, and further restraining the sheriff from selling the lands under the executions.

I am of opinion that this judgment and the reasons given for it in the opinion of the court, written by Mr. Justice Maguire, were entirely right and that there is no foundation for the present appeal.

By the North-west Territories Act the law of England as it existed on the 15th of July, 1870, so far as it has not been altered or varied by competent legislative authority, is, by the 11th section of the Act, made the rule of decision in those territories.

No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his

debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor. In a dissenting opinion delivered in the case of *Miller* v. *Duggan* (1), I brought together a number of authorities bearing on this point. I may here refer to the following cases as conclusively establishing the principle in question, viz. : *Eyre* v. *McDowell* (2) ; *Beaven* v. *Lord Oxford* (3) ; *Whitworth* v. *Gaugain* (4) ; *Kinderley* v. *Jervis* (5) ; *Benham* v. *Keane* (6) ; *Wickham* v. *The New Brunswick Railway Co.*(7) ; *Watts* v. *Porter* (8) ; *Langton* v. *Horton* (9) ; *McMaster* v. *Phipps* (10) ; and *Strong* v. *Lewis* (11).

The rule thus well established must have become the law of the territories unless it has been displaced by some statutory provision to the contrary ; and if no such enactment can be referred to it must be conclusive of the question raised by this appeal, as the Supreme Court has held it to be.

It is, however, said in behalf of the appellant that section 94 of the Territories Real Property Act (49 Vict. ch. 51) as amended by 51 Vict. ch. 20, does alter the law so as to give the appellant the priority he claims for his writs of execution over the prior unregistered transfers and contract of the respondents. That section is as follows :

Every sheriff or other officer charged with the execution thereof shall after the delivery to him of any writ or process affecting land or lien, mortgage or encumbrance or other interest therein deliver a copy of every such writ or process so in his hands or that may thereafter be delivered to him, certified under his hands, together with a memorandum n writing of the lands intended to be charged thereby, to the registrar within whose district such lands are situate, and no land shall be bound by any such writ or other process unless such copy and memorandum

(1) 21 Can. S. C. R. 33.
(2) 9 H. L. Cas. 619.
(3) 6 DeG. M. & G. 507.
(4) 1 Ph. 728.
(5) 22 Beav. 1.
(6) 3 DeG. F. & J. 318.
(7) L.R. 1 P.C. 64.
(8) 3 E. & B. 758.
(9) 1 Hare 560.
(10) 5 Gr. 253.
(11) 1 Gr. 443.

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have been so delivered ; and the registrar shall thereupon, if the title has been registered, or so soon as the title has been registered under the provisions of this Act, enter a memorandum thereof in the register ; and from and after the delivery of a copy of any such writ or other process and memorandum to the registrar the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum or of any interest he has therein, and no transfer shall be made by him of such land or interest therein except subject to such writ or other process.

Now, as I have already said, the sheriff having delivered a copy of the appellant's writs of execution to the registrar together with a memorandum of the lands intended to be charged thereby, the latter officer entered a memorandum in the register accordingly, the title then being a registered title, and the respondents then being entitled under the transfers and contract before mentioned. According to the ordinary rules of courts of equity the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more. And this, which is said to be a "broad rule of justice" and to depend, as is well pointed out by Wood V.C. in *Benham* v. *Keene* (1), upon the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position, was from early times enforced by courts of equity in order to protect the title of equitable owners and chargees. And it must have been the obvious right of the respondents to have the benefit of this protection in the way in which the judgment now impugned afforded it to them, unless the statute has abrogated the principle.

Had there been no difference of opinion I should have thought that there could be no reasonable ground for the pretense of the appellant that this 94th section gives him any priority.

(1) 1 J. & H. 685 ; 3 DeG. F. & J. 318.

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The construction of it seems to me to be obviously plain. The effect to be given to the entry on the register of the memorandum of the writ of execution is clearly and precisely stated in the section itself to be to operate as a caveat or warning to persons who might subsequently purchase or be about to purchase from the execution debtor, that he could only sell or transfer an interest subject to the lien of the writ. This in so many words is what Parliament has declared to be the effect and consequence of the registering of an execution. Surely there is nothing in this abrogating or pointing to the abrogation of prior interests. It follows therefore that the rights of prior parties remain as they were before the execution was registered, and these entitled the respondents to have their transfers registered without any reference being made in the certificate to the execution, and to have the sheriff's sale restrained. I have been through all the sections of the amended Lands Act, and I find nothing abridging the equitable rights of the respondents as they stood when the statute was passed. So far from equities being shut out there are numerous indications, as pointed out in Mr. Justice Maguire's judgment, that it was the intention to conserve them (1); particularly the right to specific performance which applies here to Erratt's case is conserved. As regards authority the *National Bank* v. *Morrow* (2), appears to me directly in point. In that case the Supreme Court of Victoria held that an unregistered equitable mortgagee was entitled to priority over a registered execution, and not only over the execution creditor but also over a purchaser from the sheriff under the execution but whose transfer had not been registered.

The 106th section of the Victoria Act is substantially identical with section 94 of the amended Lands Act,

(1) See sec. 130.

(2) Hunter's Torrens cases, p.306.

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the object of both being, not to give the execution creditor any superiority of title over prior unregistered transferees, but merely to protect the land against intermediate sales and dispositions by the execution debtor. No doubt if the sheriff had sold and the purchaser had registered his transfer, the Act would apply, and would in that case invalidate prior unregistered transfers made by the execution debtor before the registry of the execution, but no such case as that is presented by this appeal, which must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *S. S. & H. C. Taylor.*

Solicitors for the respondents: *Beck & Emery.*

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*Mar. 9, 10.
*May 18.

SAMUEL GEORGE COWAN AND OTHERS (PLAINTIFFS AND DEFENDANTS) ..... } APPELLANTS;

AND

W. F. ALLEN (BY ORIGINAL WRIT) AND JEANNE COWAN (MADE A PARTY IN THE MASTER'S OFFICE) (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Will — Construction of — Executory devise over — Contingencies — "Dying without issue" — "Revert" — Dower — Annuity — Election by widow — Devolution of Estates Act, 49 V. (O.) c. 22 — Conditions in restraint of marriage — Practice — Added parties — Orders 46 and 48 Ontario Judicature Act — R.S.O. (1887) c. 109, s. 30.*

A testator divided his real estate among his three sons, the portion of A. C. the eldest son being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum

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of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A.C. died after the testator, leaving a widow but no issue.

*Held*, reversing the judgment of the Court of Appeal, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; that it was no ground for departing from this *primâ facie* meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A.C. by this construction as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee and if paid by him his personal representatives on his death could enforce repayment to his estate.

*Held* also, that the widow of A.C. was entitled to dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act which applies only to the descent of inheritable lands.

The mortagee of the reversionary interest of one of his brothers in the lands devised to A.C. was improperly added, in the master's office, as a party to an administration action and could take objection at any time to the proceeding either by way of appeal from the report or on further directions; she was not limited to the time mentioned in Order 48 of the Supreme Court of Judicature which refers only to a motion to discharge or vary the decree.

APPEAL from the judgment of the Court of Appeal for Ontario, whereby the appeal of the present appellants from the judgment of the Chancery Division of the High Court of Justice for Ontario was dismissed with costs.

The respondents are the widow and administrator of the intestate Alexander Cowan.

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An administration order was issued, on proceedings taken by the plaintiff, on the 16th June, 1892, for the administration of the real and personal estate of Alexander Cowan, who died on the 30th June, 1891, intestate and without issue, leaving a widow, the respondent, Jeanne Cowan, and his brothers, the appellant plaintiff, Samuel George Cowan, and the appellant defendant, Albert Wilberforce Cowan, him surviving. In the course of the reference it became necessary to ascertain what interest the deceased Alexander Cowan had taken under the will dated 24th October, 1885, of his late father, James Cowan, in the lands referred to in the sixth paragraph of the will, his brothers, the appellants plaintiff and defendant, contending that in the events which had happened such lands had passed to them by virtue of the 14th clause of said will. The clauses in question are quoted in the judgment by his Lordship the Chief Justice. The widow of the intestate, Jeanne Cowan, and his brother, A. W. Cowan, were added as parties in the master's office by order in the usual form; and by a further order, the appellant, Sarah MacPherson, a mortgagee of the plaintiff's interest in the lands subsequent to the intestate's death, was also added as a party. It seems to have been urged at some stage of the proceedings before the master that none of these three defendants should have been added as parties, and that Sarah MacPherson had no interest in Alexander Cowan's estate. These objections were renewed on the appeal from the master's certificate, but subsequent to the order by which they were made parties these defendants, together with the original plaintiff and defendant, joined in making certain written and signed admissions of fact and in submitting to the master the following questions therein:

"1. What estate did Alexander Cowan take under the will of his father, James Cowan, in the lands referred to in the sixth paragraph of said will?"

"2. What interest, if any, in said lands survived to the estate of Alexander Cowan?"

"3. What rights has the defendant, Jeanne Cowan, now in said lands,

"*a*. By virtue of the said will of James Cowan;

"*b*. By virtue of the death of Alexander Cowan and her widowhood?"

The master issued the following certificate or report of his answers:

"I certify that, pursuant to judgment herein bearing date the 16th day of June, 1892, I was attended by the solicitors for the plaintiff and the defendants herein and I find as follows:

"1. That Alexander Cowan took under the will of his father, James Cowan, deceased, in the lands referred to in the sixth paragraph of said will, an absolute estate in fee simple.

"2. An absolute estate in fee simple survived to the estate of Alexander Cowan, subject to the charge thereon to Isabella Cowan as stated in the second paragraph of said will, and also subject to the rights of defendant Jeanne Cowan, doweress therein.

"3*a*. By virtue of the will of said James Cowan, the defendant Jeanne Cowan has the right to be paid $50 a year so long as she remains unmarried.

"3*b*. By virtue of the death of Alexander Cowan the defendant Jeanne Cowan is entitled to dower in said lands of her husband, or a distributive portion under the Devolution of Estates Act, as she may elect."

From these findings and the certificate all the appellants appealed, contending:

1. That the master should have found that Alexander Cowan took under his father's will an estate in fee

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simple with an executory devise over in fee to the appellants S. G. and A. W. Cowan, which in the events that had happened had taken effect, so that the lands formed no part of the intestate's estate.

2. That the master should not have found that the respondent Jeanne Cowan was entitled to dower in the lands in question or a distributive share under the Devolution of Estates Act as she might elect, or to any other interest therein than the annuity of $50 per annum bequeathed to her by said will so long as she remained unmarried.

3. That the certificate did not set aside and discharge the order adding the appellant MacPherson as a party in the master's office.

This appeal was dismissed, the learned judge holding that the intestate took under his father's will an estate in fee simple absolute and that the 14th clause of the will under which the appellants claimed was repugnant and void. "The result," as he expressed it, "being that the lands in question will devolve on the two surviving brothers of Alexander Cowan as his next of kin and his widow, should she elect to take under the Devolution of Estates Act, instead of her dower, her share under the Act." He held also that MacPherson had been properly made a party in the master's office.

The Court of Appeal upheld this decision, and the present appeal is by the same appellants seeking relief upon grounds similar to those above stated.

*Moss* Q.C. and *Hall* for the appellants. According to *O'Mahony* v. *Burdett* (1) and *Ingram* v. *Soutten* (2), the general rule of construction is, that where there is a bequest or devise and the will refers to the death of the legatee or devisee, with a contingency as death without leaving issue—that *primâ facie* means death

(1) L. R. 7 H. L. 388. (2) L. R. 7 H. L. 408.

whenever it may happen unless the testator expressly shows by the language of the will that death before a particular period was really intended. And see Jarman on Wills (1); *Re Ball. Slattery* v. *Ball* (2); *Woodroofe* v. *Woodroofe* (3); *Palmer* v. *Orpen* (4).

In *Tenny* v. *Agar* (5), before the Wills Act, the lands were devised to the first taker and his heirs forever, "upon the condition that he pay a charge of £300 to his sister." The words "die without leaving any child or issue (then over)" were there held to create an estate tail and not an absolute estate in fee, though now, since the Wills Act, the first taker would be held to take an estate in fee with an executory devise over. Had the supposed rule of construction adopted by Mr. Justice Maclennan been a proper one, it should have been held in *Tenny* v. *Agar* (5) that the first taker took the fee absolute owing to the charge of £300 being imposed upon the first taker's interest. The fact that the devise was to the first taker and his heirs forever, made it a stronger one for such a rule than the one now in question in this appeal, and should have aided the court to come to such a conclusion, if it had been a proper one. See also *Denn. ex dim Geering* v. *Shenton* (6).

The $2,000 charged in favour of S. G. and A. W. Cowan was never in fact paid to them, and being now entitled to all Alexander Cowan's estate under the will their charge of $2,000 thereon is merged in their right to the fee. See *Duke of Chandos* v. *Talbot* (7). But had the charges been paid, Alex. Cowan's executors would be entitled to be repaid the amount of the charge. *Drinkwater* v. *Combe* (8).

(1) 5th Ed. 1590.
(2) 40 Ch. D. 11.
(3) [1894] 1 Ir. Rep. 299.
(4) [1894] 1 Ir. Rep. 32.
(5) 12 East 253.
(6) Cowp. 410.
(7) 2 P. Wm. 604.
(8) 2 Sim. & Stu. 340.

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The construction sought to be applied requires the court to read into the 14th clause of the will after the word "die" the words "in my lifetime." See *In re Heathcote's Trusts* (1), where a similar attempt to read similar words in the will was overruled, and *Ingram* v. *Soutten* (2).

In the 14th clause the testator has used the technical words, "die without issue," upon the true meaning of which the result of this appeal really turns. They must be taken in their technical sense and given their well recognized meaning as defined by R. S. O. [1887], ch. 109 sec. 32 and by the courts. See *Roddy* v. *Fitzgerald* (3); *Jesson* v. *Wright* (4); *Bowen* v. *Lewis* (5); Hawkins on Wills, p. 1 *et seq.*, and cases there cited.

In regard to the gift to the widow of the deceased son "of the sum of $50 per annum out of his estate so long as she remains unmarried" being in restraint of marriage, it should be observed that this is not the case of a gift of an annuity to the widow for life upon condition that she does not remarry. It is a gift only so long as she remains unmarried. In either event such a gift would be perfectly good. See *Allan* v. *Jackson* (6); *Jordan* v. *Halkham* (7); and *Heath* v. *Lewis* (8).

No attempt is made to deprive the widow of her dower. She is entitled to her dower in the lands of her husband and the annuity as well. One of the incidents attaching to an executory devise is a widow's right to dower, and "the balance of the estate" is simply given over to the two brothers with all its incidents. See *Moody* v. *King* (9); *Smith* v. *Spencer*

(1) 9 Ch. App. 45.
(2) L. R. 7 H. L. 408.
(3) 6 H. L. Cas. 823.
(4) 2 Bligh. 1.
(5) 9 App. Cas. 890.
(6) 1 Ch. D. 399.
(7) Amb. 209.
(8) 3 Deg. M. & G. 954.
(9) 2 Bing. 447.

(1); *Buckworth* v. *Thirkell* (2); Cameron on Dower, 149 *et seq*, and Jarman on Wills (3) and the cases there cited. The most that could be urged would be whether or not the widow is put to her election to take the annuity or dower. This does not arise as she is entitled to both, but she cannot claim a distributive share under the Devolution of Estates Act as the estate passes under the father's will and not under the statute. See *McGregor* v. *McGregor* (4).

The appellant MacPherson has no interest whatever in the estate of the late Alexander Cowan, which is being administered; her title cannot be tried on a reference for the administration of the estate, which claims adverse to her; her right is to have her title tried in an action properly instituted for that purpose; she has objected and protested at every stage of the proceedings that she was improperly brought into the master's office; she is improperly added as a party, and the order adding her as a party should be discharged.

*Shepley* Q.C. for the respondent W. F. Allen (*Simpson* with him). MacPherson was made a party to these proceedings under rule 46, Ontario Judicature Act and so far as she is concerned these proceedings began in the master's office. This court will not entertain the appeal under section 24 (*a*) of the Supreme and Exchequer Courts Act as it is not a case so far as MacPherson is concerned in which the court of original jurisdiction is a superior court. *Kandick* v. *Morrison* (5); *Martin* v. *Moore* (6); *McGugan* v. *McGugan* (7).

She was served with notice and did not move under rule 48 Ont. Jud. Act and therefore she ought not to

(1) 2 Jur. N.S. 778.
(2) 3 B. & P. 652 note (*a*).
(3) 5 ed. p. 836.
(4) 20 Gr. 450.
(5) 2 Can. S.C.R. 12.
(6) 18 Can. S.C.R. 634.
(7) 21 Can. S.C.R. 267.

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be heard in appeal, but is bound under the rules and practice in that behalf. *Scammell* v. *James* (1).

This order is a practice order and interlocutory and therefore not appealable even to the Court of Appeal under section 68 of the Judicature Act.

MacPherson never appealed against the order making her a party, but joined in making admissions before the master for considering and determining the interests of the estate and of Jeanne Cowan in certain land; the master made findings and an interlocutory certificate upon the question alone, and she did not move to discharge the order making her a party; she moved by way of appeal complaining that amongst these interlocutory findings and in that interlocutory certificate the master had not inserted a further finding that the order which he had made ought to be set aside with costs. See *Shaw* v. *St. Louis* (2).

The devise over depends on two conditions, and both these must concur or the devise over cannot take effect. *Cook* v. *Noble* (3); *Grey* v. *Pearson* (4); *Wing* v. *Angrave* (5); *Abbott* v. *Middleton* (6).

Where a devise is made upon several conditions, one of which is void, the other, though good by itself, being coupled with the void one will also be rejected. *In re Babcock* (7); *Bradley* v. *Peixoto* (8).

The attempted disposition of the land on the devisee dying leaving a widow, that the widow is to have $50 per annum out of the estate, is void. It is a direct interference with the laws of England as to the incidents of an estate in fee and so is void for repugnancy. *Earl of Arundel's case* (9); *Portington's case* (10); *Mild-*

(1) 16 Can. S C.R. 593.
(2) 8 Can. S.C.R. 385.
(3) 5 O. R. 43.
(4) 6 H.L. Cas. 61.
(5) 8 H.L. Cas. 183.
(6) 7 H.L. Cas. 68.
(7) 9 Gr. 427.
(8) 3 Ves. 325; Tudor's L.C. 3rd ed. p. 972.
(9) Dyer 343 (*b*).
(10) 10 Co. 35 (*b*).

*may's case* (1); *Rosher* v. *Rosher* (2); *Dugdale* v. *Dugdale* (3).

The executory devise merely contemplates the death of one of the sons of the testator during his lifetime leaving a widow but without children. He knew that if his son predeceased him leaving children the devise would not lapse but would go to the children subject to the widow's dower; R. S. O., c. 109, s. 36. But to provide for his son's widow in case the son left no issue and predeceased the testator a provision was made for her while she remained unmarried.

The rule has been adopted in such cases that the death and failure of issue are to be read as though they must occur during the lifetime of the testator.

In any event the land does not "revert" to the brothers until the marriage of the said Jeanne Cowan (which has not happened) and until the happening of the said event it remains the property of the estate of Alexander Cowan. This affords another argument that the alleged executory devise is bad.

The word "revert" has no technical meaning in the strict construction of the clause. *Re Norman's Trusts* (4); *Carter* v. *Carter* (5). As to the possession in fee, the "charge" is not a personal liability. *Drinkwater* v. *Combe* (6).

The testator's intention was to divide the property between all his sons left him surviving, and this object is best attained by reading the will so as to make "dying without issue" refer to the period anterior to the testator's death. See *O'Mahony* v. *Burdett* (7); *Barker* v. *Cocks* (8); *Olivant* v. *Wright* (9).

(1) 6 Co. 40*a*.
(2) 26 Ch. D. 801.
(3) 38 Ch. D. 176.
(4) W. N. [1879] 175.
(5) 26 Gr. 232.
(6) 2 Sim. & Stu. 340.
(7) L. R. 7 H. L. 388.
(8) 6 Beav. 82.
(9) 1 Ch. D. 346.

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*Riddell* Q.C. for the respondent Jeanne Cowan.

This respondent seeks to maintain her right to a distributive share in the estate under the Devolution of Estates Act, and against this decision there is no appeal by either party. She has the right of election as to this share or to take dower, to which she is entitled as the estate was of inheritance and her husband died seized. *Smith* v. *Spencer* (1). The quality of this estate not the quantity settles her right to dower. *Moody* v. *King* (2). The annuity is a special devise to the widow and is not incompatible with dower; the widow is entitled to the annuity in addition to her dower or a distribute share under the statute in case she so elects.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Court of Appeal affirming with costs a decision of Mr. Justice Robertson. The cause had originally been heard before the Chancellor who pronounced a judgment by which *inter alia* it was referred to the master, in the usual form of an administration order, to take the accounts of the estate of Alexander Cowan, deceased. In the course of the proceedings before the master a question arose as to the proper legal construction of the will of James Cowan, the father of Alexander Cowan, and the master having made his report dated the 8th of May, 1894, declaring the construction of the will in question, the present appellants, Samuel George Cowan, the plaintiff in the administration action, Albert Wilberforce Cowan and Sarah MacPherson (the two last named persons having been added as parties in the master's office) appealed against the report, the respondents on that appeal

(1) 6 DeG. M. & G. 631; 2 Jur. N. S. 778.

(2) 2 Bing. 447.

being the present respondents, W. F. Allen, the administrator of Alexander Cowan (who had died intestate), the defendant in the administration action, and Jeanne Cowan, the widow of Alexander Cowan, added as a party in the master's office. The judgment of Mr. Justice Osler delivered in the Court of Appeal is prefaced with a statement of the proceedings in the several courts below and before the master to which I refer.

The motion by way of appeal from the report was dismissed with costs by Mr. Justice Robertson, and, as already stated, this order was affirmed by the Court of Appeal, that court being, however, equally divided, the Chief Justice and Mr. Justice Osler being for allowing the appeal, whilst Mr. Justice Burton and Mr. Justice Maclennan were of a contrary opinion.

The clauses of the will of James Cowan upon which these questions of construction have arisen, and which are material to be considered, are the sixth, eighth, ninth and fourteenth, and are in the following words:

6. I will, devise and bequeath to my son Alexander Cowan the north half of the north half of lot seventeen, concession four, township Clarke; also the south half of the south half of lot sixteen, concession five, township Clarke, amounting in all to one hundred acres more or less, subject to his mother's dower of $100 per annum during her life, $1,000 to his brother Samuel George and $1,000 to his brother Albert Wilberforce, and certain other considerations to his mother in bequest number two.—And which legacies and considerations before mentioned in the several sections hereinbefore written are bequeathed to my wife Isabella Cowan in lieu of dower as interlined in bequest number two.

8. I will, devise and bequeath to my son Samuel George the west half of the north half of lot number fourteen, concession four, township Clarke, known as the Doney Farm, containing fifty acres more or less, subject to his mother's dower of $50 per annum during her life; also the sum of $1,000 to be paid to him in two years after my decease with interest at six per cent per annum on the second year only, unless the money shall be paid by the end of the first year, in which case there shall be no interest; and the said $1,000 is to be paid by my son Alexander and chargeable upon the said lands willed

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to my son the said Alexander. And the line and parts of two lines erased immediately preceding are done at my request.

9. I will, devise and bequeath to my son Albert Wilberforce the north quarter of lot number fifteen, concession four, township Clarke, containing fifty acres more or less, subject to his mother's dower of $50 per annum during her life and to half of the wood my wife will require during her life; also I will and bequeath to him the sum of $1,000, payable to him by my son Alexander in four years after my death with three years interest at 6 per cent per annum on said $1,000.

14. I will and bequeath that should any of my three sons die without lawful issue and leave a widow she shall have the sum of $50 per annum out of his estate so long as she remains unmarried and the balance of the estate shall revert to his brothers with the said $50 on her marriage.

The master found as follows:

1. That Alexander Cowan took under the will of his father, James Cowan, deceased, in the lands referred to in the 6th paragraph of said will, an absolute estate in fee simple.

2. An absolute estate in fee simple survived to the estate of Alexander Cowan, subject to the charge thereon to Isabella Cowan as stated in the second paragraph of said will, and also subject to the rights of defendant Jeanne Cowan, doweress therein.

3*a*. By virtue of the will of said James Cowan, the defendant Jeanne Cowan has the right to be paid $50 a year so long as she remains unmarried.

3*b*. By virtue of the death of Alexander Cowan, the defendant Jeanne Cowan is entitled to dower in said lands of her husband, or a distributive portion under the Devolution of Estates Act, as she may elect.

The first question arising in this appeal is as to the estate taken by Alexander Cowan. The appellants, including Mrs. MacPherson, who is a mortgagee of the interest taken by the plaintiff Samuel George Cowan in the lands originally devised to his brother Alexander, contend that under the 6th and 14th paragraphs of the will, Alexander Cowan took an estate in fee in the lands specifically devised to him, subject to an executory devise over, in the event of his death without issue (which event happened) to his brothers,

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the plaintiff, and Albert Wilberforce Cowan. The respondents on the other hand contend that Alexander Cowan took an absolute estate in fee under the same provisions of the will.

Mr. Justice Robertson held that Alexander Cowan took an absolute estate for the reason that the gift over to his brothers in case of his death without issue was void for repugnancy. The two judges of the Court of Appeal who concurred in the conclusion of Mr. Justice Robertson entirely dissented from his reasons, holding that the gift over upon the death of Alexander Cowan, without children, did not take effect, for the reason that the executory limitation over was one which must be construed as intended only to take effect in the event of the death of Alexander Cowan without issue, in the testator's lifetime.

The opinion of Mr. Justice Robertson appears to have been founded on an erroneous view of the case of *Re Parry and Daggs* (1). In that case there was a devise to the testator's son, and his heirs, with an attempted gift over in the following words:

> And I hereby declare and direct that in case my said son shall die without leaving lawful issue, then and in such case the estate and premises hereby devised to him shall go to his next heir at law, to whom I give and devise the same accordingly.

A question as to the nature of the title taken by the son having arisen under the Vendor and Purchasers' Act, it came first before Bacon V.C., and then was carried to appeal. The Court of Appeal, in a judgment delivered by Fry L.J., held that the testator's son took an absolute estate and that the gift over to the collateral heir in the event of the son's death without issue was void. This interpretation proceeded on the following reasoning. It was pointed out that in either event of there being or not being issue the heir at law would

(1) 31 Ch. D. 130.

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take just as under the original gift; that if the collateral heir took he would still take as heir; therefore the gift over did not alter the devolution of the estate and its only effect would be to fetter the first taker's power of alienation for which purpose it was presumably designed. This being an illegal device, as a restraint repugnant to an estate in fee, was therefore held to be void. All this had nothing to do with the present case. The gift over here is to the two brothers of the first taker Alexander, not to his heirs. The case of *Re Parry and Daggs* has therefore manifestly no application, and indeed it was not on the argument before this court attempted to support the judgment under appeal on any such ground.

Speaking with the utmost respect, it seems to me that the grounds upon which the prevailing opinion of the Court of Appeal proceeded also fail of support from authority.

Mr. Justice Maclennan puts his judgment on the ground that the dying without lawful issue of Alexander Cowan, referred to in the 14th clause, upon which the estate in the lands devised to him by the 6th clause was to go over to his brothers, meant and was restricted to a dying without issue in the testator's lifetime.

In the cases of *O'Mahony* v. *Burdett* (1), and *Ingram* v. *Soutten* (2), though in neither of these cases did the exact question presented here arise, since in each of them the gift to the person upon whose death without issue the executory devise over was to take effect was preceded by a life estate, this point of the effect of an immediate devise in fee not preceded by any life interest, with a gift over in the event of the death of the first donee in fee without issue, was considered and opinions expressed as to its construction by the Lords who decided the two cases referred to. It was in the

(1) L. R. 7 H. L. 388. (2) L. R. 7 H. L. 408.

cases mentioned recognized as a well established rule of construction, and as having been properly laid down as such by the Master of the Rolls in his second rule in *Edwards* v. *Edwards* (1), that, as in the case now before us, where there is first an immediate devise in fee and then a gift over on the death of the first devisee without leaving children or issue, the *primâ facie* meaning of the testator is that the gift over is to take effect on a death without children not confined to the testator's lifetime but at any time. Thus in *O'Mahony* v. *Burdett* (2), Lord Cairns at p. 395 of the report expressly recognizes the soundness of the second rule in *Edwards* v. *Edwards* (1), and argues from it to a similar conclusion in the different case then actually before him.

At page 393 Lord Cairns also says:

In the absence of any authority to the contrary I should entertain no doubt that the decision of the Court of Appeal in Chancery in Ireland was in accordance with the true interpretation of the will. A bequest to A. and if he shall die unmarried or without children to B. is, according to the ordinary and literal meaning of the words, an absolute gift to A. defeasible by an executory gift over in the event of A. dying at any time under the circumstances indicated, namely, unmarried or without children.

In the opinion of Lord Hatherley, at p. 401, we find the following passage:

Then comes a subsequent case, a gift to A., apparently absolutely, and on his death without leaving any children, then over. Here the courts have at all times held, and the Master of the Rolls so states in *Edwards* v. *Edwards* (1), that that affords a sufficient indication that the words "in case of his death without leaving issue," or "without leaving children," as the case might be, were to extend to the whole period of the first taker's interest. Although he would apparently, by the terms of the gift itself, and did indeed in point of law, take absolutely yet there was an executory devise over, that might take effect at his death when the contingency should be ascertained whether he died childless or not.

(1) 15 Beav. 357.
(2) L. R. 7 H. L. 388.

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Lord Selborne in the same case of *O'Mahony* v. *Burdett* (1) also approves of this rule. In *Re Parry and Daggs* (2), already referred to on another point, Lord Justice Fry refers to this principle of construction as follows:

> In the first place, it was argued that the gift over was to take effect only in the case of the devisee dying in the lifetime of the testator. In my opinion that construction cannot prevail. When property is absolutely given to a person, and then there is a gift over in the event of the devisee dying, with no further words, it is obvious that some words must be imported to define the contingency intended by the testator. Death in itself is not a contingency, and, therefore, we must imply words to make contingent the event which has been spoken of as contingent by the testator. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator; and, according to the decision in *Edwards* v. *Edwards* (3), when the gift in fee is preceded by a life estate, the contingency has been held to refer to the death of the donee, either during the preceding life estate or in the lifetime of the testator. But here the gift over is not on a certain event, for death is coupled with the contingency of not leaving issue. Therefore, there is no need to import any words; and consequently there is no necessity for limiting the event to the lifetime of the testator.

In the case of *Woodroffe* v. *Woodroffe* (4), we have a very full judgment of the Master of the Rolls upon a will which, unlike those in the cases in the House of Lords, had this resemblance with that before us, that there was not there, as there is not here, any previous life estate preceding the estate of the devisee whose estate is made defeasible. In that case the construction contended for by the appellants in the present case was adopted.

I do not understand the learned judges whose opinion prevailed in the Court of Appeal to dispute the rule of interpretation which has been laid down in the cases already cited. But they insist that this rule is subject to be controlled by the context, a proposition which cannot be disputed. When, how-

(1) L. R. 7 H. L. 388.
(2) 31 Ch. D. 130.
(3) 15 Beav. 357.
(4) [1894] 1 Ir. Rep. 299.

ever, they rely upon there being such a context to be found in this will I most unhesitatingly differ from them.

Mr. Justice Maclennan assumed that Alexander had paid the $2,000 charged on the lands devised to him to his brothers; this is said in the appellants' factum to be a mistake, and this contradiction was not controverted on the argument at the bar. This, however, is immaterial and it can make no difference in the construction whether Alexander had actually paid off the charges or not. Mr. Justice Maclennan argues, from the extreme harshness of what he assumes to be the necessary consequences of Alexander's estate being charged in the way it is, that the testator could not have intended that after having paid off the two sums of $1,000 each, charged in favour of his brothers, and the other charges, the estate of Alexander Cowan should have been liable to defeasance on his death without children and that the only way of avoiding this was to refer the gift over to death in the testator's lifetime. The learned judge thus states his reasons for this conclusion:

> To my mind it is impossible to suppose that the testator intended that after Alexander had paid the $2,000 to his brothers his estate should be defeasible. He was quite a young man, the son of a farmer, presumably not possessed of independent means wherewith to pay these sums, and yet if the construction contended for is to prevail he could not raise the money wherewith to make the payments by mortgage of the land devised to him, or of the personal property either, for no one would lend it on a title liable to come to an end at any moment. Upon such a construction his father's gift would indeed be to Alexander a *damnosa hereditas*.

Now, even if the consequences would have been as onerous as Mr. Justice Maclennan assumes they would, in the event of Alexander Cowan having paid off these charges before his death, I am still unable to agree that that is any sufficient reason for altering the plain

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words of the will. The testator had a perfect right to impose any terms he thought fit, and it is no ground for departing from the *primâ facie* meaning of the terms of his devise that he has imposed very burdensome conditions upon a devisee who is free to accept the gift or not. With great respect for the learned judges I think this, so far from using the context to control the terms of the gift, is rather conjecturing a testator's intentions by supposing him to have meant to treat this son more fairly and liberally than would be consistent with the *primâ facie* interpretation of the terms he has used to express his intentions, a mode of construction which is of course entirely inadmissible. I have been through all the cases referred to on this point, but I do not find in any of them the least countenance for such a mode of construction.

In truth, however, no such harsh consequences as Mr. Justice Maclennan argues from would, in my opinion, have been entailed by the construction the appellants contend for. In the first place the two sums of $1,000 each charged by the testator in favour of his two sons, Samuel George and Albert Wilberforce, were not mere personal charges on Alexander arising on his acceptance of the devise, nor were they charges only on the defeasible estate devised to him, but these sums were charged upon the whole fee in the land, that is to say, upon what may be called the *corpus*. That this is so is not only plain from the tenor of the will, but is well established by the authority of a case which the Chancellor, who decided this point at the trial, cites in support of his judgment, the case of *Sadd* v. *Carter* (1) There was in that case a devise to—

A. for life, remainder to his children in fee, A. paying £40 to the plaintiff at a certain time,

and it was held that this formed a charge upon the land and not merely on A.'s estate in the land.

(1) 2 Eq. Ca. Ab. 370 S.C. Precdts. in Chy. 27.

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Then, had Alexander paid off the charges it is equally clear that they would not have been thereby satisfied and merged but would be kept alive so that his personal representation on his death would have been entitled to enforce payment of them, and his personal estate would have been recouped. Where there is a charge of this kind and it is paid off by the first taker whose estate is defeasible on the happening of a certain event, the case of *Drinkwater* v. *Combe* (1) establishes that the charge is not merged, and that on the executory devise over taking effect the estate of the first devisee is entitled to be repaid the amount paid off. In that case Sir John Leach V.C., after pointing out the different presumptions arising in the several cases of payment off of charges by a tenant for life, and by a tenant in tail, the presumption in the first case being against merger, and in the second in favour of it, thus proceeds:

> But he who takes an estate defeasible by executory devise, not having the power to defeat the devisee over, it cannot be intended that such devisee over is in any sense the object of his choice; and there is not therefore the same reason for presuming when he pays off a charge, that he means to give to such devisee the amount of the charge. In this respect as well as in the quality of his estate, he who takes such defeasible estate is more within the principle that applies to the tenant for life.

Applying this principle the Vice-Chancellor, in the case cited, directed a charge which had been paid by a devisee in fee, whose estate had been divested upon the happening of the event upon which an executory devise over was limited, to be raised in favour of the personal representatives of the first devisee.

Thus, as it appears to me, all the supposed grounds for assuming that the devise to Alexander was burdened with conditions so onerous that the testator must

(1) 2 Sim. & Stu. 345. See ed. 954. Lewin on Trusts 9 ed. also Tudors L.C. Real Property 3 825.

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be presumed not to have intended what his words *primâ facie* express, fail, inasmuch as it appears upon the authority of the cases cited that these consequences would not have followed if Alexander had paid the two sums to his brothers.

There is therefore no context overruling the primary meaning of the words "die without lawful issue" as importing death at any time. Indeed, so far from this being so, the context is all the other way, and strengthens the construction which attributes to the expression its ordinary signification. It is to be observed that the language of the testator in directing the gift over is that the estate on the event happening is "to revert to his brothers." Now, this word "revert" was also used in connection with the gift over in *O'Mahony* v. *Burdett* (1), and as there remarked, it certainly implies a gift over, not before vesting and therefore before any enjoyment by the first taker, as would of course be the case if the event on which the estate was to be defeasible was death restricted to the lifetime of the testator, but rather a gift over subsequent to a vesting of a defeasible title in and enjoyment by the first devisee. In *O'Mahony* v. *Burdett* (1), at p. 393 of the report, Lord Cairns says:

> In this particular will any light that is to be obtained from the context is not opposed to, but supports, the natural meaning of the words. The direction that if the niece should die unmarried, or without children, the £1,000 is "to revert to my nephew Colonel Henry L'Estrange," appears to indicate that the legacy was to come back, or come away, from the niece after she had had the possession and enjoyment of it, rather than to imply that the only state of circumstances under which Colonel Henry L'Estrange could take, would be a state of circumstances under which the niece would have had no enjoyment of the legacy at all. In other words, the benefit intended for the nephew appears to me to be introduced through the medium of an executory limitation over after enjoyment by a previous taker, and not as an alternative gift to take effect, if at all, before the period of enjoyment commences.

(1) L. R. 7 H. L. 388.

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All these observations apply *a fortiori* to the devise we have to construe in the present case.

I come therefore to the conclusion, which was also that arrived at by the Chief Justice and Mr. Justice Osler in the Court of Appeal, that we are here to adopt the construction propounded by the Master of the Rolls in the second rule in *Edwards* v. *Edwards* (1), which was followed in *Woodroffe* v. *Woodroffe* (2), and approved by the House of Lords in the two cases already quoted, and this requires us to hold that the gift over was intended by the testator to take effect upon the death of the devisee without issue at any time.

Jeanne Cowan, the widow of Alexander, was undoubtedly entitled to dower out of these lands notwithstanding the defeasible character of the fee which vested in her husband. *Moody* v. *King* (3); *Smith* v. *Spencer* (4); *Buckworth* v. *Thirkell* (5); *Goodenough* v. *Goodenough* (6); Jarman on Wills (7). This is clear upon authority.

Then, Jeanne Cowan, the widow, is also entitled to the annuity given to her by the will in the event of her survival of her husband. There is nothing in the gift of this annuity inconsistent with the right to dower, and Mrs. Cowan is therefore not put to her election but is entitled to enjoy both the annuity and the dower.

It is out of the question, having regard to authority, to say, as is somewhere suggested, that the gift of this annuity, which is limited to widowhood, is invalid as being in undue restraint of marriage. Theobald on Wills (8).

(1) 15 Beav. 357.
(2) [1894] 1 Ir. R. 299.
(3) 2 Bing. 447.
(4) 2 Jur. N.S. 778.
(5) 3 B. & P. 652, note *(a)*.
(6) 3 Preston Ab. 372.
(7) 5 ed. p. 836.
(8) 4 ed. p. 499 and cases there cited.

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It is claimed on behalf of Mrs. Cowan, the widow of Alexander, that under the Devolution of Estates Act she is entitled to elect between her dower and a distributive share of the devised lands. This claim is wholly unsustainable; the Act applies only to the case of the descent of the inheritable lands of an intestate; here there is no devolution by way of descent, for the estate devised to the husband, Alexander, immediately upon his death without issue vested in the devisees entitled under the gift over.

Mrs. MacPherson was not a proper party to the action and should not have been added in the master's office. It was open to her to take this objection at any time, either by way of appeal from the report, or, if sufficient material to enable the court to deal with it appeared upon the report, on further directions, and she was not limited to the time mentioned in order 48 which only has reference to a motion to discharge or vary the decree made before a party added in the master's office was put in cause. This is quite clear and I agree with what Mr. Justice Maclennan says upon it.

As regards the costs, the appellants, namely, Samuel George Cowan, the plaintiff in the action, and Albert Wilberforce Cowan and Mrs. MacPherson, who were made parties by the master, are entitled to the costs of the motion by way of exceptions or appeal from the master's report, on the original motion before Mr. Justice Robertson as well as in the Court of Appeal and in this court, against W. F. Allen the administrator of Alexander Cowan, but not against the widow As regards the widow Jeanne Cowan, she has succeeded in maintaining the report, so far as it applies to her in all respects except as regards the right to elect between her dower and her distributive share, but in this latter respect she has failed. Therefore as she succeeds in part and fails in part she ought neither

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to receive nor to pay costs, and there is therefore to be no direction as to her costs nor any order against her as to the costs of other parties. This disposition of the costs is of course only applicable to the motion by way of exceptions to or to vary the report, and the successive appeals from Mr. Justice Robertson's order. The costs of the action will have to be disposed of on further direction, or under the directions contained in the original decree.

The order of this court to be drawn up on this judgment must declare that the motion to vary the report ought to have been allowed, and must also declare the construction of the will and the rights of the parties in accordance with the foregoing judgment, and with these declarations and directions the cause is to be remitted to the court in which the action originated.

*Appeal allowed with costs.*

Solicitors for the appellants: *Stratton & Hall.*

Solicitor for the respondent Allen: *D. Burke Simpson.*

Solicitors for the respondent Cowan: *Riddell & Armstrong.*

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*May 5.
*May 6.

JAMES S. FRASER (DEFENDANT).....APPELLANT;

AND

T. GRAHAM FRASER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Will—Devise to two sons—Devise over of one's share—Condition—Context—Codicil.*

A testator devised property "equally" to his two sons J. S. and T. G. with a provision that "in the event of the death of my said son T. G. unmarried or without leaving issue" his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property on a condition which was not complied with and the devise to him became of no effect.

*Held*, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties the estate of J. S. being absolute and that of T. G. subject to an excutory devise over in case of death at any time and not merely during the lifetime of the testator. *Cowan* v. *Allen* (26 Can. S. C. R. 292) followed.

*Held* also, that the word "equal" indicated the respective shares which he two devisees were to take in the area of the property devised and not the character of the estates given in those shares.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment of the trial judge in favour of the defendant.

This appeal related to the construction of a clause in the will of the late Thomas Fraser, of New Glasgow, taken in conjunction with a codicil to the said will. The clause in question and the codicil were as follows:

"6th. I give, devise and bequeath the lots and stores between Provost and Archimedes Streets equally unto my said sons James Simon and Thomas Graham, but in the event of the death of my said son Thomas Graham, unmarried or without leaving issue, then his interest in the said lots and stores shall go to and be

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

the property of my said son James Simon or his children."

"This is a codicil to the last will and testament of me, Thomas Fraser, of New Glasgow, in the County of Pictou, merchant, bearing date the eighth day of June, 1891.

"I do hereby give, devise and bequeath unto my son Robertson Fraser, providing he returns to New Glasgow to live, an equal interest with James Simon Fraser and Thomas Graham Fraser in the lots and stores between Provost and Archimedes Streets."

Robertson Fraser died, having never returned to New Glasgow to live.

The trial judge held that they took as tenants in common with a conditional limitation in favour of defendant in case the plaintiff died unmarried or without issue. The full court reversed this decision and held that plaintiff had a half interest in fee.

*Mellish* for the appellant. If the condition had been expressed to take effect on "the death of my said son" merely that would have meant death in the lifetime of the testator, but with the words "unmarried or without leaving issue" added it means death at any time. See *Cooper* v. *Cooper* (1); *Edwards* v. *Edwards* (2); *O'Mahony* v. *Burdett* (3).

It is claimed that the words "or without leaving issue" should be read "and without leaving issue" to give effect to the intention of the testator, but all authority is against such a forced construction. See *Grey* v. *Pearson* (4).

*Borden* Q.C. for the respondent. The will and codicil must be read together to ascertain the testator's intention. *Grey* v. *Sherman* (5); *Darley* v. *Martin* (6).

The second rule laid down in *Edwards* v. *Edwards* (2), and followed in *O'Mahony* v. *Burdett* (3), must

(1) 1 K. & J. 658.
(2) 15 Beav. 357.
(3) L. R. 3 H. L. 388.
(4) 6 H. L. Cas. 61.
(5) 5 Allen (Mass.) 198.
(6) 13 C. B. 683.

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always be controlled by the context, which in this case makes it necessary to refer the death of Thomas Graham Fraser provided for in the will to death in the lifetime of the testator.

The learned counsel also referred to *Barker* v. *Cocks* (1); *Olivant* v. *White* (2); *In re Hayward* (3); and *In re Luddy* (4).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The only question involved in this appeal relates to the construction of a particular devise contained in the will of Thomas Fraser, read in conjunction with a codicil to the same will.

This devise is contained in the sixth clause of the will and is as follows:

I give, devise and bequeath the lots and stores between Provost and Archimedes Streets equally unto my said sons James Simon and Thomas Graham, but in the event of the death of my said son Thomas Graham, unmarried or without leaving issue, then his interest in the said lots and stores shall go to and be the property of my said son James Simon or his children.

The codicil is in these words:

I do hereby give, devise and bequeath unto my son Robertson Fraser, providing he returns to New Glasgow to live, an equal interest with James Simon Fraser and Thomas Graham Fraser in the lots and stores between Provost and Archimedes Streets.

Mr. Justice Townshend, before whom the action was tried, held that the gift over of the share devised to Thomas Graham Fraser was a good executory devise, which would take effect upon the death at any time "unmarried and without issue" of the devisee Thomas Graham Fraser, the present respondent. This judgment was however reversed by the Supreme Court in *banc*, it being there held that the intention indicated by the will and codicil was that the gift over of the share or interest of Thomas Graham Fraser was only

(1) 6 Beav. 82.
(2) 1 Ch. D. 346.
(3) 19 Ch. D. 470.
(4) 25 Ch. D. 394.

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to take effect in the event of his death in the testator's lifetime. From this judgment James Simon Fraser. the defendant in the action, has appealed to this court.

In the case of *Cowan* v. *Allen*, in which we have just delivered judgment, the same question arose as that here presented, and we determined that the second rule laid down by the Master of the Rolls in *Edwards* v. *Edwards* (1), approved of by the House of Lords in *O'Mahony* v. *Burdett* (2), and *Ingram* v. *Soutten* (3), and followed and applied in the case of *oodroffe* v. *Woodroffe* (4), required us to hold that in the case of a gift to a devisee in fee, not preceded by any life estate, with a gift over in case of death without issue, the executory devise over was referable to death without issue at any time, and was not to be restricted to death in the lifetime of the testator so as to be a mere provision for the case of a lapse, provided the context did not require the latter construction.

The proposition, however, in the present as in the former case, is that there is a context requiring us to adopt the restrictive construction. This is indeed the single question in the case.

With all due respect for the opinion of the majority of the learned judges who heard this cause in the Supreme Court of Nova Scotia, I am clearly of opinion that there is no such context and that the judgments of the learned Chief Justice and Mr. Justice Townshend are in all respects right. The codicil by which an equal share in the property was devised to Robertson Fraser never took effect inasmuch as he did not comply with the condition precedent therein prescribed, namely, that he should return to New Glasgow to live; still we are bound to consider this codicil as having the same effect on this question of construc-

(1) 15 Beav. 357.
(2) L. R. 7 H. L. 388.
(3) L. R. 7 H. L. 408.
(4) [1894] 1 Ir. Rep. 299.

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tion as if its terms had been embodied in the will itself.

By the sixth clause of the will the testator gives the property "equally" between the appellant and the respondent in fee; this means, of course, that they are to take equal shares as tenants in common. Then the share of the respondent is to go over on death unmarried or without leaving issue, but there is no such ulterior gift as regards the share of the appellant. This want of reciprocity, however, is not at all repugnant to the word "equally," if we refer that word to the respective shares which the two devisees were to take in the area of the property devised, and not to the ulterior disposition of the estate or quantum of interest which they were to take in those shares. And this is what we are bound to do in order to carry out the obvious meaning of the testator and to give effect to all the words of his will as sound rules of interpretation require us to do. This construction involves no inconsistency or repugnancy; the testator has given his property in two undivided halves, and he has chosen to give one of these absolutely to the appellant and the other undivided moiety for a defeasible estate only to the respondent; if he had devised the property not in undivided moieties, but had given one specific part of it to the appellant and the other part to the respondent and had made the estate of the former absolute and the estate of the latter defeasible on death without issue, no one could say that there was any context which would confine the gift over to death before the testator. Why should there be any more doubt here where the word "equally" is used only to indicate the shares, not the defeasible or indefeasible character of the estates given in those shares respectively. The word "equally" has exactly the same meaning here as if the testator had said "I give the

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'lots and stores' in equal undivided shares to my two sons" and had then added the same limitations over as those he actually added to the respondent's share alone. As to the effect of the codicil that can make no possible difference; had Robertson Fraser complied with the condition precedent on which his taking anything under it depended, the only difference which it would have introduced into the sixth clause of the will would have been that the three sons would have taken equal one-third shares of the property as tenants in common instead of equal moieties as the two sons, the appellant and respondent, take under the will, and whilst the shares of Robertson Fraser and the appellant would have been absolute, the respondent's share would have been subject to the executory devise over.

I am clearly of opinion that there is nothing either in the will or codicil requiring us to adopt any other than that laid down as the *primâ facie* construction by the cases cited.

Something has been said about reading the word "or" in the gift over as "and" so as to make the executory devise over to take effect upon the respondent dying unmarried "and" without leaving issue. No authority was cited for such an alteration of the testator's words, and I can find no trace of any. It is to be observed that the limitation over in *O'Mahony* v. *Burdett* (1) was on the same events and expressed in precisely the same words and that no point was made of any such change of words in that case, or even suggested; and Lord Cairns is particular in saying that:

A bequest to A. and if she shall die unmarried or without children to B. is according to the ordinary and literal meaning of the words an absolute gift to A. defeasible by an executory gift over in the event of A. dying at any time, under the circumstances indicated, namely, unmarried or without children.

(1) L. R. 7 H.L. 388.

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The appeal must be allowed and the judgment of Mr. Justice Townshend must be restored with costs to the appellant here and on the appeal to the Supreme Court of Nova Scotia in *banc*.

*Appeal allowed with costs.*

Solicitor for the appellant: *John McGillivray.*

Solicitors for the respondent: *Fraser & Jennison.*

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HER MAJESTY THE QUEEN (PLAINTIFF) ..... APPELLANT;

AND

SAMUEL MOSS (DEFENDANT)..... .....RESPONDENT.

1896

*Mar. 6, 7.

*May 18.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Constitutional law—Navigable waters—Title to soil in bed of—Crown—Dedication of public lands by—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.*

The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixson* v. *Snetsinger* (23 U. C. C. P. 235) discussed.

The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.

By 23 V. c. 2 s. 35 (P.C.) power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.

If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the defendant.

The proceedings in this case were taken by the Crown to expropriate certain lands in the township of Cornwall for the construction of a dam at Sheik's Island.

The facts are set out in the judgment of the Exchequer Court as follows:

"The defendant Samuel Moss is in possession of a farm situate on Sheik's Island in the township of Cornwall and county of Stormont. The fee in the land on Sheik's Island is in the Crown for the benefit of the Iroquois Indians of Saint Regis, and Moss, and other occupiers of lands thereon, hold their lands as assignees under a lease of such lands to their predecessors in title for a term of nine hundred and ninety-nine years. The farm that Moss is in possession of contained, in January, 1894, one hundred and thirteen and a half acres. On the 12th of that month the Crown through the Minister of Railways and Canals, for the use and enlargement of the Cornwall Canal, a public work of Canada, expropriated ten acres and eighty-five one hundredths of an acre of the land theretofore forming part of this farm, and the parties have agreed upon the compensation to be paid for the land so taken by the Crown, and for damages occasioned by the severance, as well as upon the amount that is to be deducted therefrom and paid to the Superintendent General of Indian Affairs in respect of the Indian title. The only questions to be determined are:—Is the defendant Moss entitled also to compensation for the depreciation in value of his farm occasioned by the construction of the public work, and if so what is the amount of such compensation? The

(1) 5 Ex. C. R. 30.

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latter question presents under the evidence little or no difficulty. There can, I think, be no doubt that when the works that are now in progress and for which the lands mentioned were taken, are completed the defendant's farm will be lessened or depreciated in value by the amount claimed, namely one thousand dollars.

"Sheik's Island lies at the foot of the Longue Sault Rapids of the Saint Lawrence River. At this point the river divides itself into three channels or branches, Sheik's Island lying between the north channel and the middle channel.

"The north channel forms part of the navigable waters of the Saint Lawrence, though it does not appear to have been used for the purposes of navigation, the normal depth of water therein being some five or six feet. Since 1833, and perhaps from a time anterior to that, the inhabitants of the island have had communication with the mainland by a bridge across this channel at or near the village of Moulinette, and in the construction at this point of the Cornwall Canal in 1833 or 1834 a way was provided by a tunnel under the canal by which the highway from the island across this bridge was carried to the north or Moulinette side of the canal. This bridge was carried away in 1851, and was then rebuilt upon a new site a short distance from that previously occupied. In rebuilding the bridge the inhabitants made use of what was called a dam that had been made for milling purposes, and which was built in the middle of the channel and part of the way across the same. In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in

repairing the bridge and maintaining the highway which connect and form the only means of communication between the island and the mainland. This bridge and partial dam formed no doubt an obstruction to the navigation of the channel such as the navigation was, and there is nothing to show that there was ever any legislative authority to justify or legalize the obstruction, unless the clause in The Expropriation Act (1), to which I shall presently refer, is sufficient for that purpose. The channel was not used for the purposes of navigation. It was necessary and proper that the lessees of the island should have a way to the mainland, and every one, including the Crown no doubt, acquiesced in the maintenance of the obstruction. In the execution of the present work of enlarging the Cornwall Canal two large dams have been constructed across the north channel, one at the west or upper and the other at the east or lower end of Sheik's Island, and when the works are completed the canal will be turned into and through this channel, which will then cease to be one of the channels of the St. Lawrence, and will become a part of the Cornwall Canal, the water level of which is at this point much higher than the level of the St. Lawrence River. The result of this will be that the highway from the island to the mainland will be submerged and destroyed, and the inhabitants of the island will be deprived of the means of communication that they have had with the village of Moulinette, at which place they have been accustomed to attend church, to send their children to school, and to transact their business as farmers. To meet this difficulty the Minister of Railways and Canals proposes, and it is part of the work contemplated and in progress, to substitute a highway to the village of Mille Roches, some two or three miles east of Moulinette. This pro-

(1) 52 Vict. c. 13 s. 34.

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posed highway will be carried over the lower dam and then across the canal by a bridge. This substituted highway will mitigate the inconveniences to which any person in the occupation of lands upon the island would otherwise be put, and will lessen the depreciation in the value of land on the island which would otherwise occur by reason of the construction of the public work.

The learned judge held that the defendant was entitled to compensation for the severance of communication between his farm and the mainland and the diversion of the highway. The Crown appealed.

*Robinson* Q.C. for the appellant. The title to the soil in the river is in the Crown ; *Dixson* v. *Snetsinger* (1); in the right of the Dominion. *The Queen* v. *Meyers* (2) ; *Attorney General* v. *Perry* (3).

Parliament alone can authorize an obstruction to navigation. *Wood* v. *Esson* (4) ; Coulson and Forbes on Waters (5).

The defendant could not acquire by user a right to maintain the communication as prescription does not run against the Crown. Hardcastle on Statutes (6) ; *Perry* v. *Eames* (7).

*Leitch* Q.C. for the respondent. The respondent holds his farm virtually under the Crown and is entitled to have the bridge maintained as a way of necessity which he was allowed to select. See *Saylor* v. *Cooper* (8) ; *Dixon* v. *Cross* (9) ; *Lupton* v. *Rankin* (10).

The defendant and those through whom he claims have used the bridge for over sixty years and the

(1) 23 U. C. C. P. 235.
(2) 3 U C. C. P. 350.
(3) 15 U. C. C. P. 329.
(4) 9 Can. S. C. R. 239.
(5) P. 43.
(6) 2 ed. pp. 405, 411.
(7) [1891] 1 Ch. 658.
(8) 2 O. R. 398 ; 8 Ont. App. R. 707.
(9) 4 O. R. 465.
(10) 17 O. R. 599.

Crown is barred by the *Nullum Tempus* Act, 9 Geo. 3 ch. 16 (Imp.) *Reg.* v. *McCormick* (1); *Reg.* v. *Williams* (2); *Attorney General* v. *The Midland Railway Co.* (3).

See also *Samson* v. *The Queen* (4).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts, which are not in dispute, are fully stated in the judgment delivered by Mr. Justice Burbidge in the Exchequer Court.

The question raised by this appeal is purely one of law, involving the right of the respondent to compensation for the destruction of the bridge connecting Sheik's Island with the north bank of the River St. Lawrence, opposite the village of Moulinette. If the submerging of this bridge or embankment by the Crown for the purposes of the new St. Lawrence Canal is to be ascribed solely to an exercise of the powers conferred by "The Expropriation Act" (52 Vict. ch. 13), then the respondent's right to compensation cannot be, and indeed is not, disputed. If, on the other hand, the cutting off of this mode of communication between the island and the mainland is to be referred to the right of the Crown (the Dominion) to preserve navigation, then the respondent is not entitled to compensation in respect to the injurious effect upon his property.

This information is filed under the 25th section of the Expropriation Act, and by it the Crown submits the right of the respondent to the court.

A portion of the respondent's lands having been taken he is entitled to claim in respect of the lands he retains being injuriously affected by the works for which the expropriation was made, beyond any injury

(1) 18 U. C. Q. B. 131.
(2) 39 U. C. Q. B. 397.
(3) 3 O. R. 511.
(4) 2 Ex. C. R. 31.

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caused by the mere severance of the land expropriated from that retained by him, and this is so even if the words "injuriously affected" in the Expropriation Act are to receive the same strict construction as that which has been placed upon the same words in the English Land Claims Act.

The bed of the River St. Lawrence at the date of confederation was vested in the Crown in right of the late province of Canada. It therefore formed part of the lands "belonging to that province" which the 109th section of the British North America Act declared should upon confederation belong to the province of Ontario, within the limits of which it was "situate."

It was argued by the learned counsel for the Crown that the title to the soil in the bed of the river, including that of the channel between Sheik's Island and the north bank, was in the Dominion. It is, however, impossible to find any provision of the British North America Act which would have the effect of vesting the title to the beds of navigable rivers in the Crown otherwise than as representing the provinces.

If, in the case of *Dixson* v. *Snetsinger* (1), it was intended to decide that the title to the bed of the river was in the Dominion, I do not so far agree with that case. I find, however, in examining the report that the court expresses the opinion that the title was in the Crown, without distinguishing between the Dominion and the province. It was not indeed necessary to make any such distinction in that case, the question before the court being as to the extent of the land granted by the Crown. The boundary, as the land was described in the plaintiff's patent, having been the river, it was contended on his behalf that this entitled him to the bed of the river to the middle of

(1) 23 U.C.C.P. 235.

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the channel, a claim which was rejected by the court. This being the only point in controversy, the court in *Dixson* v. *Snetsinger* (1) was not called upon to decide whether the title to the *alveus* was in the Dominion or in the province. The only possible pretense which the Dominion Government can have, therefore, to destroy the bridge in question must be derived either from some legislation by Parliament under the power relating to navigation and shipping, contained in the 91st section of the Dominion Act, or under the provisions of the Expropriation Act.

Without examining the legislation of Parliament relating to the removal of obstructions to navigation, I will assume for the purposes of this appeal that it is sufficient to authorize the officers of the Dominion to remove all unlawful obstructions to navigation.

This gives rise to two subordinate inquiries: First, was this bridge an unlawful hindrance to the navigation of the channel between Sheik's Island and the north bank of the river, and secondly, was the Dominion Government acting in execution of its statutory powers to protect the navigation in constructing the dams and other works which will have the effect of destroying the Moulinette bridge by submerging it?

In *Dixson* v. *Snetsinger* (1) it was held, and rightly held, that the natural channel between the island and the mainland was originally navigable at least for boats, and that, at all events in law, it formed part of a navigable river. Although this was in part a conclusion from the evidence before the court in that case, and in so far as it was so it ought not to affect the present case which as regards the facts must of course be decided on the evidence contained in the record, yet it may be assumed that the evidence before us is sufficient to support the same proposition as one of

(1) 23 U. C. C. P. 235.

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mere fact. It does, however, certainly appear that this channel had not been used for purposes of navigation for at least sixty years prior to the execution of the works now complained of, by which the Crown by constructing a dam or embankment at each end of this northern channel between Sheik's Island and the mainland on the north bank, itself destroyed the navigation. The bridge in question appears to have been in existence since 1833. It was formed by a dam or embankment running from north to south transversely across the channel which, however, did not extend to its full width, openings having been left at each end. This embankment was originally erected by riparian owners for the purpose of thereby obtaining water-power. The gaps at the ends were subsequently filled up by the local public authorities, and upon this filling in and the original embankment a road was made connecting the island with the north bank, and this road was used as a public highway until 1851, when the bridge so formed was swept away by freshets in the river. Subsequently the bridge was re-constructed, I presume in the same manner, and towards this purpose the Provincial Government contributed the sum of one thousand dollars ($1,000), the residue of the expenditure having been borne by the local authorities or the inhabitants of the island. The learned judge finds as a fact that this grant was made. He says :

> In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in repairing the bridge and maintaining the highway which connect, and form the only means of communication between, the island and the mainland.

The evidence establishes the fact that the depth of water in this channel was only some five or six feet, and that the rapid current would have made it useless

for purposes of navigation without great labour in towing up the rapids. At all events the channel could not have been used for purposes of navigation since the solid bridge formed by the embankment was first erected in 1883; and this caused no public inconvenience, not only for the reason already stated but also because for upwards of fifty years the Cornwall Canal, constructed parallel to the channel, afforded an easy and convenient navigation for vessels ascending the river, whilst vessels descending, which did not make use of the canal, passed down the middle channel to the south of Sheik's Island. I quite concede, however, that assuming this northerly channel to be navigable water the erection in the river of a dam, by means of which the bridge was formed, would have been a public nuisance, unless it was in some way legalized by the action or acquiescence of the Crown. It is not sufficient to justify the placing of an obstruction in a public river or harbour that upon a balance of convenience the structure causing an obstruction to navigation should be of great public utility, far outweighing any inconvenience caused by it as a hindrance to navigation. The case of *Rex* v. *Russell* (1), was an indictment for obstructing the navigation of the River Tyne, by erecting "coal staiths" in the bed of the river which, being tidal water, belonged to the Crown. Bayley J. who presided at the trial left to the jury the following questions:

> Were the "staiths" erected in a reasonable place? Was there a reasonable space left for the public navigating in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?

The jury having under this direction found for the defendant the Court of King's Bench refused to disturb the verdict. Lord Tenterden, however, dissented

(1) 6 B. & C. 566.

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from the judgment. In *Rex* v. *Ward* (1), Lord Denman held that *Rex* v. *Russell* (2) was not well decided and refused to follow it. In the *Attorney General* v. *Terry* (3), Jessel M.R. in an elaborate judgment strongly dissents from *Rex* v. *Russell* (2), demonstrates its unsoundness and treats it as an overruled case not to be followed. This last decision I take to settle the law as we ought to apply it in the case now before us. I hold, therefore, that even if the bridge now in question was of very great public benefit, whilst the prejudice it caused to the public as an obstruction to navigation was of the slightest possible degree, it nevertheless would have been an illegal structure amounting to a public nuisance, which, as such, the Crown might cause to be removed unless for other reasons it was not to be treated as a nuisance.

My proposition is, however, that the bridge or causeway was a legal work being, in short, a lawful highway by the dedication of the Crown. That there may be a presumption of dedication by the Crown arising from facts sufficient to warrant such an inference in the case of a subject has been decided in several cases. In *Turner* v. *Walsh* (4), an appeal from New South Wales, the Privy Council had this question before them. In delivering judgment Sir Montague Smith says:

> The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption may and indeed ought to be presumed.

In *The Queen* v. *East Mark* (5), the point was determined in the same way. Lord Denman C.J. there says:

(1) 4 A. & E. 384.
(2) 6 B. & C. 566.
(3) 9 Ch. App. 423.
(4) 6 App. Cas. 636.
(5) 11 Q. B. 877.

The Crown certainly may dedicate a road to the public and be bound by long acquiescence in public user.

Patteson J. in the same case says:

There may be a dedication by the Crown; and I think in these cases we ought not to inquire very nicely into the ownership of the soil or into the evidence of any precise intention to dedicate.

*Harper* v. *Charlesworth* (1), a case sometimes supposed to have established a contrary doctrine, is plainly distinguishable. What was there decided was that in the case of the Crown, just as in that of a private owner, no presumption of dedication arose from the acts or acquiescence of its lessee.

That the Crown was the owner of the bed of the river in the channel between Sheik's Island and the mainland has already been shown.

Then, it is well established that an open user as of right by the public raises a presumptive inference of dedication, and when such user is proved the onus lies on the person denying that inference to rebut it, *e.g.* by showing that owing to the state of the title there was no valid dedication (2).

Then, the user here was not only shown to have been open and notorious for upwards of sixty years, but the acquiescence and express assent of the Crown is shown by the fact that in 1861 it granted money to indemnify the persons who had rebuilt the bridge after it had been partially destroyed by freshets. Therefore, so far as the Crown had power to dedicate, the circumstances are very strong to show that it must be presumed to have done so. If it is said, however, that the Crown had not at common law power to divest itself of the title to the land covered with water, forming the bed of the channel. The answer is that by a statute (3) passed in 1860, express power was given to the Crown to dispose of and grant water lots in the

(1) 4 B. & C. 574.
(2) 2 Smith's L. C. 10th ed. p. 167; *Reg*, v. *Petrie* 4 E. & B. 737.
(3) 23 V. c. 2 s. 35.

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rivers and other navigable waters in Upper Canada. Therefore, from the passing of this statute down to the disturbance complained of by the respondent, the Crown could have granted to a private individual or to a municipal corporation so much of the *alveus* of the river as was occupied by the dam or causeway forming the bridge, and such grantee could of course have put the land so granted to just such uses as it has actually been put to. Then, if the Crown could thus have granted the soil it could *a fortiori* dedicate it to the public for the uses to which it has been put. The user for the thirty-five years and upwards since the passing of the Act would be amply sufficient to raise a presumption of dedication.

That a bridge may be a highway is, if any authority need be cited for such a plain proposition, shown by the case of *Beaver* v. *The Mayor of Manchester* (1).

Up to the date of confederation the conservancy of navigation was vested in the province, and if the province had so dedicated the bed of the channel for the purposes of a bridge that at that date it could not have objected to the embankment as an obstruction to navigation, it follows that when by the British North America Act the control of the navigation was transferred to the Dominion, the Crown as representing the latter government continued to be bound to permit the maintenance of the bridge.

Lastly, it does not appear that any actual public inconvenience was caused by the dam, and although, as I have already shown, we are not, in deciding the question of nuisance, to balance the convenience of the bridge against any inconvenience caused to those using the channel for the purposes of navigation, yet it must, before the bridge can be held to be a nuisance and abated as such, be shown to constitute some ob-

(1) 8 E. & B. 44.

struction to the public. So far, however, from there being any such evidence, it rather appears that for a long series of years the channel has been altogether abandoned as useless for navigation. I therefore conclude that the bridge was not an unlawful hindrance to the navigation of the river.

But, even granting that the proper conclusion had been in this respect against the respondent, I should still have been of opinion that the judgment of the Exchequer Court ought to be maintained inasmuch as the Dominion Government cannot be said to have been acting in execution of their statutory powers to protect the navigation of the river in its natural state, when, by constructing dams and other works for the purposes of the new canal, it permanently destroyed the navigation. It would indeed be nothing less than absurd to attribute acts which must for ever render the channel useless as a navigable passage to an intention to exercise the power of preserving the same channel for the public benefit for purposes of navigation.

The result is that the works in question must be held to have been constructed under the Expropriation Act (1), and the respondent is entitled to compensation as provided for by the 22nd section of that Act in respect of the injurious effect of these works on the land which he retains. The amount of this compensation has already been fixed by agreement at the sum of one thousand dollars and interest, the amount awarded by the judgment appealed against.

The appeal is therefore dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *O'Connor & Hogg.*

Solicitors for the respondent: *Leitch & Pringle.*

(1) 52 V. c. 13.

1896

*May 6.

*May 18.

THE CITY OF HALIFAX (PLAINTIFF).. APPELLANT;

AND

JAMES R. LITHGOW (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Municipal corporation—Repair of streets—Pavements—Assessment on property owner—Double taxation—24 V. c. 39 (N.S.)—53 V. c. 60 s. 14 (N.S.)*

By sec. 14 of the Nova Scotia statute 53 V. c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property and he refused to pay half the costs on the ground that his predecessor in title had in 1867, under the Act 24 V. c. 39, furnished the material to construct a brick sidewalk in front of the same property and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

*Held*, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous.

APPEAL from a decision of the Supreme Court of Nova Scotia in favour of the defendant on a special case.

The material facts submitted to the court by the special case are sufficiently indicated by the above

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head-note and the judgment of the court. The majority of the court below held that the defendant could not be called upon to pay his proportion of the cost of a concrete sidewalk laid in front of his property as his predecessor in title had, in 1867, contributed to the expense of a brick sidewalk in the same place and to make him pay for the concrete would be imposing a double tax on the property. The city appealed.

*MacCoy* Q.C. for the appellant. The same principles as to double taxation are not applied to public bodies and to private corporations. *Hibernian Mine Co.* v. *Tuke* (1).

The power to change the covering of the sidewalks is a continuing power and may be exercised whenever the necessity arises. *McCormack* v. *Patchin* (2).

The construction given to the Act by the judgment appealed from would make it impossible to apply it and is a strained construction which should not be allowed to stand. See *Attorney General* v. *Noyes* (3); *Sawyer* v. *Vestry of Paddington* (4).

*Bell* for the respondent. The construction of the Act of 1890 which is contended for by the city would impose a burden upon certain ratepayers while the Act was intended to confer a benefit. See *Bonella* v. *Twickenham Local Board* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This was a special case stated for the opinion of the Supreme Court of Nova Scotia. The case was thus submitted for the purpose of determining the liability of property owners in the city of Halifax to pay their proportion of the cost of materials and laying down sidewalks under chapter

(1) 8 Ir. C. L. R. 321.
(2) 14 Am. R. 440.
(3) 8 Q. B. D. 138.
(4) L. R. 6 Q. B. 164.
(5) 20 Q. B. D. 63.

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60, section 14 of the Acts of the Legislature of Nova Scotia for the year 1890. By the section in question it was enacted as follows:

> The council is hereby authorized to borrow on the credit of the city of Halifax as the same may be required from time to time a sum not exceeding $250,000 for the purpose of covering such sidewalks of said city as the city council shall determine with brick, flat stones, concrete, or any other appropriate permanent material and for generally improving the condition of and paving such streets and the purchase of such machinery, appliances and permanent material as the city council may determine on the recommendation of the city engineer. It shall decide upon such work to be done under the direction and superintendence of the city engineer; one-half the cost of covering the said sidewalks as above mentioned shall be a charge against the owner or owners of the property in front of which said work is done and shall form a prior lien on said property from the time the city engineer shall file in the office of the city board of works a certificate showing the total cost, which shall be conclusive as to the amount and the ownership of said property, and the lien may be enforced and collected in the same manner and with the same rights and remedies as taxes on real estate are now collected, and may also be collected in the name of the city as an action of debt due, in any court of competent jurisdiction.

In the exercise of the powers thus conferred and on the recommendation of the city engineer, the city council in August, 1891, by resolution directed a concrete sidewalk to be laid down in Barrington street, part of it opposite the property of the respondent. This work having been completed, the engineer filed a certificate showing the total cost of the work in front of the respondent's property, as required by the Act. The city now claims one-half of the cost of this concrete sidewalk to be paid by the respondent and claims a lien therefor on the property of the respondent in the terms of the statute.

The respondent insists that he is not liable to pay the half cost of this new sidewalk for the reason that his predecessor in title in the year 1867, under a statute passed in 1861 which authorized the city to expend

$20,000 in improving the city sidewalks, had in accordance with the requirements of the last mentioned Act and of a resolution of the city council passed thereunder furnished the material to construct a brick sidewalk in front of this same property. For this reason it was insisted by the respondent that it would be to impose double taxation if the Act of 1891 was applied to his property, and this contention was upheld by a majority of the court below, the Chief Justice and Mr. Justice Townshend dissenting.

At the time of the passing of the resolution for the concrete sidewalk in August, 1891, the case states that:

> The brick sidewalk of 1867 had become uneven and the hollow parts of said sidewalk retained several pools of water which lodged there.

In the judgment of Mr. Justice Henry, which sustains the position of the respondent, some cases are referred to as authorities. I have carefully examined these as well as the additional cases cited in the respondent's factum but I find nothing maintaining the propositions upon which the judgment proceeds.

It is, of course, quite competent for the legislature to direct any taxation it pleases, however burdensome, provided it does so in clear and unambiguous language. It is, however, a well known rule of construction to be applied where there is obscurity or ambiguity in the terms of an Act of Parliament which imposes taxation, and which in one view of its terms would result in the imposition of a double tax, to act on the presumption that the legislature did not intend anything so onerous and unfair as to compel a tax-payer to pay the same tax or to pay for the same public benefit twice over.

Could I find anything at all dubious or uncertain, and could I see that a brick sidewalk constructed in 1867 was the same thing as a concrete sidewalk laid down in 1891, I should not be unwilling to adopt the

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conclusion of the court below. I fail, however, to see the least uncertainty as to the intention of the legislature in passing the Act of 1891. It authorizes no exception in favour of property owners who some twenty-four years before had under an Act passed thirty years before contributed to the cost of a sidewalk, but invests the city council with absolute power to direct such sidewalks as they may think fit, the legislature of course presuming as in all such cases that there will be no abuse of the authority thus conferred. Then to be called on to pay half the costs of a concrete sidewalk in 1891, is not to be called upon twice over for the same thing, because in 1867 the same property had been obliged to contribute the bricks to construct a sideway which in 1891 had become worn out, useless and dangerous.

I entirely agree with the reasons of Mr. Justice Townshend as given in his judgment with the exception that I consider the case a much plainer one than he seems to think it.

The appeal must be allowed with costs, and the order of this court must declare that the respondent is liable to pay one-half of the cost of laying the concrete sidewalk in question under the statute of 1891, and the action must be remitted to the court below in order that the amount of the claim of the city may be determined in the manner provided by the special case. And there must be a direction that the respondent pay the costs of the city of Halifax in the court below.

*Appeal allowed with costs.*

Solicitor for the appellant: *W. F. MacCoy*

Solicitor for the respondent: *F. H. Bell.*

THE NEW BRUNSWICK RAILWAY COMPANY AND DAVID BROWN (PLAINTIFFS)..... APPELLANTS;

AND

MARGARET ELIZA KELLY (DEFENDANT).. ..... RESPONDENT.

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*May 8.
*May 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Registry laws—Registered deed—Priority over earlier grantee—Postponement—Notice.*

To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable.

APPEAL from a decision of the Supreme Court of New Brunswick (1), reversing the judgment at the hearing in favour of the plaintiffs.

In 1868 one Nason conveyed a parcel of land at Fredericton Junction, N.B., to the European and North American Railway Co., the predecessors in title of the New Brunswick Railway Co., and in 1872 he conveyed to the defendant, Mrs. Kelly, land which the plaintiffs allege was comprised in their deed. The deed to the railway company was not registered, and the action was brought for a decree postponing the conveyance to the defendant, who had registered her deed, to that of the plaintiffs. The evidence relied upon to prove notice to defendant of the prior deed was that of two witnesses named Bailey, who swore that defendant, in conversations with them, had admitted knowledge of

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 33 N. B. Rep. 310.

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the land having been previously conveyed to the company. At the hearing the decree asked for was made but was set aside by the full court.

*Blair* Q.C., Attorney General of New Brunswick, for the appellant.

*Duffy* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This was a suit in equity instituted by the New Brunswick Railway Company for the purpose of postponing a conveyance dated 23rd April, 1872, which the defendant had obtained of a certain parcel of land from one Jeremiah Nason, and had registered prior to a conveyance which the European and North American Railway Company had obtained dated 29th August, 1868, from the same grantor, but had omitted to register.

The appellants, the New Brunswick Railway Company, are the successors in title of the European and North American Railway Company. It was alleged that the defendant had had notice of the conveyance of August, 1868, at the time she took her deed from Nason.

The cause was originally heard before Mr. Justice Fraser who made a decree postponing the defendant's deed to the plaintiffs. On appeal to the Supreme Court of New Brunswick, in *banc*, this decree was reversed and the suit was dismissed with costs. From this last judgment the present appeal has been taken.

The law as to postponing subsequent purchasers who may have acquired priority over earlier grantees by first registering their conveyance is clear. Actual notice is requisite, such notice as will make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, being indispensable. The law on this subject is laid down in the following

authorities: *Wyatt* v. *Barwell* (1); *Agra Bank* v. *Barry* (2); *Lee* v. *Clutton* (3); *Ross* v. *Hunter* (4); *Russell* v. *Cashell* (an Irish case decided by Lord Chancellor Brewster in Trinity Term, 1867); *Chadwick* v. *Turner* (5); *Hollywood* v. *Waters* (6); *Rose* v. *Peterkin* (7). These are conclusive authorities that constructive notice is insufficient to postpone a deed which has acquired priority over an earlier conveyance by registration.

That possession under the prior registry deed, either by the grantee in that conveyance or by his successors in title, does not amount to actual notice, appears from many cases quoted in Madden on the Registry Laws, p. 217.

A perusal of the depositions will convince any one that it is out of the question to say there was actual notice or anything like actual notice proved in the present case. The evidence relied on to establish notice was that of Charles J. Bailey and Benjamin S. Bailey, and this consisted of mere loose conversation with the defendant, in which it is pretended she made admissions which showed that she had notice. These men had no connection with the property in any way, and therefore their evidence is open to the objection that such conversations are not sufficient to establish even constructive notice as was held in the case of *Barnhart* v. *Greenshields* (8). But even if we give entire credit to the evidence of these witnesses, what they say as regards admissions made by the defendant would not show that at the time she took her conveyance she had any notice of the prior deed of sale by Jeremiah Nason to the European and North American Railway Company.

(1) 19 Ves. 435.
(2) L. R. 7 H. L. 135.
(3) 24 W. R. 106.
(4) 7 Can. S. C. R. 289.
(5) 1 Ch. App. 310.
(6) 6 Gr. 329.
(7) 13 Can. S. C. R. 677.
(8) 9 Moo. P. C. 36.

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I do not propose to enter upon a critical examination of the evidence for it has been fully discussed in the judgments delivered in the court below by Mr. Justice Tuck and Mr. Justice Barker, whose observations entirely commend themselves to my judgment and whose conclusions I am prepared to and do adopt.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *Wesley VanWart.*

Solicitor for the respondent: *C. E. Duffy.*

ADELINE CRAWFORD AND MARGARET HARKLEY (PLAINTIFFS)... } APPELLANTS;

AND

ALEXANDER BRODDY, ALEXANDER ELLIS AND FRANCIS NIXON (DEFENDANTS)..... ..... } RESPONDENTS.

1896

*Mar. 10,11.

*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Will, construction of—Death without issue—Executory devise over—Conditional fee—Life estate—Estate tail.*

A testator died in 1856 having previously made his last will divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years,—"giving the executors power to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue.

*Held*, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will.

*Held* further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court, Chancery Division (2), and restoring the judgment of the trial court.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 307. (2) 25 O. R. 635.

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The action sought a declaration that under the true construction of the will of which the material parts are quoted in the judgment of his Lordship the Chief Justice, his son Francis Nixon, the younger, took, under the third clause, only a life estate in the lands in question, and that upon his death the property passed to his surviving brothers and sisters under the executory devise over contained in the fourth clause of the will. The trial judge dismissed the action with costs, holding that the devisee took an estate tail, but this decision was reversed by the Chancery Division and it was there held that the devise gave a fee conditional with an executory devise over and a reference was directed as to improvements made on the lands under mistake of title, the question of costs being reserved.

The Court of Appeal reversed the judgment of the Divisional Court and restored the judgment at the trial, and a majority of the court held that the gift over in the fourth clause did not apply to or modify the devise in the previous clause of the will which had vested the absolute fee in Francis Nixon, jr.

*Chrysler* Q.C. for the appellants. There being no inconsistency or repugnancy with the declared intentions of the testator as drawn from the whole instrument, each clause of the will must be expounded according to the ordinary and grammatical sense of the words used. The survivorship clause thus would include all the devisees and avoid uncertainty by referring to all that precedes it. *Clark* v. *Clark* (1); *Fisher* v. *Anderson* (2); Williams on Executors (3); Jarmyn on Wills (4); *Gordon* v. *Gordon* (5); *Bathurst* v. *Errington* (6); *Rhodes* v. *Rhodes* (7).

(1) 17 Can. S.C.R. 376.
(2) 4 Can. S. C. R. 406.
(3) 9 ed. p. 928.
(4) 5 ed. pp. 393, 443 *et seq.*
(5) L. R. 5 H. L. 254.
(6) 2 App. Cas. 698.
(7) 7 App. Cas. 192.

Unless the survivor clause refers to the whole prior part of the will, there would be an intestacy as to lot 8 and its rents in case the son Francis died before he was of age. An intestacy must be avoided if possible. See *In re Harrison* (1). There is no connection by grammatical construction or direct words of reference between the devise of lot 5 and that of lots 6 and 8. See *Doe d. Palmer* v. *Richards* (2); *Compton* v. *Compton* (3). Where two devises are in opposition the last governs. *Ulrich* v. *Litchfield* (4); *Randfield* v. *Randfield* (5).

The use of the word "fourthly" could not limit the executor's powers nor the devise as to lands. *Ex parte Wynch* (6); Jarmyn on Wills (7). The failure of issue was limited to the death of Francis, the younger, by the words "at the death, &c," because the will does not contain the phrase "die without issue," which standing alone before the Wills Act, had a technical meaning, indicating an indefinite failure of issue, but contains the words "having no issue" which have no technical meaning but the grammatical one of having no issue living at the death, and because the prior estate was a fee simple, and also by the use of the word "survivors" without words of limitation. Jarmyn on Wills (8); *Gray* v. *Richford* (9) and cases there cited; *Ex parte Davies* (10); *M'Enally* v. *Wetherall* (11); *King* v. *Evans* (12); *Ranelagh* v. *Ranelagh* (13). The survivors were the other sons and daughters living at Francis' death. *King* v. *Frost* (14). On the whole will and the surrounding circumstances the testator intended the survivor clause to apply to the whole

(1) 30 Ch. D. 390.
(2) 3 T. R. 356.
(3) 9 East 267.
(4) 2 Atk. 374.
(5) 8 H. L. Cas. 225.
(6) 5 DeG. M. & G. 188.
(7) 5 ed. p. 494.
(8) 5 ed. cc. 30, 33.
(9) 2 Can. S.C.R. 431.
(10) 2 Sim. N. S. 114.
(11) 15 Ir. C. L. 503.
(12) 24 Can. S. C. R. 356.
(13) 2 Mylne & K. 441.
(14) 15 App. Cas. 548.

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prior part of the will, and if its effect is restricted to paragraph 4 the doubt spoken of in *Thornhill* v. *Hall* (1) remains but is removed by applying it to the whole will. *Pickwell* v. *Spencer* (2).

*McFadden* and *Blain* for the respondents. The third paragraph standing by itself gives the fee in lot 8 absolutely to Francis Nixon, the younger, and it would be wrong to cut down this interest by extracting the sentence "at the death, &c." from the middle of the fourth paragraph of the will to connect and read along with the third paragraph. Doing so is contrary to the true principle of construction laid down in *Meyers* v. *The Hamilton Prov. & L. Co.* (3), and in *Thornhill* v. *Hall* (1). And as Francis attained the age of twenty-one he became indefeasibly seized in fee simple of the land in question.

Transferring the sentence and reading it along with paragraph three would make Francis' taking subject to two contingencies, and as one contingency has been fulfilled (arriving at the age of 21 years), he would take an estate absolute upon the authority of *Cook* v. *Noble* (4), and *Griffith* v. *Griffith* (5).

This is not a grant of an estate in fee with an executory devise over, but a fee without a devise over. *Farrell* v. *Farrell* (6). The intention of the will as to dying without issue applied before the devisee became 21; when he became 21 the property vested. *Gould* v. *Stokes* (7).

If it did not vest as a fee simple it did as a fee tail. *Little* v. *Billings* (8); *Gray* v. *Richford* (9); *Travers* v. *Gustin* (10); Theobald on Wills (11); *Morgan* v. *Thomas*

(1) 2 Cl. & F. 22.
(2) L.R. 7 Ex. 105.
(3) 19 O. R. 365.
(4) 5 O. R. 43.
(5) 29 Gr. 145.
(6) 26 U. C. Q. B. 652.
(7) 26 Gr. 122.
(8) 27 Gr. 353.
(9) 2 Can. S. C. R. 431.
(10) 20 Gr. 106.
(11) 3rd ed. 302, 500, 503, 520, 524.

(1); *Hellem* v. *Severs* (2); *Doe d. Cannon* v. *Rucastle* (3); *Evans* v. *King* (4); *Tyrwhitt* v. *Dewson* (5).

The words "having no issue," import an indefinite failure of issue. Theobald on Wills (6); and if there is a devise to A. simply or to A. for life, followed by a gift over in default of issue, if these words import an indefinite failure of issue, A. takes an estate tail. Theobald on Wills (6). Therefore, Francis Nixon the younger takes an estate tail by implication.

Francis Nixon, the younger, took an absolute interest by implication, inasmuch as an absolute interest will be implied from a direction that the trust is to cease at twenty-one or from a reference to the trustees for the legatees; *Peat* v. *Powell* (7), and other cases referred to in Theobald, and an absolute interest will be given because the trustees will be directed to apply not only the interest but the produce till Francis Nixon, the younger, attains twenty-one years.

Even if the clause as to failure of issue relates to the third paragraph, the death having no issue meant an indefinite failure of issue, and not a failure at the death of the devisee or legatee. Jarmyn on Wills (8); *Farrell* v. *Farrell* (9).

As to a bequest of personal estate with a gift over of the share of any one dying without issue to survivors, see Hawkins on Wills (10), where *Hughes* v. *Sayer* (11) is cited; but Hawkins states it is otherwise in devises of real estate, and states that the above case of *Hughes* v. *Sayer* (11) does not apply in devises of real estate and cites *Chadock* v. *Cowley* (12). Where there is a devise to A., and his heirs, with a gift over if A. should

(1) 8 Q. B. D. 576.
(2) 24 Gr. 320.
(3) 8 C. B. 876.
(4) 23 O. R. 404.
(5) 28 Gr. 112.
(6) 3 ed. pp. 302, 520 *et seq.*
(7) Amb. 387.
(8) 5 ed. 1331-1333.
(9) 26 U. C. Q. B. 652.
(10) 2 Am. ed. pp. 205 *et seq.*
(11) 1 P. Wm. 534.
(12) Cro. Jac. 695.

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die under twenty-one, or having attained twenty-one should die without issue, it has been held that the correspondence between the two events on which the limitation over is to take effect, is sufficient to restrain the dying without issue to a failure of issue at the death.

The learned counsel referred to the following cases. *Forth* v. *Chapman* (1); *Bamford* v. *Chadwick* (2); *Simmons* v. *Simmons* (3); *Coltsman* v. *Coltsman* (4), is distinguished from the earlier cases, and is not at variance with former decisions. *Wyld* v. *Lewis* (5) was not cited in *Coltsman* v. *Coltsman* (4). As to the meanings of the word survivor, see Theobald on Wills (6). If it means in this case the longest liver, then the failure of issue is not restricted. *Chadock* v. *Cowley* (7); *O'Donohoe* v. *King* (8).

There was an intention to benefit the *stirpes*; and in such case a restricted construction would not be adopted. Theobald on Wills (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The only question on this appeal is one as to the construction of the will of Francis Nixon who died in 1856, and therefore before the passing of the provisions of the Wills Act regarding death without issue.

So much of this will as is material to the question raised on the present appeal is as follows:

2nd. I give and bequeath to my son Adam Nixon, lot number 6 in the 3rd concession of the township of Chinguacousy, aforesaid, containing 100 acres more or less, together with the houses and outhouses thereon erect.

3rd. I give and bequeath to my son Francis Nixon, lot number 8 in the 4th concession of the said township of Chinguacousy, contain-

(1) 1 P. Wm. 663.
(2) 2 W. R. 531.
(3) 8 Sim. 22.
(4) L. R. 3 H. L. 121.
(5) West 311.
(6) 3 ed. p. 500.
(7) Cro. Jac. 695.
(8) 8 Ir. Eq. 185.

ing 100 acres more or less, together with all the houses and outhouses thereon erect, at the age of 21 years, giving the executors power to lift the rent, and to rent, said executors paying said Francis Nixon all former rents due after my decease up to his attaining the age of 21 years.

4th. I appoint Ross Nixon, James Alderson, and Alexander Nixon my executors of this my last will and testament, in whose hands I leave lot number 5 in the 3rd concession of township aforesaid, containing 50 acres more or less, to be disposed of as follows as soon as the lot can liquidate the following :

To my son Franklin Seymour, the sum of 250 pounds of lawful money.

To my son Francis, one acre, being the north-west corner of said lot number 5 in the 3rd concession.

To my daughter Ellen Benson, wife of James Benson, the sum of 25 pounds of lawful money.

To my daughter Margaret, the sum of 50 pounds, and in case she pleases the executors in her marriage the sum of 25 pounds more.

To my daughter Adeline, the sum of 50 pounds, and in case she pleases the executors in her marriage the sum of 25 pounds more.

At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors.

To my niece the sum of 12 pounds, 10 shillings.

To James William the sum of 25 pounds.

After the aforesaid claims are paid, lot number five in the third concession falls into the hands of Adam Nixon. And in case the said lot 8 in the 4th concession will not realize the above claims in full, the balance to be paid by Adam and Francis, share and share alike, and in case the lot brings more than said claims the overplus to be paid by my executors to Adam Nixon.

The action, which originally involved other questions besides that relating to the construction of this will, was tried before Mr. Justice Ferguson, who held that Francis Nixon the testator's son took an estate tail in lot number eight in the 4th concession of Chinguacousy. Upon appeal to the Divisional Court of Chancery that court (composed of the Chancellor and Mr. Justice Meredith) held that Francis Nixon took a fee subject to an executory devise over in the lands in question. There was then a further appeal to the Court of Appeal and it was there held by a majority

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of the court that both the preceding judgments were erroneous, and that Francis Nixon took a fee simple absolute in lot no. 8. Mr. Justice Street dissented from this judgment and agreed in the conclusion of the Divisional Court of Chancery.

The judgment of the Court of Appeal proceeded upon the reasons which are fully stated in the judgment of Mr. Justice Maclennan. The will, as I have already remarked, having been made in 1852 by a testator who died in 1856, must be construed according to the old law as it stood before the enactment, copied from the English Wills Act, providing that a failure of issue is to be taken to mean a failure of issue at the death, thus altering the old rule of construction which had established that unless there was a context calling for a restrictive construction failure of issue meant a failure of issue indefinitely.

The question here turns on a provision in the fourth section of the will which is in these words:

> At the death of any one of my sons and daughters having no issue their property to be divided equally among the survivors.

The Court of Appeal were of opinion that this gift over on death without issue did not apply to the lot number 8, in the 4th concession, which by the third clause of the will had been given to Francis Nixon in absolute terms, but was applicable only to lot number five, in the 3rd concession, which by the 4th clause of the will was directed to be sold to pay the legacies thereby bequeathed, with the exception of one acre devised to the testator's son Francis. The Court of Appeal therefore held it was unnecessary to decide the question upon which Mr. Justice Ferguson and the Divisional Court had differed as to the effect of this gift over on failure of issue. With all due respect for the Court of Appeal, I am entirely unable to adopt the reasoning which has led to their conclusion. The

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rule of construction established by the well known cases of *Gray* v. *Pearson* (1); *Abbott* v. *Middleton* (2); and *Roddy* v. *Fitzgerald* (3), is that we are to construe a will by reading it

> in the ordinary and grammatical sense of the words unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument, should follow from so reading it (4).

And as has been said by Lord Cranworth in *Abbott* v. *Middleton* (2):

> It is not the duty of a court of justice to search for a testator's meaning otherwise than by fairly interpreting the words he has used.

These cases are of such high authority and the rule of construction they lay down has become so familiar, that no one will be inclined to impugn it. The only doubt or difficulty which arises is in applying it.

It cannot be disputed that the ordinary grammatical construction of the clause in question requires us to read it as applying *primâ facie* to lot number 8, which the testator in the preceding section had devised to Francis Nixon in terms sufficient to pass the fee simple. The gift over is to be "at the death of any one of my sons and daughters," words which include Francis as one of the sons. And it is to be of "their property," meaning of course property which the testator has power to deal with as having previously devised or bequeathed it by the will. Therefore this word "property" must, according to the ordinary *primâ facie* grammatical meaning, comprise lot 8 devised to Francis. In order then to except lot number 8 from the provision in question we must be able to point to some "absurdity," "repugnance" or "inconsistency" which would be the consequence of including it.

(1) 6 H. L. Cas. 61.
(2) 7 H. L. Cas. 68.
(3) 6 H. L. Cas. 877.
(4) Per Lord Wensleydale in *Abbott* v. *Middleton*.

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No absurdity can, of course, be suggested. That there is either inconsistency or repugnance in a testator first giving an estate in fee in absolute terms and then cutting down that gift and making the absolute estate defeasible by an executory devise over or by the addition of words altering the estate to an estate tail, is a proposition which would be at variance with numberless authorities. The rule adverted to by Mr. Justice Osler as established by *Thornhill* v. *Hall* (1), has manifestly no application here, for no clearer and more decisive terms could be used than the language of the testator in the clause by which he limits the subsequent estates over. I fail therefore to see any safe ground on which we can proceed in following the Court of Appeal in a departure from the ordinary grammatical interpretation. If we once cut loose from the rule of literal construction and begin to speculate about the probable meaning of the testator we find ourselves surrounded by uncertainty. The mere mechanical arrangement of the will by a division into sections or paragraphs can have no conclusive effect on this question. It would be unsafe in the highest degree to construe a loosely framed will like this on any such principle. I am therefore unable to agree with the Court of Appeal that the gift over does not include lot number 8 devised to Francis Nixon.

This compels us to determine the point on which the learned judge who tried the action and the Divisional Court differed, viz.: the proper construction of the gift over "at the death" of any of the testator's sons and daughters having no issue. Do these words import an indefinite failure of issue and thus cut down the estate of Francis to an estate tail, or do they mean a failure of issue restricted to the time of the death of the first devisee, thus leaving Francis Nixon

(1) 2 Cl. & F. 22.

a fee but subject to an executory devise over? That the latter, which was that adopted by the Divisional Court, is plainly the proper construction upon authority is not open to dispute. I refer to the cases of *Ex parte Davies* (1); *Parker* v. *Birks* (2); *Coltsmann* v. *Coltsmann* (3); and *Gray* v. *Richford* (4). In Jarman on Wills (5), it is said that the three first of these cases have been considered

> to have established the rule of restrictive construction for cases in which the devise is to A. in fee and if he dies without issue then *at* or *on* his death over.

Indeed without authority a different conclusion would be quite inadmissible, for the question being whether the testator meant an indefinite failure of issue or a failure of issue at the death of the first taker, all doubt must disappear when we find that he has himself in so many words said that he meant a failure at the death of the first devisee.

The appeal must be allowed, the order of the Court of Appeal discharged, and the judgment of the Divisional Court restored with costs to the appellants here and in the Court of Appeal.

*Appeal allowed with costs.*

Solicitor for the appellants: *Thomas Dixon.*

Solicitors for the respondent Nixon: *Blain & Mahaffy.*

Solicitor for the other respondents: *W. H. McFadden.*

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(1) 2 Sim. N. S. 114.
(2) 1 K. & J. 156.
(3) L. R. 3 H. L. 121.
(4) 2 Can. S. C. R. 431.
(5) 5th ed. p. 1332.

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*Mar. 7, 9.
*May 18.

JOHN RENNIE (PLAINTIFF).....APPELLANT;

AND

HUGO BLOCK AND WILLIAM ALEXANDER (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Chattel mortgage—Mortgagee in possession—Negligence—Wilful default—Sale under powers—"Slaughter sale"—Practice—Assignment for the benefit of creditors—Revocation of.*

A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.

An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.

Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.

Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124 and the assignor was notified of such refusal and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner.

APPEAL from the decision of the Court of Appeal for Ontario affirming the judgment of the Chancery Division of the High Court of Justice for Ontario which refused to grant a new trial, or to direct a judgment to be entered for the plaintiff against the defendants, and confirmed the judgment of the trial court in favour of the defendants with costs.

PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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Plaintiff brought action for an account and damages against the defendant Hugo Block, as mortgagee in possession of his stock in trade, and the other defendant as the bailiff or agent who held such possession for the mortgagee, for damages caused by wrongful conduct and want of proper care and diligence in the sale of the goods under power of sale contained in a chattel mortgage, and for trespass by them in taking and retaining possession of his shop and premises in which the stock was contained.

The mortgagee had entered and taken possession under a clause to the effect that he should have such powers in case he might at any time "feel unsafe or insecure, &c.," and after advertising a "slaughter sale" sold a large portion of the goods at whatever price was offered by purchasers and the remainder by public auction at a rate on the dollar.

The special circumstances of the case are stated in the judgment of the court pronounced by his Lordship Mr. Justice Sedgewick as follows:

The plaintiff, in the year 1893, was a dry goods merchant at Saint Catharines, Ontario. In March and May of that year he gave to the defendant Block (a money lender in Toronto) three chattel mortgages upon his stock in trade as security for two loans amounting in the whole to $19,357.71, or thereabouts. These mortgages were payable on demand, and gave the mortgagee the right of seizure and sale in the event of default at any time. The plaintiff continued to carry on his business in the usual way until the 5th of July following, having in the meantime repaid the mortgagee about $11,000 on account. On that day he, the mortgagee, made demand of payment, which was not made, and he thereupon took possession of the plaintiff's premises and stock in trade, with the intention of selling it then. It was claimed by the

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plaintiff that in continuing in the store for the time he did (a period of about a fortnight) after the seizure he was a trespasser, no such authority having been given under the mortgages, but I think it was made abundantly clear at the trial that the plaintiff assented to this. In fact he in writing requested the respondent Block to allow Mr. Alexander, the agent acting for Block, to continue to carry on the business in the St. Catharines store for two weeks in order that he might in the meantime raise money to pay off the debt.

At the time of the seizure there were goods in the store valued at say $40,000, more or less.

Immediately upon taking possession the defendants advertised the goods for sale and on the following day, particularly on the 11th and 12th of July, the sale took place.

If the plaintiff has any right of action or claim against the defendants he has it in consequence solely of the reckless and improvident way in which the sale was carried on, a point to which I will refer later on. In his statement of claim the plaintiff set up that the chattel mortgages were not intended to be payable upon demand and that on that account the original seizure was illegal, and he also claimed for the trespasses above referred to. Neither of these claims proved tenable, but the statement of claim proceeded as follows:

"5. The defendants, after wrongfully taking possession as aforesaid of said store and stock, then did, in absence of the plaintiff, give public notice through the newspapers and posters that the plaintiff's said stock of goods would be sold at half price or at any price that could be obtained for them, and in pursuance of said notice did proceed for the period of two days, namely, on the 11th and 12th days of July last,

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to sell in a reckless, careless and improvident manner, the said stock as advertised, to the great injury of the plaintiff's interests."

"6. On the said 11th and 12th days of July, 1893, in pursuance of the said advertisements and posters, the defendants conducted a slaughter sale of the plaintiff's said stock and goods, and the public crowded into the store and premises of the plaintiff in large numbers, and the throng of people became so large and excited that the employees of the plaintiff lost control of them and were unable to conduct the sale and the business in a proper, orderly and systematic manner."

"7. During the said 11th and 12th days of July, owing to the immense crush of people who were led and induced by the defendants to enter the store and premises, the regular employees of the establishment were unable to maintain any order or protect the goods which were by the crowd strewn all over the premises in the utmost confusion. The said crowds invaded the whole premises, going behind the counters, taking, selecting and measuring goods for themselves. Goods were thus in large quantities pulled from the shelves and counters and thrown in confused heaps on the floors and counters, and thus greatly damaged."

"8. By the wrongful conduct of the defendants as aforesaid the plaintiff was greatly damaged in his credit and reputation as a merchant, and caused the other creditors of plaintiff to stop his credit, whereby the plaintiff was forced to close his said store and discontinue his said business."

In their statements of defence the defendants denied these allegations, and further contended that the sale as conducted on the 11th and 12th of July was in accordance with an agreement come to between the plaintiff and the defendant Alexander. And it was further set up as follows :

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"16. The defendant alleges the fact to be that after the commencement of this action and on or about the 9th day of September, 1893, the plaintiff herein assigned all his property which might be seized and sold under executions and all his real estate and his credits and effects to one John McClung, of the city of Toronto, assignee, in pursuance of the provisions of chapter 124 of the Revised Statutes of Ontario, being an Act respecting assignments and preferences by insolvent persons, such assignment being made by him in accordance fully with the provisions of the said Act, and such assignment is still in full force and effect, and all said property, estate, credits and effects became and still are vested in the said John McClung."

"17. The defendant alleges the fact to be that by said assignment and transfer, not only by reason of the provisions of the statute in that behalf, but also by reason of the general provisions of the law as applicable to all such assignments and transfers, the alleged claim of the plaintiff herein (if any) thereby passed to the said John McClung, who would be the only person entitled to maintain such action if the right thereto existed at all, which the defendant herein again denies, and by reason of such assignment the plaintiff alleges and submits that the plaintiff herein is not now by himself entitled to maintain this action, and that the same cannot be maintained at all except by or with the concurrence of the said John McClung as party thereto."

In reply to these last two paragraphs, the following answer was made:

"2. The plaintiff denies that he made an assignment of his estate, rights, credits and effects for the benefit of his creditors to John McClung, as alleged in paragraphs 13 and 14, and that if he did make such an assignment (which he does not admit, but denies) says

that said McClung, acting on the advice, at the request and with the consent of the creditors, renounced and refused to act under the said alleged assignment, and that said alleged assignment is null and void and of no effect."

The case came on for trial before Mr. Justice Rose, he having dismissed the jury, and upon the conclusion of the plaintiff's case he dismissed the action, no witnesses having been called for the defence.

This judgment was affirmed by the Divisional Court before the Chancellor and Mr. Justice Ferguson. Upon appeal it was also affirmed, although Mr. Justice Osler gave his opinion with hesitation and Mr. Justice Street (sitting temporarily as an appeal judge) was of opinion that the plaintiff should have succeeded and be paid his damages at $500.

From that judgment an appeal is asserted here.

*O'Donohoe* Q C. and *Meek* for the appellant. A mortgagee who takes possession must account to the mortgagor. *White* v. *City of London Brewery Co.* (1); Fisher on Mortgages (2).

He must account for what he should have received. *Parkinson* v. *Hanbury* (3); *Kensington* v. *Bouverie* (4); *Hinde* v. *Blake* (5); *Robertson* v. *Norris* (6); Jones on Mortgages (7).

As to duties and responsibilities of the mortgagee of chattels who takes possession and sells see *Bird* v. *Davis* (8); *Stromberg* v. *Lindberg* (9); *Leach* v. *Kimball* (10); *Botsford* v. *Murphy* (11).

If the conduct of mortgagee has been negligent, wasteful or oppressive the mortgagor is entitled to

(1) 42 Ch. D. 237.
(2) 4 ed. secs. 741, 1438, 1470 and 1474.
(3) L. R. 2 H. L. 1.
(4) 7 DeG. M. & G. 134.
(5) 11 L. J. Ch. 26.
(6) 1 Giff. 428.
(7) 3 ed. sec. 1123.
(8) 14 N. J. Eq. 467.
(9) 25 Minn. 513.
(10) 34 N. H. 568.
(11) 47 Mich. 537.

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damages as well as to an account. *Bearss* v. *Preston* (1); *Burr* v. *Dana* (2).

Where a mortgagee takes possession through unreasonable fear, &c., he is trespassing and is liable to exemplary damages. *Davenport* v. *Ledger* (3); *Boyd* v. *Beaudin* (4); *Furlong* v. *Cox* (5).

The mortgagee in possession is a trustee of the surplus proceeds of sale and may be charged with interest thereon. See Lewin on Trusts (6).

As to the assignment, the creditors refused to act and the assignee did not accept it. See Burrill on Assignments (7); *Mackinnon* v. *Stewart* (8). The *cestuis que trustent* never took any interest under the assignment, and it never became operative.

*Watson* Q.C. for the respondents. There is no trespass for the mortgages authorized, and the plaintiff consented to, the mortgagee taking possession. The plaintiff's line of business was selling off bankrupt stocks by "slaughter sales," and he cannot complain of a similar sale being made of the mortgaged goods in his own place of business by the mortgagee.

There is no evidence upon which damages can be assessed. The goods sold during the days the special sales lasted brought an average of 50 cents on the dollar whilst the remainder of the stock brought only 42½ cents on the dollar when sold *en bloc* at auction, and there were no depletions in any line of the stock so far as the evidence shows.

The finding upon the facts in the courts below ought to stand and no reason has been shown to justify a new trial.

By reason of the assignment which the plaintiff made after the suit was commenced all his interests passed

(1) 66 Mich. 11.
(2) 72 Wis. 639.
(3) 80 Ill. 574.
(4) 54 Wis. 193.
(5) 77 Ill. 293.
(6) 9 ed. c. 10 ss. 24, 25.
(7) 4 ed. pp. 167, 168, 547.
(8) 20 L. J. Ch. 49.

to and still remain vested in the assignee and the plaintiff has no right now to maintain the action or this appeal. *Harper* v. *Culbert* (1); *Hodgson* v. *Sidney* (2): Lewin on Trusts (3); *Doyle* v. *Blake* (4); *Read* v. *Truelove* (5); *Webster* v. *Vandeventer* (6). On the merits see also *Drane* v. *Gunter* (7); *Warner* v. *Jacob* (8); *Beatty* v. *O'Connor* (9); *Merriam* v. *Cronk* (10).

The judgment of the court was delivered by:

SEDGEWICK J.—(His Lordship read the facts as above set out and proceeded as follows):—Two questions only are involved. First: Did the facts disclosed at the trial entitle the plaintiff to damages or to an inquiry as to his loss by reason of the alleged reckless or improvident sale? Secondly: Assuming the first question affirmatively answered, is the plaintiff precluded from recovering by reason of the assignment to McClung set up in the defence?

As to the first question it must be borne in mind, as I understand from the evidence, that the defendant Block has been paid in full from the proceeds of the sale at different times, and he has allowed nothing to the plaintiff on account of any of the losses set up in the claim. Further, there was no evidence to show that the plaintiff assented to the manner of the sale as actually conducted. He was away at the time, and could not therefore have complained. If, therefore, there was any illegality in the proceedings the defendants alone are responsible for it.

I am of opinion that the sale was reckless and improvident in several particulars, and that in conse-

(1) 5 O. R. 152.
(2) L. R. 1 Ex. 313.
(3) 9 ed. p. 366.
(4) 2 Sch. & Lef. 231.
(5) Amb. 417.
(6) 6 Gray (Mass.) 428.
(7) 19 Ala. 731.
(8) 20 Ch. D. 220.
(9) 5 O. R. 747.
(10) 21 Gr. 60.

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quence of such recklessness and improvidence such a loss resulted as entitled the plaintiff to have an account taken as to what the true amount of it really was. In other words, the defendant Block, being in possession and bound to act in a prudent, reasonable manner in selling the goods, failed in that regard and being wilfully in default is liable to account not only for what he has, but also what he might have, received had he acted with a proper regard for the interest of the plaintiff, whose trustee (so far as the equity of redemption was concerned) the defendant Block was.

The plaintiff, I think, may justly complain, first, because the goods were sold in many instances far below the cost price, and far below their real worth. They were admittedly "slaughtered"; retail dealers purchased so low that they could resell at a large profit. It is no answer that the plaintiff in his day had carried on "slaughter" sales. A man may do what he likes with his own. Financial necessities may compel him to sacrifice his wares. That, however, is not the test of conduct on the part of a mortgagee in possession, selling mortgaged goods. He must not be influenced by his own necessities or needs. He must act as a merchant would act in ordinary business affairs.

Secondly, complaint may well be made that proper means were not taken by the employment of sufficient salesmen to protect the store from loss.

Thirdly, because of the damage that must have resulted from the reckless way in which the goods were dealt with while in course of sale.

Finally, because no account was taken or kept of the goods actually sold, the proceeds being ascertained by counting the cash on hand at night.

The evidence of one witness, John McCarthy, which is substantially the same as that of many others, may be given.

John McCarthy sworn, examined by Mr. Fullerton.

Q. Where do you live?—A. 29 St. Paul Street.

Q. What is your business?—A. Hotel manager.

Q. Do you remember the sale at the house known as Rennie's store on the 11th and 12th of July last?—A. Yes.

Q. Were you there on either or both of those days?—A. I was there on the 11th and 12th.

Q. What were you doing there?—A. I was purchasing.

Q. How did you find the crowd for numbers?—A. In the neighbourhood of 200 and 300 people.

Q. Where?—A. In the store.

Q. How was the crowd outside?—A. In the front and rear there would be 100 to 150.

Q. 100 to 150 outside?—A. Yes.

Q. What were they doing?—A. Trying to get in.

Q. Do you know whether any people got in otherwise than through the doors?—A. Yes, they got in through the windows.

Q. Did you see them?—A. Yes.

Q. Any other way?—A. Some of them went up the back steps and in through the upstairs door and came down through the store.

Q. Then you say there were between 200 and 300 inside?—A Yes.

Q. About how many people were there to wait on that number?—A. I would judge about 11 or 12.

Q. Were they capable of waiting on the crowd that was there from what you saw?

Mr. Watson: I don't think that is a proper way of putting it; it is a question of what occurred.

Mr. Fullerton: Q. Tell us what you saw there and we will judge from that?—A. There were not quarter enough clerks to wait on the people there.

Q. What were the people doing?—A. They were handling the goods in front and behind the counters, pulling them down, examining them, and some people buying some, and some people carrying them to the clerks and purchasing them and walking out with them when they could get out.

Q. Do you remember Mr. Lahey being there?—A. Yes.

Q. See anything happen to him that day?—A. Yes, while Mr. Alexander went to dinner he opened the back door to let some people out. Mr. Alexander was not there at the time; he opened the back door to let some people out, and there was a crush so that he could not get the door shut, and they got him in between the door and the wall, and he could not move from there until the crowd got out; Alexander and somebody else came to the door and got it shut again.

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Q. Got him released?—A. Yes.

Q. Do you know whether he was laid up from the jam?—A. I heard so.

Q. Did you buy some things yourself that day?—A. Yes.

Q. What?—A. I bought about $40 worth of stuff.

Q. That was the first day?—A. In all.

Q. What was the nature of the stuff you bought there?—A. 16 yards of silk, towels and towelling.

Q. What price did you pay for the silk?—A. $1 a yard.

Q. Do you know the selling price of the silk?—A. $2.25 was the mark.

Q. What else did you buy?—A. Some towelling.

Q. Do you remember what it was marked?—A. Some was 15 cents and some was 20 cents; I bought some for 7 cents and some for 9 cents.

Q. Anything else you bought there?—A. Some white spreads.

Q. What did you pay for those?—A. 80 cents for one and $1.25 for the other.

Q. What were they marked?—A. One was $2.25 and the other was marked $1.75.

Q. Anything else?—A. I bought the makings of a suit of clothes, and I paid $4 and something for it.

Q. Do you remember what it was marked?—A. No, I forget just what it was marked.

Q. How did the prices range so far as you saw them?—A. They ran about half.

Q. You said that you saw people behind the counters?—A. Yes.

Q. To what extent?—A. About 3 or 4 at a time; outsiders I am talking about.

Q. What were they doing there?—A. Pulling the goods off the shelf.

Q. What were they doing with them?—A. Placing them on the counter for people to look at; somebody would say, let us see them.

Q. Were you behind the counter yourself?—A. Yes.

Q. What were you doing there?—A. Looking at the goods.

Q. Was there any restraint as to where people were to go?—A. No, none at all.

Q. Was there a jewelry department there?—A. Yes.

Q. Did you see anything about that?—A. Yes. I saw some gentlemen pulling the jewelry out and looking at it and putting it back again.

Q. Any clerk in attendance?—A. One time there was and then they were alone for quite a while.

Q. Any goods on the floor?—A. Yes.

Q. How did they come there?

Mr. Watson: This is leading.

Witness: The goods were taken off the shelves and piled on the counter until they got like hay, and then rolled on the floor.

Mr. Watson: Q. Like hay?—A. A ton of hay. Then they rolled on the floor, and then they were trampled on, and nobody seemed to care whether they were picked up or not.

Mr. Fullerton: Q. Were they picked up?—A. Some were and some were not.

Q. What class of goods did you see on the floor in that way?—A. Generally up where they had the stockings, and silk handkerchiefs and neckties and gloves on the gents' side, and fine underwear.

Q. Did you see that on the floor?—A. Yes.

Q. Did you see anything in the shirts department?—A. White shirts. They were thrown around in the same way and fell on the floor some of them, and some of them were picked up and scattered in all directions there.

Q. Could you give us any idea of the quantity of goods you saw on the floor?—A. There would be at times quite a lot there, and people kind of gathered them up and put them in the pile again and they would tumble down again.

Q. Did you say you saw people climbing in at the windows?—A. Yes.

Q. How many?—A. I saw 15 or 16.

Q. Then as to measuring and wrapping up the goods and all that sort of thing?—A. Very little wrapping up. Out of all I bought there was none of it wrapped up; I carried it out in my hand.

Q. Did you see others coming out with their goods?—A. Yes.

Q. In what way?—A. Carrying them in their hands, over their shoulders, or over their arms rather.

Q. To what extent did that prevail?—A. Generally through the sale; did not have time to make out checks or parcel it up at all.

Q. Did you see the money being paid?—A. Yes, on several occasions.

Q. To whom?—A. To all the different clerks.

Q. What check was there kept on that?—A. None in some cases that I saw.

Q. Did you see anything unusual about the money that was paid to the clerks?—A. I saw some of the clerks putting it in their pockets.

Q. To any large extent?—A. I would not say. I saw on a couple of occasions them put it in their pockets.

Q. Was there any check that you saw to prevent that sort of thing?—A. None whatever.

Q. Was there any check to prevent goods being carried out that were not paid for?—A. No. If you bought any goods at the front store

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you had to go out at the rear door, and if you carried them in your hand or over your arm and went to the rear door, the man there did not know whether you had paid for them or not. I was not questioned any time, and I went out with $40 worth of goods at different times.

Q. Did you see others going out with amounts as large?—A. In the same way.

Q. Did you see any corsets carried off?—A. Yes. I saw a man that clerks for Mr. Stanley in the big 22 carry out an armful of corsets; he went out the back door with them, and his name is Mr. Hiltz.

Q. Do you remember seeing James Fraser there that day?—A. Yes; he bought a lot of underwear, put it on his arm and walked out with it when he paid for it.

Q. What means did they take of preventing the crowd from getting in and out by times?—A. They locked the front door, and then the crowd got so thick at the back some people wanted to get out, and they could not get out; they would not open the back door, and it kept the crowd in there. After a while they would let three or four slide out as soon as they got a little crowd ready; then they took the key out and put it on a shelf; and then they would unlock the door again and let four or five out, and then lock the door again.

Q. Were you upstairs at any time?—A. Yes.

Q. How was the business being conducted up there?—A. There was no clerk up there on three or four occasions I was up there.

Q. Were there people there?—A. Yes.

Q. To what extent?—A. There would be five or six or seven or eight.

Q. Goods up there?—A. Yes.

Q. What were the people doing about the goods?—A. Looking around, handling them over. The goods were lying on tables and the goods were hanging up, cloaks and mantles; people were examining them.

Q. What guarantee was there that the goods carried out were paid for?—A. There was no guarantee at all.

Q. Nothing to prevent it being done?—A. No.

The goods were not all sold in this way. Those remaining after these sales were sold at 40 cents on the dollar. I think it may fairly be assumed that except for the "slaughter sale" so called a larger price might have been realized. The best of the goods must have been taken during the two days' sale. The crowd of purchasers would seize upon the best bargains and the depletion of the stock of the finer class of goods would necessarily tend to diminish the value of what remained.

The trial judge in his oral judgment at the close of the trial seems to admit a possible loss. He says:

As to the goods upon the floor, some of them may have been trampled upon, some of them may have been more or less injured, but to what extent they were upon the floor and to what extent they were injured nobody has ventured an opinion, and I suppose it would be impossible to make an estimate.

The learned Chancellor in his judgment says as follows:

The judgment should be affirmed, but I would be disposed to say without costs, as the defendant did act in rather a careless and possibly destructive manner as to some things during the two days slaughter sale.

And Mr. Justice Ferguson agreed with him.

On the whole, I am of opinion that the plaintiff made out at least a *primâ facie* case of loss, and that there should be a reference to ascertain as far as possible its extent.

There is no conflict as to the duties of a mortgagee in possession; reference may, however, be had to Coote on Mortgages (1); Fisher on Mortgages (2); and to *National Bank of Australasia* v. *United Hand in Hand & Band of Hope Co.* (3), where the judicial committee of the Privy Council held that a mortgagee was chargeable with the full value of the mortgaged property where it had been sold at an undervalue from want of due care and diligence.

Then as to the second point, the facts presented here are as follows:

After this action was commenced the plaintiff made a general assignment of his estate, including, as I will assume, the cause of action here, to one McClung, which assignment McClung executed. He thereupon called the intended beneficiaries, Rennie's creditors, together and they one and all refused to execute or accept the benefits of the assignment. McClung thereupon in writing notified Rennie through his wife of this fact, and proceeded to say "We have therefore refused to act under the assignment and have not registered the same."

(1) 5 ed. p. 800 *et seq.* (2) 3 ed. p. 948.
(3) 4 App. Cas. 391.

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No formal transfer back to Rennie was made. Under these circumstances, was the plaintiff precluded from proceeding with his action? I am of opinion he was not. It is established law that an assignment of property by a debtor to a trustee for the payment of debts without the knowledge or concurrence of the creditors is a revocable direction by the assignor as to the mode in which he wishes his own property to be applied for his own benefit, and that the creditors named are not constituted *cestuis que trustent* and cannot claim to have the trusts of the assignment executed either against the debtor himself or his trustee. The principle underlying this statement of the law is stated by Lord Cranworth in *Synnot* v. *Simpson* (1); and see *Garrard* v. *Lord Lauderdale* (2), and *Johns* v. *James* (3).

But where the assignment has been executed by the creditors or where it has been communicated to them and they have or may be supposed to have acted upon it, then it becomes irrevocable. The creditors become *cestuis que trustent*, having a right to enforce the trusts of the deed and the trustee becoming in the first place the trustee for them, not for the assignor. Apply these principles to the present case. Upon the execution of the assignment and before communication to the creditors the assignee was the trustee or agent simply of the assignor. So far as lands and goods were concerned the legal property passed to the assignee, and so far as credits or choses in action were concerned the right of enforcing them (under a special statute) passed likewise to the assignee. But, so far, he held this property and these rights as trustee for the assignor only. Had the creditors executed the deed as contemplated, or otherwise assented to it, they would have become equitably entitled to the benefit

(1) 5 H. L. Cas. 121.
(2) 3 Sim. 1.
(3) 8 Ch. D. 744.

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of such property and rights. Their refusal, however, to accept it and the refusal of the assignee to register or act upon it, amounted to the same thing as if it had never been communicated at all. Its revocable character was never lost, and the assignee's letter and the assignor's acting upon it by proceeding with this case constituted, in my opinion, an actual revocation of the assignment and of any rights which the assignee had under it. It is true the legal title of lands would still remain with him, but he would be a bare trustee for the assignor obliged to convey to him upon demand; goods transferred by the assignment would pass back by delivery where necessary, and the assignor's right to enforce choses in action would be determined absolutely by the fact of the revocation itself.

Under the Mercantile Amendment Act, R. S. O., ch. 122, in order that an assignee of a chose in action may sue in his own name, a written assignment is necessary; it is nowhere enacted that a written instrument is necessary to restore to the assignor his original right.

There is another view which may be taken, leading to the same conclusion. The transaction in question was never completed by the acceptance of the assignee, and the concurrence of the creditors. It remained inchoate and conditional, it never became executed, and the assignment may have ceased to have any legal effect at all upon the assignor receiving the intimation that the creditors and assignee as well refused to recognize it or in any way act upon it.

The result, in my judgment, is that the appeal should be allowed with costs, both here and in the courts below; that there should be judgment for the plaintiff and a declaration that he is entitled to recover as against the defendant Block, for the losses specified in the 5th, 6th and 7th paragraphs of his amended

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statement of claim, with a reference to the proper officer to ascertain its amount. Under the circumstances the action against Alexander should be dismissed, but without costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *John O'Donohoe.*

Solicitors for the respondents: *Watson, Smoke & Masten.*

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*Mar. 11.

*May 18.

H. S. HOWLAND, SONS & CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

ARCHIBALD GRANT (DEFENDANT) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Debtor and creditor—Composition and discharge—Acquiescence in—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preferences.*

Upon default to carry out the terms of a deed of composition and discharge a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented.

*Held*, that a creditor who had benefited by the realization of the assets and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it.

The debtor's assent to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Supreme Court of the North-west Territories, dismissing the plaintiffs' appeal from the judgment in the court below whereby their action was dismissed with costs.

A statement of the case appears in the judgment of the court pronounced by his Lordship Mr. Justice King.

*Kappele* for the appellants. The plaintiffs did not assent to the extension of time by the new arrangement made by the debtor with other creditors.

The respondent failed to perform the conditions precedent to his release in the terms of the deed of composition. *Day* v. *McLea* (1); *Mason* v. *Johnston* (2). The release was in consideration of a speedy performance by the debtor; otherwise the creditor got no consideration. *Ex parte Vere* (3). *Cujus est dare ejus est disponere.* See *Sewell* v. *Musson* (4); *Oughton* v. *Trotter* (5); *Edwards* v. *Hancher* (6).

*Lougheed* Q.C. for the respondent. There was a part performance by appellants. Rev. Ord. N. W. Ter. (1888) ch. 58, sec. 9, s.s. 7. The appellants got consideration through the other creditors signing. *Good* v. *Cheesman* (7); *Boyd* v. *Hind* (8); *Wood* v. *Roberts* (9); *Cork* v. *Saunders* (10); *Boothbey* v. *Sowden* (11); *Butler* v. *Rhodes* (12). Appellants adopted the new agreement and may not improve their position by violating it (13). Appellants cannot retain the dividend they received and deny the validity of the proceedings. *Lewis* v. *Leonard* (14); *Steinman* v. *Magnus* (15); *Garrard* v.

(1) 22 Q. B. D. 610.
(2) 20 Ont. App. R. 412.
(3) 19 Ves. 93.
(4) 1 Vern. 210.
(5) 2 N. & M. 71.
(6) 1 C. P. D. 111.
(7) 2 B. & Ad. 328.
(8) 1 H & N. 938.
(9) 2 Stark 417.
(10) 1 B. & Ald. 46.
(11) 3 Camp. 175.
(12) 1 Esp. 236.
(13) Addison, Contracts (9 ed.) pp. 83, 172.
(14) L. R. 5 Ex. D. 165.
(15) 2 Camp. 124.

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*Woolner* (1); *Jolly* v. *Wallis* (2); *Tallock* v. *Smith* (3).

Time as of the essence of the composition was waived by continuing the negotiations after the expiration of the period there limited. *Webb* v. *Hughes* (4); *Crawford* v. *Toogood* (5); *Green* v. *Sevin* (6); Pollock on Contracts (7).

The judgment of the court was delivered by:

KING J.—This is an appeal from a judgment of the Supreme Court of the North-west Territories in favour of the respondent.

The action was brought by the present appellants to recover a balance claimed to be due upon two promissory notes made by the respondent in favour of the appellants upon the 22nd of February, 1889.

The substantial defence was that the appellants had concurred with the other creditors of the respondent in a certain distribution of respondent's property by way of composition and discharge and had obtained the dividend agreed upon.

At the time of the making of the notes in suit the respondent was doing business as a trader at Calgary, and had a number of creditors at Winnipeg, Toronto and other places. The appellants did business in Toronto and had supplied respondent with goods for which the notes in question were given. The respondent became embarrassed, and by an agreement of 11th February, 1889, made between himself of the first part, the executing creditors of the second part, and one Pettigrew and two other merchants of Winnipeg of the third part, he placed the control and direction of his business in the hands of the parties of the third

(1) 8 Bing. 258.
(2) 3 Esp. 228.
(3) 6 Bing. 339.
(4) L. R. 10 Eq. 281.
(5) 13 Ch. D. 153.
(6) 13 Ch. D. 589.
(7) 6 ed. p. 486.

part who were to act as trustees and supervise and direct the conduct and management of respondent's business, receiving weekly all the proceeds and distributing the amount pro rata amongst the creditors less the amount of any purchases of stock that they might have deemed it proper to make. The creditors on their part agreed not to enforce their demands during the continuance of the agreement which was limited to six months. The appellants were amongst the executing creditors. The six months expired on the 11th of August. The result of the arrangement was not satisfactory to the creditors, and on the 21st of August a deed of composition and discharge was entered into between the respondent and the creditors. It was recited that the creditors had agreed to accept 75 cents on the dollar payable in three equal sums in 6, 9 and 12 months from the date of the deed, without interest, by promissory notes of the debtor secured to the creditors' satisfaction. It was then covenanted that the receipt by the parties of the second part, within 60 days, of the promissory notes should operate as a payment, and satisfaction in full of their respective claims.

The composition deed was executed by 13 creditors, including the appellants, representing $17,890, of which sum the appellants' claim of $2,621 formed part.

One Ashdown had given the debtor a letter stating that as soon as satisfactory arrangements had been made he would be prepared to endorse his paper to the extent of 75 cents on the dollar provided that the same was accepted by the creditors in full of their demands against the debtor, and this letter was shown by the latter to the creditors as an inducement to execute the composition deed.

The respondent and Ashdown failed to come to terms, the notes were not given for the composition, and the deed ceased to be binding on the creditors unless they consented to go on afterwards.

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This, in my opinion, is what they did.

On the 26th of October the respondent agreed to sell to Ashdown, and the terms of payment were made to agree with the terms of the composition deed as to dates, etc.

This was done with the concurrence of the creditors, for, two days afterwards, we find Pettigrew writing to the appellants stating that he had been appointed by the creditors to act as trustee for them, to receive the settlements from Ashdown and transmit the same to the several creditors, and requesting appellants to send a memorandum of their claim.

The appellants adopted what had been done and afterwards, on November 25th, we find them complaining of the delay that had taken place in completing the arrangement.

Pettigrew then wrote to Ashdown and his reply (Dec. 5) shows that he also considered that he was assisting in carrying out the composition.

The actual transfer to Ashdown had been made on the 18th November, but payment of the price was delayed on account of the stock taking.

The following power of attorney from appellants to Pettigrew under date 10th December, 1889, was produced by the respondent. It does not appear when it was received by Pettigrew and, as hereafter to be observed, it seems not to have attracted notice.

TORONTO, Dec. 10, 1889.

We hereby appoint and authorize W. D. Pettigrew to receive for us from J. H. Ashdown the amounts of settlement as per arrangements of the estate of A. Grant, and all receipts given by said W. D. Pettigrew for the same shall be binding upon us as if they had been signed by us, but it is understood that nothing the said W. D. Pettigrew shall do shall discharge the said A. Grant from his debt to us unless by our further consent.

Passing over the concluding clause, it would seem that the words "the amounts of settlement as per

arrangements of the estate of A. Grant," point to the carrying out of the composition through the appropriation of the Ashdown purchase to it, or (according to the evidence of respondent) to a new arrangement whereby the proceeds of that transaction were to be accepted in satisfaction and discharge of the original liabilities. There is nothing else to which the words can be reasonably applied.

On the 18th of December, Pettigrew having the day before received from Ashdown his notes for the purchase money as in liquidation of the creditors' claims, wrote to the appellants as follows:

We sent you a few days ago through J. Robertson & Co. to obtain your signature so as to allow us to obtain your notes. If you wish me to send them please send the necessary authority, also power for me to sign discharge to A. Grant. Dividend is 64½ cents in the dollar.

The terms of this letter, both in asking for authority to receive the notes, and in requesting power to sign discharge to Grant, appear to show that Pettigrew had not received the paper of December 10th before alluded to.

On December 23rd the appellant replied:

Your favour of 18th received. We did not understand that the sale of Grant's assets to Ashdown was to include the former's discharge, and it must be left with us for future consideration. If you require anything more than the inclosed please notify us.

What was inclosed was an authority to Pettigrew as follows (and it is significant that nothing is said as to a former authority having been sent):

TORONTO, Dec. 23, 1889.

In the matter of the disposal of the assets of A. Grant of Calgary to J. H. Ashdown of Winnipeg, we hereby authorize W. D. Pettigrew of Winnipeg to receive our share of the consideration therefor, giving J. H. Ashdown a full receipt, and also to do such further acts as may be necessary to give the said J. H. Ashdown quiet possession so far as we are concerned of the various properties transferred.

In ordinary course this would not reach Winnipeg for a couple of days, and prior to that, viz., on the 23rd

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December, a deed of release was executed releasing Grant from all claims of the executing creditors in consideration of moneys to them respectively paid by Grant. The creditors executing this release were all those who had executed the composition deed, excepting the appellants and a creditor for the amount of $350.64.

The release may, in absence of proof to the contrary, be supposed to have been executed by the Winnipeg creditors at least on the day it bears date.

The amount actually received by these creditors was the amount of the net proceeds of the Ashdown sale mentioned in Pettigrew's letter as 64½ cents on the dollar.

On the 6th January, 1890, the appellants wrote to Pettigrew:

> Will you be good enough to send us at once the notes for our share of the amount realized from the sale of the assets of A. Grant. There has already been as much delay in this matter as we feel we should consent to.

Pettigrew communicated with Grant as to handing over the Ashdown notes without receiving a discharge, and Grant replied by telegraph to pay over the notes and that he would write the appellants. Then the next day (14th January), Pettigrew wrote to appellants:

> Yours to hand. We are in receipt of instructions from Mr. Grant to pay over the composition notes without asking you to sign discharge. In accordance with this we now inclose you the three notes.

The notes were paid at maturity, and the appellants now claim to recover the balance of the amount of the original notes.

I think the fair conclusion upon the evidence is that the whole body of creditors who had executed the composition deed waived the performance within the time limited by it, and that by arrangement with Grant they agreed to have it given effect to and carried

out through the medium of the Ashdown sale, receiving Ashdown's notes as payment of the composition.

Either this, or (as testified to by Grant) that it was agreed that the proceeds of the sale should be taken in satisfaction of the claims of the creditors.

I think that the creditors had reason to believe that all the body of executing creditors were assenting parties to the transactions that took place respecting the realization of Grant's assets and the distribution of them; and that, whatever the arrangements that were in fact made, they were adopted by the appellants who received the benefit of them. They cannot therefore be now repudiated by appellants upon the ground that they were not fully understood, without at least a surrender of the advantages that had been derived through them.

The assent of Grant makes no difference as it would be a fraud upon the other creditors if one who has concurred in recommending a distribution of the debtor's property seeks by arrangement with the debtor to make better terms for himself.

It would of course be different if the creditors had reason to know that the appellant was standing out. Clearly they did not have actual knowledge. Did they obtain notice through the knowledge of Pettigrew? I do not think it a case for constructive notice.

Then as to the knowledge Pettigrew is shown to have had. The letter of December 23rd, and the power of attorney contained in it, did not reach him (as already stated) until the transaction was completed as to some, at least, of the creditors. And as to the power of attorney of December 10th, the want of evidence respecting it, and the uncertainty as to when it came to the knowledge of Pettigrew, prevent reliance being placed upon it to affect the creditors with knowledge of its contents.

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I therefore, upon the whole, think that it is not open to the appellants to get a larger proportion of their claim than they, with the other creditors, agreed by the composition deed to take.

The others were in the end content to take 64½ cents in the dollar instead of 75 cents. If appellants were not disposed to adhere to the composition they ought to have plainly severed themselves from their co-creditors. In that event there might have been a larger dividend to the others out of the proceeds of the sale than the 64½ per cent.

I therefore think that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Lougheed & McCarter.*

WILLIAM RICHARDS (DEFENDANT).....APPELLANT; 1896

AND *May 6, 7.
*June 6.

THE BANK OF NOVA SCOTIA (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Principal and agent—Agent's authority—Representation by agent—Principal affected by—Advantage to other than principal—Knowledge of agent—Constructive notice.*

Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal such representation cannot be called that of the principal. In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.

The local manager of a bank having received a draft to be accepted induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the draft against the acceptor :

*Held*, affirming the decision of the Supreme Court of New Brunswick, that the bank was not bound by such representation ; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it which would burden it with responsibility instead of conferring a benefit ; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside the verdict at the trial for the defendant and entering a judgment for the plaintiff bank.

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*PRESENT :—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

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The facts are fully set out in the judgment of the court.

*Blair* Q.C., Attorney General of New Brunswick, and *Pugsley* Q.C. for the appellant. The bank is seeking to enforce the contract with the defendant made by its agent and cannot say that it is not bound by what the agent did. *Foster* v. *Green* (1); *Wilde* v. *Gibson* (2); *Kennedy* v. *Panama Mail Co.* (3); *Central Railway Co. of Venezuela* v. *Kisch* (4).

*Borden* Q.C. and *Coster* for the respondent referred to *Oliver* v. *The Great Western Railway Co.* (5); *Chapleo* v. *Brunswick Building Soc.* (6).

The judgment of the court was delivered by:

KING J.—This is an action brought by the respondent as holder of two drafts against the appellant as acceptor and as drawer of the respective drafts.

The first was drawn by one James A. Morrison to his own order upon defendant for $458.80 at three months and endorsed to respondent.

The other was drawn by defendant upon one James Robinson, December 9th, 1892 at 90 days for $448.74 and was endorsed to plaintiff.

The defendant pleaded that he was induced to accept the one bill and draw the other by the fraud of the plaintiff.

He also pleaded as to the first bill that the plaintiff requested defendant to accept the same for the accommodation of the drawer, and upon the undertaking that the same would be paid out of the proceeds of certain goods held by the bank as security from the drawer. And, as to the second bill, that the same was drawn for the accommodation of the bank.

(1) 31 L. J. (Ex.) 158.
(2) 1 H. L. Cas. 605.
(3) L. R. 2 Q. B. 580.
(4) L. R. 2 H. L. 99.
(5) 28 U. C. C. P. 143.
(6) 6 Q. B. D. 696.

It appeared that the head office of the bank is at Halifax, N.S., and that, at the time of the transactions in question, it had an agency at Newcastle, N.B., under the charge of one Frank R. Morrison. Besides acting as agent of the bank Morrison carried on business for himself without the knowledge of the bank, and was in the habit of applying to customers of the bank for accommodation under various pretenses. As part of his plan of financing drafts were made or accepted by his brother, James A. Morrison, doing business at Halifax, N.S. Sometime in the year 1892, James A. Morrison drew upon defendant without any authority, and the draft was discounted with the respondent bank at Halifax before acceptance and was by the bank sent on to its Newcastle agency where Richards resided for acceptance and to be there retained for collection in case of acceptance.

F. R. Morrison, who knew that his brother had drawn without authority and who was desirous, in the interest of his brother and presumably of himself, that the draft should not be returned for non-acceptance, endeavoured to induce defendant to accept.

From what took place we have only the testimony of the defendant as Morrison died before the maturity of the draft in suit. The defendant's account of is that, after exhibiting an invoice of molasses and vainly endeavouring to persuade Richards to purchase and to accept the draft in payment, with offers of renewal. etc., he then said that the goods were held by the Bank of Nova Scotia, and that the bank would see that they were sold and would look after the draft when it became due, adding that in case the goods were not sold the bank would want a renewal. He says that thereupon he accepted. The draft in suit is a second renewal.

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Then, as to the other draft in suit, he says that he drew this because F. R. Morrison (as before) pointed out certain molasses which he offered to sell as the property of the bank, and upon defendant's declining to buy requested him to make the draft upon Robinson as he "wanted to return the paper instead of the molasses, and he would see that the goods were disposed of and the paper taken up when it became due."

The jury found that the representations were made by F. R. Morrison and *bonâ fide* believed in by defendant, and that he became a party to the drafts upon the faith thereof; and that the statements were untrue to the knowledge of F. R. Morrison.

They, however, further found, as to the first draft, that it was accepted for the accommodation of James A. Morrison the drawer, and, as to the second, that it was drawn for the accommodation of F. R. Morrison, and to enable him to obtain money on it for himself.

And, as to both drafts, they find that the representations were not within the apparent scope of F. R. Morrison's authority as agent of the bank, and that there were such suspicious circumstances in connection with the alleged representations as to put defendant on inquiry, or to make it his duty to inquire as to the truth of the statements and the authority of the agent to make them.

The learned trial judge upon these findings directed a verdict for the defendant with leave for the plaintiff to move to enter a verdict in its favour for either or both of the drafts, in case the court should consider it entitled to recover either in whole or in part.

The Supreme Court of New Brunswick (VanWart J. dissenting) directed a verdict to be entered for the plaintiff for the amount of both drafts, and the appeal is from such judgment.

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Upon the argument we thought it unnecessary to call upon the counsel for the plaintiffs in respect of the second draft, it appearing to us that the representation did not unequivocally purport to be on behalf of the bank. On the contrary it appeared to be on behalf of F. R. Morrison himself, for whose accommodation the jury have found the draft to have been drawn in order to enable him to obtain money for himself. The defendant was therefore not induced to draw it by the fraud of the plaintiffs, through themselves or their agent, as charged in the first plea to the court upon such bill, nor was it for the accommodation of plaintiffs as charged in the second plea to such court.

Then as to the other draft. This was discounted at Halifax by the head office and sent to Morrison at Newcastle to be presented for acceptance, and in case of non-acceptance to be protested, and in case of acceptance to be held for collection.

The extent of the liability of a principal for the wrongful or fraudulent act of his agent is considered in *Barwick* v. *English Joint Stock Bank* (1); *Mackay* v. *Commercial Bank of New Brunswick* (2); and *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (3). In the former of these cases it is said that the general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, and that the principal's or master's responsibility extends to the manner in which the agent or servant has conducted himself in doing the class of acts which he is put into position to do.

With regard to the draft in question it seems from the evidence of Mr. Blair to have been sent for a special purpose. Bills are ordinarily presented for acceptance in order to secure the liability of the acceptor. Here

(1) L. R. 2 Ex. 259. (2) L. R. 5 P. C. 394.
(3) 18 Q. B. D. 714.

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it was found that the defendant accepted the draft, and of course at the request of the bank agent, for the accommodation of the drawer James A. Morrison and upon a representation and engagement by the bank agent that the acceptance would involve no liability. It was found that this was beyond the apparent scope of the agent's authority, and further that the circumstances were so suspicious in connection with the representation as to have put defendant upon inquiry, or to make it his duty to inquire, as to the truth of the statements and as to the authority of the agent to make them.

When a person is acting outside of the apparent scope of his authority and makes a representation to advance his own private ends (or what is the same thing the private ends of some one other than his principal) it can in no sense be called the representation of the principal. In other words it is not a representation by him as agent. In such case the belief of the person acting upon it is immaterial as against such obvious want of authority.

The cases as to adopting the burdens with the benefits of a contract made by an agent are not applicable, because, to the extent that F. R. Morrison was an agent, he did not make a contract, and to the extent that he promoted the personal advantage of the drawer he was acting for private ends and not within the scope of his limited authority.

The plaintiff bank is indeed to be held to have adopted whatever its agent said or did in procuring the acceptance provided that he was in fact acting for the bank, and this cannot be said when the stipulation was that instead of the bank receiving an advantage it was incurring a responsibility.

But it is urged that as F. R. Morrison was an agent to present the draft for acceptance and report to his principals, the bank would be affected by his knowledge of the transaction. Ordinarily this would be so.

In *Wyllie* v. *Pollen* (1), Lord Westbury expressed the opinion that the doctrine of constructive notice ought not to be extended, and held *inter alia* that it must be confined to knowledge of that which was material to the transaction and something which it was the duty of the agent to make known to the principal,

because (says his Lordship) the doctrine was based upon the assumption that the agent told him something that it was important he should know.

Where the agent acts in breach of trust and in fraud of his principal, and for private ends, as here, it is a violent presumption to make that the principal was informed by the agent, and a presumption contrary to the truth in almost every case. The presumption in such case would entirely be the other way. The fiction of constructive knowledge, properly limited, is a useful one, but extended this far it would be an instrument of fraud.

I think, therefore, that the representation of Morrison was in effect that of a third person, and consequently that defendant was not induced to accept the bill by the fraud of plaintiff or its agent, and that for like reasons the proof of the second count also fails.

Upon the whole I think that the appeal should be dismissed with costs.

*Appeal dismissed with costs.**

Solicitor for the appellant: *J. H. Barry.*

Solicitors for the respondent: *G. C. & C. J. Coster.*

*In *Bank of Nova Scotia* v. *Robinson*, an appeal from a decision of the Supreme Court of New Brunswick (2) in a case arising out of the same transactions as those in the case of Richards, the jury found that the drafts were accepted by Robinson for the accommodation of the bank and that he was induced to accept by untrue representations of the manager. The defendant had a verdict which the Supreme Court of New Brunswick refused to set aside for improper admission and rejection of evidence.

The appeal was dismissed with costs.

(1) 32 L. J. Ch. 782.

(2) 33 N. B. Rep. 326.

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*May 5, 6.
*June 6.

EDWARD WARNER (DEFENDANT)..... APPELLANT;

AND

PATRICK C. DON AND CHARLES O. ROGERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Mortgage—Mining machinery—Registration—Fixtures—Interpretation of terms—Bill of sale—Personal chattels—R. S. N. S. (5 Ser.) c. 92, ss. 1, 4 & 10 (Bills of Sale)—55 V. (N. S.) c. 1, s. 143 (The Mines Act).*

The "fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia "Bills of Sale Act" (R. S. N. S. 5 ser. c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.

APPEAL from the judgment of the Supreme Court of Nova Scotia in *banc* affirming the decision of the trial court in favour of the plaintiffs.

A sufficient statement of the facts and questions at issue appears in the judgment of the court rendered by Mr. Justice Sedgewick.

*Harris* Q.C. for the appellant argued that the mortgage should have been registered as a bill of sale, citing *In re Eslick* (1); *In re Trethowan* (2).

*Harrington* Q.C. for the respondents referred to *Ex parte Moore & Robinson's Banking Co. In re Armytage* (3); *In re Yates* (4).

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 4 Ch. D. 503.
(2) 5 Ch. D. 559.
(3) 14 Ch. D. 379.
(4) 38 Ch. D. 112.

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The judgment of the court was delivered by :

SEDGEWICK J.—The appellant Warner had recovered judgment in the Supreme Court of Nova Scotia against the Symon-Kaye Syndicate (a company formed in England under "The Companies Act"), had issued execution, and the sheriff had levied upon certain fixtures and other chattels at the gold mines of the company at Montague, Halifax County, N.S. The goods so levied upon were claimed by the present respondents, two London merchants, who claimed title under a mortgage executed in their favour by the company long previous to the judgment, and an interpleader issue was directed to settle the question. Upon the trial the learned Chief Justice decided in favour of the mortgagees, and that decision was unanimously affirmed by the Supreme Court in *banc*. It is from that judgment that this appeal is taken.

The facts are simple and practically undisputed. On the 24th of May, 1893, the company obtained from the Crown a statutory lease of a large number of gold mining areas at Montague, and subsequently placed upon the work engines, boilers and other plant and machinery necessary for the working of the mines. On the 29th of June following the company mortgaged the property to the respondents to secure repayment of an advance of $25,000. The granting clause in the mortgage was as follows :

And this indenture also witnesseth that in pursuance of the said request, and for the consideration aforesaid, the company hereby assigns, grants, bargains, sells, transfers and sets over to the mortgagees, and the survivor of them, and the executors or administrators of such survivor, their or his assigns, all and singular the demised premises particularly specified in the schedule hereunder written, and also all the messuages, buildings, erections, engines, works, plant, machinery, tools, fixtures, goods and chattels of what kind or nature soever which have been, or shall be at any time during the continuance of the present security, erected, constructed or brought upon the said demised prem-

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ises hereinbefore expressed to be granted and assigned, or any of them or any part thereof, and all the estate, right, title, interest, claims and demand of the company into and upon the same premises, to have, hold, use and enjoy the said demised premises from hereafter for the residue now to come of the said term of 40 years, subject to the rents, covenants, conditions and agreements by and in the said indenture of the 27th day of May, 1893, reserved and contained, and henceforth on the lessees' part to be paid, observed and performed, and subject also to the proviso for redemption hereinafter contained. And to have, hold, use and enjoy all such and so many of the said messuages, buildings, erections, engines, works, plant, machinery, tools, fixtures, goods and chattels as were not so demised as aforesaid, and are not and shall not be of the nature of Crown fixtures, unto the mortgagees and their assigns forever, subject nevertheless to the provisos, conditions and covenants in the said indenture of lease contained concerning the same, and subject also to the said proviso for redemption.

This mortgage was registered in the office of the Commissioner of Mines under "The Mines Act" (ch. 1 of the Nova Scotia Acts of 1892) and under section 143 was valid as against subsequent purchasers, etc., although not registered in the registry office for the county of Halifax. It was not, however, filed in the registry office as a chattel mortgage or bill of sale under ch. 92 R. S. N. S. (5th ser.), and in so far as it is a mortgage of personalty as distinguished from a mortgage of realty it may be admitted that it is void as against the present appellant, an execution creditor, both under section 1 and section 4 of that Act.

According to the decision of the learned Chief Justice the only question before him on the trial was as to the horizontal engine in the pump house. From the judgment of the court in *banc* it does not appear that any other question was there raised. Upon this appeal we were asked by counsel for the appellant to consider and adjudicate upon another question, viz.: the title of certain smaller articles levied upon under the appellant's execution, which articles are specified in the formal judgment upon the trial, but bearing in mind the statements of the only judges whose opinions

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are before us in the case as to what was the question in the courts below, we cannot, in the absence of any correction by them or amendment of the case, presume that these statements are inaccurate, and allow another question not adjudicated upon below to be raised here for the first time. The discussion in the present case must therefore be confined to the horizontal engine, referred to by the Chief Justice.

Section 10 of the Nova Scotia "Bills of Sale Act" (ch. 92, R. S. N. S. 5th ser.) enacts, in part, as follows:

> The expression "personal chattels" shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery and shall not include chattel interests in real estate * * *

This provision was taken from the corresponding provision of the English "Bills of Sale Act," 1854, and is an exact copy of it. The English clause has been altered by the "Bills of Sale Act" of 1878, and the amending Act of 1882, but these changes have not yet been adopted by the Nova Scotia Legislature.

The question upon this appeal is:—Is the engine here a "personal chattel" or a "fixture" within the meaning of section 10, or is it a part of the real estate? If it is such a fixture the appellant's view must prevail, the engine being liable to seizure under execution against the mortgagor.

Now there is no doubt that at common law this engine, attached as it was to the freehold, was a "fixture" within the primary meaning of that word. Apart from any question as between landlord and tenant, or as between mortgagee and execution creditor or trustee in bankruptcy, it was a fixture. If it had been erected and attached by a tenant he doubtless as against his landlord might during his term remove it as a trade fixture, but that was because the law gave to the tenant that special right out of regard to public policy and the interests of agriculture and manufactures, but

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apart from that and similar exceptions it was as much a part of the realty as the land itself. Then the expression "fixtures" in the section does not purport to embrace all kinds of fixtures. There are of course fixtures not attached to the realty; there are fixtures, such for example as some of the smaller articles enumerated in the pleadings here, which "are capable of complete transfer by delivery," and I think it was such fixtures, and such fixtures alone, which the legislature had in view. A fixture attached to the freehold and forming part of it is not capable of transfer by delivery. An engine or building may be forcibly detached from the land on which it is erected and therefore "delivered," but it is not a delivery that is capable of being exercised only by a trespass, or a tortious act, that the statute has in view. It has reference, I think, to such articles as, although technically called fixtures, are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting land.

Stress was laid at the argument before us upon the fact that this was the case of a mortgage by a licensee or tenant and not by the owner of the fee, and cases were cited (to which I shall presently refer) distinguishing between fixtures covered by a tenant's mortgage and those covered by that of an owner. Admitting for the moment that the mortgage in question is a tenant's and not an owner's mortgage, I have come to the conclusion that there is now no such distinction to be made and that it has been so declared as well by the House of Lords as practically by the Imperial Parliament in the amending Act of 1878, to which I have referred.

It was decided in 1856 by Lord Hatherly when V. C. Sir William Page Wood that if an instrument which conveys an interest in land conveys also machinery

affixed to the land such instrument does not require registration under the "Bills of Sale Act." *Mather* v. *Fraser* (1). The Court of Queen's Bench in 1869 followed that decision in *Longbottom* v. *Berry* (2), and in the Court of Exchequer Chamber in 1872 where judgment was delivered by Lord Blackburn, in *Holland* v. *Hodgson* (3) Lord Hatherly's view in *Mather* v. *Fraser* (1) was referred to and entirely adopted. And so too in the case of *Boyd* v. *Shorrock* (4) decided in 1867, where the mortgage in question was made not by the owner but by a tenant. In *Hawtry* v. *Butlin* (5) also, in 1873, in a case of a tenant mortgaging fixtures the general law above stated was apparently departed from and *Boyd* v. *Shorrock* (4) was in terms disapproved. Following this case in the same year came *Ex parte Daglish*, *In re Wilde* (6) in which it was likewise held that when a tenant mortgaged trade and other fixtures the mortgage must be registered as a bill of sale, otherwise all the fixtures would pass to the trustee in bankruptcy, *Boyd* v. *Shorrock* (4) being in that case also dissented from.

This case was followed in 1874 by *Ex parte Barclay*, *In re Joyce* (7), before the same Lord Justices. It too was the case of a tenant mortgaging trade and other fixtures, and resembles in most particulars the case before us. Sir George Mellish L.J. in his judgment held that the instrument did not require registration as a bill of sale, upon the ground that the mortgagees had no power under the mortgage to sever the fixtures from the premises and sell them separately, but could only sell the premises with the fixtures upon them.

Most of the questions involved in these more or less conflicting decisions were set at rest in 1875 by the

(1) 2 K. & J. 536.
(2) L. R. 5 Q. B. 123.
(3) L. R. 7 C. P. 328.
(4) L. R. 5 Eq. 72.
(5) L. R. 8 Q. B. 290.
(6) 8 Ch. App. 1072.
(7) 9 Ch. App. 576.

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House of Lords in *Meux* v. *Jacobs* (1). There a leaseholder had mortgaged certain premises, and the contest was between the mortgagee and a person to whom the mortgagor had subsequently given a bill of sale of certain fixtures which had not been specifically mentioned in the first mortgage. In my view their Lordships in that case settled the principles upon which this case must be decided, at the same time putting at rest the conflict as to whether any difference in principle obtained as between the mortgage of a leasehold and of an absolute interest. What was held in that case is well stated by Mr. Brown in his work on "Fixtures" (2):

First: *As to the quality of fixtures as being* REAL *or as being* PERSONAL *estate.* Fixtures are real estate, and it was precisely for that reason that in the Bills of Sale Act, 1854, the legislature felt itself obliged for the purposes of that Act to declare them personal estate. But they are not otherwise personal estate, save and except for the purposes and to the extent of that Act, that is to say, in cases of a dispute arising between a mortgagee on the one hand and either the trustee in bankruptcy or an execution creditor on the other hand.

Secondly: *As to fixtures being* IMPLIEDLY *granted, demised or assigned.* When the freehold or leasehold hereditaments are granted, demised or assigned, and the grant, demise or assignment does not expressly grant, demise or assign the fixtures, but there is an indication upon the face of the deed that the fixtures were intended to form part of the grant, demise or assignment, then they are impliedly granted, demised or assigned.

Thirdly: *As to the question whether the fact of the principal hereditaments that are in mortgage being* FREEHOLD *or being* LEASEHOLD *makes any difference quoad the fixtures therein assigned.* That circumstance makes no difference whatever, provided the fixtures are dealt with similarly in both cases, that is to say, as part and parcel of the principal hereditaments that are respectively granted or demised or assigned.

All of these conditions are present in this case, and as there the mortgagee succeeded as against a subsequent purchaser, so here he must succeed as against the execution creditor.

(1) L. R. 7 H. L. 481. (2) 4 ed. p. 137.

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In the English "Bills of Sale Act" of 1878, the definition of the expression "personal chattels" was broadened so as to settle by statute what the decision of the House of Lords in *Meux* v. *Jacobs* (1) may not have expressly determined in regard to the judicial conflict to which I have referred.

> The expression "personal chattels," shall mean goods, furniture and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures * * but shall not include chattel interests in real estate nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (2).

We have the authority of the late Vice-Chancellor Bacon in 1880 in *Ex parte Moore & Robinson's Banking Co. In re Armytage* (3), for saying that so far as the present question is concerned the interpretation clause in the English amendment was passed, not to amend or change the law but to make it clear and remove doubts, it being admitted however, that in regard to trade fixtures there had been a change and doubtless a most beneficial one.

On the whole we are of opinion that the respondents are entitled to the engine under their mortgage to the exclusion of the execution creditor.

I deem it right to expressly state that we are not here dealing with the case of an instrument made by a tenant assigning only fixtures and other chattels which he has a right to sever. Such an instrument doubtless would come either wholly or in part within the "Bills of Sale Act." Nor does the question come up in the present case as to whether those articles, other than the engine, mentioned in the mortgage under which the respondents claim are within the Act. Neither is it necessary for us to determine whether this mortgage (assuming it to be a bill of sale) comes

(1) L. R. 7 H. L. 481.
(2) 41 & 42 V. c. 31 s. 4.
(3) 14 Ch. D. 386.

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within the Act which requires that the instrument be filed in the registry office of the county where the maker resides; nor the final question as to the continuance of an attaching creditor's lien after judgment and before the issue of the execution. The determination of these two questions would have been necessary only in the event of our having decided in the appellant's favour upon the main point in controversy.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondents: *Harrington & Chisholm.*

FREDERICK DE S. CONGER (PLAINTIFF) ..... } APPELLANT;

AND

GEORGE ALLAN KENNEDY (DEFENDANT) ..... } RESPONDENT.

1896

*May 18.

*June 6.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Constitutional law—Marital rights—Married woman—Separate estate—Jurisdiction of North-west Territorial Legislature—Statute—Interpretation of—40 V. c. 7 s. 3 and amendments—R. S. C. c. 50—N.W. Ter. Ord. no. 16 of 1889.*

The provisions of ordinance no. 16 of 1889, respecting the personal property of married women, are *intra vires* of the legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor General in Council passed under the provisions of "The North-west Territories Act."

The provisions of said ordinance no. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-west Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.

The words "her personal property" used in the said ordinance no. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in sec. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33) distinguished.

APPEAL from the decision of the Supreme Court of the North-west Territories, affirming the judgment of the trial judge who dismissed the plaintiff's action with costs.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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A statement of the facts and questions at issue in this case will be found in the judgment of the court pronounced by his Lordship the Chief Justice.

*Hogg* Q.C. for the appellant. The legislature of the North-west Territories was, by order in council passed under the provisions of the 13th section of "The North-west Territories Act," properly vested with the power to enact their ordinance no. 16 of 1889, and that ordinance was from the date of its assent (22nd November, 1889) the law applicable to the personal property of married women in the territories. The provisions of the ordinance are not repugnant to R. S. C. ch. 50, secs. 36 to 40 but entirely consistent therewith, being merely an enlargement of its application.

These provisions were not in force when *Brittlebank* v. *Gray-Jones* (1) was decided. The *primâ facie* meaning of the ordinance must be adhered to; *Kraemer* v. *Gless* (2); and as the legislation is remedial it must be liberally construed. Wilberforce on Statute Law (3); Hardcastle on Statutes (4). The ordinance is not restricted and has application to all the property of a married woman, married during the time it remained in force.

*Armour* Q.C. for the respondent. The property in question passed to the husband upon marriage, when he became liable for the debts of the wife and was by the common law vested with the ownership and possession of her property. The Dominion statute alters the common law and must be strictly interpreted; so also should the ordinance in any effect it may have.

"The North-west Territories Act" restricts the classes of property which may be held by married women as separate estate. The ordinance is limited by all the words after the words *feme sole* and deals with procedure only, the former words of the clause being intro-

(1) 5 Man. L. R. 33.
(2) 10 U. C. C. P. 470.
(3) P. 235.
(4) 2 ed. p. 71.

ductory only and having reference to the classes mentioned in the Dominion Act as capable of being held as separate estate. The absence of any intention that this ordinance should enlarge the married woman's rights as defined by the Dominion statute is shown by the repeal of the ordinance and the further provisions made by ordinance no. 20 of 1890 at the next session of the legislature. Any other interpretation would be incompatible with "The North-west Territories Act" and the provisions of 54 & 55 Vic. (D.), ch. 22, s. 6. These facts show that Parliament did not intend to give the North-west Legislature free scope in respect to married women's property for they both legislate directly upon that subject. *Lawson* v. *Laidlaw* (1); *Howard* v. *The Bank of England* (2); *In re March* (3); *In re Jupp* (4); *Brittlebank* v. *Gray-Jones* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Supreme Court of the North-west Territories, affirming the judgment of Mr. Justice Rouleau who dismissed the appellant's action.

On the 11th of December, 1889, at Napanee, in the province of Ontario, William Cox Allan was married to Janet C. Conger, then a widow. At the time of the marriage William Cox Allan was domiciled in the North-west Territories, having his residence at Macleod, in those territories. On or about the 9th of January, 1890, Dr. and Mrs. Allan went to Macleod and continued to reside there as man and wife up to the month of October, 1890, when Mrs. Allan left the territories and never afterwards returned there during her husband's lifetime. Dr. Allan died on the 30th of November, 1893, intestate, and the defendant was duly

(1) 3 Ont. App. R. 77.
(2) L. R. 19 Eq. 295.
(3) 27 Ch. D. 166.
(4) 39 Ch. D. 148.
(5) 5 Man. L. R. 33.

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appointed to be his administrator and now represents his estate.

At the time of the marriage Mrs. Conger owned a quantity of furniture, household stuff and goods, specifically described in the statement of claim. These goods were then stored in the city of New York, but were soon afterwards removed to Macleod, which place they reached about the 19th of January, 1890, when they were immediately placed in Dr. Allan's house where they remained up to the time of his death. They were then taken possession of by the respondent, in whose possession they have since remained. On the 17th November, 1892, prior to the death of Dr. Allan, Mrs. Allan executed a bill of sale whereby she assigned and conveyed the goods in question to her son, the present appellant. The respondent having refused to deliver up the goods, insisting that they belonged to the estate of Dr. Allan, the present action was brought to compel the specific delivery up of the property, or in default for damages. The respondent in his statement of defence claims the goods as belonging to the estate of his intestate. The action was tried before Mr. Justice Rouleau who dismissed it with costs, and this judgment, on an appeal to the Supreme Court in *banc*, was upheld, Mr. Justice Wetmore dissenting from this decision.

There is no question of fact in dispute between the parties. It is conceded that Dr. Allan was at the date of the marriage domiciled in the territories. The respondent's proposition that the law of the territories as it stood at the time of the marriage must govern as to the marital rights of the husband in the personal property then belonging to the wife is not controverted by the appellant.

The questions we have to decide are then limited to two. First, had the territorial legislature power

to enact the territorial ordinance no. 16, of 1889, passed on the 22nd November, 1889? Secondly, if the ordinance referred to was *intra vires* of the assembly, what is its proper legal construction?

By the North-west Territories Act (Revised Statutes of Canada, ch. 50, sec. 13) it was enacted that:

The Lieutenant-Governor in Council shall have such powers to make ordinances for the government of the North-west Territories as the Governor in Council from time to time confers upon him; but such powers shall not, at any time, be in excess of those conferred by the ninety-second and ninety-third sections of "The British North America Act, 1867," upon the legislatures of the several provinces of Canada:

2. No such ordinance shall be so made which is inconsistent with or alters or repeals any provision of any Act of the Parliament of Canada in force in the territories.

By an order of the Governor General in Council dated the 11th day of May, 1877, it was ordained that the Lieutenant-Governor of the North-west Territories in Council should be, and he was thereby, empowered to make ordinances in relation to certain enumerated subjects, and amongst others upon "Property and civil rights in the territories, subject to any legislation by the Parliament of Canada upon these subjects."

By section 36 of the North-west Territories Act, Parliament enacted that:

All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys or property, shall be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a *feme sole*, and no order for protection shall be necessary in respect of any such earnings or acquisitions; and the possession, whether actual or constructive, of the husband, of any personal property of any married woman shall not render the same liable for his debts.

This provision is followed by others which may be read as subsidiary to it contained in the sections from 37 to 40, inclusive.

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The legislative powers of the Lieutenant-Governor in Council having, pursuant to section 24 of the Act, become vested in the Legislative Assembly of the Territories, that legislature passed the ordinance now in question, being no. 16 of 1889, and thereby enacted that:

> A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate, and by will or otherwise deal with, personal property as if she were unmarried.

And this was declared to be subject to the proviso that it should have no retroactive effect.

This ordinance was assented to by the Lieutenant-Governor, and came into force on the 22nd November, 1889, and was therefore the law which was applicable to the personal property of Mrs. Conger at the date of her marriage on the 11th of December, 1889.

We are of opinion that this ordinance was entirely within the competence of the territorial legislature. It was legislation on a matter coming within the definition of property and civil rights, a subject which, by the order in council of the 11th of May, 1877, the Lieutenant-Governor in Council was authorized to legislate upon, and which consequently was within the jurisdiction of the assembly.

Then, the only other ground upon which an objection to the constitutional validity of the legislation can be rested is, that it is inconsistent with the provisions of the North-west Territories Act relating to the personal property of married women, contained in sections 36 to 40 (inclusive).

The answer to this contention is well put by Mr. Justice Maguire at the end of his judgment. It is plain that the ordinance, if it is to be interpreted as the appellant contends, is in no way repugnant to the legislation of Parliament contained in the Territories Act. At the most it merely enlarges the scope of a

married woman's rights over her personal property, by making all such property separate property, and giving her in respect of it the rights of a *feme sole*, thus applying to all her personal property the same rights of enjoyment and disposition which Parliament had, by section 36 of the Territories Act, conferred in respect of the particular species of property—her own earnings—specified in that section. It is enough to say that this was perfectly consistent with the Act of Parliament, and cannot by any ingenuity of argument be shown to be *ultra vires* of the legislature.

The real question to be here determined is the interpretation of ordinance no. 16.

In the case of *Brittlebank* v. *Gray-Jones* (1), the Court of Queen's Bench of Manitoba (then the court of appeal from the courts of the North-west Territories) held that section 36 of the Territories Act was restricted in its application to the earnings of a married woman, and did not extend to her general personal property. I entirely concur in this decision, which, however, appears to me to leave the question raised by this appeal untouched, if indeed it does not rather assist us in arriving at the conclusion which the appellant seeks to establish.

The argument of the respondent is that we must subordinate the ordinance to the Act of Parliament, by construing the words "her personal property," the primary meaning of which is "all her personal property," as meaning the particular species of personal property mentioned in section 36 of the Act; namely, the "earnings of a married woman." One objection to such a construction, and by itself a fatal objection, would be that by doing this we should be treating the Act of the legislature dealing with a subject within its competence as entirely ineffectual. If we say that

(1) 5 Man. L. R. 33.

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there was no enlargement as regards the kind of personal property to which the ordinance refers, but that we are to treat the words "personal property" as used in the same restrictive sense as in the Act of Parliament, then it must have been entirely inoperative, for the powers of disposition of such property conferred by the ordinance would not be more comprehensive than those given by the Act. The ordinance would therefore be useless and the law would remain just as it was before its enactment. In the construction of statutes it is a well established rule, especially as regards beneficial statutes, that the legislature must, so far as is consistent with the language of the Act, be presumed to have intended some alteration in the law, and not a mere repetition of the previous law as to which no doubt or question had been raised.

Then, the words "her personal property" unconfined by any context, must be interpreted as having reference to all the personal property belonging to a married woman, married subsequently to the Act, as well as to all the personal property acquired since the Act by women married before the Act. This is the plain *primâ facie* meaning of the words in question taken in their ordinary sense, from which we have no authority to depart.

If a testator, under the law as it existed prior to any legislation respecting the property of married women, had bequeathed personal property to a married woman with a declaration in the terms of the ordinance that in respect of it she should have all the rights and be subject to all the liabilities of a *feme sole*, and might alienate it and deal with it by will or otherwise as if she were unmarried, there could be no possible doubt but that a court of equity construing such a bequest would hold that the legatee would have, in respect of the subject of the legacy, all the powers of enjoyment

and disposition which a single woman would have to the total exclusion of the husband's common law rights. Authorities innumerable establish this. Then I fail to see any reason why a different construction should be placed upon the language of the legislature. What are included in the words "all the rights" of a *feme sole* as applied to personal property? Clearly they include the rights not only of separate disposition but also of separate enjoyment, and these were the rights which the legislature must be deemed to have intended to confer, not as relating to a particular kind of personal property but in respect of all personal property, unless on some speculative reasoning we are to assume they did not mean what they have said.

Had there been any ambiguity in the language in which the ordinance is expressed so as to leave it open to two alternative constructions, then the rule that innovations on the common law relating to property are to be construed strictly would have applied, but where the language is clear and unambiguous, as here, that principle of construction cannot be applied.

On the whole I am of opinion that the construction adopted by the court below cannot be sustained.

The appeal must be allowed and the judgment of Mr. Justice Rouleau must be reversed and vacated, and for it there must be substituted a judgment declaring the appellant's right to have a specific delivery of the goods and chattels in the statement of claim specified, and directing such delivery with a reference as to damages in respect of any such goods not delivered. The respondent must pay the appellant's costs here and in both the courts below.

*Appeal allowed with costs.*

Solicitors for the appellant: *Harris & Burne.*

Solicitors for the respondent: *Haultain & McKenzie.*

1896

*May 19, 20.

*June 6.

A. R. WILLIAMS (PLAINTIFF).....APPELLANT;

AND

E. LEONARD & SONS (DEFENDANTS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Chattel mortgage—Description—Bills of Sale Act—R. S. O.* [1887] *c.* 125 *—Appeal—Order to amend pleadings—Interference with—Debtor and creditor—Purchase by creditor—Consideration—Existing debt.*

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King Street, in the City of London;" and in a schedule referred to in the mortgage was this additional description: "And all machines * * * in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor * * * or which are now or shall be on any other premises in the said City of London."

*Held*, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O. [1887] c. 125) to cover machines so manufactured.

The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration within sec. 5 of the Bills of Sale Act.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the defendants.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 17 Ont. P. R. 73.

(2) 16 Ont.P. R. 544.

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The material facts are sufficiently stated in the above head-note and the judgment of the court.

*McEvoy* for the appellant. The description in the mortgage was sufficient to cover the machine claimed by the appellant. *McCall* v. *Wolff* (1); *Horsfall* v. *Boisseau* (2).

The respondents were not purchasers in good faith, having merely taken the machine and credited the price in their debtor's account. They parted with no value and their position was the same after the alleged purchase as before. *Tourville* v. *Naish* (3); *Cary* v. *White* (4); *Eyre* v. *Burmester* (5); and see *Forristal* v. *McDonald* (6).

*Gibbons* Q. C. for the respondents, referred to *Fraser* v. *The Bank of Toronto* (7) on the question of sufficiency of description and on the question of purchase to *Taylor* v. *Blakelock* (8).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The appellant (plaintiff in the court below) brought this action to recover a machine called a bolt cutter, of the value of some $350. By his statement of claim the appellant asserted a double title, claiming first under a purchase from one William Yates, a manufacturer carrying on business under the name of the "London Machine Tool Company," and, secondly, under a chattel mortgage which the appellant alleged to have been duly registered, and under which he asserted that he had (by his agent James Burns) taken possession before the delivery of the machine in question to the respondents.

The respondents by their statement of defence

(1) 13 Can. S. C. R. 130.
(2) 21 Ont. App. R. 663.
(3) 3 P. Wm. 306.
(4) 52 N. Y. 138.
(5) 10 H. L. Cas. 90.
(6) 9 Can. S. C. R. 12.
(7) 19 U. C. Q. B. 381.
(8) 32 Ch. D. 560.

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pleaded that they were purchasers for valuable consideration of the machine in question.

The action having come on for trial before Mr. Justice Rose, without a jury, the following facts were disclosed in evidence. It appeared that on the 1st September, 1893, Yates made a chattel mortgage in favour of the plaintiff to secure advances to be made. The description of the goods in this mortgage was as follows:

All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Company (describing the premises), on the north side of King street, in the city of London.

A schedule referred to in the mortgage deed contained an additional description in these words:

And all machines * * * in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor * * * or which are now or shall be on any other premises in the said city of London.

The bolt cutter was wholly made, not upon the premises occupied by the mortgagor at the date of the mortgage, but on premises to which the mortgagor subsequently removed, and it never was upon lot 17. Mr. Justice Rose held this not to be a sufficient description within the Bills of Sale Act (1). The learned judge in his judgment (2), disposes of this point as follows:

The bolt cutter in question is not, I think, covered by the chattel mortgage to the plaintiff. It never was on lot no. 17, and even in the light of *Horsfall* v. *Boisseau* (3), I cannot hold that the words in the schedule *i.e.*, "or which are now or shall be on any other premises in the city of London" can extend to goods manufactured on the new premises and which never were on lot 17, nor if they should be construed to refer to such goods could I hold such words to be a sufficent description within the meaning of the Bills of Sale Act R. S. O. c. 125.

This view of the objection to the chattel mortgage was adopted by the Queen's Bench Division and the

(1) R. S. O. c. 125. (2) 16 Ont. P. R. 546.
(3) 21 Ont. App. R. 663.

Court of Appeal, and appears to me to be supported by conclusive authorities.

It was then attempted to show that the plaintiff had taken possession under the mortgage by his agent James Burns, but it clearly appeared from the evidence of Burns himself, when called as a witness by the plaintiff, that there was no change of possession, his position on the premises of the mortgagor being that of an inspector or watcher, and not that of one who had by taking possession superseded the possession and control of the mortgagor.

The plaintiff then proved that he had, apart from any title under the mortgage in September, 1894, purchased the bolt cutter from Yates and paid for it, the price being included in a draft which the plaintiff accepted and retired.

The tool cutter, however, remained on the premises of the London Tool Company, and was on the 11th December, 1894, sold by Yates to the respondents, the consideration being the discharge of a pre-existing debt due by the former to the latter; and in pursuance of this sale the machine or tool cutter was, on the 13th December, 1894, delivered to the respondents. The respondents insisted that they thus acquired a good title and that the previous sale to the appellant was avoided under section 4 of the Bills of Sale Act (1). The learned judge, however, refused to entertain this defence as the Act had not been pleaded, and also refused to permit the respondents to amend their statement of defence, and entered judgment for the appellant. On appeal to the Queen's Bench Division this judgment was reversed, and it being held that the respondents were entitled to the amendment which had been refused by Mr. Justice Rose the appeal was allowed and the action dismissed. This order was affirmed by the Court of Appeal.

(1) 57 V. c. 37, and R.S.O. c. 125, s. 4.

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The Chief Justice.

On the argument of this appeal it was determined that this court would not interfere with an order granting leave to amend whatever opinion it might entertain of the propriety of the amendment, such an order being a matter of procedure within the discretion of the court below. Further, had I been called upon to pronounce upon that question, I should have been of the opinion that the amendment was most properly granted, and was in every way warranted by the authorities referred to in the judgment of the Divisional Court (1).

There remains but one other question discussed upon the argument to be noticed. It was insisted by the learned counsel for the appellant that the respondents were not *bonâ fide* purchasers for valuable consideration within section 5 of the Bills of Sale Act before referred to, inasmuch as the consideration given by them was the discharge of a pre-existing debt and not a consideration paid at the time of purchase.

Although authorities from the American reports can, as I am well aware, be cited in great number in support of this proposition, yet the English law, which we must follow, is well settled the other way. That a pre-existing debt is a sufficient consideration to bring a purchaser within the definition of a purchaser for value, and to entitle him to the protection afforded to such purchasers, has been well established, not only as regards the transfer of negotiable securities, but also in applying the principle of protection which courts of equity afford to such purchasers.

In the case of *Taylor* v. *Blakelock* (2), Lord Justice Bowen says:

"A purchaser for value" is a well-known expression to the law. By the common law of this country the payment of an existing debt is a payment for valuable consideration. That was always the common

(1) 16 Ont. P. R. 548. (2) 32 Ch. D. 560.

law before the reign of Queen Elizabeth as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country; and many of the commercial instruments which the law recognizes have no other consideration whatever than a pre-existing debt.

The man who has a debt due to him, when he is paid the debt has converted the right to be paid into actual possession of the money; he cannot have both the right to be paid and the possession of the money. In taking payment he relinquishes the right for the fruition of the right. In such a case the transaction is completed; and to invalidate that transaction would be to lull creditors into a false security, and to unsettle business.

In the case of *Leask* v. *Scott* (1), it was held that the endorsee of a bill of lading who took the same in satisfaction of a prior debt was a *bonâ fide* transferee for value. And in the cases of *Poirier* v. *Morris* (2); *Swift* v. *Tyson* (3); and *Currie* v. *Misa* (4), the same rule was held to apply to transfers of bills of exchange and negotiable paper generally.

The reasoning upon which these cases are rested is entirely applicable to the case of a purchaser under sections 4 and 5 of the Bills of Sale and Chattel Mortgage Act (5), and should therefore govern the construction of those sections.

There was no pretense that the respondents had any notice of the appellants' title and they therefore in all respects bring themselves within the protection of the statute.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *McEvoy, Wilson & Pope.*

Solicitors for the respondents: *Gibbons, Mulkern & Harper.*

(1) 2 Q. B. D. 376
(2) 2 E. & B. 89.
(3) 16 Peters 1.
(4) L.R. 10 Ex. 153.
(5) R.S. O. c. 125.

1896

*May 20.

*June 6.

THOMAS H. PURDOM, EXECUTOR OF THE ESTATE OF ALEXANDER DAVIDSON, DECEASED, ALEXANDER PURDOM AND EBENEZER L. DAVIDSON (DEFENDANTS) .... ..... APPELLANTS;

AND

A. E. PAVEY & CO. (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Action—Jurisdiction to entertain—Mortgage of foreign lands—Action to set aside—Secret trust—Lex rei sitæ.*

A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns* v. *Davidson* (21 O. R. 547) approved and followed.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Armour C.J. who allowed a demurrer to the statement of claim.

The facts of the case are stated by Chief Justice Armour as follows:

This action was brought by Pavey & Company on behalf of themselves and all other creditors of McKay & Davidson, and it was by their statement of claim alleged that the firm of McKay & Davidson was composed of William L. Mackay and Ebenezer Davidson; that they carried on business as merchants in Ontario, and on or about the 25th day of July, 1889, made a

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 9 sub nom. *Pavey* v. *Davidson*.

general assignment for the benefit of their creditors; that the plaintiffs were of such creditors to the amount of $467, and that there were other such creditors to the amount of $13,000; that there was realized under such assignment only to the extent of forty cents on the dollar of the amounts due to the plaintiffs and such other creditors, and that the plaintiffs and such other creditors were still such creditors for the residue of the said amounts. That subsequent to the said assignment one John L. Davidson departed this life and by his last will devised to his father, Alexander Davidson, and his mother, Isabella Davidson, for their natural lives, certain lands in the city of Portland, in the State of Oregon, one of the United States of America, remainder to his brother, the said Ebenezer L. Davidson, in fee. That by indenture, dated the 19th day of December, 1889, the said Ebenezer L. Davidson conveyed the said lands to his father, the said Alexander Davidson, for the consideration of $6,500; that the same day the said Alexander Davidson conveyed the said lands to Alexander Purdom to secure payment of the sum of $6,500 which the said Alexander Davidson covenanted to pay to the said Alexander Purdom on or before five years after said date as set forth in said mortgage.

That the said Alexander Purdom took the said mortgage as a trustee only for the said Ebenezer L. Davidson, in pursuance of a fraudulent scheme entered into between the said Alexander Davidson, Alexander Purdom and Ebenezer L. Davidson, to the end, purpose and intent to delay, hinder and defraud the plaintiffs and the other creditors of the said Ebenezer L. Davidson, and that the said Alexander Purdom held the same as trustee aforesaid, or if he had realized upon the same; that he held the proceeds upon trust for the said Ebenezer L. Davidson; that the said Ebenezer L.

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PURDOM v. PAVEY & COMPANY.

Davidson had no assets out of which the plaintiffs and other creditors could obtain payment of their claims against him; that since the commencement of the action Alexander Davidson died, and that Thomas H. Purdom was his executor; and they claimed judgment against the said Ebenezer L. Davidson for the sum of $303.56, and interest and costs.

That the said Alexander Purdom might be declared to be a trustee for the said Ebenezer L. Davidson of the said mortgage and the moneys secured thereby; that the said Alexander Davidson might be restrained from paying the amount of said mortgage debt to the said Alexander Purdom, but might be ordered to pay the same into court to abide further order therein; or that a receiver might be appointed by this honourable court to collect in the moneys due under said mortgage, for payment into court of the moneys so collected, and distribution and payment thereof under the order and direction of the honourable court, and costs and further and other relief.

The defendants, Thomas H. Purdom, executor of the said Alexander Davidson and Alexander Purdom, demurred to the statement of claim on the ground, amongst others, that the conveyance and mortgage set forth in the statement of claim were made in Oregon respecting lands situated therein, and the transaction was not subject to the laws of Ontario, and the cause of action, if any, arose in the said state, and was beyond the jurisdiction of this honourable court.

And the defendant, Ebenezer L. Davidson, demurred to the said statement of claim upon the said ground.

Judgment was given allowing the demurrer, which judgment was reversed by the Court of Appeal, and the defendants appealed to this court from the latter decision.

An action had previously been brought by Pavey & Co. for the creditors of the insolvent firm to have the mortgage set aside as fraudulent and a demurrer in that action was allowed; *Burns* v. *Davidson* (1); the action was then abandoned and the present proceedings were taken.

*Purdom* for the appellants. The objection taken to the former action apply with equal force to this. The law as to how far our courts can deal with actions respecting foreign lands is clearly laid down in *Burns* v. *Davidson* (1); *Henderson* v. *The Bank of Hamilton* (2); *British South Africa Co.* v. *Companhia de Moçambique* (3).

*Gibbons* Q.C. for the respondents. The defendants by their demurrer admit that they are trustees only and the foreign courts could not grant the relief that is asked.

All the parties are within the jurisdiction and an order *in personam* only is asked for. We could garnishee the money in defendants' hands. *Vyse* v. *Brown* (4).

The courts will always grant relief against fraud though lands abroad may be affected. *Massie* v. *Watts* (5).

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal reversing a judgment of the Chief Justice of the Queen's Bench Division upon a demurrer to the statement of claim. The pleadings and the nature of the question which has arisen upon the sufficiency of the statement of claim appear from

(1) 21 O. R. 547.
(2) 23 Can. S. C. R. 716.
(3) [1893] A. C. 602.
(4) 13 Q. B. D. 199.
(5) 6 Cranch 160.

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the judgments delivered in the Court of Appeal and by Chief Justice Armour and need not be repeated.

This case differs from the former case of *Burns* v. *Davidson* (1) in this respect; that was an action to have the conveyance of these same lands and the mortgage given for the purchase money declared fraudulent and void, whilst in the present case the respondents Pavey and Company (the plaintiffs below) do not attack the sale of the lands but in the 12th paragraph of the statement of claim allege:

> That the said Alexander Purdom took the said mortgage as a trustee only for the defendant E. L. Davidson in pursuance of a fraudulent scheme entered into between the defendants to the end, purpose and intent to delay, hinder and defraud the plaintiffs and the other creditors of the said defendant E. L. Davidson and that the said Alexander Purdom holds the same as trustee aforesaid, or if he has realized upon the same then that he holds the proceeds upon trust for the defendant E. L. Davidson.

This (giving the plaintiffs the benefit of the modern rule by which pleadings are now construed favourably to the pleader and not as formerly *contra proferentem*) I can only read as an allegation that the mortgage transaction, assuming the sale to be not impeached, was fraudulent as having been made upon a secret trust for the benefit of the debtor tending to hinder and defeat creditors.

So far as the lands are concerned, the validity or invalidity of this transaction must depend on the *lex rei sitae*—the law of the state of Oregon—and there is no allegation that according to that law a constructive trust by operation of law would arise by reason of the intent to hinder and delay creditors or that even an express trust must necessarily enure to the benefit of or be available for the satisfaction of creditors. It may be that a mortgagee's interest according to the law of Oregon is not exigible. Up to 1837, according to

(1) 21 O. R. 547.

English law such an interest was not at common law, nor until the passing of statutes of comparatively modern date, available to satisfy creditors by means of either legal or equitable execution. Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law.

It appears to me therefore that there is in principle the same objection to giving relief in a case of this kind as that which prevailed in the former action, although it may not be so strikingly apparent.

If it were possible to separate the debt from the security—the foreign lands—as the learned counsel for the respondent contended should be done, the case might admit of different considerations, but the second paragraph of the plaintiffs' claim for relief very clearly seeks a declaration of trust not of the debt alone but of the security, that is of the foreign lands so far as they are a security, as well as the debt. This claim for relief is in these words:

That the said defendant Alexander Purdom may be declared to be a trustee for the said Ebenezer L. Davidson of the said mortgage and the moneys secured thereby.

The word "mortgage" here signifies not merely the debt—indeed the plaintiffs themselves distinguish it from the debt—but the security for the debt—the lands.

Further, it is not at all clear that even if all that was asked had been a mere attachment of the debt such relief could be given, inasmuch as in that case the mortgagor could not be compelled to pay the debt without having the lands reconveyed to him and this would involve an administration of the law of Oregon by the courts here as the sufficiency of such a reconveyance would depend altogether on that law. See *Hope* v. *Carnegie* (1).

Whatever it may be in form this action is in substance an attempt to get satisfaction by way of equit-

(1) 1 Ch. App. 320, a converse case.

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able execution of a debt out of a mortgagee's interest in foreign lands. It therefore only differs from the cases of *Burns* v. *Davidson* (1), *Henderson* v. *Bank of Hamilton* (2) in this, that those were cases in which it was sought to make available for the satisfaction of creditors the interest of an absolute owner instead of as here the limited interest of a mortgagee in such lands.

I think therefore that the passage from Lord Selborne's judgment in *Harrison* v. *Harrison* (3), which is quoted by the Chancellor in *Burns* v. *Davidson* (1), is equally applicable to the present case.

Then whether the allegation of a "trust" of the purchase money secured by the mortgage which the plaintiffs allege is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitae*, and from this alone it follows that the forum of the *situs* is the proper forum.

In this last aspect of the case *Re Hawthorne. Graham* v. *Massey* (4) and *Norris* v. *Chambres* (5), appear to me to be authorities.

The appeal must be allowed, and the judgment of Chief Justice Armour allowing the demurrer must be restored with costs to the appellants in this court and in the Court of Appeal.

*Appeal allowed with costs.*

Solicitors for the appellants: *Parke & Purdom.*

Solicitors for the respondents: *Gibbons, Mulkern & Harper.*

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(1) 21 O. R. 547.
(2) 23 Can. S. C. R. 716.
(3) 8 Ch. App. 346.
(4) 23 Ch. D. 743.
(5) 29 Beav. 246.

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DAMASE LAINÉ AND OTHERS (PLAINTIFFS)..... APPELLANTS; *May 11. *June 6.

AND

THÉOPHILE BÉLAND (INTERVENANT)..RESPONDENT.

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

*Property real and personal—Immoveables by destination—Moveables incorporated with the freehold—Severance from realty—Contract—Resolutory condition—Conditional sale—Arts.* 379, 2017, 2083, 2085, 2089, *C.C.—Hypothecary creditor—Unpaid vendor.*

An action was brought by L. to revendicate an engine and two boilers under a resolutory condition *(condition résolutoire)* contained in a written agreement providing that, until fully paid for, they should remain the property of L. and that all payments on account of the price should be considered as rent for their use, and further that, upon default, L. should have the right to resume possession and remove the machinery. The machinery in question had previously been embedded in foundations in a saw-mill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building but the engine had been taken out and was lying in the mill-yard, outside of the building. While in this condition the defendants hypothecated the mill property to B. and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. B. intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothecs upon the lands.

*Held*, that the agreement between L. and the defendants could not be considered a lease but was rather a sale subject to a resolutory condition with a clause of forfeiture as regards the payments made on account.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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But whether the agreement was a lease or a sale on condition, L. having, as respects the boilers and their accessories, consented to their incorporation with the immoveable and dealt with them while so incorporated, they became immoveables by destination within the terms of article 379 of the Civil Code and subject to the duly registered hypothecs of the respondent. *Wallbridge* v. *Farwell* (18 Can. S. C. R. 1) followed.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), annulling and setting aside the judgment of the Superior Court, District of Quebec, which had maintained the revendication and declared the plaintiffs to be owners of all the machinery seized under the writ of revendication by which plaintiffs' action was commenced, and further substituting therefor a judgment allowing the intervention filed, in so far as it affected part of the machinery in question (the boilers), but rejecting the intervenant's petition as to the engine seized.

The machinery consisted of an engine and two boilers which had formerly been fixtures in a mill at Valcartier belonging to Neilson & Co. and which had been sold upon them by the sheriff and purchased by one Fairchild on 24th February, 1893. On the 13th March following Fairchild sold the mill and fixtures to Béland & Martineau, the defendants, and upon the 14th they sold the same property to Fortunat Martineau. On 28th March Fortunat Martineau re-sold the mill and fixtures to the defendants, reserving from the sale the engine which was then detached from the building and lying in the mill-yard, and the two boilers which still remained built into their foundations. He afterwards sold the engine and boilers to the firm of Carrier & Lainé for $800 and on the 7th April, 1893, they sold them to Béland & Martineau for $2,000, of which $800 was to be paid to Fortunat Martineau and the balance

(1) Q. R. 4 Q. B. 354.

to Carrier & Lainé. This sale was made by *contrat sous seing privé* which recited that the $800 payable to F. Martineau was the price at which Carrier & Lainé had purchased the engine and boilers from him according to a copy of the agreement between them attached to the deed, and on the same day they "signified" to Fortunat Martineau that the $800 was so to be paid to him by Béland & Martineau. This *sous seing privé* deed of 7th April, 1893, contained a clause resolutive of the sale in case the vendees did not pay the price, and it is upon this clause that the plaintiffs based their action, brought on the 15th January, 1895, for the revendication of the engine and boilers. Carrier having died in the meantime, the action was brought by Lainé, the surviving partner in the firm, and Vanfelson and Lainé, administrators of the estate of the deceased partner, Carrier. By two deeds of hypothec dated respectively 10th April and 31st August, 1893, and registered 13th April and 1st September, 1893, the defendants, as security for advances made to them, charged the lands on which the mill was erected in favour of Théophile Béland, the intervenant, who claimed the engine and boilers as fixtures and machinery, both by nature and by destination forming part of the mill and consequently subject to his rights as hypothecary creditor. The plaintiffs contested the intervention on the grounds that the engine and boilers still belonged to them, had never become the property of the defendants and had always remained moveables and never formed part of the freehold hypothecated to the intervenant. The defendants filed no defence to the action and issues were joined upon the intervention and contestation only.

*Belleau* Q.C. for the appellants. The dealings show no intention by the parties to immobilize the machinery;

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it was sold as separate property, severed from the realty, and moveable by nature. Arts. 377, 379, 380, C.C.; *Hourelle* v. *l'Administration de l'Enregistrement* (1). The hypothecs can only affect what belonged to the debtors, and the registration laws have no application to chattels on the premises. See the opinion of Proudfoot J. in *Thomas* v. *Inglis* (2); also *Rose* v. *Hope* (3); *Union Building Soc.* v. *Russell* (4); where the same principles are affirmed. A steam engine although a fixture becomes a moveable when sold separately from the freehold, even when it had not been yet displaced. *Simon et Bondaux* v. *Enregistrement* (5); see also *Desfourneaux* v. *Davout* (6); *L'Administration de l'Enregistrement* v. *Mandel* (7); *Luce-Alexis* v. *Follope* (8); *Baquoit* v. *Tiberge* (9). The conditional agreement was in effect a lease and the unpaid vendors never consented to give the machinery the character of immoveables. *Staron* v. *Guinard Synd.* (10).

The respondent relies further upon the opinions of the following commentators: Demolombe (11); Marcadé, no. 354; Dalloz (12); 2 Aubry & Rau, 20; 4 Huc (13); 5 Laurent, nos. 476, 482; 1 Baudry-LaCantinerie, no. 1229; 2 Boileux, 604; 2 Demante, nos. 399 *bis* I & II. *Renaud* v. *Proulx* (14); *Union Bank* v. *Nutbrown* (15).

*Robitaille* for the respondent. The boilers were at the time of the hypothec imbedded in the structure, built into brick foundations with lime and cement and could not be removed without injury to the building. Arts. 379, 380, C. C. The engine was only temporarily dis-

(1) S. V. '32, 1, 594.
(2) 7 O. R. 588.
(3) 22 U. C. C. P. 482.
(4) 7 L. C. R. 374.
(5) S. V. '83, 1. 382.
(6) S. V. '38, 1, 869.
(7) S. V. '33, 1, 632.
(8) S. V. '31, 1, 388.
(9) S. V. '29, 1, 344.
(10) S. V. '90. 2, 113.
(11) Biens, nos. 291, 292, 322-324.
(12) Rep. vo. "Biens," no. 59.
(13) Code Civil, no. 20, pp. 26, 27.
(14) 2 L. C. L. J. 126.
(15) 10 Q. L. R. 287.

placed and was always destined to be replaced in the mill, as in fact it was afterwards and was actually used for some time in the operation of the mill. It thus became an immoveable both by nature and destination and both the engine and the boilers with their fittings must be considered to have been charged by the hypothecs, which moreover are entitled to the priority given by registration over the unregistered claim of the plaintiffs. The respondent is entitled to have his security protected from depreciation by the demolition of the structure and the removal of important parts of the mill machinery, which he was entitled to regard as the property of the defendants and as giving value to the property. The unpaid vendors have by their failure to protect their rights, if they had any, by registration and also by their consent to the incorporation of the machinery in the freehold, lost all right to disturb the rights of the registered hypothecary creditor. Arts. 2083, 2085, 2098, C. C.; 8 Aubry & Rau, 255, 256; 30 Dem. (1); Guillouard (2); 6 Marcadé (3); 4 Aubry & Rau, 400. Immoveables cannot be revendicated. Art. 416 C. C. A vendor can only enforce his lien by actual possession. Art. 1970 C. C.

See also the remarks by Sir Alexander Lacoste, Chief Justice of the Court of Queen's Bench as to the insufficiency of the appellants' proof of title (4).

THE CHIEF JUSTICE.—I agree with the learned Chief Justice of the Queen's Bench that the appellants failed in proving their title and upon this ground I rest my judgment that the appeal must be dismissed.

Upon the other point in the case, namely, that as to whether the boilers in question were moveables, or whether they passed under the hypothec granted to

(1) 476 no. 547.
(2) Vente II, p. 109, nos. 576 and 578.
(3) 301 sub. art. 1656 C.N.
(4) Q. R. 4 Q. B. 358.

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the intervenant as affixed to and forming adjuncts to the land, I express no opinion.

TASCHEREAU, SEDGEWICK and KING JJ. were of opinion that the appeal should be dismissed for the reasons stated in the judgment pronounced by Mr. Justice Girouard.

GIROUARD J.—Les appelants, Carrier, Lainé et Cie, machinistes de Lévis, revendiquent de Béland et Martineau, marchands de bois de Québec et propriétaires d'un immeuble et d'un moulin à scie à St.-Gabriel de Valcartier, un engin, deux bouilloires et leurs accessoires, qu'ils leur livrèrent, disent-ils, aux termes d'un écrit sous seing privé, signé le 7 avril 1893, à la condition qu'ils en resteraient propriétaires jusqu'au parfait paiement de tout le prix, les acomptes devant être considérés comme le loyer de ces objets ; et ils en concluent à l'audition devant nous, qu'ils en étaient les locateurs ou au moins les vendeurs avec condition résolutoire, et dans l'un ou l'autre cas, les propriétaires. L'écrit constate que ces bouilloires et leurs accessoires étaient alors incorporés à l'immeuble, et il est prouvé d'ailleurs, qu'ils l'avaient été longtemps auparavant par les propriétaires d'alors du fonds et du moulin, savoir, N. Neilson et Cie.

Il ne s'agit à présent que de ces bouilloires et de leurs accessoires, l'intimé ayant abandonné ses prétentions sur l'engin, qui, dit-il, avait été enlevé et mobilisé. La preuve que les appelants ont faite de leur titre à ces bouilloires et à leurs accessoires, laisse beaucoup à désirer ; il me semble qu'ils n'en ont fait aucune ; mais fut-elle parfaite, je ne crois pas qu'ils doivent réussir à l'encontre de l'intimé qui est un créancier hypothécaire dûment enrègistré. Ce dernier allègue qu'il est le porteur de deux hypotheques consenties en sa faveur

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par Béland et Martineau, lorsqu'ils étaient propriétaires dument inscrits de l'immeuble auquel ces objets étaient alors incorporés pour l'exploitation du dit moulin, et il demande le renvoi de la demande en revendication faite par les appelants, si mieux ils n'aiment lui donner caution. La cour Supérieure à Québec (Pelletier J.) renvoya la contestation de l'intimé et maintint la revendication des appelants, étant d'opinion que les dits objets mobiliers n'étaient pas la propriété de Béland et Martineau, et ne pouvaient pour cette raison être immobilisés. La cour d'Appel, M. le juge Blanchet dissidant, renversa ce jugement et maintint les prétentions de l'intimé, et de ce jugement les appelants appellent à cette cour.

M. le juge Blanchet ne voit qu'un bail dans l'écrit du 7 avril 1893. Les appelants n'ont pas osé aller aussi loin ni dans leur déclaration, ni dans leur réponse aux moyens d'intervention; ils se sont contentés de relater l'écrit sous seing privé du 7 avril 1893, sans en définir la nature. Mais est-ce un bail ou une vente avec condition résolutoire, ou même une simple vente à crédit? Il est de jurisprudence constante que les tribunaux ne sont pas liés par la qualification que les parties ont donnée à leurs conventions. Ils peuvent, sans dénaturer le contrat, lui restituer son véritable caractère par une appréciation des circonstances de la cause et de l'intention constatée des contractants. C'est ce que la cour de Cassation a décidé par plusieurs arrêts et notamment le 27 juillet 1895 (1), où toute la jurisprudence française est résumée. La cour de Cassation jugea dans cette espèce qu'il peut être déclaré qu'un acte qualifié bail, constatant la location de certains meubles, avec réserve de la propriété jusqu'au paiement intégral de loyers stipulés, est fictif et contient en réalité une vente ferme et à crédit. Dans la cause qui

(1) Pandectes Françaises, 1896, p. 151.

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nous occupe, les parties contractantes n'ont pas qualifié "bail" la convention intervenue entre' elles, mais simplement "contrat sous seing privé." Si l'on lit le texte même de ce contrat, il n'y est pas même dit que les appelants donnent à bail ou louent à Béland et Martineau les objets mobiliers en question, mais qu'ils "s'engagent par les présentes à faire et fournir pour la partie de la seconde part," etc. Puis vient la stipulation du prix, non pas du louage. mais de la valeur des effets, savoir $2,000, $800 payables comptant à Fortunat Martineau pour et à l'acquit des appelants, et la balance, $1,200, payable aux appelants, par paiements mensuels de $100. Enfin, les appelants stipulent qu'à défaut du prix "tel que convenu," ils "auront le droit de se faire livrer les dites machineries" à leur fabrique à Lévis, et que "jusqu'à parfait paiement du prix," elles "resteront" leur propriété, et que toute somme donnée "en paiement partiel du prix ci-dessus, sera considérée comme prix du loyer et usage des dites machineries." Annexée au contrat est une lettre adressée par les appelants à Fortunat Martineau de qui ils disent avoir acheté ces effets, l'informant qu' il sera payé par Béland et Martineau, "leur ayant transmis notre marché." Il est impossible de trouver dans cette convention les conditions d'un bail de la part des appelants ; tout au plus peuvent-ils y trouver une vente sous condition résolutoire avec clause pénale que les acomptes seraient forfaits, bien qu'en réalité les creanciers ordinaires peuvent peut-être soutenir à bon droit qu'une telle vente n'est qu'une vente ordinaire à crédit, point sur lequel il n'est pas nécessaire de se prononcer dans l'espèce actuelle. La preuve orale des appelants corrobore celle qui résulte de l'examen des écrits. Ils demandent à leur témoin, Alfred Martineau, un des membres de la société Béland et Martineau : "Vous avez acheté, et vous êtes chargé de payer For-

tunat Martineau et à décharger Carrier et Lainé," et il repond : " Oui." Ailleurs, les appelants interrogeant le même témoin sur la valeur des effets, supposant qu'il s'agit d'une vente et non d'un bail :

Q. Voulez-vous dire quelle est la valeur de ces machineries ?—R. Tout complet ?

Q. Oui, telles qu'elles ont été vendues, telles qu'elles ont été livrées ?—R. Une couple de mille piastres.

Q. Voulez-vous dire si les machineries que vous avez achetées, que le demandeurs se sont engagés en vertu de cet acte, à vous livrer, vous ont été livrées par les demandeurs ?—R. Oui, Monsieur ; les deux bouilloires étaient dans la bâtisse.

La majorité des juges de la cour d'Appel n'a pas songé à rechercher la nature du contrat de 7 avril 1893 ; à leurs yeux sans doute, et je crois qu'ils avaient raison, il importait peu que les appelants fussent vendeurs ou simples locateurs ; ils avaient consenti à l'incorporation des machines à l'immeuble ; ils les avaient vendues pendant qu'elles étaient ainsi incorporées ; elles étaient, donc, devenues immeubles et frappées des hypothèques de l'intimé.

L'Honorable juge en chef, et M. le juge Bossé expriment l'opinion,dans leurs notes, que ces objets mobiliers peuvent être considérés immeubles par nature ; mais le texte du jugement déclare simplement qu'ils étaient incorporés à l'immeuble et en faisaient partie intégrante, sans s'expliquer sur la nature de leur immobilisation. Je crois qu'ils sont devenus immeubles par le seul fait de l'incorporation qu'en firent les propriétaires du fonds et qu'ils sont immeubles par destination " tant qu'ils y restent," aux termes de l'article 379 du Code Civil. Cet article déclare que—

les objets mobiliers que le propriétaire a placés sur son fonds à perpétuelle demeure, *ou qu'il y a incorporés, sont immeubles par destination, tant qu'ils y restent.* Ainsi sont immeubles sous ces restrictions, les objets suivants, et autres semblables : 1. Les pressoires, chaudières, alambics, cuves et tonnes ; 2. Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines.

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Il est incontestable, et le fait me paraît admis par l'appelant et tous les juges, qu'il y a eu de fait incorporation des machines à l'immeuble et que cette incorporation a été faite par le propriétaire du fonds. Voilà tout ce que l'article 379 de notre Code prescrit; il n'exige même pas que l'incorporation ait été faite à perpétuelle demeure. Il ne fait aucune mention du vendeur non payé, ou avec la condition résolutoire, pas même de locateur ou de tout autre propriétaire des objets mobiliers qui aurait consenti à leur incorporation. L'article de notre Code, plus précis que celui du Code Napoléon, dit que l'immobilité dure tant que l'incorporation existe ; par conséquent, la simple intention du propriétaire du fonds n'est pas suffisante pour faire cesser l'immobilité, et il s'ensuit enfin que la simple vente par Béland et Martineau à Fortunat Martineau des bouilloires et de leurs accessoires, restés incorporés à l'immeuble—en supposant que les appelants seraient aux droits de ce dernier—n'a pu avoir cet effet au moins vis-à-vis des tiers.

Vainement, dit Laurent (1)—l'acheteur dirait-il que la vente seule mobilise les immeubles par destination ; cela est vrai entre les parties ; cela n'est pas vrai à l'égard du créancier hypothécaire qui a un droit réel dans la chose, droit qu'il conserve tant que la chose est attachée au fonds.

Gilbert sur Sirey (2).

Sans doute, le droit du propriétaire des effets ainsi immobilisés reste intact vis-à-vis du propriétaire du fonds ; mais vis-à-vis des tiers inscrits comme acquéreurs ou créanciers hypothécaires de tout l'immueble, il devient soumis aux lois spéciales sur la propriété foncière et l'enregistrement. C. C. 2017, 2083, 2085, 2098. Les appelants n'ont qu'à s'en prendre à eux-mêmes, s'ils n'ont pas pris les précautions prescrites par ces lois, car ils savaient que ces bouilloires et leurs acces-

(1) Vol. 30, no. 233.

(2) 3 ed. art. 524, nn. 1, 7, 8, 13.

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soires étaient incorporés à l'immeuble lorsqu'ils prétendent les avoir achetés de Fortunat Martineau et les avoir vendus ou loués à Béland et Martineau. Décider autrement serait ouvrir la porte à toutes espèces de fraude. Voilà d'ailleurs, la doctrine que cette cour a consacrée à l'égard du vendeur non payé dans un jugement élaboré et rempli d'autorités, rendu en 1890 dans les causes de *Wallbridge* v. *Farwell* et *The Ontario Car Foundry Co.* v. *Farwell* (1), que jusqu'ici a cependant échappé à l'attention des parties. Cette cour décida que le créancier hypothécaire doit être préféré au vendeur non payé et je crois que cette décision s'applique au vendeur avec condition résolutoire, et même au locateur, car le droit de revendiquer du vendeur non payé implique la résolution du contrat comme dans le cas du vendeur avec condition résolutoire ou du locateur, avec cette seule différence, que dans le premier cas la résolution résulte de la loi, tandis que dans l'autre elle résulte du contrat. M'appuyant, par conséquent, sur ce que je considère la jurisprudence de cette cour, je suis d'avis de confirmer le jugement de la cour d'Appel avec dépens.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Belleau, Stafford & Belleau.*

Solicitors for the respondent: *Robitaille & Roy.*

(1) 18 Can. S. C. R. 1.

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May 20, 21.

*June 6.

E. T. CARTER (DEFENDANT).....APPELLANT,

AND

LONG & BISBY (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Trust—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.*

If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin.

APPEAL from the decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the plaintiffs.

The material facts of this case are not in dispute. The appellant Carter is the assignee of the insolvent firm of Smith Bros., local wool buyers in Dresden, Ont. The respondents, Long & Bisby, are wool merchants in Hamilton who in 1894, after some correspondence with Smith Bros., who had bought wool for them in former years, advanced to Smith Bros. money with which to buy wool for which they agreed to pay seventeen cents per pound. All the money advanced, except $201, was used by Smith Bros. as agreed and the latter having failed all the wool they had on hand, including

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 121.

that bought for Long & Bisby, passed to the assignee, from whom it was replevied by the plaintiffs.

The questions for decision on the appeal were, whether or not the wool in the hands of the assignee was affected with a trust in favour of the plaintiffs, their portion of it never having been set apart or separated from the mass, and whether or not the plaintiffs had sufficient property in the wool to enable them to maintain an action of replevin. The courts below all held in favour of the plaintiffs.

*Gibbons* Q.C. for the appellants, argued that the property never passed to Long & Bisby and they could not gain possession of it in the face of the statute 55 Vict. ch. 26 (O).

*Crerar* for the respondents, cited *Pennell* v. *Deffell* (1); *Harris* v. *Truman* (2).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that the wool in question in this appeal was trust property and the sum of $200 also in question was a trust fund in the hands of Smith Bros., held by them at the time of their insolvency as trustees for the respondents Messrs. Long & Bisby. I entirely agree that no legal property in the wool had vested in the respondents, but I think they had, for reasons which I will presently state, a clear equitable title to a quantity of wool to be taken out of all the wool Smith Bros. had on hand, equivalent to the funds advanced by them to the insolvents (less $200) at the rate of 17c. per pound, as well as to the balance of trust moneys on hand.

There can be no dispute as to the material facts. The respondents employed Smith Bros. as their agents to buy wool with money furnished by the respondents, for which service the agents were to be paid by any

(1) 4 DeG. M. & G. 372. (2) 9 Q. B. D. 264.

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difference between the amount at which they might be able to purchase the wool and the agreed price of 17 cents per pound. This mode of remuneration did not make it any less a contract of agency than if the commission had been fixed in some other way and the wool had been the exact proceeds of the advances. As to the facts, I entirely agree in the opinion of Mr. Justice Burton expressed in the following extract from his judgment:

> It is clear, I think, upon the letters that it was the intention of both parties that the one should furnish funds to be expended by the other in the purchase of wool as agents, their remuneration being the difference between the sums at which they could purchase and the 17c. which the plaintiffs were willing to allow, and this is made particularly plain by the plaintiff's letter of the 18th of May, in which they decline to entertain a proposal to increase the rate and inclose a cheque for $400 "on account of wool to be purchased for our account," and the reply in which Smith Bros. accept the terms, and those of the previous letter, to keep the wool insured; and Smith Bros. throughout the correspondence lead the plaintiffs to believe that they are holding the wool for them and that they had, on the 14th of June, between 6,000 and 7,000 lbs. in hand, and the learned trial judge has expressly found that Smith Bros. were agents merely for the plaintiffs.

I adopt this as a perfectly correct statement of the facts established by the evidence, and based upon these facts the judgments appealed against appear to me to be well supported as regards the law both by principle and authority.

A great number of cases decided in courts of equity ranging over more than a century have established that trust moneys may always be traced into property of any species into which it may have been converted, in such a way that the court will give the *cestui que trust* as nearly as possible the same interest in the property as that which he had in the money of which it is the produce (1).

(1) See *Re Hallett's estate*, 13 Ch. D. 696.

That money placed in the hands of an agent or other person standing in a fiduciary relationship in order that he may invest it for the benefit of his principal will be considered trust funds within this principle is also commonplace doctrine not calling for any authority.

The case however of *Harris* v. *Truman* (1), if there was any ground for raising a reasonable doubt as to the law, would be conclusive against the appellant. That case in all features which are material exactly resembles the case before us. It proceeded entirely upon the equitable doctrine alluded to. Lord Coleridge at page 268, says:

> The judgment of the court below is founded mainly on two grounds. The first ground is of this nature: When large amounts of money are entrusted to a man to buy goods and carry on a business he becomes a trustee for the person to whom the money belongs and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity; it applies where the relation of principal and agent in the ordinary sense of the word does not exist. According to this doctrine where a confidence is created between two persons and where the one receives the money on the faith that he will do a certain thing and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the person giving the money. I think that this ground is quite right.

The learned counsel for the appellant, whilst admitting the principles propounded in the case of *Harris* v. *Truman* (1), endeavoured to distinguish it from the present case on two grounds. First it was said that *Harris* v. *Truman* (1) was (as no doubt it was) a case of fraud on the part of the trustee or quasi-trustee, that the doctrine in question is never applied except in cases of fraudulent conduct on the part of the person who stands in a fiduciary position, and that in the present case there

(1) 7 Q. B. D. 340; 9 Q. B. D. 264.

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had been no fraudulent or dishonest conduct on the part of Smith Bros. I quite agree that no such imputation can be made against the agents in this case; but I entirely deny the proposition that courts of equity only apply the doctrine in cases of fraud. On the contrary, wherever the operation of the equity is essential to the protection of the person beneficially entitled who is considered in equity to be the owner of the property, however innocent the conduct of the fiduciary legal owner may have been a court of equity will always intervene. If there were any such distinction as that suggested it could only proceed upon the ground that the court acted *in pœnam* against a wrong doer, but such a mode of proceeding has been disclaimed over and over again by equity judges.

Then it was said, and with perhaps a little more force and reason, that the authority of *Harris* v. *Truman* (1) could not apply here, inasmuch as in that case all the malt and barley seized by the defendants had been or were presumed to have been purchased with the money of the defendants, whilst in the present case Smith Bros. had mixed the wool bought for the respondents and their own wool together, so that the wool which the respondents claimed title to could not be distinguished for the purposes of an action of replevin.

It has been already said that there is not the slightest ground for any imputation of wrongful conduct against the trustees or agents, and this applies to the mixing of the wool as well as in all other respects (2). Where the owner of chattels, having the legal property in them, has had his property mixed with similar chattels belonging to other persons so that out of the

(1) 7 Q. B. D. 340; 9 Q. B. D. 264.

(2) 9 Q. B. D. 268.

mass thus commingled the chattels originally belonging to each person are indistinguishable, as in the case which has so frequently happened of a quantity of saw-logs being thus mixed (1), the rule at common law is that where this has been done without fraud or wrong an original owner is entitled to take from the mass an equivalent in quantity and quality for the property which he has lost by the mixing, and he is treated as having a legal title to such property.

Then if this can be done where goods are mixed in which the several parties interested all have legal titles, there is no reason why it should not be equally applicable when the title of one of the parties is, as in the present case, equitable merely.

In his judgment in *Harris* v. *Truman* (2), Lord Coleridge addresses himself to this point also ; he says :

> I think that the second ground of the Queen's Bench Division is right also. A person placed in a fiduciary relation with another may have dealings of his own and may mix up his own dealings with the dealings on behalf of his *cestui que trust*, but it has been held in courts of equity that when a fiduciary relationship has been created in respect of a fund which has been misapplied, and when it cannot be shown what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds and it shall not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust.

This appears to me to show conclusively that the respondents might have done here just what was done by the defendants in *Harris* v. *Truman* (2), namely, have seized, not through an act of the law but by their own act, the same goods which they actually seized here by means of this action of replevin. I am not aware of any authority, shewing that under the present system of procedure an equitable title to chattel property is not sufficient to support an action

(1) See Cooley on Torts (2 ed.) p. 68 and cases there cited.

(2) 7 Q. B. D. 340 ; 9 Q. B. D. 264.

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of replevin, and there is no good reason that I can see why it should not be sufficient. It is true that the more apt remedy would seem to be an action for the specific delivery of the property which before judgment might be protected provisionally by the interim remedies of an injunction and receiver. This would be in conformity with the practice which prevailed before the fusion of the two jurisdictions. Although not ordinarily interfering in the case of chattels, courts of equity would always take jurisdiction in two cases viz., where the chattel was of peculiar value so that damages would be no adequate compensation, a ground with which we are not concerned in this case. The other ground was where a fiduciary relationship existed between the parties; there, irrespective altogether of the nature and value of the property, the jurisdiction of equity could always be invoked for the protection of the *cestui que trust* (1).

The $201, the unexpended balance of the advances made by the respondents, was of course a sum of trust money; that it was a balance of the last remittance appears from the evidence of William T. Smith, who proves that when the Smiths proposed to draw it out of the bank in order to return it to the respondents, the bank manager persuaded him to leave it in his hands on the distinct understanding that it was Long & Bisby's money.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitor for the respondents: *Crerar, Crerar & Bankier.*

(1) See *Pooley* v. *Budd* 14 Beav. 34; *Fuller* v. *Richmond* 2 Gr. 24; *Flint* v. *Corby* 4 Gr. 45.

H. S. STEPHENS, ASSIGNEE OF THE ESTATE OF STEPHEN W. GILES, INSOLVENT (PLAINTIFF)..... } APPELLANT;

1896

*May 21.

*June 6.

AND

EDWARD BOISSEAU (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Debtor and creditor — Payment by debtor — Appropriation—Preference— R. S. O.* [1887] *ch.* 124.

A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B. who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B. who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock which payment was alleged to be a preference to B. over the other creditors.

*Held*, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. [1887] ch. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he

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could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment for the plaintiff at the trial.

The facts of the case are thus stated by Mr. Justice Maclennan in the Court of Appeal:—

"The defendant held a chattel mortgage, dated 6th February, 1893, on two different stocks of goods belonging to one Giles, in the city of Hamilton, The mortgage was made to secure indorsements made by the defendant for Giles on a composition with the creditors, and also advances in cash and goods to the amount of $4,000 to set him up again in business. The composition notes, dated 1st February, 1893, were duly made and indorsed at six and eight months, and the defendant advanced to the mortgagor goods to the amount of $4,982.37, and paid accounts at his request to the amount of $673.22, instead of the $4,000 named in the mortgage, an excess of $1,655.59. On the 11th of August the mortgagor was in default, not only for the goods and cash advances, but also for $856.49 of composition notes overdue and which the defendant had been obliged to pay, and there were composition notes amounting to $1,454 still current and which would not be due until the 4th of October.

"On the 11th of August, therefore, the total indebtedness of the mortgagor to the defendant was about $7,970—of which about $6,516 was past due. On that day a sale was made by the defendant, with the concurrence of the mortgagor, of one of the mortgaged stocks *en bloc* to one Huston, and the defendant ac-

(1) 23 Ont. App. R. 230.

cepted the purchaser's notes for the price at 4, 5 and 6 months date, indorsed by Giles. These notes were accepted by the mortgagee as cash, deducting a discount for the time they had to run, and they amounted, less discount, to $5,640.89. The defendant applied this money generally upon that part of his debt which was overdue, other than the composition notes, and the effect was that thereby his debt, including the $1,655.59, was satisfied and discharged except the composition notes due and to grow due, amounting to $2,324.20 and a small sum of $14.70, in all $2,338.90. The way the plaintiff puts it in his statement of claim is that the defendant deducted out of the proceeds of the notes the sum of $4,000, being the amount of a certain chattel mortgage on the stock sold to Huston, and for the price of which the notes were given, and applied the balance or sum of $1,655 in payment of a past due and unsecured indebtedness of Giles to him. The plaintiff's counsel also put in as evidence at the trial the defendant's account, showing the application of the purchase notes as cash by him in the manner above mentioned; and there is no doubt that Giles, the debtor, approved of, or acquiesced in, that application of the purchase money. A few days afterwards, that is on the 17th of August, Giles made an assignment of his estate to the plaintiff for the benefit of his creditors. There is no doubt whatever that on the 11th of August, when the sale of the first stock was made, the debtor was quite insolvent, and the defendant must have been well aware that he was so. The present action was brought on the 11th of June, 1894, and it is for the purpose of recovering from the defendant the sum of $1,655.59, being a sum equal to the unsecured part of the defendant's debt which he satisfied out of the proceeds of the sale of the first stock of goods, and

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which the plaintiff contends was a fraudulent preference.

"It seems that just before the assignment was made the defendant had seized the second stock of goods comprised in his mortgage and was in possession. An execution was also about the same time placed in the sheriff's hands against the mortgagor, and the sheriff made a seizure of that stock as belonging to the mortgagor. The assignee having also claimed the goods the sheriff interpleaded. Upon the return of the summons on the 16th of September, 1893, the plaintiff's claim as assignee was barred, and an issue was directed between the execution creditor and the defendant, which was ultimately tried and decided in favour of the defendant. *Horsfall* v. *Boisseau* (1).

"The goods were sold under the order of the court and by order dated the 21st of March, 1894, the defendant was declared to be entitled to receive out of the proceeds the sum of $2,239.54, being the balance still remaining due upon his mortgage."

On these facts Mr. Justice Meredith gave judgment for the plaintiff, and the question is whether that judgment is right.

The judges in the Court of Appeal were unanimous in their opinion that Mr. Justice Meredith's judgment was wrong and it was reversed. The assignee then appealed to this court.

*Gibbons* Q.C. for the appellant referred to *Mader* v. *McKinnon* (2); *Kitching* v. *Hicks* (3); *Cameron* v. *Perrin* (4).

*Kappele* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts are fully stated in the judgment of Mr. Justice Maclennan and I need not repeat them.

(1) 21 Ont. App. R. 663.
(2) 21 Can. S. C. R. 645.
(3) 6 O. R. 739.
(4) 14 Ont. App. R. 565.

Unless the appellant can show that some statutory provision has been contravened by the respondent he cannot possibly be entitled to any relief, inasmuch as at common law preferential payments are unimpeachable.

Then how can it be maintained that there was in the case before us any transaction between Giles and the respondent which offended against the provisions of the 2nd section of Revised Statutes of Ontario, ch. 124? The validity of the mortgage itself was not questioned. The sale to Huston was made at the instance of the respondent and could not have been carried out without his assent. Had all the debt which the mortgage was given to secure, that is to say the $4,000 for new goods, the $2,338 for the composition notes as well as the $1,165 unsecured debt, been due, and had there been one sale including both stocks of goods for an amount equal to or in excess of the $7,970, the aggregate debt secured and unsecured, the case would have presented the same question of law as that which has actually arisen. It would have been quite within the respondent's rights in the supposed case, as I think it was in the present, that he should have sold all the mortgaged goods and received the proceeds. Then as regards the surplus which would have been lawfully in his hands, he could have properly appropriated a due proportion to the payment of his secured debt, leaving in his hands a balance equal to or exceeding the unsecured debt. What would there have been in that case to have disentitled the respondent if sued by the assignee for the balance to the benefit of section 23 of the Revised Statutes of Ontario, chapter 124? This section provides that:

> The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent

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as if the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this or any other Act respecting frauds or fraudulent preferences.

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It would have been out of the question to have said that there was in the case actually before us any agreement or arrangement bringing it within the exception of cases of fraud contained in this section.

Then, the case put, in all its legal aspects, is indistinguishable from the present, and that being so the same consequences must follow here as in that supposed.

The only way in which the right which was acquired by the respondent, by reason of his having to realize his security by sales of the mortgaged property, could have been obviated, was by redemption by Giles or his assignee before the sales which would have deprived the respondent of the benefit of the set-off under the 23rd section, by means of which he has, without in any way infringing the law against preferences, gained an advantage over the other creditors. The appellant not having chosen to exercise this right of redeeming must abide by the consequences.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitors for the respondent: *Laidlaw, Kappele & Bicknell.*

## LONDON LOAN CO. *v.* MANLEY.

1896

*May 20.

*Mortgage—Loan to pay off prior to incumbrance—Interest—Assignment of mortgage—Purchase of equity of redemption—Accounts.*

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the respondent.

After hearing counsel for both parties the court dismissed the appeal.

*Appeal dismissed with costs.*

*Gibbons* Q.C. for the appellant.

*W. H. Blake* for the respondent.

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## BRIDGEWATER CHEESE FACTORY CO. *v.* MURPHY.

1896

*May 21.

*Company—Authority of president—Promissory note—Discount—Liability of company.*

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

After hearing counsel for the appellant the court dismissed the appeal.

*Appeal dismissed with costs.*

*Porter* and *Cross* for the appellant.

*Moss* Q.C. and *Masson* for the respondent.

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(1) 23 Ont. App. R. 139. (2) 23 Ont. App. R. 66.
(3) 26 O. R. 327.

1895
*Oct. 9, 10.
1896
*Oct. 13.

# IN THE MATTER OF JURISDICTION OVER PROVINCIAL FISHERIES.

## SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL IN COUNCIL.

*Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O.* [1887] *c.* 24, *s.* 47—55 *Vict. c.* 10, *ss.* 5 *to* 13, 19 *and* 21 *(O)—R. S. Q. arts.* 1375 *to* 1378.

The beds of public harbours not granted before confederation are the property of the Dominion of Canada. *Holman* v. *Green*, (6 Can. S. C. R. 707) followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.

Per Gwynne J.—The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under British North America Act, s. 92, item 10, and for the administration of the fisheries.

R. S. C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament.

The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters. A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92.

Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen*, (6 Can. S. C. R. 52) followed.

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The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide.

Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in other public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne J. dissenting.

Per Strong C.J. and King and Girouard JJ.—The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation.

The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the provinces under the British North America Act. The legislative authority of Parliament under section 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personally conferring qualification, and will give no exclusive right to fish in a particular locality.

Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne J. contra.

Per Gwynne J.—Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per Strong C. J. and Taschereau, King and Girouard JJ. R. S. O. c. 24, s. 47, and ss. 5 to 13 and 19 to 21 of the Ontario Act of 1892, are *intra vires* except as to public harbours, but may be superseded by Dominion legislation. R. S. Q. arts. 1375 to 1378 are also *intra vires*.

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Per Gwynne J.—R. S. O. c. 24, s. 47 is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of Revised Statutes of Canada, chapter 135, "An Act respecting the Supreme and Exchequer Courts" as amended by 54 & 55 Victoria, chapter 25, section 4.

By Orders in Council passed respectively on the twenty-third day of February, 1894, and the twenty-third day of February, 1895, the following questions, seventeen in number, were referred to the Supreme Court.

1.—Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate? And is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from

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one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation ?

2.—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chapter 92, intituled "An Act respecting certain works constructed in or over navigable rivers," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part ?

3.—If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river ?

4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament ?

5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown ?

6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them ?

7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the

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right of fishing in such waters as mentioned in the last question, or any and which of them ?

8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned ?

9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also ?

10.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively ?

11.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands ?

12.—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, prevent-

ing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

13.—Had the legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled "An Act respecting the sale and management of Public Lands," and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

14.—Had the legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

15.—Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as may consist with, any laws passed by the Dominion Parliament within its constitutional competence?

16.—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

17.—Had riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

The following counsel appeared for the several governments interested:

*Christopher Robinson* Q.C. and Mr. *Lefroy* for the Dominion of Canada.

*Æmelius Irving* Q.C., *S. H. Blake* Q.C. and Mr. *J. M. Clarke* for the province of Ontario.

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Hon. *T. C. Casgrain*, Attorney General, for the province of Quebec.

Hon. *J. W. Longley*, Attorney General, for the province of Nova Scotia.

*Æmelius Irving* Q.C. and Mr. *Clarke* for the province of British Columbia.

The provinces of Prince Edward Island and Manitoba took no part in the proceedings. A factum was filed on behalf of the province of New Brunswick, but no counsel appeared to support it on the hearing.

*Robinson* Q.C. I appear for the Dominion, with my learned friend Mr. Lefroy. The questions are submitted, as your Lordships are aware, by the Dominion Government, in order to be advised as to the respective rights of the Dominion and the provinces with regard to various questions bearing upon the water rights and harbours, and the question of fisheries which have arisen between the Dominion and the provinces at different times. As I understand, these questions (of which there are rather a large number) are submitted, many of them, I apprehend, with a view rather to their importance in the administrative aspect, that is to say, to guide the different governments in the exercise of their administrative powers, than with regard to any necessary material or pecuniary importance that they may be to the respective governments. As to some of them, I apprehend it is of probably more importance to get them settled than to settle them either one way or the other. As to others, they do involve important interests, and both the Dominion and the provinces are contending seriously and earnestly for different views.

Perhaps it may be as well in the beginning just to endeavour, without reference to the questions, to point out, as I understand it, what are the material questions arising between the two governments.

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In the first place, I apprehend the discussion here will be very much shortened by the fact that, as regards the most important questions, this court, in the cases of *The Queen* v. *Robertson* (1), and *Holman* v. *Green* (2), has either expressed deliberate opinions, or has given deliberate decisions, which are conclusive on one side or the other if they are adhered to. Now, I apprehend that with regard to those questions which are actually decided, for example in *The Queen* v. *Robertson* (1), there is no object in re-discussing them here at all. There are, however, questions which are not actually decided in *The Queen* v. *Robertson* (1), I mean, which were not part of the discussion, but upon which, nevertheless, the various judges have expressed deliberate and considered opinions.

To take the question of fisheries first—perhaps that being the most important—I shall just put very shortly to your Lordships what are the difficulties which have arisen. There does not appear to be any substantial dispute that, under the power given to the Dominion over sea-coast and inland fisheries as one of the subjects entrusted to their legislative action, they have power to regulate fishing; that is to say, to prescribe close seasons, to prescribe the manner in which the fish shall be taken, and so on. Everything that may be said in popular language to consist of regulations, it seems to be admitted, belongs to them. The only question, as I understand, that there is a serious contest upon with regard to that arises on the position taken by some of the provinces, which they have acted upon in their legislation, that until the Dominion prescribes regulations they have power to prescribe them; in other words they say: "Admitting that when the Dominion chooses to come in and make fishery regulations they will supersede our regu-

(1) 6 Can. S. C. R. 52. (2) 6 Can. S. C. R. 707.

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lations; in the meantime, until they do that, we have a right to make regulations." But I do not think it is seriously contested, with regard to what may be strictly regulations, that the Dominion is supreme when it chooses to act. However, the serious point is that the Dominion claims unlimited powers over the fisheries, just as the province has power over any other property; and they say: "We have a right to deal with that as you can deal with any property in your charge; we may give a person the exclusive right to fish on any land, no matter where, and we may charge him just such fee as we please." And the provinces say: "You can only regulate; the land is ours, the rights to be exercised over it, in so far as that consists of property, are ours also." The material importance of that rests in this, that it is then vain to say to the Dominion: "You will make regulations and prescribe times and manners in which fish are to be caught;" for all that involves enormous expense, the employment of fishery inspectors all over the country, and their pay, and so on. The provinces say: "You can do that and pay the expenses of it, but all the revenue to be derived from these fisheries belongs to us." Now that is a matter to be settled between them, and it may be that we have not only the power to regulate, but the power to license. A very curious result might arise, though it is perhaps not very important here, because it is not in the sense of taxation that this question comes up, but it would look as if—however this decision went—either of these parties could attain the same result under their taxing powers. The Dominion has power to raise money by any mode or system of taxation. I have never been able to satisfy myself, apart altogether from the further question as regards fishery, why they cannot say: "We will tax everyone who fishes $100." That is raising money by

taxation; and the Dominion can do that if they please. On the other hand it is difficult to contend, in view of the later decisions, that the provinces, under their right to levy money for municipal purposes by direct taxation, cannot do the same thing; because your Lordships are aware the later decisions have gone in the direction —I might say it has been expressly decided in *The Bank of Toronto* v. *Lambe* (1)—that the requirement of a license is direct taxation.

Then, the second question is as to the rights of the Dominion over navigable waters. We have passed a statute, the result of which is that no person can put up any erection in navigable waters without submitting the plans to the Dominion and obtaining their assent to it; that is to say, the Dominion claim is: "It is our province, in the exercise of our jurisdiction over navigation and shipping, and over navigable waters, and over trade and commerce, to say beforehand, as they can do in the United States, what we will allow to be put up in navigable waters." On the other hand the provinces say,—New Brunswick, at all events, asserts it very distinctly and emphatically while Nova Scotia does not take such strong ground—"No; your power over navigable waters is to proceed against us when we are obstructing you, and you must satisfy a court or jury that the particular obstruction is an impediment to navigation and make us remedy it, but you cannot prescribe beforehand what we shall put in navigable waters." The Dominion say that falls short of what is necessary to enable them to exercise their legislative power. Then that has an indirect and important effect on the question of granting water lots. The provinces say: "We can grant water lots in navigable waters." Take the Detroit River, or any river; it was the common practice before

(1) 12 App. Cas. 575.

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confederation, and since then it has been the custom of the provinces, to grant water lots, to erect warehouses, and so on. The provinces say: "We may grant those water lots, and our grantee may do as he pleases with them, subject to your right to bring him before a court or jury, and shew that what he is doing is an impediment to navigation." And the Dominion say: "We have a far wider power; we can prescribe beforehand what shall or shall not be done in navigable waters; and if we choose to say, 'that lot shall not be filled up,' we have a right to do so, and we are to decide whether it will be an impediment to navigation or not." Your Lordships will see that has indirectly an important bearing on the right of the provinces to grant water lots. Then what does the grantee take under it? The provinces cannot authorize impediments to navigation; there is no question about that if we shew it is an impediment to navigation. But the question is, can we say beforehand: "You shall not erect it, because we say it will be an impediment to navigation." Can they say: "No, it will not; we will go and test that." They all admit that if it is an impediment to navigation we can have it removed by the ordinary process, just as we always could; but it is an important question as to our power of making regulations which will take effect by anticipation so to speak. They may say: "We propose to put up this, it will not be an impediment to navigation, and you can prosecute us if you like, but we will test that before a jury." We say: "No, we have a higher power than that, and we are to say whether it will or will not be an impediment to navigation." Now, that is a question of practical importance.

The first question is one relating entirely to the property in the beds, as apart from legislative powers altogether. It is: "In whom are the beds vested as

matters of property?" The beds of all waters, within the provinces, not granted before confederation to whom they do belong?

In *Holman* v. *Green* (1) the court has said that public harbours go to the Dominion, so that as to that class of waters the question is answered by that case.

Then we go on to ask: And is there any difference between the respective waters? We ask that in order that your Lordships may not say, "No, all of them did not pass"; we want your Lordships to tell us which passed, and which did not pass, if you answer it in that way. That is the purview of that question.

As regards many of these things there can probably be little discussion, because we claim them either upon the ground of decided cases, or upon the ground of specific clauses of the British North America Act. For example, we claim, in the first place, all rivers, tidal or non-tidal, navigable or non-navigable, ungranted at the time of the passing of the British North America Act. Then that brings up a matter which has been a question, certainly, in the minds of the Dominion Government since confederation. The late Minister of Justice, as we all know, and as his reports show, has always taken the position, under the British North America Act, in connection with section 109, "The public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada," that all rivers not granted at confederation passed to the Dominion. In the third schedule of the Act we find the words, item five, "Rivers and Lake Improvements." Sir John Thompson always held and took the position that "Rivers" meant "Rivers" and rivers are the property of the Dominion Government, that all rivers

(1) 6 Can. S. C. R. 707.

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which had not been granted, and which at the time of confederation were the property of the respective provinces passed to the Dominion Government. This was not part of the decision in *The Queen* v. *Robertson* (1). But I am placing it as the distinct and earnest contention of the Dominion Government; it is not a point on which very much can be said; and there it stands. I may explain to your Lordships how it stood in the different drafts. It began in the "Quebec Resolutions" in 1864, which was the initiation of the matter, as "River and Lake Improvements." You find it in one or two out of six different drafts, "River" still; but you find it in the later drafts, and in the Parliamentary Roll as it stands at present "Rivers." It stood, I think, for the last two or three drafts and at all events now stands in the Imperial Roll, just as it was first adopted by the London Conference, "Rivers and Lake Improvements."

All that can be said is to draw your Lordships' attention to the well known rule in the construction of statutes, which was put strongly by Sir William Richards when he said that when the legislature changed their phraseology it was to be assumed they changed it intentionally, and for some reason, whatever the reason was, we have got the words "Rivers and Lake Improvements." If there had not been the words, "And Lake Improvements," there would not have been any question; that is beyond doubt. If it had just stood that the following shall be the property of the Dominion, "Rivers and Lakes," there would have been no possibility of raising a question. Then can you conceive any reason as to why rivers should be given to the Dominion? The Dominion suggests that rivers were intentionally given to them; that so far as navigable rivers go they have entire control

(1) 6 Can. S. C. R. 52.

over trade and commerce. In the United States the control over rivers to a most unlimited extent, so far as the navigable character of them is concerned, is given to the Federal Government by virtue of trade and commerce, which is entrusted to them, although in a much more limited sense than it is entrusted to our Parliament. The Dominion Government say that "Trade and Commerce," "Navigation and Shipping," and still more "Fisheries," having been entrusted to them, and rivers being intimately connected with every one of these subjects, they were intended to have the property in rivers; and it was reasonable that it should be so. They point out, that so far as navigable rivers are concerned, with regard to navigation, and so far as fisheries are concerned and rivers running from one province into the other, navigable in one part and non-navigable in another, they have legislative jurisdiction and that it was desirable that the whole subject of rivers should be vested in one power, and placed under one control; they say, therefore, that there are valid and good reasons why the intention should have been to give rivers to them. And your Lordships will see there is nothing by any means either improbable or inconsistent with that. The beds of rivers are practically of little value, except for the purpose of the water which runs over them. Well, as is said in several American cases and English cases, it is of no importance who owns the bed of Lake Ontario in the middle, but questions may arise in which the ownership may become of importance as regards the duty of legislative action, and we want to have it settled. Then we say rivers belong to us.

Then we find "All canals." Your Lordships will find in that same third schedule, "Canals with lands and water power connected therewith." We get

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under that, all canals which constituted a part of the public works and property of any province at the time of the coming into force of the British North America Act.

Then we claim so much of any waters, whether salt or fresh, tidal or non-tidal, navigable or non-navigable, as were occupied by lighthouses and piers, forming part of the public works of any of the provinces at the time of the coming into force of the British North America Act, or were or are appurtenant to or necessary for the use and maintenance thereof. I should have thought that under the same schedule which gives us lighthouses and piers, and Sable Island, that we should certainly be entitled to that. And likewise so much of the waters of lakes of every description as were occupied by improvements forming part of the public works and property of any of the provinces at the time of the coming into force of the British North America Act, or as were or are appurtenant to or necessary for the use and maintenance of such improvements.

Then we claim the large fresh water lakes, more particularly the chain of great lakes from Lake Superior to the St. Lawrence River and waters of any description which have been in any way set apart for general public purposes in any of the provinces, and formed part of the property of any of the provinces at the time of the coming into force of the British North America Act. That again depends on the express words of item 10 of the third schedule, "Lands set apart for general public purposes." They are expressly given to the Dominion.

Then we claim the sea-coast, subject to any transfer made of it under 54 & 55 Vic. ch. 7. That depends a good deal upon the same questions which govern the consideration of the right to the great lakes. So does

the question of territorial waters, meaning the three mile zone. With regard particularly to that, your Lordships will remember that the jurisdiction of the Crown over the three mile zone has been established by innumerable decisions, and recognized by Imperial legislation as the law of England, mainly for the purposes of defence; and we say the Dominion having been given, among other things, exclusive control over defence they should have,—and it was intended to give them—the ownership of that part of the territory which can only be used for those purposes. It can only be used for navigation, and shipping, or defence. Those being the only useful purposes for which it can be applied, and those being under the exclusive control of the Dominion, we say they are entitled to the ownership of the land, upon the same ground, and for the same reasons. I need not now go into any discussions about the difference between the American constitution and our own, all tending in our favour, on the principles on which their constitution is framed.

Then we claim, —"Waters on land reserved for Indians," in the same way. While the Indian title remains, and while the administration and control is vested in the Dominion Government, we say the property in Indian lands is vested in the Dominion Government.

Ordnance property is expressly given to the Dominion by item 9.

Then as to "Waters on any land or public property assumed by Canada for fortification or defence." By section 117 Canada may assume "such lands as she may require for the purposes of public defence." That of course would include land covered with water.

That is all I intend to say on the questions as to the right in the beds—that is to say. of the soil under the water—of the different waters of the Dominion.

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The next question is: "Is the Act of the Dominion Parliament, Revised Statutes of Canada, ch. 92, intituled 'An Act respecting certain works constructed in or over navigable waters,' an Act which the Dominion Parliament had jurisdiction to pass, either in whole or in part"? Now, on reading that statute it struck me that a doubt might well occur to any one whether it was really intended to relate to any works which did not themselves affect navigation, whether it was not essential to the jurisdiction which they assumed that the works should impede navigation, although I do not think that was the intention, because there are other clauses which require any person proposing to erect a work in any navigable water to submit the plan to the Dominion Government and get their assent before they proceed with the work. For example any bridge to which the Act applies, which is not approved by the Governor in Council, etc., may be lawfully removed under the authority of the Governor in Council. "No bridge, boom, etc., shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council." See *Queddy River Driving Boom Co.* v. *Davidson* (1); *Pennsylvania* v. *The Wheeling Bridge Co.* (2); *South Carolina* v. *Georgia* (3); *Gibbons* v. *Ogden* (4); *Gilman* v. *Philadelphia* (5); Story on the Constitution (6), sums up the whole thing.

In *Gibbons* v. *Ogden* (4), it is said:

"Power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the rivers navigable in the United States, etc. This includes necessarily the power to keep these rivers

(1) 10 Can. S. C. R. 222.
(2) 13 How. 519.
(3) 93 U. S. R. 4.
(4) 9 Wheat. 1.
(5) 3 Wall. 713.
(6) 5 ed. Vol. 2, pp. 16 and 17, note (a).

open and free from any obstruction to their navigation, to remove obstructions where they exist, and to provide as they think proper against the occurrence of the evil, and the punishment of the offenders. For these reasons Congress possesses all the powers which existed in the States before the adoption of the national constitution, and which have always existed in the Parliament in England."

It cannot be put more strongly than that. We claim precisely the same powers.

Question five must be answered in the affirmative. Six, seven and eight all practically concern the right given to the Dominion Parliament by virtue of their jurisdiction over sea-coast and inland fisheries; and the extent of that jurisdiction is perhaps the most important question to be determined. If I understand what was as really decided in *The Queen* v. *Robertson* (1), it was a necessary part of the decision, that the land had all been granted by the Crown to the particular company before confederation. It was thought when the case was brought before Mr. Justice Gwynne that there was a portion of the land which had not been granted, and therefore the question was asked, "What would have been the rights of the Federal Government if the land had not been granted and belonged to the provinces? What are the rights of the Federal Government over any of the lands which have been granted?"

What I propose to do I may say is to point out what has been decided in *The Queen* v. *Robertson* (1), what opinions have been indicated in that case on matters not decided and what is the position taken by the Dominion Government.

First, as to what *The Queen* v. *Robertson* (1), decided. As I have said when the case came before Mr.

(1) 6 Can. S. C. R. 52.

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Justice Gwynne, it was thought a portion of the land had not been granted, and therefore the question was asked of him: "What would have been the rights of the Dominion Government to license if the land had not been granted, or on so much of it as was not granted?" He answered this question.

When the case came up in appeal Mr. Lash, who appeared for the Dominion, discovered that all the land had been granted, and he did not care to present that question again; nevertheless their Lordships expressed their opinions on that question, perhaps necessarily expressed them in order to explain clearly their views on other questions. It may have been necessary to express an opinion as to their rights on lands ungranted, in order to contrast with their opinions as to the rights on lands granted. But the real decision in *The Queen* v. *Robertson* (1), was simply no more than this: In the first place the lease was a lease of the land, and unless the Dominion Government owned the land they clearly had not the power to lease the land. In the next place, all the Dominion Government had assumed to do was to give their Minister power to grant fishing licenses where the exclusive right of fishing did not already exist by law. Whether they could have given him the right or power to grant a license for fishing over all lands, without reference to that, was not determined, and that is what we desire to have determined now. Then that being the only point really decided, which would not cover any question here, the courts did express their opinion, I think very plainly, to this extent, that where an individual had lands before confederation he had an exclusive right of fishing; therefore the Minister, under that clause of the statute, had no power to grant a license over that land.

(1) 6 Can. S. C. R. 52.

Question number nine is unnecessary if question number eight is answered in the negative.

Then question number 10: "Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled 'An Act respecting Fisheries and Fishing,' or any other of the provisions of the said Act, or any, and which of said several sections, or any and what parts thereof, respectively?"

That is rather a long statute, and it is a very wide question. All I desire to say with reference to the whole situation is that it deals practically with the entire question of fishing and there is no dispute as regards the regulation of fishing and everything connected with the time and manner of taking fish. Over that, it is conceded, we have the right of jurisdiction. If we have, then what are we doing under that Act that we have not the right to do, with the exception of this licensing question, which, guarded as it is, makes it difficult to say that it is not possible to pass it? We have taken a leaf out of the Ontario book in that respect, and have guarded ourselves in the same way.

Questions 10 and 11 may practically be bracketted together. Twelve is, I think, a question arising if our power is limited to regulations for the protection, improvement and preservation of fisheries, and so on; and according to *The Queen* v. *Robertson* (1) I suppose the court will answer that it is.

Then the next question is this: "Had the legislature of Ontario jurisdiction to enact section 47, of R. S. O. ch. 24 as to the sale and management of public lands?"

That is the section authorizing the legislature of Ontario to grant water lots. Your Lordships will

(1) 6 Can. S. C. R. 52.

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remember, as was stated in the original statute, 23 Vic. ch. 2 sec. 35, that there had been doubts as to the rights exercised by the province to grant water lots in navigable waters. That Act provided that it was lawful for them to do so, and always had been lawful for them to do it. It is in that respect that the question becomes important. It is quite possible—though I do not believe it would happen—that the Dominion and the various provincial governments might exercise their rights in antagonism to each other, or with a view to interfere with each other's rights; and the right to grant water lots may be more or less valuable, depending on the nature of the control.

The question as to the legislature of Quebec having the jurisdiction to enact certain sections will, I think, be decided by the extent of the general jurisdiction.

I think all those questions will be answered when your Lordships define the general jurisdiction over fisheries.

The next question brings up an important matter, not only a question of some importance as bearing on this particular subject, but a question of great general importance as bearing upon the question of our constitution. The question reads: "Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as they may consist with, any laws passed by the Dominion Parliament within its constitutional competence?"

They claim that until we legislate on this subject they can legislate upon it, as affecting property and civil rights. We say that is plainly not the case, and if we have the jurisdiction to regulate fisheries it must, under the terms of the British North America Act, be exclusive jurisdiction; that they cannot pass legislation

upon the subject of fisheries until we take it up, any more than we can pass legislation upon the general property and civil rights until they take it up. Our powers differ from the powers in the United States, where concurrent legislation is admissible. Speaking as a rule, the States may legislate until Congress sees fit to legislate in the exercise of its power, but where we get a grant of legislative power it is exclusive. The province could not pass a compulsory bankruptcy law, for instance or a bank Act because we have exclusive jurisdiction over those subjects. I quite admit that there are a great many subjects according to the last decision of the Privy Council upon the question of insolvency, which involve what may be called an intermediate or middle zone of subjects, which may belong to several large subject matters of legislation, and the provincial legislatures may make a great many regulations which, until the Dominion has legislated, may be quite within their power. Take, for instance, the regulations which the provincial government make with regard to voluntary assignments, and so on; it has been held that although, until the Dominion Parliament chooses to legislate upon bankruptcy, they may regulate those matters as an incident of bankruptcy, yet the moment the Dominion Parliament proceeds to deal with the matter the provincial legislation is superseded; but that principle cannot be applied here, inasmuch as this legislation cannot be attributed to anything but fisheries. Whatever legislation we have a right to enact with regard to fisheries they have no right to enact.

*Lefroy* follows for the Dominion Government.

There are two points arising in the case on which I would like to say a few words. The first point is with reference to its being reasonable that the beds of such rivers as the St. Lawrence—that is, the

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Crown interest in them—should vest rather in the Crown as represented by the Dominion Government than in the Crown as represented by the provincial governments; and I would ask your Lordships if there is any other principle, or any view except that one, upon which the property in the beds of those rivers can be held, under our constitution; and if that is the only theory or principle on which it can be so held, whether after all that would not apply as well to the large lakes as to the large rivers, such as the St. Lawrence, or any other river forming the boundary between the two nations? The question is perhaps more clearly put in this way: We are dealing with one Crown; and the only question is whether the Crown interest in the beds of these waters is to be administered and is to be controlled by the Dominion Government and Parliament, or by the provincial government and legislature. In other words, is it reasonable and right under the general scheme of the British North America Act, to attribute the *jus regium* in the beds of navigable waters and rivers like the St. Lawrence, even above the ebb and flow of the tide, to the Crown as forming a constituent part of the Dominion Parliament, or to the Crown as forming a constituent part of the provincial legislature? I submit that the former is more reasonable; and that the decisions have, after all, led us up to a point where we can scarcely take any further step without reaching that conclusion; because the decisions certainly point to this, that the executive power is co-extensive with the legislative power. Mr. Justice Ramsay says, in the case which was afterwards called the *Bank of Toronto* v. *Lambe* (1), that it has never been doubted that the British North America Act attributes plenary govern-

(1) M. L. R. 1 Q. B. 188.

mental powers over certain matters to both the Dominion Parliament, and to the provincial legislatures.

And in the case of *The Queen* v. *St. Catharines Milling Company* (1), Mr. Justice Patterson says:

"The administrative and legislative functions I take to be made co-extensive by the Act."

In the pardoning power case the principle is stated in the broadest way by the Chancellor of Ontario (2), that legislative power carries with it a corresponding executive power, though all executive powers may be of a prerogative character.

Mr. Justice Burton in the Court of Appeal also re-echoed these words (3). When it came before this court, the appeal was decided on another ground and the court did not pass on that point. Then, my Lords, if we have reached that point, we have the *jus regium* in those lands which are peculiarly pertinent, or which have peculiar relation, to certain legislative powers. The principle upon which the Crown interest in the bed of the St. Lawrence pertains to the Crown as represented by the Dominion Government, is that the legislative power over defence and responsibility for enforcing all international relations and international treaties, the control over navigation and shipping, and over trade and commerce are all within the Dominion.

It seems to be a most anomalous thing, if the Dominion Government and Parliament have exclusive jurisdiction over all these subjects to which the ownership of the bed is pertinent—and to none other legislative powers can it be said in the same sense to be pertinent—that it should not be held to attach to the Crown as a constituent part of the Dominion Parliament. But I may perhaps call in aid an Imperial

(1) 13 Ont. App. R. 171. (2) 20 O. R. 249.
(3) 19 Ont. App. R. 38.

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enactment, so far as the argument is based upon trade and commerce, sec. 7, ch. 62 of 29 & 30 Vic. I call it in aid of the argument so far as it rests on the possession by the Dominion Parliament of the exclusive power to legislate in respect to trade and commerce; because by this enactment it is provided that, "All rights of the Crown in the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up as the tide flows (and which are here for brevity called the foreshore), except as in the Act provided, are transferred to the management of the Board of Trade."

I call it in aid simply to this extent; that the Imperial Parliament has vested the beds of all those waters in the Board of Trade, because the Imperial Board of Trade is the Department of the Government in Great Britain which regulates trade and commerce, the manner of erections in navigable waters, and just the very subjects which my learned leader has argued come under the Dominion Parliament by virtue of its control over trade and commerce. There is nothing in the Act, I think, which can be said to conflict with this view. It is true that under section 109 lands which belong to the different provinces, at the union, continue to belong to the provinces. But limiting words come at the end of that section, that this assignment of these lands is "subject to any interest other than that of the province in the same;" and though it may well have been, as I submit, that the ownership of the beds, at any rate, of the great lakes, did not appear to be a matter of so much importance as to need specific mention, still if your Lordships conclude that it is reasonable to attribute the *jus regium* in regard to this matter to the Parliament rather than to the legislatures, then I say that such conclusion is warranted by that section, by the gift of the lands of

the province being subject to any interest other than that of the province in the same.

The other point is that, in reference to the last three questions, the provincial legislatures have no jurisdiction to legislate upon the subject of inland fisheries in their own waters. The Act has given to the Dominion Parliament the exclusive power over sea-coast and inland fisheries, and the proposition of the provinces seem to amount to this. "This is very true, but we may legislate for our own inland fisheries." Now, I think that the concluding words of section 91 "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 exclusively to the legislatures of the provinces" may be said at last to have received an established construction, which is that the provinces may not legislate upon a subject coming within the enumeration of subjects in section 91, saying, "Oh, well, it is only a private matter, and we may legislate upon it." The dicta of the Privy Council have all pointed in this direction. In the case of *L'Union St. Jacques de Montréal* v. *Belisle* (1), their Lordships refer to that number 16 of sec. 92. They said the Act they were there considering was undoubtedly a local and private Act; and they added, "Now section 91 qualifies it, if it be within any of the classes therein enumerated, because of its concluding words."

They refer to it in *Citizen's Insurance Company* v. *Parsons* (2). There they said: "Though the paragraph applies in its grammatical construction only to number sixteen of section ninety-two, it would seem to have been inserted with the view of providing for cases of apparent conflict."

(1) L. R. 6 P. C. 35. (2) 7 App. Cas. 108.

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Then again in the same judgment they refer to it as, "This endeavour to give pre-eminence to the Dominion Parliament in cases of conflict of power."

In several of the arguments before their Lordships,—for example, in *Hodge* v. *The Queen* (1)—some discussion has taken place upon these concluding words; and it has appeared to be accepted by their Lordships that the meaning is just this, that the provinces may not say: "We can legislate upon this as a local and private matter, although it touches or affects some of the enumerated matters in section 91." And then, in the recent argument upon Prohibitory Liquor Laws, Lord Herschell, in the argument on the second day, at page 68, says of it: "That provision is that you cannot get under the words 'local and private nature,' anything which is in one of the enumerated classes of section 91."

Now, I submit that they are out of court, upon the decisions as they now exist. The question is: Do these words refer only to no. 16 of section 92? The Privy Council have said in the *Citizen's Insurance Company* v. *Parsons* (2) that, though they apply in their grammatical construction to number 16, they would seem to have been inserted with the object of preventing cases of apparent conflict. There is nothing to debar the argument, that when these concluding words of section 91 say "matters of a local or private nature," they are not referring only to matters merely "of a local or private nature."

I support the view taken by Mr. Justice Gwynne in the Prohibitory Liquor Laws case (3) and which I know has been taken by very many members of this court in different cases, that the reference is to all the subjects in section 92. The construction on the other

(1) 9 App. Cas. 117. (2) 7 App. Cas. 96.
(3) 24 Can. S. C. R. 212.

point is clearly settled now, I take it, that it means that the provinces cannot defend a law as a matter of "local or private nature," if it comes within the enumerated subjects of section 91. They cannot defend it under number 16. Can they defend it under any other? The concluding words of section 91 are not that it shall not be deemed to come within matters of "a merely local and private nature;" but that it shall not come within "the local and private matters comprised in the class of enumerated subjects assigned to the provinces." I submit that it looks upon all the subjects in section 92 as comprising one big generic class. It seems to me to be perfectly good English to say there is one generic class of local and private matters comprised in the sixteen enumerated classes. You can say with perfect propriety that the sixteen enumerated classes comprise within their united boundaries one generic class; and then the construction would be that a province cannot legislate upon any subject in section 92 —and those are the only subjects on which they can legislate—that affects or deals with a subject in section 91, on account of those concluding words, and also, I submit, on account of the words in the earlier part of section 91, which says "that notwithstanding anything in this Act," the exclusive legislative authority of the Dominion Parliament extends to all matters coming within the classes of subjects there enumerated, which must mean that notwithstanding all the powers given to the provincial legislatures, the Parliament of Canada shall exclusively legislate on these subjects. The importance of those words has not been dwelt upon as much as one might expect; but Mr. Justice Gwynne refers emphatically to them in the *City of Fredericton* v. *The Queen* (1):

"Notwithstanding anything, whether of a local or private nature, or any other character, the exclusive

(1) 3 Can. S. C. R. 566.

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legislation of the Parliament of Canada extends to all matters mentioned in sec. 91."

The real meaning of the concluding words of section 91 is to repeat and make clearer than ever the effect of the words in the prior part of the section, "notwithstanding anything in this Act." The one states the same thing as the other conversely. The first says "Notwithstanding anything given to the provinces," Parliament shall exclusively legislate upon those subjects; and the other says to the same effect. The one says that the Dominion Parliament shall alone legislate upon those subjects, and the other says the provinces may not legislate on those subjects, notwithstanding anything that has been given to them. And therefore the provinces cannot legislate under any single head of section 92 upon subjects enumerated in section 91, and cannot claim the right to legislate for the regulation of their inland fisheries. The subject of the sea-coast and inland fisheries is of a different character from bankruptcy. Very great difficulty has been experienced in arriving at what was of the essence of legislation in reference to bankruptcy and insolvency, but there is not so much difficulty in arriving at what is the essence of legislation in respect of sea-coast and inland fisheries. At all events, there is no doubt that legislation on provincial inland fisheries is legislation on inland fisheries; and if that cannot be disputed, in view of the decisions, the last three questions must be decided in a way opposed to the constitutionality of the provincial Acts.

*Longley*, Attorney General, for the province of Nova Scotia.

Your Lordships will be good enough to bear in mind that, while the Dominion stands here as a unit, each province has the right of presenting its own views distinctly and that if any admission is made by one province it is not to bind another.

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I have divided the points as I desire to submit them into four general heads. The first, as to the ownership of beds of non-navigable waters; second, as to the right of the Dominion Government to lease or license fishing privileges in non-navigable waters; third, as to the right of the Dominion and provincial governments respectively to license fishing privileges in navigable waters; and fourth, as to the ownership of the beds and shores of navigable waters, harbours, tidal rivers, and the foreshores of the sea, comprising everything that the word "foreshore" can mean,—that is the extension from high-water mark out,—and all classes of waters whatever. I think all the questions resolve themselves into these four heads.

In regard to the first question submitted *The Queen* v. *Robertson* (1) has determined it and that case seems to me to be founded so completely upon principles which do not depend entirely upon the British North America Act, or upon the application of the plain and simple principles of that Act, that I do not feel inclined to discuss it here at all.

The ownership of the beds of non-navigable streams, or the fishing privileges which go with it, cannot be pretended to be in the Dominion. *The Queen* v. *Robertson* (1) determined that the Dominion had had no right to license fishing privileges in non-navigable waters, because in respect to private owners it was vested in the owners and became an absolute piece of property, and a right which could only be affected by that legislature which has control over property and civil rights.

D Now, as to the question of the right of the Dominion or the provinces respectively to license or lease privileges in waters that are navigable. I do not know that it would be sound to adopt the exact narrow rule

(1) 6 Can. S. C. R. 52.

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according to the common law of England that a navigable water means a tidal water and non-navigable water means one in which the tide does not flow. In the United States this rule has been considered inapplicable and we cannot find fault with that conclusion. In England this holding coincides with the fact, but it does not coincide here. It is not necessary for the purposes of this argument to limit the control of the Dominion over navigation.

The later decisions as to the British North America Act have adopted the safe principle of interpretation with relation to both powers, and of giving the Act that fair scope which, balancing the powers nicely, will work out in the main the safest and soundest principle, most in accordance with the spirit of the Act. "Property and Civil Rights" may be interfered with by legislation respecting "Trade and Commerce" and *vice versâ*. The courts have been compelled to balance the respective rights and put them in certain categories giving in some cases the control to the provinces and in others to the Dominion. Using the words of the Judicial Committee of the Privy Council, they say that, for certain purposes and in certain aspects, the control is in one category, and for certain other purposes and aspects in the other.

With regard to "Fisheries" you can apply the same principle both in regard to navigable and non-navigable waters; and as the sea-coast and inland fisheries are in the Dominion, we must read that in the light of other powers which are given to the provinces, and limit the application in the same manner as courts have been compelled to limit the application of "Trade and Commerce" which now clearly means the general regulation of the trade of the country, whereas there are a thousand things pertaining to the minute features

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of the trade of the country—say, whether liquor should be sold or not—which are vested in the provinces. The same method may be adopted in respect to protecting fishing generally, provided nothing shall be done to interfere with the proper development of our great fishing industry from a national point of view. We must not interpret in such a way as will give the Dominion any property in the fish. It is not necessary to interpret it in that way, which in fact would lead to the greatest confusion, because it is not necessary for the proper exercise of their functions that the fish should be vested in them. I take it, that the proper meaning of "Sea-coast and Inland Fisheries" is that the control of the fisheries is a public national control, similar in its scope to "Trade and Commerce," but it does not touch "Property and Civil Rights"; and that in so far as any person has property or civil rights in the fishery, or the public have civil rights in respect to non-navigable waters, these rights cannot be affected by Dominion legislation. Then according to the common law of England in regard to fishing in navigable waters the courts have held that it is a common right which each individual member of the public has; and the judicial and fair interpretation in respect to this matter of the fisheries is that the national control of fisheries, the proper regulation of it, is vested in the central authority, but it does not necessarily involve property in the fish, or a right to say that a person shall not fish unless he gets their leave. Then the Dominion have nothing to do with licensing or leasing fisheries at all. They have a right to define seasons, or to lay down a close season, for certain purposes, but they have no right to say to any person who has a property in any public water, "you shall not exercise that right." Then if it appears that the control over the property is not

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vested in the Dominion, and that they have not the right to license, it also follows as a matter of course, that the licensing power is with the provinces; they may license generally for the purpose of revenue, and they can even license those things the control of which in general terms is vested in the Dominion. Control of a subject does not mean ownership. They have control over "Banks and Banking" as a system, but they do not own the banks. Neither does the fact that banks and the system of banking is vested in the Dominion prevent the provinces from licensing the bank itself in order to do business. That has been done. They have control over insurance, but the licensing of insurance companies, and also making certain regulations as to conducting insurance business, is also vested in the provincial legislatures. The contention of the province is that the Dominion cannot license or lease fisheries in any kind of waters whatever in the Dominion. They can control and develop fisheries from a national sense, but they do not own the fish or the right to fish, and consequently the provinces under the general power of licensing, have the right to issue those licenses for the purpose of revenue.

Now coming to the fourth and most important consideration, I must point out that *Holman* v. *Green* (1) only professes to take away a piece of the foreshore. I contend that the beds of the harbours did not vest in the Dominion, but only the works and such parts of the land as the works were on, and such as was necessary for the purposes of the harbour. We do not deny that the Dominion has control over harbours, those that exist now and those that they may create hereafter, and the right to their creation and preservation; everything that makes a harbour of value or necessarily pertains to proper management, manipu-

(1) 6 Can. S. C. R. 707.

lation, control and guidance of a harbour is with them without the slightest limitation whatever. But the ownership of the soil underneath the harbour is of no importance to them for the purpose of navigation and shipping, for which they have the harbour. Any undivided authority in regard to the land will lead to interminable difficulty. It is possible to get, under the British North America Act, an interpretation of the relative powers of the provincial and Dominion Governments in relation to foreshores and harbours and all waters bounding on land while will be simple and not in any conflict of authority, and I ask that principle to be applied as embodying justly and fairly the spirit of the Act.

There is no province taking advantage of 54 & 55 Vic. ch. 7, passed by the Dominion Parliament respecting the handing over of the harbour beds to the provinces. It is only an intimation that the Dominion recognized as a sound principle that the foreshores should be vested in the provinces. That is the only value of the Act itself. We claim that the beds belong to the provinces and to their grantees, although no grantee could drive a pile there that would interfere with navigation. The proper interpretation of the British North America Act is to give the provinces the land, and to give the Dominion the power of controlling navigation absolutely. If I want to build a wharf, I must get the land to build it on from the provincial authority and then go to the Dominion Government to get their approval of the structure I propose to erect. Any other interpretation would lead to serious results.

Now, as to the lands covered by water surrounding an entire province. Nova Scotia has such land all round it with the exception of a few miles on the Isthmus. Ordinary grants of land, and practically all lands granted on the coast, go to high-water mark. When

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the tide is out, there is of course a large section of land remaining between these lands and low-water mark. Undoubtedly that land must go to the province under section 109, unless something takes it away. I do not ask the court to overrule *Holman* v. *Green* (1), but I have a right to press the decision into the narrowest limits. Whatever public works, and property enumerated in the schedule of the Act, canals and lands and water powers connected therewith, belonged to the provinces, and whatever property the province had in them, passed, but that was all that passed; and the difficulty is in indicating where the line should be between the public harbours and the foreshores. For instance, if all land is vested in the provinces, unless expressly taken away by some form of words in the Act, then we still have the entire seashore round the provinces. In *Holman* v. *Green* (1), the question was as to an improved natural harbour. We are discussing powers, and whether the harbours vested in the provinces, or in commissioners, or in private companies, it would not change the position, because I concede to the Dominion the most absolute control of navigation; they can prevent obstructions in harbours, bridge them, deepen them, and for that purpose they have a right to go into the bed, that is not disputed. I am trying to get a fair broad scope of the British North America Act with regard to the powers of the two authorities respectively. The Dominion can have full control over the wharves, and can say what class can be built and what class not built, and how the approaches can be guarded, and levying tolls and so on, but all that can be done without their having of necessity any property in the land. In *Holman* v. *Green* (1), Fournier J. says:

(1) 6 Can. S. C. R. 707.

"It is also admitted that the 'Queen's Wharf' is a public wharf, built by the local government with the public money voted when necessary, in the same manner as most other wharves on the island; and that this wharf was built about the year 1840, and has ever since been used as a public wharf by the numerous vessels which frequent Summerside Harbour. These admissions show conclusively that the harbour at Summerside is a public harbour." He therefore held that, under sec. 108 of the British North America Act, it belonged to the Dominion.

The learned Chief Justice made a distinction between waters abutting on foreign countries and other waters. I do not think the ownership of the land under water is affected in the slightest degree by that consideration. The ownership of the beds affects nothing from a military point of view. In case of war any part of the water or the land or any part of the bed necessary for military purposes, could be taken without any question of affecting the British North America Act in any manner. The Dominion would of course have absolute control over the waters in respect to foreign countries, but the land goes to the provinces under section 109. It is not necessary that the ownership of the land should be vested in them for military purposes.

*Irving* Q. C. for the Province of Ontario. My learned friend the Attorney General for Nova Scotia was good enough to say that the views that might be put forward by any of the provinces would be only taken, or should only be taken, as the view of the province respectively as put forward by the counsel of the province. That must necessarily be so, because the point here is for your Lordships to determine what the law is under the British North America Act, not to be governed by what the particular view of any one

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province may or may not be. Your Lordships, no doubt, will determine what in your view is the proper construction to put upon the Act, however some of the provinces may differ from others. So my learned friends who presented the case on behalf of the Dominion in several instances based their arguments upon the reasonableness of the views they presented, but I need hardly say that no part of their argument can be listened to because of their view of what is reasonably convenient, or that if others were drawing the British North America Act it would be drawn in a different spirit or different view. Unreasonable as its provisions may be argued to be, that which I have no doubt will be enunciated by your Lordships will be the construction of the Act as enacted.

I shall make some brief references with regard to the view expressed that the Dominion, under its legislative powers, can draw to itself territorial rights in lands which I think have been invariably, and by all tribunals, accepted as vested in the provinces. Where there are exceptions these exceptions are defined, and I say your Lordships have never lost sight of the broad distinction between legislative jurisdiction on the one hand, as divided between the two legislating bodies, and the territorial rights as vested in either on the other hand; and that in both cases the subjects of grant have been expressed and are not to be implied. For instance, on the one hand we have section 109, in which it states "all lands, etc., shall belong to the several provinces," and section 117 specially declares that with the exception of the lands which have been transferred by section 108 to Canada, as public works and property enumerated in the third schedule of the British North America Act, the several provinces shall "retain all their respective public property not otherwise disposed of," etc. Your Lordships have recognized the value of

that word "retain" in the judgments in *Mercer* v. *The Attorney General of Ontario* (1); although perhaps some of the judgments were not supported in the Privy Council, the effect of the Act was discussed, and all united in giving the value to that particular section. We have all lands in the province, except such as there is right in Canada to assume under section 117, and that property which by force of section 108 is declared to be the property of Canada. We hear of the *jus regium* as supporting territorial right, an indefinite and somewhat, I think, inaccurate expression, standing by itself, as the books show that *jus regium* is often used to exemplify different classes of interests in some of which there is no property whatever, but counsel used the term as equivalent to property rights, and applicable to Crown lands in the bed of the rivers. The point is taken that by certain attributes of Dominion power, treaty obligations, or certain powers of legislation, the beds of rivers may pass to, and the titles thereof be vested in, the Dominion. To that I take exception and objection. The distribution of legislative power between the Dominion and the provinces may be compared very closely in the third schedule and the 117th clause, and I wish to point out that in the third schedule every item of property is specifically granted. Take them as we go along—military and naval services and defence, armouries, drill-sheds, and so forth, munitions of war, and lands set apart for general purposes—and we see that by the 117th section they are to take whatever they require. We see (sec. 91), beacons, buoys, lighthouses, and Sable Island. Then we see navigation and shipping and quarantine, and so on. We see with reference to those that the schedule conveys to them canals, with lands and water powers connected therewith, lighthouses and

(1) 5 Can. S. C. R. 538.

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piers, and Sable Island. If lighthouses and Sable Island were by the section conveyed absolutely, why was it thought necessary to put them here again? Then custom-houses are all appropriated; and we see that the Dominion has the equivalent, the regulation of trade and commerce, the raising of money by any mode or system of taxation. Wherever their legislative power necessarily required land to carry it out we find an absolute and express grant, either by the schedule, or by the schedule with section 108, or by section 117, whereby that was expressly secured. But we find no grant of land as connected with sea-coast and inland fisheries. Therefore it was never intended that anything in respect to that legislative right should carry any territorial right, or any territorial property; so also in respect to navigation and other matters that I have spoken of as cognate. No property is required to be vested in the Dominion except such as appears there by the schedule.

As to the item "5. Rivers and Lake Improvements" there is a discrepancy in the statute and in the Quebec resolutions to which I refer. The French version reads "*Améliorations sur les lacs et rivières*" The improvements govern the whole, and that is the way it is in the journals. Also see judgment per Gwynne J. in *The Queen* v. *Robertson* (1).

An American authority, Story, has been cited as holding the view that the fact of the legislative authority in Congress drew to the United States the territory over which that power was exercised. I find the contrary at sections 1274, 1275 (5th ed.):

"Congress may authorize the making of a canal, lighthouse" * * * "military roads" * * * "but in this and the like cases the general jurisdiction

(1) 6 Can. S. C. R. at pp. 98-9.

of the State over the soil subject only to the rights of the United States, is not excluded."

The fact that Congress can legislate in respect to commerce on the rivers, and with reference to bridges, in no way gives the estate, or changes the title in the estate.

As to the first question, the argument is that the term "navigable" is to be applied to all rivers, lakes and waters which are navigable in fact, and that the test in England of the ebb and flow of the tide has no applicability. I, however, presume that the common law applies to our navigable waters in the same way that it is understood to apply to navigable waters in England within the ebb and flow of the tide. The points decided in *The Queen* v. *Robertson* (1) were confined to a private non-navigable river, in which the land was vested in the riparian proprietor. It left untouched the question of the beds of ungranted rivers. I think there can be no distinction as to any river bed, whether it is in the individual or in the Crown in the right of the province ungranted. My argument with reference to lands in the beds of streams, is carried to all lands covered with water anywhere within the limits of the provinces, and there is no outer fringe, there is not room for any Dominion territorial property outside of the provinces on any ground whatever, not taking public harbours into consideration. With reference to the international line, the boundary line of this country, and of many other countries, consists of dry land; and there is no difficulty that can be suggested, or no reason why it should be in any way different, because instead of land there is water. More effect than necessary has been given to the position of the Parliament and Government of Canada with reference

(1) 6 Can. S. C. R. 52.

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to the treaty powers, because they have, as I understand, no power to make a treaty. All that is vested in them is the power to carry out a treaty which is made by the Imperial Government.

"The Parliament and Government of Canada shall have all powers necessary and proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." British North America Act, sec. 138.

The address on the subject of the "Quebec Resolutions" is to be found in the Journals of the House of Assembly of Canada, of 14th March, 1865, pp. 202-209, volume 24 of the first series of 1865. There are two paragraphs to be considered, the one the translation of Sea-coast and Inland Fisheries which there appears: "*Les Pêcheries des côtes de la mer et de l'intérieur;*" and in the third schedule "*Améliorations sur les lacs et rivières.*" The English text is, on the 14th March, 1865, Journals of the House of Assembly, page 208, "5. River and Lake Improvements."

The argument on the question of Public Harbours as presented by Ontario, recognizes the decision of this court and deals with it as a matter not open for us to argue, but respectfully questioned.

The objectionable passage in the Dominion statute, R.S.C. ch. 92, (subject of the second question and further questioned in the sixteenth,) is that no bridge, boom, dam or *aboiteau*, shall be constructed so as to interfere with navigation unless the site has been approved of. That is in section two. This is not legislation relating to "Navigation;" it interferes with civil rights in the sense that property and civil rights are within the province.

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The power of Parliament is limited to that which is "Navigation;" and it is by no means inconsistent with navigation that there should be some use of the bed of a navigable river by the riparian proprietor, who should be able to use all his river frontage, all the bank, so that he does not interfere with navigation. The right assumed by the Dominion to declare that any Act is an interference with navigation is an interference with a civil right. The condition of the law where it was all in the hands of one legislature, as in England, was that invariably the right for a public work had to be determined, and the right for any interference with the stream had to be determined, by issuing a writ of *ad quod damnum*; then upon that the Crown and parties were cited to see whether the work was an interference with navigation, or an interference with the highway or not; and if not, then the private right became perfected. Here two legislatures have the whole power; first, the power in respect to civil rights; then, the powers respecting navigation. The true exercise of the powers as to navigation is one thing, but this Act, because part of the territory may be applied or become subservient to navigation, has tied up the whole frontage of the rivers against riparian proprietors, and deprived them of their civil rights, without any defined tribunal dealing with the question of fact. The law is that any one can place any erection whatever, in a navigable river, at his own risk; and, after some cases overruled, the latest law recognized is *The Queen* v. *Betts* (1), the case of a bridge, subsequently commented upon by Malins V. C. in *Attorney General* v. *Lonsdale* (2). We deny the Dominion the right to say beforehand that there shall be no bridges because they interfere with navigation.

(1) 16 Q. B. 1022.

(2) L. R. 7 Eq. 377.

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We say that there cannot be any wrong unless it amounts to a public nuisance. There is a great power given to the Dominion, but the point is that this question is not determined at any place; the riparian bank of the whole country is, as it were, put under a ban; there is no freedom; every right is taken away from the riparian proprietor. I refer to remarks by Lord Justice Blackburn in *Orr Ewing* v. *Colquhoun* (1) respecting the law of England as to the rights of owners of land covered with water. As to the third question, I contend that the grantee of land extending into a lake or river has the right to build thereon, subject to the work not interfering with navigation.

All that is important in the 17th question is involved under the head as to where is the property. Riparian proprietors had no exclusive right before confederation because our argument is that with these navigable waters the title absolute was in the Crown.

I pass the 6th and 7th questions because they are both involved in the question of proprietary right of fishing in non-navigable waters, which at present seems to be conceded to be within the provincial power.

For the purposes of the argument of the 8th question, I assume to be admitted the position of the provinces, which is that the beds of all navigable waters were by the British North America Act vested in the provinces; and therefore the question arises on that "To whom passes the right of property in the fisheries, or what is the right of property, or what is fishery within this particular item 'Sea-coast and Inland Fisheries'?" My contention is that those being navigable waters, the right to the fish therein stands upon the same footing as the rights of fishing in navigable waters in England in places where the tide ebbs and flows; and that, if these are navigable waters in fact,

(1) 2 App. Cas. 839, pp. 861 and 862.

it must follow that the rule of law, as far as fisheries are concerned, should be the same as in tidal waters in England, which places those fisheries in the Crown only as in right of the public, who have the common right of fishing therein. Therefore, if my argument is valid so far as to say "here we have these large navigable waters, and they are the property of the province"—which, of course, is a subject of question—then it follows that, the beds being the property of the province, the right of fishery therein is in the public as of common right, and therefore within the provincial rights of legislation in so far as civil rights and property are concerned, and by force of section 109 within the territorial rights of the provinces. The provinces have entire power over the property, and the right of taking, provided they take subject to the laws enacted by the Dominion with reference to capture or close season, or any other legislative power within the Dominion, which does not and cannot affect the right of property in the provincial fisheries.

As to no. 9, a question with reference to licenses, I submit the decision in *The Queen* v. *Halliday* (1), and other cases mentioned in the Ontario factum, and the case of *Fortier* v. *Lambe* (2). The latter case concludes that the province has the right to require a license to be taken out, even if the Dominion has jurisdiction to grant license.

The 10th question is a recapitulation of the main question in different form, because two or three matters of principle govern the whole; and if the principles, for instance, which I endeavour to lay down, prevail, then practically the answer to no. 10 will be, that the Dominion had not jurisdiction to pass section 4 of "The Fisheries Act" because it is aimed at the pro-

(1) 21 Ont. App. R. 42. (2) 25 Can. S. C. R. 422.

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perty or right of fishing, this right in the navigable waters being a common public right of all the inhabitants of Ontario; and Ontario relies on the judgment in *The Queen* v. *Robertson* (1). I refer to the whole case, and I select the opinion of Mr. Justice Fournier who says (at p. 140):

"With regard to the right of property, neither the Federal Act nor the Fisheries Act have made any change in the state of things existing before confederation. The ownership remains where it was before. There is not, then, in this respect any encroachment on the side of the federal power. If the action of the Department of Marine and Fisheries has not been consonant with this principle as in the present case, such action is void."

And further:

"While thoroughly respecting the right of fishing as property, could not the Federal Government exercise in the general interest of the Dominion the right of oversight and protection? I think it could, and that that is precisely the object of the powers of legislation which have been granted to it on this subject. There is in my opinion no incompatibility between the exercise of this power and the exercise of the right of fishing as a right of property in other things than those of the Government."

Section 22 of R. S. C. ch. 95 challenges special question. It gives a right to use vacant public property for fishing purposes, and it is not within the power of the Dominion to pass such provisions except only as to property of the Dominion over which Parliament can legislate.

If my views as to the answer to the 10th question are admitted, then, *a fortiori*, the 11th question should be answered in the negative.

(1) 6 Can. S. C. R. 52.

The 12th question relates to the general issue, whether the Dominion has any other jurisdiction than to pass general laws. It certainly has jurisdiction to pass general laws, but none other.

Next comes the 13th question, as to whether the legislature of Ontario had jurisdiction to enact R. S. O. ch. 24, which is popularly spoken of as the Act that empowers the granting of water lots although it is capable of greater scope. Is it *intra vires?* The history of the Act is that it is a re-enactment of an Act passed before confederation and the point turns on where is the proper jurisdiction to repeal; whether the provincial legislature obtained the same right in respect to the matters there dealt with as Canada had before, under the previous Act. Then who has power to enact it since confederation? The language of the Act is:

"It has been heretofore, and it shall be hereafter, lawful for the Lieutenant-Governor to authorize sales or appropriations of land covered with water in the harbours of the rivers and other navigable waters in Ontario under such conditions as it has been or as it may be deemed requisite to impose."

That is where the old Act terminated. This Act has added:

"But not so as to interfere with the use of any harbour, or with the navigation of any harbour, river or other navigable water."

It was first re-enacted in the revision of 1877; that was before *Holman* v. *Green* (1), and was the re-enactment of the Act of 23 Vic. ch. 2. The Act referred to in the question is a mere re-enactment of the Ontario statute of 1877 where it appeared for the first time as an Ontario Act. The first point submitted to your Lordships is that these beds of rivers, lakes or waters are in the Crown in the right of the province. Then if it be

(1) 6 Can. S. C. R. 707.

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that the provinces have the right to convey them so that navigation be not interfered with, that is all this Act purports to do. In *The Whitstable Free Fishers* v. *Gann* (1), Erle J. says:

"There is no rule of law which prevents the Crown from granting to a subject that which is vested in itself."

Therefore, all these lands passed to the province, or remained in the province, and were retained, and it is in the power of the Crown to grant them, subject to non-interference with navigation.

The Act is meant to apply to Crown lands and provincial waters; for instance, it provides,—

"No tourist or summer visitor shall take or catch or kill in any provincial waters, etc." referring to waters over which the provincial legislature had power to legislate for the purposes of this Act. That is not unconstitutional.

In reference to the 15th question, the province can act in matters of police in these small fisheries; it is an attempt to protect them in aid of and not inconsistent with the Dominion legislation.

*S. H. Blake* Q.C. follows for Ontario. In whom lies the land covered with water? That lies at the very threshold of this inquiry. That is, therefore, question number one; the next question seems to be in respect of the matter of fisheries; and the third in respect of the matter of navigation. All the other questions are simply dealing with the variations of these matters as they may arise. The first and main question is as to whether in the Dominion or in the provinces we place the land which is covered with water. From that will arise the question of the position of the coast of the rivers and the streams and so on to the extent of many

(1) 11 C. B. N. S. 387.

thousand miles, and then will follow the question of navigation, and the question also of the fisheries.

The solution is by considering the British North America Act and really there is very little authority that aids one in the solution, excepting the cases decided by your Lordships and by other courts upon that Act itself. Only some two or three American cases would really assist us. Our own cases lead to the decision that we must solve the questions as they arise upon the best conclusion that can be come to as to the meaning of the Act. Now, my Lords, it seemed to me, that the first point for consideration was where were these rights before confederation? That seems to me the true starting point, in order to see whether they went to the Dominion or passed to the provinces. I am simply referring to the rights to land covered with water, or the land where it stood before the period of time spoken of in the British North America Act. Then next, where did these go? Unless we can certainly and distinctly trace these lands that were in the provinces prior to confederation to the Dominion, then they are still with the provinces. Prior to confederation it was not doubted that these lands were in the provinces with the fullest power of dealing with them, the lands, the land covered with water, the streams, rivers, lakes, navigable and non-navigable. If there was any question in Ontario it was distinctly settled by the decisions which dealt with the question. Prior to confederation all the rights that are the basis of the questions presented were in the provinces. It is for the Dominion to shew that they have been either taken from the provinces, or that they have been modified in favour of the Dominion, as against the province. I say that the province has, in regard to rivers and streams, large or small, navigable or non-navigable, the right to

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sell, to deal with, to regulate, and, as a matter of course, to legislate in respect of them. Secondly, what is the position of the Dominion as given to it under the same Act? Section 109 says, "all lands, etc., shall belong to the several provinces." The word "lands" means as much land covered by water as land not covered by water; we have therefore, clearly vested in each province all the lands that belonged to it at that date. The absolute control of the province has clearly not been interfered with; and each province has vested in it by virtue of this section all the lands, including the lands covered with water, including the banks of the streams, the banks of the lakes, the coastways, the three-mile limit; everything as possessed in 1866 passed to the provinces in 1867, unlimited, just as it stood, with all the rights that are given by section 109.

To pass from that position which was occupied by Upper and Lower Canada, in the more recent cases, at all events, attention is called to the fact that in the preamble of the legislation that deals with this matter, it is said to be that the provinces are to be federally united. There is a treaty of union, binding them together, but interfering only so far as may be absolutely necessary with property and civil rights in each. *Primâ facie* each province retains all that it has, the only interference being such as may be absolutely necessary in order to benefit the whole of the provinces thus united.

We must conclude that we have all these lands and rights contained in the provinces, except in so far as it may be necessary for the general benefit, by general regulations, for the whole of the community. Unless there is absolute necessity there is no interference with full and entire enjoyment after confederation, the same as prior thereto.

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The only limitation is to be found in the section 109, which makes the vesting, the grant, subject to "any trusts existing in respect thereof and to any interest other than the province in the same." This is very material, because wherever it was proper to curtail what was going to the provinces there in express words we find it; and therefore, it is not by mere surmise, or by mere possibility, that the interest in the provinces is to be cut down. That very exception shows how completely it was intended that the lands, and every right, title and interest in connection therewith, passed to the provinces. The same subject-matter is dealt with by section 117: "The several provinces shall retain all their respective public property." It reiterates section 109. The property is to remain. There may be legislative power in respect to it, but the property itself is to remain. The word "property" covers land beyond a doubt, because of what follows in that same section, "subject to the right of Canada to assume any lands, etc." That clause would not have been inserted if the word "property" was not intended to cover "lands." The property remains in the provinces subject to the limited right of the Dominion to legislate with reference to it, the limit being only so far as the general interests of the whole Dominion may call for it. Our title is strengthened by the words "not otherwise disposed of," for all property is retained in the provinces unless there be some specific disposition of it in the Act; whenever there is to be anything interfered with at all it is put in so many words. If the large reading sought to be placed upon the terms "Militia, Military and Naval service and Defence" and so on, passed the land, there could have been no object in putting the limitation at the end of section 117.

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The Dominion has only a legislative right to take away land from the provinces for specific purposes. This all brings out very clearly the difference between the legislative authority or power and the proprietary or territorial right or power; the one in the provinces, the other to a certain extent in the Dominion. Even the lands needed for fortifications, defence and so forth went to the provinces, subject to the right of the Dominion.

That the provinces were to have the fullest control, subject to the exceptions dealt with, is clear also from section 92, which includes "local works and undertakings." That gives the exclusive right of dealing with property.

The language of the Act which deals with what is given to the Dominion, aids very much in this construction so far as the property given to the provinces is concerned. Section 91 declares the subjects over which the Dominion has exclusive legislative authority; it is not pretended that anything more was given than legislative authority. If it was intended by virtue of the legislative authority in respect to navigation and shipping, to give the sea-coasts, they would have stated in express terms that the three mile limit went to them, but they simply say in respect to the subjects mentioned, that is, for instance, in numbers 5, 7, 9, 10, that exclusive legislative authority is given. This cannot deprive the provinces of their proprietary rights, any more than naming a trustee to look after your estate could be said to give him the whole estate. No language is used strong enough to deprive the provinces of the proprietary rights which they clearly had. The difference is made clear between the legislative power and the proprietary rights, and that is, from what follows, made very distinct. In answer to the argument that if the Dominion has the right to legis-

late as to navigation and shipping it must also have harbours, the coast-lines and all the property that is necessary, everything that may possibly in any shape or form be brought into contact with the subject, we say that where it was found necessary the property has been given in so many words, as for instance in section 108 and the third schedule. In section 91 is a list of subjects for legislative authority and where more than this was considered necessary it is given by the schedule. With the right to pass legislation as to shipping and as to fisheries, nothing more went than the general power of supervising in the interest of all, and all these large rivers and lakes did not go, because it would have been entirely unnecessary to have inserted in the schedule several of these matters if it all went. I will ask your Lordships to contrast section 91 with the third schedule. Compare item no. 10 with the items, 2, 3 and 5 in the schedule. No. 10 says that there is to be authority to legislate as to "Navigation and Shipping." Give all that the Dominion claims, and there is no necessity for item 2 in the schedule, "Public Harbours," nor item 3, "Lighthouses" and "Piers" and "Sable Island." How was it possible to manage the "Navigation and Shipping" without "Lighthouses" and "Piers"? The thing was impossible, but notwithstanding the lighthouses and piers did not go and it was necessary to specifically refer to them in order to take them away from the provinces. This is strengthened by section 108. Then take item 5 of the schedule, "Rivers and Lake Improvements"—if they had all the rivers and lakes and everything else, under the item "Navigation and Shipping," why was it necessary to mention specifically the river and lake improvements? According to the way in which the Act is prepared the fullest legislative authority is given without any

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property rights at all, and where it is intended to derogate from the proprietary rights of the province, it was necessary to do so in specific terms. Again the fullest power did not give the right to deal in any way with the lands, because that is specifically mentioned at the end of section 117:

"Subject to the right of Canada to assume any lands or public property required for fortifications or for the defences of the country."

The heading of the schedule shows that the property went generally to the provinces and it is only by exception that any goes to the Dominion. Therefore the control and management of the lands remained with the province where the lands are situated unless specifically taken from it, except so far as may be necessary for the general purposes of the Dominion, and then only so far as necessary for such purpose. I refer to the *St. Catharines Milling and Lumber Company* v. *The Queen* (1), at page 56, where it is said in reference to the public works and undertakings mentioned in the schedule:

"As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purposes of national defence, and all lands set apart for general public purposes."

There is the idea of the restriction needed and of everything otherwise going to the provinces. On page 57 their Lordships say:

"In connection with this clause it may be observed that by section 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of

(1) 14 App. Cas. 46.

Canada to assume any lands or public property required for fortification."

Then they refer to section 109 on the same page:

"The enactments of section 109 are in the opinion of their Lordships sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which, at the time of the union, were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108 or might assume for the purposes specified in section 117."

Of course that covers the lands covered with water as much as the lands that were not; and the effect of what was said in the giving generally to the provinces, and by exceptions to the Dominion, works out, as the Privy Council held, that result. And, lest there should be any questions upon that point, the court says further on, at page 58 quoting from the Mercer case:

"It was not disputed in the argument for the Dominion at the Bar, that all territorial revenues arising within each province from lands (in which term must be comprehended all estates in land,) were reserved to the provinces."

Then in *Hodge* v. *The Queen*, (1) at page 131:

"Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character, for the good government of taverns, etc., licensed for the sale of liquor by retail, and such as are calculated to preserve in the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade

(1) 9 App. Cas. 117.

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and commerce, which belongs to the Dominion Parliament."

So that you have the right of the Dominion simply to make the general regulations, large supervisory powers, and it is not *ultra vires* of the provinces to have in respect of these matters of licensing or the like the fullest power to deal with their own property.

Then, in *The Citizens' Insurance Company* v. *Parsons* (1), at p. 107 we have these words:

"The scheme of this legislation, as expressed in the first branch of section 91, is to give the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures."

The same rule is laid down in *Russell* v. *The Queen* (2), a case under The Canada Temperance Act.

The question as to the beds of waters, includes all waters of every kind whatsoever. I deny entirely that all harbours, whether there are improvements there or not, go to the Dominion simply because mariners are in the habit of taking refuge there when the water is rough. The land, the land covered with water, the coast-ways, the foreshores and the three mile zone all belong to the provinces, and the only thing that could possibly go to the Dominion was the harbours then belonging to the provinces. I say this notwithstanding *Holman* v. *Green* (3). The provinces did not own the natural harbours; they only had the right in respect to them of making regulations as to shipping and so on, the same rights that we say the Dominion has in regard to them. It is not necessary to have any property in them for the purpose of carrying out all such regulations. If all the beds were taken by the

(1) 7 App. Cas. 96. (2) 7 App. Cas. 829.
(3) 6 Can. S. C. R. 707.

Dominion under the clauses in question, it would have been unnecessary to say, as is said in the first item of the schedule, "Canals with lands and water power connected therewith." The claim of the Dominion is too extensive as to "all waters, etc." And the same way with the fifth item, because the canals are fed with the rivers. The canals went under the head of "canals," and the river improvements feeding them they have under the fifth item. That is one of the arguments that this word "Rivers" is not to be taken alone, but should be read in connection with the word "improvement." The class of subjects dealt with in the schedule is "Public Works" and in such a schedule the principle *noscitur a sociis* might reasonably be said to control. You are dealing with public works, and this refers to improvements in lakes and rivers.

Then it would not be necessary to give the right to inland and sea-coast fisheries if the bed of all the water had gone to the Dominion, because all the water passed, and the fisheries went with the water. But they mentioned inland and sea-coast fisheries which it would have been unnecessary to insert if all the water passed to the Dominion.

In reference to "Public Harbours," so far as Ontario is concerned, the only public harbours that we have to which the clause could refer are mentioned in the schedule "A" to chapter 28 of the Consolidated Statutes of Canada (1859); there are six on Lake Erie and three on Lake Ontario. We argue that it was only the harbours on which public money had been spent, or something otherwise done in order to make them public harbours, that were intended to be thus passed over to the Dominion. A harbour may belong to an individual and still remain open to the public. The harbours passed were only such as were identified

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by the province as such. I maintain that mere user as such for any number of years does not constitute a harbour a "public harbour." I also contend that *Holman* v. *Green* (1) does not extend beyond the circumstances that were found in that case, a harbour belonging to the province upon which money has been expended. It may be argued that there are three classes of public harbours, the public harbours of the province, public harbours of joint stock companies, and public harbours belonging to individuals; but here we are concerned with all "public harbours situate in the territorial limits of the provinces." The question, however, must not be answered generally, but limited to public harbours of the provinces. What passes is qualified by the word "public." We admit that the Governor in Council may proclaim a harbour, and then the rules affecting harbours shall apply, but that is another question. There is the power of originating harbours with the Dominion, but that does not interfere with the soil. The dictionaries define a harbour to be a shelter or recess, a port of haven for ships, natural or artificial, on the coast of the sea, lake, or other body of water where ships may find protection. The ordinary meaning is a place to shelter ships from the sea, where ships are brought to load and unload. I ask your Lordships to make that limitation in regard to the question of public harbours. I maintain that it is a place that has been proclaimed as a public harbour, where goods can be landed, and so forth. As to port, see Hall's "Essay on the Sea-shore" (2), citing Butler's notes to Co. Litt. (3), as follows:

"As to ports, there is a very material and important distinction between the franchise of a port and the property of its soil. As to the franchise, by the com-

(1) 6 Can. S. C. R. 707. (2) 2 ed. pp. 29-30.
(3) 261, a.n. 205.

mon law, a port is the only place where a subject is permitted to unload customable goods. This privilege constitutes what is called the franchise of a port. To create the franchise of a port is part of the royal prerogative. But this does not in any wise affect the property of the soil."

I insist that *Holman* v. *Green* (1) should not be carried beyond that and extended to harbours that were not the property of the province or that never had been opened or declared. The Act refers to the time of confederation. The question must be answered entirely in the negative, that they did not pass to the Dominion and that they were lands of the province and remained so. Otherwise the province could not have waterworks, ice cutting, public baths, lumber driving, boathouses, yacht clubs, dry-docks or anything of that kind. They would not have power to enter the coast lines for the purpose of damming the streams, backing up the water, draining the lands, building aqueducts, erection of breakwaters to prevent encroachments, preservation of boundaries, the cleaning of streams, regulating the shooting of game over the flats, straightening watercourses, increasing land area by means of dredging and pumps. If answered in the affirmative all these would go to the Dominion, and though peculiarly matters for the provinces would be taken away from them.

Now as to the question: "Has the Dominion Parliament power to declare what shall be an interference with navigation"? I say that while the Dominion may have a perfect right to deal with navigation and shipping they have no right to declare what shall be embraced within navigation and shipping. If they have they might introduce into the terms a number of matters that were never intended, and if they are to be supreme in respect to that what is the recourse

(1) 6 Can. S. C. R. 707.

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of the provinces? Therefore it seems material to me to consider their Acts, chapters 92 and 93 in connection with this 16th question. It may be that "Z" represents "Navigation and Shipping," and they have the right to interfere with it; but they may have to declare that "Y" has to do with it; and they may say "We shall have to legislate in respect to Z and Y, because we introduce our legislation "Y" into this legislation, which is fully covered by "Z"; -therefore I say, there should not be permission to the Dominion to declare what is covered and what is not covered. The right of navigation is the right of way simply, and this statute goes beyond what is laid down in *The Citizens' Insurance Company* v. *Parsons* (1), and the other case to which I have referred.

It seems to me also that following the whole argument, "Fisheries" must mean, not the minor question of individual fishing, but must embrace generally the fishing industry of the country; it is simply the large matter which is given as the common fishery, the right of fishing in the sea and public waters, open to all the public, where the Dominion are given the right of making regulations, but no right whatever beyond that. Smaller matters, the matter of the individual fishing in our thousand of streams and lakes, has been entirely eliminated from the Dominion jurisdiction; they are not concerned with the rivulets, but what concerns the management of the whole of this national concern. No better exposition can be given than by the late Chief Justice Ritchie, in *The Queen* v. *Robertson* (2):

"I am of opinion that the legislation in regard to inland and sea fisheries contemplated by the British North America Act was not in reference to 'property and civil rights'—that is to say, not as to ownership

(1) 7 App. Cas. 96. (2) 6 Can. S. C. R. 120.

of the beds of the rivers, or of the "fisheries," or of the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public."

We exclusively have the right to license, to deal with our property, to say who shall and who shall not take it and the quantities in which they may take it, with the one exception of those general laws which may be passed, stating, that with certain engines, they shall not be taken and the like. Just for the reasons in *The Queen* v. *Robertson* (1) the legislature of Ontario had jurisdiction to enact the 47th section of chapter 24, Revised Statutes of Ontario. And as to the providing of fishways, dams, slides and other constructions, it follows from *The Queen* v. *Robertson* (1), that we have the right to do that in the streams. It may be that should the Dominion regulations go farther than those of the province they may then constitute the law of the land in regard to extra protection; but as it stands we have always had regulations as to fishways, aprons, the running up of fish and so forth without interference, all that is necessary as dealing with a class of matters not within the Dominion powers, such as our little streams, and trout fishing and the like. Question 17 must be answered that the riparian owners have the exclusive right of fishing in navigable non-tidal waters the beds of which are granted to them.

*Casgrain*, Attorney General, for the Province of Quebec.

I take it that the fundamental principles on which the questions have to be answered have been laid down to the fullest extent by the learned counsel who have preceded me, but I wish to present a few con-

(1) 6 Can. S. C. R. 52.

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siderations upon the particular position of the province of Quebec on account of the peculiar jurisprudence, which is given to the province by the Civil Code and French law. There as in other parts of Canada rivers are classed as navigable and non-navigable, but it is not the Common Law, as distinguished from the Civil Law, which regulates the proprietorship of these rivers. Under the Civil Law, all rivers which are *de facto* navigable belong to the public domain, whilst rivers which are not navigable or floatable belong to the riparian proprietors *ad medium filum aquæ*. These principles are mentioned in *Bell* v. *The Corporation of Quebec* (1); 2 Daviel (2). Rivers *de facto* navigable belong to the Crown domain, and the beds are in the Crown but in the case of non-floatable and non-navigable rivers to the riparian proprietors. C. C. arts. 399 to 405. These articles are under the title of "Property in its relations with those to whom it belongs or who possess it."

As to the right to fish, art. 587 C. C. provides that it is governed by particular laws of public policy, subject to legally acquired rights of individuals. Where the Seigniorial tenure prevailed the King had the ownership of all waters, so long as the lands bordering upon them had not been conceded to the Seignior, who might grant it to the *censitaire*. But the King had the exclusive right of fishing in all public waters and could grant rights of fishing, and it is thus that all along the River St. Lawrence, almost from the city of Montreal to the gulf, rights of fishing have been given and water-lots conceded. Loiseau (3); Proudhon (4); 9 Pothier (5).

(1) 5 App. Cas. 84.
(2) *Des cours d'eau*, secs. 530, 540.
(3) *Traité des Seigneurs*, ch. 12.
(4) *Du domaine de propriété*, 274, no. 888.
(5) Ed. Bugnet, nos. 50 to 54.

The Civil Code clearly means in speaking of "public domain" or "Crown domain" the Crown as represented by the province of Quebec, the sovereign power vested beneficially in and represented by the province of Quebec. If there be any doubt it seems to me that the Seigniorial Tenure Act in 1854 settled it. The Seigniorial Court determined that the reserve made in certain seigniories by the seigneurs of the right of the rivers was illegal. Therefore the *censitaires* had the right of fishing in non-navigable rivers.

If your Lordships will refer to section 39 of this Act you will find this provision:

"So much of the constituted *lods et ventes* and other casual rights as will not be appropriated out of the fund appropriated for the relief of the *censitaires* by sections 36 and 37 shall be assumed by the province and paid by the Receiver General, out of the consolidated revenue fund, to the *Seigneurs* or parties respectively entitled to such rent half yearly on the 1st January and 1st of July, and the *censitaires* shall be discharged from the payment thereof."

In the rights abolished by the Act were rights which belonged to the Crown as *Seigneur dominant*, for instance, *le droit de Quint*, sections 7 and 11. Then referring to sections 87 and 88 your Lordships will find that the Eastern Townships of the province of Quebec were compensated for this expenditure resulting from the purchase of these rights; so that, I take it, the province of Quebec purchased all the rights which belonged to the Crown from the Seigniors and paid for them out of its own funds; therefore, I think, so far as concerns the province of Quebec, there can be no doubt whatever that it represents the Crown *quoad* all the rights in the land, in the waters and in the fisheries which existed in the Crown at the time. So that, applying what has been

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said in relation to sections 109, 117 and the 13th enumeration of section 92 of the British North America Act, when the British North America Act was passed, there cannot be the least doubt, so far as the province of Quebec is concerned, that these lands, with all the incidents and accessories to lands, remained in the province of Quebec, or in the Crown for the benefit of that province. I think that the argument that the provinces have been deprived of these proprietary rights has been fully disposed of by the learned counsel who have preceded me.

As to questions 2 and 17, taken together, respecting the jurisdiction of the Dominion to pass R. S. C. ch. 92, "An Act respecting certain works constructed in or over navigable waters," I simply quote the Civil Code, art. 414:

"Ownership of the soil carries with it ownership of what is above and below it. The proprietor may make upon the soil any buildings or plantations he thinks proper saving the exceptions established in the title of 'Real Servitudes.'"

Then art. 407 C. C. declares that no one can be compelled to give up his property, except for public utility, and in consideration of a just indemnity previously paid. These articles of the Civil Code confer upon the owner of a beach lot the right to build wharves; and it would not be in the power of the Dominion Parliament to say, before any judicial decision has been arrived at on the question, that they had the right to prevent him building on the lot, thereby taking away one of the elements of ownership, without expropriation and payment of the indemnity proved by the Code; they cannot legislate away the proprietary right held under the Civil Law.

The province of Quebec answers all the other questions, except 14, with the same answers as have been

given by the province of Ontario and the other provinces.

As to question 14, affecting the jurisdiction of Quebec to pass sections 1375 to 1378, inclusively, of the Revised Statutes of Quebec, or any of them or any parts thereof, the Dominion concedes the right to pass the provisions of section 1375, respecting the right of a reserve in grants of provincial lands, of three chains around rivers and lakes for fishing purposes. But as all these provisions are shown, by their intitulation, to regulate only such rights of fishing as existed in "non-navigable rivers and lakes," the province has the right to pass the whole statute. It does not come in conflict with, nor is it repugnant to, Dominion legislation. The case of *The Queen* v. *Robertson* (1) covers every article in this section of the statute. In the province of Quebec I consider that it is immaterial as to fishing rights and the ownership of the beds of lakes whether they be navigable or not, for as the seignior succeeded the king as the *seigneur dominant*, then he has dominion over and ownership of the lakes, whether they are navigable or non-navigable. I do not think there are any lakes in France which should be treated as our lakes are treated in this country. Our Act applies to all lakes whether they are navigable or not. The Quebec law from its history shews on our behalf a case stronger in this respect than that of any other of the provinces. Our rights cannot be infringed upon by a construction placed upon the British North America Act, which suits all the other provinces. The title derived under the Act does not change the tenure of lands in Quebec, so as to make it according to title and tenure of lands in other provinces. I cannot conceive

(1) 6 Can. S. C. R. 52.

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that the British North America Act could take away any of the rights which existed in the province of Quebec, and I maintain that it does not take them away.

*Irving* Q.C. and *Clarke*, for the province of British Columbia. We desire, on the authority of Lord Watson, to point out to your Lordships, that similarly to the province of Quebec, the law in British Columbia was also in some respects different in reference to the ownership of the beds of lakes, rivers and other waters, in this sense; by the Act there called "The English Law Ordinance Act of 1867," the words are expressly inserted "so far as the same are not from local circumstances inapplicable." That is, the law of England was adopted in British Columbia so far as not inapplicable, by the express words of the Act. Lord Watson's comment will be found in the case of *The Attorney General of British Columbia* v. *The Attorney General of Canada* (1). That is the Precious Metals case. Therefore in the case of British Columbia the question is not embarrassed with the difficulties which are contended with in the judgments which have been discussed in the Upper Canada authorities. The Dominion base their claim to the beds, not upon any grant of "lands" in the British North America Act, but upon what they allege as the *jus regium* in the foreshores, in the beds of navigable waters and in other respects, and they say that by virtue of the grant of legislative powers to the Dominion that *jus regium* was vested in the Dominion. I submit that any such regal rights as the Dominion claims would exist in the beds were clearly, as it is expressed, *jura regalia*, and that they passed to the provinces under the word "royalties" in the 10th section of the British North America Act. That word "royalties" is associated, of course, with

(1) 14 App. Cas. 295.

the words "lands, mines and minerals"; and not only is the word "situate" used in section 109 in regard to these words, but also the word "arise," so that there is the fullest grant possible of *jura regalia*, of all royalties to each province by that section. In *Attorney General* v. *Mercer* (1), the whole question of the construction and effect of the word "royalties" is fully discussed by Lord Selborne at page 778. Your Lordships will find there a number of definitions which are very material. As to one of the references, *Dyke* v. *Walford* (2), Lord Selborne refers to the part at pages 480-481, and approves of the statement of the law there, which is that the foreshore is expressly included as a *jus regale*; he held therefore that the foreshore passed by virtue of section 109 to the province. Therefore I submit that in the case of the foreshore which the Dominion claims by virtue of the *jus regium*, the Privy Council have expressly stated that it is among the "royalties" which passed to the provinces. The reasoning of Lord Watson, in *Attorney General of British Columbia* v. *The Attorney General of Canada* (3), commencing at page 299, clearly goes the length of showing that the matters now claimed were, if not land, at any rate "royalties" under section 109, which went to the provinces. The contention of the province is further borne out by the definition of "Regalia" under the word in Sweet's Law Dictionary. In *The Lord Advocate* v. *Hamilton* (4), the law on this subject is stated to be the same in England as in Scotland. The question is referred to in *Den* v. *The Jersey Company* (5), a case as to beds of navigable waters. Chief Justice Taney states that the soil under public and navigable rivers are part of *jura regalia*. See also Gould on Waters (6),

(1) 8 App. Cas. 767.
(2) 5 Moo. P. C. 434.
(3) 14 App. Cas. 295.
(4) 1 Macq. H. L. 46.
(5) 15 How. 426.
(6) 2 ed. s. 17.

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and Broom & Hadley Commentaries on the Laws of England (1), "Prerogative." These authorities show that not only the foreshores but these other matters, in so far as they are not covered by the word "land," are expressly covered by the word "royalties." The extension of that opinion is found in *Sutherland* v. *Watson* (2); *Gammell* v. *Commissioners of Woods & Forests* (3); see the statements of Lord Chancellor Chelmsford, p. 457, and of Lord Cranworth at p. 465. These rights cannot in any event be held to have gone to the Dominion by virtue of their jurisdiction over "navigation." Those cases discuss fully the question of the private right, *jus privatum* in navigable waters, the foreshore and so on, and what is the *jus publicum*, subject to which any private grantee can take the *jus privatum*. That is the position of the matter as well after the union as before. The question is discussed in Coulson & Forbes on Waters (4), and in Moore on the Foreshore and the Seashore (5), and in Hall's Essay, before referred to, on the Rights of the Crown in the Sea-shore (6), particularly in the note to page 712. In many cases these rights were granted in England by the Crown and held by private individuals, subject, of course, to the public right of navigation and so on, which was held to be inalienable. The construction to be given to the British North America Act must be that which would occasion least possible interference with the private rights of individuals, and the provincial rights are within the same protection. The cases affecting the interpretation of this section 108 are referred to in *The Western Counties Railway Company* v. *The Windsor and Annapolis Railway Company* (7); Lord Watson's judgment at pages

(1) Vol. 1, pp. 314-315.
(2) 6 Court of Sessions cases, 3 ser. 212-213.
(3) 13 Court of Sessions cases, 2 ser. 854; 3 Macq. H. L. 419.
(4) P. 33.
(5) 3 ed. pp. 638, 654.
(6) P. 667 *et seq.*
(7) 7 App. Cas. 178.

188, 189. I refer your Lordships also to Hardcastle on Statutes (1), and to what Lord Westbury has said in *Walsh* v. *The Secretary of State for India* (2), at page 386.

*Robinson* Q.C., in reply.—There may be difficulty in stating what may be a public harbour, and what might be the limits of such a harbour. I do not see that the questions here can require the court to decide what is a public harbour. Your Lordships are only asked in whom public harbours are vested and when that is answered the respective governments have to determine for themselves what is a public harbour. In *Holman* v. *Green* (3), Strong J. said:

"I can, however, conceive no other meaning to be attached to the words 'Public Harbours' standing alone, than that of harbours which the public have a right to use."

It does not seem to me that there is much difficulty in getting at what is meant by "Public Harbour" in a general sense. I think any place so sheltered by surroundings as to form a place of shelter, where the public have a right to go, which is part of the public land of the province, forms a public harbour. This question is confined to lands ungranted before confederation; therefore in such lands any part of those navigable waters which form a harbour is a public harbour. The question is about the beds. In the case decided by Thompson J., *Fader* v. *Smith* (4), he held a sort of inlet, a place called St. Margaret's Bay, a public harbour, because ships went and lay there.

The Dominion is given lake improvements. I should say dredging was a lake improvement; dredging channels and so forth. A breakwater might also be an improvement; we can do nothing now but conjecture, it

(1) 2 ed. p. 134.
(2) 10 H. L. Cas. 367.
(3) 6 Can. S. C. R. 707.
(4) 6 R. & G. (N.S.) 433.

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is impossible to say how much is meant, we can only determine it in each case as it comes up. Harbours and rivers may all have improvements, but these items are mentioned simply as "Harbours" and "Rivers" which would include the improvements as well, and then they gave us "Lake Improvements" as another property. The subject of navigation was so intimately connected with harbours that they gave the Dominion the "Harbours"; and in the same way as well as for fishing, spawning and so on, they gave them the "Rivers." These matters are of practical importance when you come to work them out. Must we be prevented building a pier or some sort of harbour protection by having the province come to us and say, "That is our property, you must expropriate the bed before you can construct your improvements"?

Then in regard to fisheries, they may have the right to legislate in aid of our regulations, but if we required a fishway to be built and imposed a penalty for not building it, and if the province followed our example and imposed another penalty for not building it, the province is going beyond its powers. No one could be proceeded against for this same thing by both the Dominion and the province. Suppose their legislation in aid of ours was as to the kind of fishway, I am certain no one could be punished by the penalty imposed by the Dominion and the province as well. The penalty of the province would be *ultra vires*, because they have nothing to do with the subject matter. It is argued that the legislature never intended to take away property by using the word "Fisheries." I submit that it is not taking away rights because you confine it to one legislature instead of another. We claim no property in fisheries, we never did claim it, but we claim we have legislative power to deal with it just as we like, just as the province can take away

property. In case it became necessary for the prevention of the extermination of fish, for their protection in some cases, I should say that the Dominion has the power to prevent a person taking fish even upon his own land.

The case of "Navigation and Shipping" forms a fair instance of the argument we advance. In *Steadman* v. *Robertson* (1), Fisher J. says:

"If the authority to legislate upon sea-coast and inland fisheries empowered the Parliament to interfere with private rights, and deal with the property in the fish, upon the same principle, by the authority to legislate upon 'Navigation and Shipping,' it would be enabled to the same extent to deal with the property in the ships of ship-owner." My only answer to that is, that it is so enabled. "The right in the ship is no higher or more sacred to the ship-owner than the right in the fish to the riparian proprietor." "Shipping" being given to the Dominion, they can take a ship from A. and give it to B. They have dealt with it as a separate subject, and they can legislate how they can be loaded, and as to everything else.

As to those items 13, 14 and 15, under which the provinces claim the right of concurrent jurisdiction, and claim their right to regulate fisheries as local and private matters, we say it is impossible; nothing can be of a local and private nature which comes within any of the subjects entrusted to Parliament by section 91.

THE CHIEF JUSTICE.—By an order of His Excellency the Governor General in Council bearing date the 23rd day of February, 1894, certain questions, being those hereafter numbered from one to fifteen, were referred to this court for hearing and consideration; and by a subsequent order in council dated the 23rd day

(1) 2 P. & B. 595.

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of February, 1895, two additional questions, being those hereafter numbered sixteen and seventeen, were also so referred.

On the ninth and tenth days of October, 1895, counsel appeared and were heard for the Dominion and for the provinces of Ontario, Quebec, Nova Scotia and British Columbia respectively; the remaining provinces, upon whom notice of hearing had been duly served, did not appear by counsel; a factum was, however, submitted on behalf of the province of New Brunswick.

I now proceed to state my opinion in answer to the case so referred.

*Question* 1.—Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate? And is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

*Answer.*—At the time of confederation the beds of all lakes, rivers, public harbours and other waters within the territorial limits of the several provinces which had not been granted by the Crown were vested in the Crown as representing the provinces respectively, and there was no distinction in this respect between any of the waters specifically mentioned in the first question propounded by the order in council. The un-

granted beds of all such streams and waters were therefore lands belonging to the several provinces in which the same were situated, and under section 109 of the British North America Act became upon confederation vested in the Crown in right of the several provinces, subject only to the exception respecting existing trusts and interests mentioned in that section, and excepting the beds of public harbours, which, by the operation of section 108, were vested in the Dominion. What harbours are to be deemed "public harbours" within the meaning of those words in the third schedule to the Act has been already determined in the case of *Holman* v. *Green* (1), a decision which is binding on this court.

*Question* 2.—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chapter 92, intituled "An Act respecting certain works constructed in or over navigable rivers," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

*Answer.*—By section 91 of the British North America Act, enumeration 10, exclusive authority is conferred on the Parliament of Canada to legislate respecting "navigation and shipping." In the case of *The Queddy River Boom Company* v. *Davidson* (2), this court determined that a provincial legislature had no authority to legalize an obstruction to navigation, for the reason that the exclusive right so to legislate was under section 91 vested in the Parliament of the Dominion. This case is an authority binding on the court. The Act, chapter 92 Revised Statutes (Canada), does not, as it appears to me, in any respect exceed the powers of Parliament. It makes provisions for the conservancy of the navigation which were reasonable and proper, and within the competence of Parliament. I am therefore of opinion that this question must be answered in the affirmative as to the whole of the Act in question.

(1) 6 Can. S. C. R. 707. (2) 10 Can. S. C. R. 222.

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*Question* 3.—If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

*Answer.*—This question as propounded is contingent on a negative answer being given to question number 2, and it might therefore be passed over. I may, however, say that in the case of a provincial grant such as the question supposes the grantee would have a right to build upon the land so granted, subject only to his compliance with the requirements of the statute referred to in the preceding question, and to his obtaining an order in council authorizing the same, and provided the work did not interfere with the navigation of the lake or river. In such a case the land granted would be the private property of the grantee, which, on ordinary principles of the law of property, he is at liberty to use as he thinks fit, provided he does not thereby prejudice any right of the public, and that he has complied with all statutory requirements.

*Question* 4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in the preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

*Answer.*—As already stated, it has been determined in the case of *Holman* v. *Green* (1) that the beds of public harbours are by section 108 of the British North America Act, and the third schedule, vested in the Crown in the right of the Dominion. A province cannot therefore grant any portion of the bed of such a harbour.

(1) 6 Can. S. C. R. 707.

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*Question* 5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

*Answer.*—According to the common law of England, which applies in all the provinces constituting the Dominion except the province of Quebec, riparian proprietors undoubtedly have an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. This is a proprietary right, the fishery in such a case being denominated a territorial fishery; in other words, it is an incident of the property in the soil. The case of *The Queen* v. *Robertson* (1), was virtually a decision to this effect, though the precise question there in controversy related to the right of fishing in non-navigable waters the beds of which had not been granted by, but still remained vested in, the Crown in right of the province. It was there held, upon authorities which equally apply to the case of private proprietors of the beds of non-navigable streams and waters, that the provinces could confer an exclusive right of fishing upon their licensees. I extract a portion of my judgment in the case to which I adhere in every respect:

It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement, but is strictly a right of property. To sustain these propositions of law authorities without number might be cited; it is sufficient for the present purpose to refer to two or three of the most weighty and apposite. Sir Matthew Hale says in the Treatise *de jure maris:* "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent, so that the owners of one side have of common right the property of the soil, and consequently the right of fishing *usque filum aquæ*, and the owners on the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of

(1) 6 Can. S. C. R. 52.

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both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length; with this agrees common experience."

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To the authority on this head already quoted may be added that of Lord O'Hagan, lately Lord Chancellor of Ireland, who when a judge of the Irish Court of Common Pleas, in giving judgment in the case of *Murphy* v. *Ryan*, already referred to, thus distinctly affirms the doctrine of Sir Matthew Hale; he says:

"According to the well established principles of the common law the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle, constituting the legal boundary, and being so possessed have an exclusive right to the fishery in the water which flows along their respective territories."

From a treatise on the law of waters lately published by Messrs. Coulson & Forbes, I extract the following passage:

"In all rivers and streams above the flow and re-flow of the tide, whether such rivers are navigable or not, the proprietors of the lands abutting on the streams are *primâ facie* the owners of the soil of the *alveus* or channel *ad medium filum aquæ*, and as such have *primâ facie* the right of fishing in front of their own lands. This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not, strictly speaking, a riparian right arising from the right of access to the water, but is a profit of the land over which the water flows, and as such may be transferred or appropriated, either with or without the property in the bed or banks, to another person, whether he has land or not on the borders of or adjacent to the stream."

The passage just quoted states what I consider to be the proper legal conclusion from the decided cases. The cases of *Marshall* v. *Ulleswater Co.* (1) and *Bristow* v. *Cormican* (2), are authorities to this effect.

As regards the province of Quebec, the law in that province depends on the old law of France which is thus stated by Pothier (3):

A l'égard des rivières non navigables, elles appartiennent aux différents particuliers qui sont fondés en titre ou en possession pour s'en

(1) 7 B. & S. 232.
(2) 3 App. Cas. 641.
(3) Traité du droit de propriété vol. 9, ed. Bugnet no. 53; see Civil Code of Quebec, Art 567.

dire propriétaires dans l'étendue portée par leurs titres ou leur possession. Celles qui n'appartiennent point à des particuliers propriétaires appartiennent aux seigneurs hauts justiciers dans le territoire desquels elles coulent. Loiseau, Traité des Seigneurs, chap. 12 no. 120. Il n'est pas permis de pêcher dans les dites rivières sans le consentement de celui à qui elles appartiennent.

*Question* 6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

*Answer.*—Certainly not, for the reason that the right of fishing in such non-navigable waters belongs exclusively to the owners of the beds of such waters and because the Dominion Parliament has no power to interfere by legislation with this right, notwithstanding the grant by section 91 of the British North America Act, subsection 12, of the right to legislate as regards sea-coast and inland fisheries. The exclusive power to legislate as regards "property" in a province is by section 92, subsection 13, conferred on the provincial legislatures, and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations. As this has already been decided by the case of *The Queen* v. *Robertson* (1), which is binding upon me, I consider the decision in that case as settling the existing law. In stating my opinion in answer to the questions propounded by the order in council, I conceive it to be my duty to state the law to be as I find it judicially established in cases which would be binding on this court in the exercise of its ordinary jurisdiction in contentious cases. Therefore, even if I had any reason for differing from the principles laid down in *The Queen* v. *Robertson* (1), which however I have not, I should still consider myself bound to follow the authority of that case.

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*Question* 7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

*Answer.*—No, for the reasons already given in the answers to preceding questions.

*Question* 8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

*Answer.*—As regards non-navigable waters this question has been already answered. As regards navigable waters such as the great lakes and large navigable rivers within the boundaries of a province, the beds of which have not been granted but remain in the Crown in right of the province, I am of opinion that the right of fishing is public, and that such public right of fishing is not restricted to waters within the ebb and flow of the tide. So to confine the public common right of fishing is no doubt the rule of the common law as applied in England and Ireland, but this rule does not appear to me to apply to the great lakes of Canada, such as Lakes Superior, Huron, Erie, Ontario and Winnipeg. Nor do I think the rule in question applies even to such rivers as are specifically mentioned in the first question propounded to us, or other non-tidal rivers which are *de facto* navigable. It appears from several cases decided in the courts of the province of Ontario that such lakes and rivers are to be considered navigable waters and that the rule of the English law as to navigable tidal waters applies to them. I refer particularly to the cases of *Parker* v. *Elliott* (1); *The Queen* v. *Meyers* (2); *The Queen* v. *Albert Sharp* (3); *Gage* v. *Bates* (4); *Dixson* v. *Snetsinger* (5).

(1) 1 U. C. C. P. 470.
(2) 3 U. C. C. P. 305.
(3) 5 Ont. P. R. 140.
(4) 23 U. C. C. P. 116.
(5) 23 U. C. C. P. 235.

It is true that the right of fishing was not in question in any of these cases, the point in controversy in each of them having been the right of the riparian owner claiming under a grant from the Crown to the property in the bed of the river or lake opposite their land frontage. It follows, however, from the reasoning of the courts that such navigable waters were to be likened in all respects to rivers which, according to the common law, came within the definition of navigable rivers.

Where, however, the Crown in right of the provinces has granted any part of the bed of such navigable rivers, the right of fishing is in such cases, as an incident of property, vested in the grantee. In the case of non-navigable waters riparian proprietors on one side whose grants are bounded by the stream are entitled to the property in the bed of the river to its middle thread. This rule, however, is not applicable to the great lakes of Canada, and to rivers which are *de facto* navigable, for the reasons given in the Ontario cases before cited. Indeed, as regards lakes, Lord Blackburn doubted the applicability of this rule to a comparatively small Irish lake such as Lough Neagh, for in the case of *Bristow* v. *Cormican* (1), he says:

> Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aquæ* should apply to a lake is a different question. It does not seem convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough, many miles in length, tacked on to his frontage.

In answering this question I have, in order to clearness, gone beyond what it was strictly necessary to state in response to the inquiry made of us, for it would have sufficed to say that the Dominion Parliament has

(1) 3 App. Cas. 641.

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no jurisdiction to enact laws conferring on the lessees or licensees of the Dominion a right of fishing in any waters, whether navigable or non-navigable, "the beds and banks of which are assigned to the provinces respectively under the British North America Act."

*Question* 9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also?

*Answer.*—It has been already shown that the Dominion Parliament has not "such jurisdiction as is mentioned in the preceding three questions;" no further answer to this question is therefore required.

*Question* 10.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

*Answer.*—In the case of non-tidal waters which are in fact non-navigable, whether the title to the bed of the stream remains in the Crown, or has become vested in its grantees, the answers to the preceding questions have already stated what I consider to be the law, which is, as laid down in *The Queen* v. *Robertson* (1), that in the case of such waters the Dominion Parliament cannot authorize the minister to confer upon licensees and lessees exclusive rights of fishing. The case referred to does not, however, directly apply to navigable waters the beds of which have not been granted by the province. In such waters, although above the ebb and flow of the tide, where the title to the bed of the river remains vested in the Crown, it has already been stated that of common right the public are entitled to fish. The case of *The Queen* v. *Robertson* (1) does not touch the ques-

(1) 6 Can. S. C. R. 52.

tion as to the right of the Parliament of the Dominion so to legislate as to confer exclusive rights of fishing in such waters. In the judgment I there delivered I expressly distinguish this point as one not dealt with by the decision in that case. It is true, however, that although *The Queen* v. *Robertson* (1) called for no expression of opinion on this point, I did in my judgment allude to it in considering the meaning of the words "inland fisheries" in section 91 of the British North America Act. In that judgment, at page 134 of the report, occurs the following passage:

I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression "inland fisheries" conferred upon Parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word "property," can only be interfered with by the provincial legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea-coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding; prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner, or with forbidden engines; and in many other ways providing for what may be called the police of the fisheries. Again, under this provision Parliament may enact laws for regulating and restricting the right of fishing in the waters belonging to the Dominion, such as public harbours, the beds of which have been lately determined by this court to be vested in the Crown in right of the Dominion, and also for regulating the public inland fisheries of the Dominion, such as those of the great lakes and possibly also those of navigable non-tidal rivers.

And from the same judgment I make the following extract as showing that it was not intended to deal with the question now under consideration. It is there said:

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There are of course fisheries of a very different character from those in non-navigable waters to be found within the limits of all the provinces—public fisheries, such as those in tidal rivers and in the great lakes of the western provinces. A question may arise whether the provisions contained in section 91 authorize Parliament to empower the Crown to grant exclusive rights in respect of such fisheries. Upon this point it would not be proper now to express any opinion since none has been raised for adjudication. The same may also be said of an important question which may hereafter be presented for decision as to the right to legislate so as to authorize exclusive rights in respect of fisheries in what have been called by Chancellor Kent the "great rivers," meaning large navigable non-tidal rivers, a question the solution of which must depend on whether the beds of such rivers are vested in the Crown in right of the Dominion, not as part of its domain, but as trustees for the public, or in the owners of the adjacent lands, inasmuch as the right of fishing would in the first case be in the public as of common right, but in the second vested in the riparian proprietors.

These are questions the discussion of which would not be appropriate in the present case, and I refer to them only to point out that what I have said as to the rivers of the class to which the portion of the Miramichi now in question belongs, has no reference either to navigable fresh water rivers or to the great lakes.

In the judgment delivered in *The Queen* v. *Robertson* (1) by the late Chief Justice, the words "inland fisheries" in section 91 were held to authorize legislation respecting regulation and protection of the fisheries, not legislation which would derogate from rights of property either of the provinces or of private persons in respect of the right of fishing beyond what might be necessary for the regulation and preservation of the fisheries. My brother Fournier also interprets these words in the same way; the portion of his judgment which bears on this question is contained in the following passage:

La section 91, sous-section 12 de l'Acte de l'Amérique Britannique du Nord, en donnant au gouvernement fédéral le pouvoir de légiférer sur les pêcheries, ne lui en attribue pas le droit de propriété. Il ne les enlève pas des propriétaires ou possesseurs d'alors pour se les

(1) 6 Can. S. C. R. 52.

approprier. Ce n'est pas ainsi non plus que cette section a été interprétée par l'acte 31 Vic. ch. 60, passé très peu de temps après l'acte de Confédération. La section 2 déclare expressément que le " Ministre de la Marine et des Pêcheries pourra, lorsque le droit exclusif de pêcher n'existe pas déjà en vertu de la loi, émettre ou autoriser l'émission de baux ou licences de pêche pour pêcher en tout endroit où se fait la pêche." Comme on le voit les droits de tous ceux qui avaient un intérêt ou une propriété dans les pêcheries sont respectés. Sous le rapport du droit de propriété l'acte fédéral, ni l'acte des pêcheries n'ont fait de changement à l'état de choses existant avant la Confédération. La propriété est demeurée où elle était auparavant. Il n'y a donc sous ce rapport, aucun empiétement de la part du pouvoir fédéral. Si l'action du département de la Marine n'a pas été conforme à ce principe, comme dans le cas actuel, cette action est nulle. Tout en respectant le droit de pêche comme propriété, le gouvernement fédéral ne peut-il pas y exercer, dans l'intérêt général de la Puissance, un droit de surveillance et de protection? Je crois que oui, et que c'est là précisément le but des pouvoirs législatifs qui lui ont été conférés à ce sujet. Il n'y a, suivant moi, aucune incompatibilité entre l'exercice de ce pouvoir avec l'exercice du droit de pêche, comme droit de propriété en d'autres mains que ceux du gouvernement. Le gouvernement fédéral peut, suivant moi, dire au propriétaire : " Vous ne pêcherez qu'en certaines saisons et qu'avec certains instruments ou engins de pêche autorisés." Cette restriction n'est pas une atteinte mais bien plutôt une restriction accordée à ce genre de propriété. C'est une réglementation, je dirai, de police et de contrôle sur un genre de propriété qu'il est important de développer et de conserver pour l'avantage général. On sait ce que deviendrait en peu de temps les pêcheries, s'il était libre aux particuliers de les exploiter comme bon leur semblerait. En peu d'années leur aveugle avidité aurait bientôt ruiné ces sources de richesses et nos pêcheries, au lieu de revenir aussi riches et aussi fécondes qu'autrefois, retourneraient bientôt à l'état de dépéri-sement, sinon de ruine, où elles étaient avant d'avoir été l'objet d'une législation protectrice. Ce pouvoir de réglementation, de surveillance et de protection a été, avant la Confédération, exercé par chaque province dans l'intérêt public. C'est le même pouvoir qu'exerce aujourd'hui le gouvernement fédéral. Pas plus que les provinces ne l'ont fait, il n'a le pouvoir de toucher au droit de propriété dans les pêcheries, son pouvoir se borne à en régler l'exercice.

Mr. Justice Henry also agrees in the construction placed by the Chief Justice and other judges on the British North America Act; he says:

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In fact, in my opinion, the power under the Act is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient.

Although *The Queen* v. *Robertson* (1), did not directly deal with this question as to the right of the Dominion Parliament to confer exclusive rights of fishing in lakes and navigable rivers above tide-water, yet it is a necessary inference from the construction placed on subsection 12 of section 91, by which the power of legislation is restricted to the regulation of the fisheries, that no power to control fishing rights, so far as they were vested in the provinces or their grantees, was intended to be thereby conferred. That the right of fishing in lakes and non-tidal navigable rivers in which the title to the bed is vested in the provinces or private owners is an incident of such ownership of the soil in the bed of the rivers is, in my opinion, a consequence to be deduced from the Upper Canada cases already referred to and is also a just inference from the cases of the *Mayor of Carlisle* v. *Graham* (2) and *Murphy* v. *Ryan* (3), the latter cases attributing the public right of fishing in tidal rivers to the ownership of the beds by the Crown. In the case of *The Queen* v. *Burrow* (4), which concerned the public right to fish in Ullswater, an English lake, Cockburn C. J. says:

> If it had been clearly settled that the public could not have any right to fish in a navigable river above the ebb and flow of the tide it might be different, but I for one am not prepared to assent to that proposition without further argument.

In *Bristow* v. *Cormican* (5), the House of Lords held that the Crown has no *primâ facie* right to the soil or fishery of non-tidal waters. The right of the public to fish in such waters was not *sub judicê*. This case is, however, by no means conclusive of the present ques-

(1) 6 Can. S. C. R. 52.
(2) L.R. 4 Ex. 361.
(3) Ir. Rep. 2 C.L. 143.
(4) 34 J. P. 53.
(5) 3 App. Cas. 641; see Coulson & Forbes p. 347.

tion. Assuming that the Upper Canada cases before cited of *Parker* v. *Elliott* (1); *The Queen* v. *Meyers* (2); *The Queen* v. *Sharp* (3) and *Dixson* v. *Snetsinger* (4); were well decided, as I hold they were, the soil of all non-tidal navigable rivers, so far as it has not been expressly granted by the Crown, was, at the date of confederation, vested in the provinces, and was reserved to them by section 109 of the Confederation Act. Therefore, if the right of fishing is an adjunct of the property in the soil, the public, through its trustee the Crown, must be held to be entitled to the enjoyment of this right in so far as the beds of the rivers and lakes had not been expressly granted. That the Crown in right of the provinces could grant either the beds of such non-tidal navigable waters or an exclusive right of fishing is, I think, clear. Before Magna Charta the Crown could grant to a private individual the soil in tidal waters with the fishery as an incident to it, or the exclusive right of fishing alone as distinct from the soil. Then, as the restraint imposed by Magna Charta does not apply to any but tidal waters, there is no reason why the prerogative of the Crown to make such grants in the class of waters now under consideration, large navigable lakes and non-tidal navigable rivers, should not be exercised now as freely as it could have been with reference to tidal waters before Magna Charta The Upper Canada cases do not, it is true, involve any decision as to fishing rights, but are confined to the determination of the question as to the title to the soil in the beds of navigable non-tidal rivers, but it follows that if the right of fishing is an incident of the right of property in the bed of the stream, these cases are conclusive authorities, shewing that the right of fishing in such waters is in

(1) 1 U. C. C. P. 470.
(2) 3 U. C. C. P. 305.
(3) Ont. P. R. 140.
(4) 23 U. C. C. P. 235.

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the public subject to the right of the provinces to grant, either separately from, or as incidental to, the title to the soil, exclusive rights to individual grantees. A strong argument in favour of this view of the law is to be found in the invariable practice, which has prevailed in Canada from the earliest times since the settlement of the country, to treat the right of fishing in navigable waters above the flow of the tide as public, and in the injustice and impolicy of a contrary rule and the hardship and inconvenience which would result therefrom to the pioneers of settlement in a new country, who have to some extent to rely on the products of the forests and streams for their food supply. It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists. I cannot bring myself to think, this being the condition upon which the law of England applies in settled colonies, that we are required, in the case of ceded colonies which have adopted that law as the rule of decision, to apply it in a manner which would be entirely unsuitable to the circumstances and conditions of the people.

What has been so far said has reference only to the provinces other than the province of Quebec. With regard to that province the right of fishing in waters which are in fact navigable or floatable depends altogether on the old law of France, the ancient law of the province. By that law all waters of this class belonged to the domain of the Crown, and the public enjoyed the right of fishing therein subject to the prerogative of the Crown to grant, at its pleasure, exclusive rights of fishing to individuals. This prerogative is now vested in and can only be exercised by the Crown in right of the province. I refer on

this head to Pothier (Bugnet edition) Traité de la propriété (1).

In the case of *Dixson* v. *Snetsinger* (2), the Ontario Court of Common Pleas had before it a question of title as to a part of the bed of the River St. Lawrence. The plaintiff, a riparian owner, there claimed title to the bed of the river *ad medium filum aquæ* under a grant from the Crown which described the land granted as bounded by the river. The court held that the Crown of Great Britain having acquired by cession the rights and prerogatives which had previously belonged to the French king, those rights remained unaffected by the division by Imperial legislation (31 Geo. 3, ch. 31) of the ceded territory into the two provinces of Upper and Lower Canada, and by the subsequent enactment by the legislature of Upper Canada of an Act declaring that thenceforth, in all matters of controversy relative to property and civil rights, resort should be had to the law of England as the rule for the decision of the same, and therefore that, as under the French law the Crown had been invested with the title to the bed of the river for public purposes, the Crown of Great Britain had a title in all respects co-extensive, and that the ordinary presumption by which a grant of land bounded by a water-course extended to the middle thread of the stream did not apply. Whilst the actual decision in *Dixson* v. *Snetsinger* (2) was limited to this, and in this respect followed previous cases before cited, it may be said that this judgment contains some very weighty arguments in favour of the view contended for by the provinces in the present case, and is authority for the proposition that the common law of England did not apply to the non-tidal navigable rivers of Canada, as explained in the following extract from it:

(1) Nos. 50, 51, 52.

(2) 23 U. C. C. P. 235.

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By the Imperial statute, 14 Geo. 3, ch. 83, "for making more effectual provision for the government of the province of Quebec, in North America," it was enacted "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same." Now, whether the rule of the civil law or that of the common law of England as to what constitutes navigable streams applies, whether the soil is in the Crown, or in the riparian proprietor *ad medium filum aquæ*, is a question relating to property and civil rights, and by this Act, therefore, the law of Canada as it was at the time of the passing of the Act was declared to be the law of the province of Quebec, and not the common law of England in that particular. Now, from the case of *Boissonnault* v. *Oliva* (1), decided in 1833, there is no doubt that the River St. Lawrence was a river, the bed and waters of which were vested in the Crown for the benefit of the public, according to the law of Canada; that, in effect, the rule of the civil law, and not that of the common law of England, which is limited to the extent of the flux and reflux of the tide, prevailed.

Prior then to the conquest of Canada from France, and since the conquest by virtue of this statute, 14 Geo. 3, ch. 83, the River St. Lawrence was within the rule of the civil law, and not of the common law of England, as to navigable rivers. In this condition, that is, free from the limitations and restrictions of the common law of England as to the flux and reflux of the tide, the River St. Lawrence continued after Canada, or what was then called the province of Quebec, became British territory; it did not come within the operation of the common law of England by the fact of being a British territory; it did not come within the operation of the common law of England by the fact of becoming a British province.

If the doctrine of this case of *Dixson* v. *Snetsinger* (2) is correct, and I do not question its soundness, it would seem to apply not only to lakes and rivers in the present provinces of Ontario and Quebec, in the boundaries of which are now comprised so much of the territory of the old province of Quebec, established by the Act of 1774, as yet remains part of the dominions of the Crown, but also to the provinces of Nova Scotia, New Brunswick, and Prince Edward Island as well, inasmuch as all these were originally territories ceded by France to Great Britain. Further, it might also

(1) Stuart L. C. R. 564. (2) 23 U. C. C. P. 235.

apply to the province of Manitoba and the North-West, so far at least as those portions of the territory of the Dominion were acquired to the British Crown under the 10th article of the Treaty of Utrecht by the description of "the bay and streights of Hudson, together with all lands, seas, sea-coasts, rivers and places situate in the said bay and streights, and what belong thereunto." With regard to the province of British Columbia, however, the principle of the decision in *Dixson* v. *Snetsinger* (1) can have no application.

On the whole I arrive at the following conclusions as to the right of fishing in the class of waters under consideration, namely: navigable lakes and non-tidal navigable rivers, and the limitation of the power of the Parliament of the Dominion to legislate respecting the fisheries in these waters.

First.—The beds of all such waters which remained ungranted at the date of confederation were public lands belonging to the provinces within the limits of which the same were situated, and as such were, by section 109 of the Confederation Act, vested in the provinces respectively.

Secondly.—So long as the property in the beds of this class of rivers remains ungranted the right of fishing in such waters belongs to the public as of common right.

Thirdly.—The Crown in right of the provinces can, however, grant the beds of such waters and streams, in which case the exclusive right of fishing, unless expressly reserved, passes to the grantee as an incident of the ownership of the soil in the bed, and the provinces can also grant an exclusive right of fishing in the same waters, distinct from and without any grant of the bed.

Fourthly.—The Parliament of the Dominion cannot by its legislation in any way affect or interfere

(1) 23 U. C. C. P. 235.

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with the rights of fishing in the waters before mentioned, nor with the title and rights of the provinces in respect of such waters and the fisheries therein save as hereafter mentioned.

Fifthly.—Neither the provinces (except in the case of the province of Quebec) nor the Dominion can, without legislative authority, grant exclusive rights of fishing in tidal waters, but the legislatures of the provinces may authorize such grants as regards all tidal waters within the limits and jurisdiction of the provinces respectively.

Sixthly.—The power of legislation conferred upon Parliament by section 91, subsection 12, is to be limited in the manner defined in the case of *The Queen* v. *Robertson* (1), to the conservancy and regulation of the fisheries and other matters there specified.

Having thus ascertained, as far as I have been able to do so, the property rights of the provinces, and the rights of the public, with regard to fisheries in navigable fresh water, as well as the constitutional powers of Parliament to legislate upon such subjects, a task from which I was not relieved by the case of *The Queen* v. *Robertson* (1), that decision having been confined to non-navigable waters, I proceed to examine the 4th section of the Revised Statutes of Canada, chapter 95, and to answer explicitly the inquiry contained in the 10th question as to the jurisdiction of the Dominion Parliament to pass that section and the other provisions of the Act.

Section 4 is as follows:

> The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue, or authorize to be issued, fishery leases and licenses for fisheries and fishing wheresoever situated or carried on, but leases or licenses for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

I do not doubt that it is within the power of the Dominion Parliament, in the exercise of its authority to

(1) 6 Can. S. C. R. 52.

superintend, regulate and conserve the fisheries, to require that no person shall fish in any public waters within the Dominion without having first obtained a license from the Minister of Marine and Fisheries or other officer of the Dominion Government, and to require for such personal license the payment of such fees or duties as may be imposed by Parliament, and to prohibit all persons who may not have taken out such licenses from fishing in any way; and also to prohibit particular classes of persons, such for instance as foreigners, unconditionally from fishing. Such licenses must, however, be purely personal licenses conferring qualification, and any legislation going beyond this and assuming to confer exclusive rights of fishing is (subject to exception as to waters belonging to the Dominion and waters within the confines of unsurrendered Indian Reserves) unconstitutional and void.

Therefore, so far as this section 4 attempts to confer exclusive rights to fish in provincial waters, whether navigable or unnavigable, it was not within the competence of Parliament.

Whether it does attempt to do this is of course a question of construction, but one which there can be but little difficulty in determining. The licenses and leases contemplated are to be for particular localities, that is, they are to be "for fisheries and fishing wheresoever situated or carried on;" they are to be granted only "wherever the exclusive right of fishing does not already exist by law;" and they are to be "leases" as well as licenses; language which indicates an intention to authorize the Minister to confer by means of such licenses exclusive rights of fishing. This I hold to have been beyond the jurisdiction of Parliament to enact so far as provincial waters are concerned, and within the expression "provincial waters" I include

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all navigable waters within the boundaries of a province whether tidal or non-tidal, excepting only such waters as belong to the Dominion, that is to say, waters the beds or soil of which are vested in the Dominion, and all streams in unsurrendered Indian lands. The power of Parliament to legislate so as to confer exclusive rights in Dominion waters is of course to be attributed to the 1st subsection of section 91, authorizing legislation respecting the public property of the Dominion. The 24th subsection of section 91 giving the right to legislate as to lands reserved for the Indians comprehends the right to legislate respecting waters in unsurrendered Indian territory. Over these two latter descriptions of waters Parliament has, I concede, exclusive jurisdiction. With reference to unnavigable waters I need say nothing, as *The Queen* v. *Robertson* (1) has, as regards these, established a rule of law by which I am bound so long as that case stands unreversed.

It follows that all the remaining provisions of chapter 95 which attempt to confer exclusive rights of fishing in either private or public waters belonging to the provinces, or which are designed to carry out provisions assuming to confer exclusive rights and which can have no other object or application, are void. I do not feel called upon to make a minute critical examination of every subsection of this long Act of Parliament. I consider it to be sufficient, in the absence of any more specific questions, to indicate the principle by which I consider the constitutional validity of its numerous detailed provisions are to be tested. I may say, however, that it appears to me that, in addition to section 4, portions of section 14, subsections 1 and 11 are *ultra vires*, as are also subsections 1, 3 and 4 of section 21. Section 22 so far as

(1) 6 Can. S. C. R. 52.

it assumes to authorize interference with the public property of the provinces is also excessive.

The beds of public harbours, non-tidal as well as tidal, according to the case of *Holman* v. *Green* (1), which, as I have said, is binding upon me, are vested in the Dominion.

Whether the Dominion has, notwithstanding the provisions of Magna Charta, authority to grant exclusive rights of fishing in tidal harbours, is a question which has not been specifically addressed to us, though it is perhaps involved in the inquiry as to the validity of the legislation contained in section 4 of chapter 95 as applicable to tidal harbours. I have no doubt that Parliament has the power to authorize exclusive rights of fishing in such harbours notwithstanding Magna Charta. As regards non-tidal harbours the prohibition of the charter, as before mentioned, is not applicable. Therefore, assuming *Holman* v. *Green* (1), assigning the beds of all public harbours to the Dominion, to be a sound decision and binding upon me, I am of opinion that such harbours, being thus public property of the Dominion for which Parliament has the exclusive and undoubted right to legislate, section 4 of chapter 95, Revised Statutes of Canada, and the other provisions of that Act consequent upon it, are as applicable to all public harbours *intra vires* of Parliament, and the restriction of Magna Charta is as to tidal harbours to be considered as thereby repealed.

*Question* 11.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands?

*Answer.*—An answer to this is included in the answer to the preceding question.

(1) 6 Can. S. C. R. 707.

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*Question* 12.—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing, in the interest of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

*Answer.*—The Dominion Parliament has no jurisdiction in respect of fisheries (other than fisheries in what have already been described as Dominion waters and the waters in unsurrendered Indian lands) except to pass general laws such as those specified in this question, and such as are pointed out as *intra vires* of Parliament in the case of *The Queen* v. *Robertson* (1).

*Question* 13.—Had the legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled "An Act respecting the sale and management of Public Lands," and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

*Answer.*—So far as the provincial legislation mentioned in this question was not inconsistent with previous laws of the Dominion Parliament on the same subjects and has not been superseded by subsequent legislation of the Dominion, I am of opinion that the provisions mentioned in this question were within the power of the provincial legislature, under the authority conferred upon it by section 92 of the British North America Act to make laws respecting property in the province, and to legislate respecting all matters of a local and private nature in the province. So far as these enactments in any way conflict with prior

(1) 6 Can. S. C. R. 52.

Dominion legislation they were void *ab initio*, and so far as the Dominion has since legislated in any manner inconsistent with these provisions they became upon such subsequent legislation, *ipso jure*, void. In a judgment delivered in a case now before the Judicial Committee of the Privy Council, I enunciated the principle that for the purpose of executing distinct legislative powers, one conferred upon Parliament by section 91, and a different power conferred upon provincial legislatures by section 92, of the British North America Act, the same measures of legislation might be open to both legislatures. That in such a case, so long as the Dominion had not legislated a provincial legislature, in the exercise of its own distinct authority, might legislate, but that the federal legislation being necessarily paramount, so soon as Parliament enacted a law in any way inconsistent with the prior provincial legislation the latter would be thereby superseded and become void. My answer to the present question is based on the same principle.

*Question* 14.—Had the legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

*Answer.*—Clearly section 1375, which is a provision confined to non-navigable rivers and lakes which form part of the domain of the province, requiring certain reservations to be made on the sale of Crown lands covered by such waters, is within the competence of the provincial legislature, which must have the right to regulate the sale and use of the property of the province.

The provisions for leasing lands thus reserved for fishing purposes are also entirely within the competence of the province, as has been virtually decided by *The Queen* v. *Robertson* (1). The provisions of the other

(1) 6 Can. S. C. R. 52.

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sections, all relating to non-navigable waters, are also *intra vires* according to the same authority.

*Question* 15.—Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as may consist with, any laws passed by the Dominion Parliament within its constitutional competence?

*Answer.*—An answer to this is contained in the answer to question no. 13.

*Question* 16.—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

*Answer.*—The Dominion Parliament which has authority to legislate for the conservancy of navigation has, beyond doubt, a right to declare what shall be deemed an interference with navigation, and to control all works erected in navigable waters. No other answer could be given without disregarding the authority of *The Queddy River Boom Co.* v. *Davidson* (1).

It is a universal rule of the highest courts called upon to decide on constitutional questions arising as to the limited powers of legislation, that an argument drawn from the possibility of a power of this kind being abused ought not to prevail. The presumption is that there will be no such abuse. In many cases the Supreme Court of the United States has enunciated this as a rule of constitutional construction.

*Question* 17.—Had the riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

*Answer.*—Certainly they had, for the reasons already stated in answer to foregoing questions.

TASCHEREAU J.—First Question—As to public harbours (are there any private harbours?) I am bound by the decision in *Holman* v. *Green* (2) to say that the

(1) 10 Can. S. C. R. 222. (2) 6 Can. S. C. R. 707.

beds thereof belong to the Dominion. If the question was not concluded by that case I would say that the beds of public harbours belong to the provinces. As to all other waters, without distinction, the beds thereof likewise belong to the provinces wherein they are situate. The factum filed on the part of British Columbia, and the authorities therein cited under this question, leave no alternative for us but to so hold, in the position we occupy under a reference of this nature. Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves. The questions are of the nature of those upon which the Privy Council in the recent case made remarks that will, I hope, restrict in the future references such as the present one by the Department of Justice.

Second and sixteenth Questions.—To these two questions, which it seems to me should be answered together, I would say yes. The authorities referred to in the factum for the Dominion under this question seem to me conclusive.

Third Question.—No answer is required, as no. 2 is answered in the affirmative.

Fourth Question.—My answer to the first question determines this fourth question.

Sixth, seventh and eighth Questions.—No, it has not such power. I refer to the authorities cited in the Ontario factum under these questions.

Ninth Question.—The answer to the preceding three questions render this one unnecessary.

Tenth and eleventh Questions.—Yes, it had the power to pass the said section 4 because it, in terms, applies only wherever the exclusive right of fishing

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does not already exist. As to the other portions of the said Act none have been pointed to us as *ultra vires*. Twelfth Question.—The answer to the preceding question being in the affirmative renders an answer to this one not required.

Thirteenth Question.—Yes; as to said section 47 it is a mere re-enactment of the statute that was in force before confederation. As to the Act of 1892, it has no application by its own terms to fishing and to waters over which the legislature of Ontario has no jurisdiction. The case of *The Attorney General for Canada* v. *The Attorney General of Ontario* (1) is in that sense.

Fourteenth Question.—Yes. The factum for the Dominion seems to concede it as to section 1375. As to sections 1376, 1377 and 1378, as only applicable to non-navigable rivers and lakes, I would also answer yes.

Fifteenth Question.—Yes. That is conceded by the Dominion factum.

Fifth and seventeenth Questions.—These two questions, I submit with deference, are not authorized by the statute. The words "important questions of law or fact touching provincial legislation" in sec. 4 of 54 & 55 Vict. ch. 25, mean, in my opinion, touching provincial legislation enacted since confederation, and the words "touching any other matter" mean any other matter of the same nature, that is to say, on the law, either federal or provincial, since confederation. But I do not think that under the intent of that enactment we are called upon to determine what was the law in any of the provinces before confederation.

In *Re The London & Westminster Bank* (1), the judges declined answering a question put by the House of

(1) 23 Can. S. C. R. 458. (2) 2 Cl. & F. 191.

Lords which was not confined to the strict legal construction of existing laws.

GWYNNE J.—In answer to the first question submitted by the above order, I am of opinion,

1st. That the expression "Public Harbours" in the second item of schedule no. 3 of the British North America Act does, by force of sec. 108 of that Act, comprehend the soil and beds of all such harbours whether they be in salt or in fresh water, and that therefore the effect of the statute is to declare Her Majesty to be seised of the soil and beds of all such harbours as the property of Canada.

2nd. That the beds of all the great lakes and of the rivers through which runs the boundary line between the United States and the Dominion of Canada, or the boundary line between two or more provinces of the Dominion and the beds of all rivers navigable above tide-waters, as also the beds of the sea-coasts of the Dominion and of all rivers to the extent to which tide-waters reach are, as also the beds of all other lakes and rivers within the limits of the several provinces not granted before confederation are, vested in Her Majesty subject to the jurisdiction and control of the Dominion Parliament in so far as may be deemed necessary by that Parliament or required for creating future harbours or for the erection of beacons, piers or lighthouses, or other public works hereafter to be constructed for the benefit of the Dominion and within the jurisdiction of the Dominion Parliament, as for example bridges over navigable waters, railways, or the termini of railways and the like, and in short all other works placed under the jurisdiction of the Dominion Parliament by virtue of the exception to item 10 of sec. 92 or otherwise; and also specially as regards the administration of the fisheries as herein-

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after mentioned. In support of my view in answering this question, I refer to *Parker* v. *Elliott* (1); *The Queen* v. *Meyers* (2); *Attorney General* v. *Perry* (3); *Boissonnault* v. *Oliva* (4); and *Dixson* v. *Snetsinger* (5).

In answer to the 2nd and 3rd questions, I am of opinion that the Dominion Parliament had jurisdiction to pass the Act, chapter 92 of the Revised Statutes of Canada.

My answer to the 4th question is in the negative for reason already given in answer to question no. 1.

In answer to the 5th question, I am of opinion that riparian proprietors before confederation had the right there made the subject of inquiry, subject of course to the control of the legislature of the province within which such lakes, rivers, streams and waters were situate.

My answer to the 6th, 7th, 8th, 9th and 12th questions is as follows :—

The British North America Act by the term "Sea-coast and Inland Fisheries," as used in item 12 of section 91, gives to the Dominion Parliament precisely the same jurisdiction, in my opinion, over inland fisheries and over sea-coast fisheries.

No jurisdiction is given to the provincial legislatures or any of them over anything whatever under the term "Fisheries"; whatever comes within that term is given exclusively to the Dominion Parliament, and that term as used in item 12 of section 91 comprehends, in my opinion, not merely regulations for the protection of the fish and prescribing the times and seasons and modes of fishing, but also provisions for the cultivation and raising of fish, and, a most important

(1) 1 U. C. C. P. 470, p. 488 *et seq.*
(2) 3 U. C. C. P. 305, p. 350 *et seq.*
(3) 15 U. C. C. P. 329.
(4) Stuart's L. C. R. 564.
(5) 23 U. C. C. P. 238 *et seq.*

matter, for filling the several lakes and rivers within the Dominion with young fish so raised, and also for regulating the business of catching fish, and also for granting leases or licenses to take fish at certain places, or in certain waters, to as full an extent in short as the Parliament of the late province of Canada, or of the several other provinces prior to confederation, could have done within their respective provinces. "Fisheries" being provided for specially in section 91, none of the powers conferred on provincial legislatures by the items enumerated in section 92 can in any manner detract from, qualify or affect the power vested in the Dominion Parliament over whatever comes within the term "Sea-coast and Inland Fisheries." This is the plain result of the last clause of section 91, which was introduced, as it appears to me, to express the clear intent of the framers of the scheme of confederation to be to distribute between the Dominion and the several provinces the jurisdiction formerly exercised by the respective provinces, and to make the jurisdiction upon the matters distributed to each an exclusive jurisdiction, except where otherwise expressly provided; and consequently no provincial legislature can qualify or restrict the jurisdiction of the Dominion Parliament over "Fisheries" by requiring lessees or licensees under the authority of the Dominion Parliament to take a license from a provincial government before exercising and enjoying within the limits of a province rights purported to be granted under the authority of the Dominion Parliament, or by issuing licenses to catch fish in derogation of the authority of Parliament over the subject which is placed *exclusively* under the jurisdiction of the Dominion Parliament.

There is no difficulty whatever that I can see in holding the "fisheries" in inland waters to be placed *exclusively* under the jurisdiction of the Dominion,

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even though the beds of those waters may be the property of the provinces, and I can see no principle whatever upon which the term "Sea-coast and Inland Fisheries" should be given a limited construction or upon which language used in prescribing the limits of the jurisdiction of the Dominion Parliament should be construed in the narrowest and most limited sense while the language used in prescribing the limits of the jurisdiction of the provincial legislatures should be construed in the most unlimited sense. As bearing upon this subject, I refer to my judgment in the Exchequer Court in *The Queen* v. *Robertson* (1).

In answer to the questions nos. 10 and 11, as submitted by the order in council, I am of opinion that sec. 4 of ch. 95 of the Revised Statutes of Canada, which is identical with sec. 2 of 31 Vict. ch. 60 of the Dominion Parliament, was and is, as also were and are all the other provisions of said chapter 95, within the jurisdiction of the Dominion Parliament.

In answer to the 13th question: Being of opinion as already expressed that Her Majesty is seized of the soil and beds of all public harbours as the property of the Dominion, I am of opinion that the 47th section of ch. 24 of the Revised Statutes of Ontario, in so far as it assumes to confer upon the Lieutenant-Governor of the province power to authorize the sale of land covered with water within such harbours, has assumed to deal with a subject not within the jurisdiction of the provincial legislature. As regards land covered with the waters of any navigable river or lake, there are doubtless very many places along the margin of such rivers and lakes where no reasonable objection could be made to provincial legislatures authorizing the sale of pieces of land covered with the waters of such river or lake, but in any such case, for the reasons already

(1) 6 Can. S. C. R. 53

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given, provision should, I think, be made, not only against any such sale interfering with the navigation of the lake or river, but also against its prejudicing or in any manner interfering with the full enjoyment and exercise by the Dominion Parliament of all its rights and powers as regards "Sea-coast and Inland Fisheries," and as regards the construction and maintenance of all public works of the character referred to in my answer to question no. 1, and, to avoid all conflict of interest and all litigation in respect thereof, it would seem to be desirable that, as a condition precedent, an understanding should be reached with the Dominion Government upon the subject under the sanction of Parliament. Such an understanding could no doubt be readily arrived at.

As to sections 5 to 13, both inclusive, and sections 19 to 21, also both inclusive,—none others are mentioned,—of the Act of the Ontario Legislature of 1892 in the 13th question referred to, viz.: 55 Vict. ch. 10, I do not think that any Act or part of an Act of the provincial legislature passed for the purpose of aiding in the protection of fisheries as provided by an Act of the Dominion Parliament, would be held to be *ultra vires* as being legislation upon a subject, namely, the "Fisheries," which is exclusively within the jurisdiction of the Dominion Parliament, however inoperative and unnecessary such provincial legislation might be, but except as so in aid of the legislation of the Dominion Parliament, I am of opinion that the subject is not within the jurisdiction of the provincial legislatures.

As to questions 14 and 15, I refer for my answer to these questions to my opinion as herein already expressed especially in my answer to question no. 13.

KING J.—I concur in the opinion of the Chief Justice.

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GIROUARD J.—The numerous questions submitted for our opinion may be reduced to two principal heads, namely: What are the respective powers and rights of the Dominion and of the provinces, under the British North America Act, 1st, over navigable and non-navigable waters in respect of "Sea-coast and Inland Fisheries and 2nd, over navigable waters in respect of "Shipping and Navigation"?

1st. In respect of "Sea-coast and Inland Fisheries." At all times in England and in France before the Revolution, the ownership of fisheries and the right of fishing were considered as part of the ownership of the soil in the beds of the waters and an incident to the grant of that soil. For this reason, the riparian proprietors of private or non-navigable rivers, lakes and waters, the beds of which had been granted to them, or at least not reserved by the Crown or its grantee, had an exclusive right of fishing to the middle of those waters, and this is undoubtedly the law of all the provinces; *Lord* v. *Commissioners of Sydney* (1); *Devonshire* v. *Pattinson* (2); Loyseau, Des Seigneuries (3); 5 Duranton (4); 9 Pothier, Bugnet's ed. (5); Gilbert sur Sirey, C. N. (6); Championnière Eaux Courantes (7); *Robertson* v. *Steadman* (8) over-ruled in *Steadman* v. *Robertson* and *Hanson* v. *Robertson* (9), and by *The Queen* v. *Robertson* (10); *Minor* v. *Gilmour* (11); *Boswell* v. *Denis* (12); *Lebouthillier* v. *Hogan* (13); *North Shore Railway Co.* v. *Pion* (14); *Thompson and Hurdman* v. *Attorney General of Quebec* (15); *Beatty* v. *Davis* (16).

(1) [1859] 12 Moo. P. C. 473.
(2) [1887] 20 Q. B. D. 263.
(3) Ch. 12, p. 120.
(4) N. 223.
(5) P. 121.
(6) Art. 538.
(7) Pp. 16-18; C.C. 424-427, 503.
(8) [1876] 3 Pugs. 621.
(9) [1879] 2 P. & B. 580.
(10) [1882] 6 Can. S. C. R. 52.
(11) [1858] 12 Moo. P. C. 131.
(12) [1859] 10 L. C. R. 294.
(13) [1888] 17 R. L. 463.
(14) [1889] 14 App. Cas. 612.
(15) [1895] Q. R. 4 Q. B. 409.
(16) [1891] 20 O. R. 373.

The right of fishing and of making fishing grants in the ungranted beds of such waters is vested in the Crown without any restriction, and it may be added that the same principle applies to non-tidal navigable waters; but according to the old law of France, the right of the riparian proprietor does not extend to the banks and bed of a navigable or floatable river, without a special grant from the Crown; and according to both the English and French law, navigable waters are subject to a right of servitude or an easement in favour of the public to navigate on the same, which right cannot be granted away except by Parliament (1); *Colchester* v. *Brooke* (2); *Gann* v. *Free Fishers of Whitstable* (3); *Lyon* v. *Fishmongers' Co.* (4); *North Shore Railway* v. *Pion* (5); Hale de Jure Maris (6); Championnière, Eaux Courantes (7); *Stein* v. *Seath* ( ); *Fournier* v. *Oliva*, 1830, and *Boissonnault* v. *Oliva* (9); *Brown* v. *Gugy* (10); *Béliveau* v. *Levasseur* (11); *Pierreville Steam Mills Co.* v. *Martineau* (12); *Bell* v. *The Corporation of Quebec* (13); *Normand* v. *La Cie de Navigation du St. Laurent* (14); *Thomson and Hurdman* v. *Attorney General of Quebec* (15); *Brown* v. *Reed* (16); *Wood* v. *Esson* (17); *Gardiner* v. *Chapman* (18); *Clendinning* v. *Turner* (19); *Warin* v. *London Loan Co.* (20); *Ratté* v. *Booth* (21); *Beatty* v. *Davis* (22).

(1) Anon. [1808] 1 Camp. 517n.
(2) [1845] 7 Q. B. 339.
(3) [1865] 11 H. L. Cas. 192.
(4) [1876] 1 App. Cas. 662.
(5) 14 App. Cas. 612.
(6) Ch. 2.
(7) Pp. 16-18, 642, 704.
(8) [1830] 3 R. L. 457.
(9) [1833] Stuart L.C.R. 427,524; Con. St. L. C. 1860, ch. 26, s. 2.
(10) [1864] 2 Moo. P. C. (N.S.) 341.
(11) [1869] 1 R. L. 720.
(12) [1875] 20 L. C. Jur. 225.
(13) [1879] 2 Q. L. R. 305; 7 Q. L. R. 103; 5 App. Cas. 84.
(14) [1879] 5 Q. L. R. 215.
(15) Q. R. 4 Q. B. 409.
(16) [1874] 2 Pugs. 206.
(17) [1884] 9 Can. S. C. R. 239.
(18) [1884] 6 O. R. 272.
(19) [1885] 9 O. R. 34.
(20) [1886] 7 O. R. 706; 12 Ont. App. R. 327; 14 Can. S. C. R. 232.
(21) [1890] 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188.
(22) 20 O. R. 373.

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According to the English law the public cannot acquire any right of fishing in fresh navigable waters, because the word "navigable" imports that the river or lake is one in which the tide ebbs and flows. The fishing right of the public is therefore limited to what is called the foreshore and arms of the sea and tidal navigable rivers and lakes; but, wherever no special grant had been made by the Crown before Magna Charta, or can be presumed from prescription, the Crown holds the same for the public; for, by Magna Charta and other statutes, the Crown is expressly precluded from making fresh fishing grants in those waters; *Warren* v. *Mathews* (1); *Ward* v. *Creswell* (2); *Carter* v. *Murcot* (3); *Bagott* v. *Orr* (4); *Malcomson* v. *O'Dea* (5); *Edgar* v. *Commissioner for English Fisheries* (6); *Bristow* v. *Cormican* (7); *Pearce* v. *Scotcher* (8); Black. (9); Chitty, Prer. (10); Hale, De Jure Maris (11); Coke, First Institute, Thomas' (12); see also Angell on Tide Waters; Gould on Waters and Moore, Law of the Foreshore (13), where other cases are collected.

The old French law, followed in La Nouvelle France, never made the distinctions of the English common law as to tidal and fresh navigable waters, and laid no restriction upon the power of the King to make fishing grants, except with regard to navigation. At the time of the treaty of cession the law of France had been changed in some respects; the sea-coast fisheries had been declared free to the French people by the "Ordonnance de la Marine" of 1681, but this ordonnance as well as the ordonnance "des Eaux et Forêts"

(1) [1702] 6 Mod. 73.
(2) [1741] Willes's Rep. 265.
(3) [1768] 4 Burr. 2163.
(4) [1801] 2 B. & P. 3 ed. 472.
(5) [1862] 10 H. L. Cas. 593.
(6) [1871] 23 L. T. 732.
(7) [1878] 3 App. Cas. 641.
(8) [1882] 9 Q. B. D. 162.
(9) Vol. 2 p. 39.
(10) P. 143.
(11) CC. IV. & V.
(12) Thomas' ed. vol. 1, p. 47, n. 2, p. 230, n. 9.
(13) 3 ed. pp. 436-591.

of 1669 and other subsequent statutes on the same subject, which will be found collected in Guyot, Vo. Pêche, were never in force in Canada for want of registration by the Superior Council of Quebec, as being unsuitable to the condition of the colony. Before the cession to Great Britain in 1763 the King was therefore the sole owner of the foreshore and the beds and banks of all navigable and floatable rivers, and of the fisheries therein, subject to the public right of navigation and of fishing wherever no exclusive grant had been made. This public right of navigation was a statutory law right which could be interfered with only by the legislative authority. See ordonnances of February 1415, art. 679; May 1520, art. 1, 2, 3; January 1583, art. 18; Isambert, Vol. 8, p. 427, Vol. 12, p. 173, Vol. 14, p. 526. The public right of fishing was a mere royal grace or favour which could be ended by the Crown. The *Edits et Ordonnances* contain many decisions of the Canadian Intendants of Justice where this right of the Crown is fully recognized. Vol. 2 pp. 21, 294, 297, 428, 536, 542, 590; Vol. 3, pp. 203, 244, 253, 263, 269, 321, 382, 390, 428, 456. Puffendorf, quoting Grotius, in his Treatise De Jure Naturæ et Gentium, tells us that this right was even recognized by the law of nations. He says:

> De là il paroît que le droit qu'ont les particuliers, dans un Etat, de ramasser ou de prendre des choses mobiliaires dont personne ne s'est encore emparé, d'aller à la grande ou à la petite chasse, de pêcher, et autres choses semblables; que ce droit, dis-je, dépend uniquement de la volonté du Souverain, et non d'aucune loi naturelle. (1)

Can it be said that, under the treaty of cession, the King of England has smaller rights than the King of France had, especially as the Imperial Parliament has declared in 1774, by a statute known as the Quebec

(1) Barbeyrac [ed. 1706] vol. 1, p. 524.

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Act (1), that, "in all matters of controversy relative to property and civil rights," the old laws and customs shall remain in force in Canada until amended or repealed by competent authority? Courts of justice in Quebec have often answered in the negative with regard to both water lots and fishing grants,—*Droits de Pêche et Lots de grève.* As early as 1816, the Court of King's Bench, quoting French authorities, was saying:

> Les rivières navigables et leurs grèves sont choses publiques. Or un individu ne peut avoir la possession de choses publiques sans un titre de la Couronne. *Morin* v. *Lefebvre* (2),

Later on, in 1854, the Superior Court of Quebec, composed of Chief Justice Reid and Meredith J., held, in *Regina* v. *Baird* (3), that riparian proprietors, in this case along tidal waters, namely at Anse des Mères, near Quebec, are not entitled, as a matter of right, to obtain a grant of beach lots in the River St. Lawrence, fronting their property, in preference to any other, and that in particular cases the Crown will grant such beach lots to persons not riparian proprietors. Meredith J. observed:

> To this important question I have given the most careful consideration, and am of opinion, that, although under ordinary circumstances, a riparian proprietor has a strong equitable claim to a grant of the beach in front of his property in preference to any other person, yet that as a matter of law, a grant may be legally made of such beach, against the will of the riparian proprietor and to such other person as the Sovereign and Her advisers, taking into consideration the particular circumstances of each case, may in their discretion think most deserving of such grant, and most likely to render it conducive to the public good.
>
> It is beyond doubt that under the old law of France, the Crown could, with the view of promoting industrial enterprises, make grants of such portions of any navigable river as were not required for navigation; such grants were then required for mill sites more frequently

(1) 14 Geo. 3 ch. 83, s. 8. (2) 1 R. de L. 354; 3 R. de L. 303.
(3) 4 L. C. R. 331.

than for any other purpose, and it is generally with reference to property of that kind that the right of the Crown in this respect is spoken of.

Guyot, in his Trait des Fiefs (1), says: "Nous ne parlerons point des rivières navigables. Tout le monde sait que ces grandes rivières sont au Roi, qu'elles sont du domaine du Roi, et que si quelques seigneurs y ont droit de pêche, de moulins ou autres plus grands droits, c'est qu'ils sont fondés sur des titres confirmés par nos Rois."

Chief Justice LaFontaine, in the admirable opinion which he delivered as president of the Seigniorial Court in 1856, after reviewing all the authorities and the provincial statutes from 1807, comes to this conclusion:

De ce qui précède, je conclus que les seigneurs, comme tous autres particuliers, ont pu acquérir des droits dans les rivières navigables, mais non par de plein droit comme seigneurs des fiefs adjacents à ces rivières à la différence des rivières non navigables ni flottables dont la propriété leur était dévolue à ce seul titre. Pour acquérir ces droits dans une rivière navigable, il leur fallait une concession expresse de la part du souverain; et encore fallait-il que ces droits, pour être valablement concédés, ne fûssent pas contraires à l'usage public de ces rivières pour la navigation et le commerce, lequel usage est inaliénable et imprescriptible.

Il faut dire la même chose de la propriété des rivières non-navigables ni flottables, soit qu'elle soit restée aux mains du seigneur, soit qu'elle soit passée en celles de ses censitaires, ce qui est une question de titre ou de possession. Le seigneur, ou le censitaire riverain, est obligé de souffrir les servitudes auxquelles le droit naturel et le droit civil, de même que des règlements de police faits par une autorité compétente, ont put assujétir ces rivières.

And in a recent case in 1886 *Lavoie* v. *Lepage* (2), the Court of Review, composed of Casault, Caron and Andrews JJ., said:

Il n'y a aucun doute que, sans concession spéciale de la Couronne, les propriétaires riverains n'ont pas le droit d'établir des pêches fixes dans les rivières navigables qui bordent leurs propriétés, et que les seigneurs n'ont pu accorder ce droit aux censitaires que lorsqu'ils l'avaient obtenu eux-mêmes de la Couronne.

At the time of the cession to Great Britain in 1763, these principles applied not only to the province of

(1) Vol. 6, p. 663. (2) 12 Q. L. R. 104.

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Quebec, but to the whole country known as Canada, or La Nouvelle France, including Upper Canada; they also applied to Acadia, Cape Breton and Prince Edward Island, and part of New Brunswick of to-day, when these colonies were in possession of the French. La Collection de Manuscrits, recently published by the government of Quebec, gives a most remarkable instance of an important sea-coast and inland fishery grant made in 1682 to one Berger by the French king, on the coast of Acadia, without the authority of his parliament, and in spite of the protest of the colonial authorities. Vol. 1, 298, 304, 329.

True, the laws of England as to property and civil rights were introduced into the province of Upper Canada (1), and also in the Maritime Provinces, without the intervention of the Imperial Parliament; see Houston, Const. Documents of Canada (2); Congdon, Nova Scotia Digest (3); but it seems to me very questionable if the prerogatives and proprietary rights of the Crown were thereby altered with regard to navigable waters; and in several cases the courts of Ontario have decided that they were not with regard to that part of the River St. Lawrence which is situate in the province of Ontario.

In *Gage* v. *Bates* (4), Richards J. said:

> The opinion expressed by the learned Judges of the Common Pleas in *Parker* v. *Elliott* (5), although not expressly deciding this point, seems to me to lead to the conclusion at which we have arrived, that the rule of the common law as to the flux and reflux of the tide being necessary to constitute a body of water a navigable river, does not apply to a case like the present.

And in *Dixson* v. *Snetsinger* (6), Mr. Justice Gwynne, delivering the judgment of the court, said:

(1) U. C. 32 Geo. III, ch. 1, 1792.
(2) Pp. 3-22.
(3) Pp. 1336, 1374.
(4) [1858] 7 U. C. C. P. 116.
(5) 1 U. C. C. P. 470.
(6) [1872] 23 U. C. C. P. 235.

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Prior to the passing of this Act (1), the bed of the River St. Lawrence was vested in the Crown for the public use and benefit, as a navigable river within the meaning of that term as understood by the civil law, and not affected by the rule of the common law of England; and a grant by the Crown wherein land should be described as being bounded by the water's edge, or the bank of the river, or such like expressions, would not pass *ad medium filum aquæ*, as it would in rivers above the flux and reflux of the tide by the common law of England. The question then is: Can and does the provincial statute so alter the character in which the bed of the River St. Lawrence is held by the Crown since the passing of that Act in Upper Canada, as that a grant by the Crown of lands bordering on the river by the words "along the water's edge," or "the bank of the river," or "along the river," or such like, should convey the bed of the river *ad medium filum aquæ*, subject to an easement in the public of navigating on the waters, but divesting the Crown of its estate in the bed of the river?

Is the language of this provincial statute sufficient, and is its object to introduce this rule of the common law as to navigable rivers, which when applied to the rivers in an insular country such as England may be perfectly consistent with reason and common sense, but which is neither conformable to reason or common sense when applied to such a river as the St. Lawrence, which is not only a highway dividing the territories of different nations for the greater part of its extent, but which traverses more than half a continent, and with a little assistance from art is navigable for vessels navigating the ocean for more than 1,500 miles above tide-waters, and which in its course forms lakes more than 100 miles in width?

See also *The Queen* v. *Meyers* (2).

It is very doubtful that the distinctions of the English common law and the restrictions of Magna Charta were ever in force outside of England and Ireland, and some of the British colonies in North America; they have not been accepted by Scotland (3); they do not apply to colonies where a different system of law prevails, for instance, in the Cape of Good Hope, where rivers both navigable and non-navigable are held according to the principle of the Dutch Roman law (4). So far as the British colonies

(1) 32 Geo. III, ch. 1.

(2) [1853] 3 U. C. C. P. 305.

(3) 1 Bell Principles 9th ed. pp. 456-461.

(4) *Van Heerden* v. *Weise*, 1 Buchanan App. R. 5; *Beaufort West* v. *Mernicle*, 2 Juta App. R. 36; *French Hoek Municipality* v. *Hugo*, 3 Juta App. R. 346.

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governed by the English law are concerned, several at least seem to have refused to admit them. Many instances of royal grants in North America and in India may be quoted where the restrictions of Magna Charta were entirely ignored by the Crown, e.g. the charters to the East India Company, and to the Hudson Bay Company and other grantees in the New England colonies. Cases are not wanted either to establish that long before the intervention of legislatures the colonial authorities would not follow the distinctions of the English common law, and the decisions in this respect are most interesting.

In *Attorney General* v. *Perry* (1), Richards C. J., delivering the judgment of the court, said:

> In this country, the practice has obtained in towns and cities for the Crown to grant land covered with water, and generally to the owner of the bank, when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant.

In *Warin* v. *London Loan Co.* (2), affirmed on appeal (3), Wilson C. J. said:

> It cannot therefore be disputed that the Crown had and has the right to grant water lots, that is, as I understand it, the *soil* which the Crown holds as its own special property; Hale's De Jure Maris; *Parmeter* v. *Attorney General* (4); and the Crown right of the *jus publicum* for navigation and the like; that is, the Crown can transfer the whole of its rights, private and public, to a grantee, subject, as the statute says, that the grantee shall not interfere with the use of the harbour as a harbour, or with the navigable rights of the public.

But as to tidal waters, the Supreme Court of Nova Scotia, Hill J., adopted the principles of the English law and held in *Meisner* v. *Fanning* (5) that the Crown cannot grant the waters of a navigable arm of the sea, so as to give a right of exclusive fishing therein.

(1) [1865] 15 U. C. C. P. 331.
(2) [1885] 7 O. R. 724.
(3) 12 Ont. App. R. 327; 14 Can. S. C. R. 232.
(4) 10 Ont. P. R. at p. 431.
(5) 3 N. S. Rep. (Thomson) 97.

In *Rose* v. *Belyea* (1), the Supreme Court of New Brunswick held that

the soil of a public navigable river (in this case the St. John River, within the ebb and flow of the tide) is in the Crown, and the right of fishing belongs to the public. Since Magna Charta the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual.

And in *The Queen* v. *Lord* (2), Peters J., delivering the judgment of the Supreme Court of Prince Edward Island, said:

With respect to these public rights, viz., navigation and fishery, the King is, in fact, nothing more than a trustee of the public, and has no authority to obstruct, or grant to others any right to obstruct or abridge the public in the free enjoyment of them. But subject to these public rights, the King may grant the soil of the shore and all the private rights of the Crown with it. Yet, until he does so, he holds the soil clothed with the *jus publicum*, and while the soil thus remains the King's no unnecessary or injurious restraint upon the public, in the use of the shore, would be imposed by the King, the *parens patriæ*.

In the United States it is well settled law that the title to all tidal waters and their beds and the fisheries therein is vested, not in the United States, but in the several States of the Union, subject to the regulations of Congress wherever connected with interstate or foreign commerce. Likewise in many of the States, inland rivers and lakes navigable are, like tide-waters, state public property. Gould on Waters (3); American and English Encyclopedia of Law (4); Story Const. (5).

Whether the restrictions and distinctions of the English law were in force or not in the English colonies I consider that they are of no importance for the determination of the questions submitted to us, as they have been removed by colonial legislation before confederation in most, if not all, the provinces, as being

(1) [1867] 1 Hannay 109.
(2) [1864] 1 P. E. I. 257.
(3) Pp. 72-78.
(4) Vos. Navigable Waters and Fisheries.
(5) Ed. 1891, par. 1075.

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unsuitable to their condition on this continent. In Quebec several statutes have been passed bearing more or less upon the subject of fisheries. The earliest one is 47 Geo. III, ch. 12, s. 1, (1807), which enacts:

> That all and every his Majesty's subjects shall peaceably have, use and enjoy the freedom of taking bait and of fishing in any river, creek, harbour or road, with liberty to go on shore on any part within the inferior district of Gaspé, between Cap Cat on the south side of the River St. Lawrence and the first rapid of the River Restigouche within the said district, and on the Island of Bonaventure opposite to Percé, for the purpose of salting, curing and drying their fish, to cut wood for making and repairing stages, flakes, hurdles, cook-rooms and other purposes necessary for preparing their fish for exportation, or that may be useful to their fishing trade, without hindrance, interruption, denial or molestation from any person or persons whomsoever. *Provided such river, creek, harbour or road, or the land upon which such wood may be cut doth not lie within the bounds of any private property by grant from his Majesty or other title proceeding from such grant by his Majesty, or by grant made prior to the year one thousand seven hundred and sixty, or held under and by virtue of any location certificate or title derived from any such location certificate.*

See also L. C. Stat. 1824, ch. 1; 1827, ch. 11; 1831, ch. 38; 1836, ch. 55; Can. 1851, ch. 102; 1853, ch. 92.

By the Seigniorial Acts, Cons. St. L. C. ch. 4, s. 62, par. 3, the legislature of the late province of Canada enacted:

> All *unconceded lands and waters* in the said Seigniories (in Lower Canada) shall be held by the Crown in absolute property, and may be sold or otherwise disposed of accordingly, and when granted, shall be granted in *franc aleu roturier*.

On the 1st August, 1866, the Civil Code of Lower Canada came into force and article 400 declares the law to be and to have been that "navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads" are to be "considered as being dependencies of the Crown domain." See *Rex* v. *Laporte* (1); *Samson* v.

(1) [1840] de Bellefeuille's Code, p. 85.

*McCauley* (1); *Regina* v. *Baird* (2); *Béliveau* v. *Levasseur* (3); *Normand* v. *Cie de Navigation* (4); *Thomson & Hurdman* v. *Atty. Gen. of Quebec* (5). Then comes article 414 which declares that the "ownership of the soil carries with it ownership of what is above and what is below it;" and art. 587: "The right of hunting and fishing is governed by particular laws of public policy, subject to the legally acquired rights of individuals." It is clear that before confederation, in Quebec, the proprietary right of the Crown (in right of the province) in the ungranted public and private fisheries was not subject to any restriction, and that the right of the Crown to issue fishing grants by lease, license or otherwise, in all ungranted navigable and non-navigable waters, whether tidal or not, remained unrestricted as in old France and in England before Magna Charta, except with regard to navigation (6). A few years before the promulgation of the Quebec Code the legislature of the late province of Canada had practically adopted the same principle by enacting first in 1858, that "the Governor in Council may grant fishing leases and licenses on lands belonging to the Crown," meaning evidently lands covered by water, without any restriction as to tidal or non-tidal, navigable or non-navigable waters; 22 Vic. ch. 86, s. 4; Can. Con. St. (1859), ch. 62, s. 1, amended in 1865 by 29 Vic. ch. 11, s. 3; and second, in 1860 by declaring (7):

Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbours, rivers and other navigable waters in Upper Canada [there was no doubt as to Lower Canada] and it is desirable to set at rest any question which might arise in reference thereto, it is declared and enacted, that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorize sales, or appropriations, of such

(1) de Bellefeuille's Code, p. 85.
(2) 4 L. C. R. 325.
(3) 1 R. L. 720.
(4) 5 Q. L. R. 215.
(5) Q. R. 4 Q. B. 409.
(6) Con. St. L. C. [1860] ch. 26, s. 2.
(7) 23 Vic. ch. 2, s. 35.

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water lots under such conditions as it has been or it may be deemed requisite to impose.

No reservation was made of the public right of navigation, but when the provision was re-enacted in 1877 and 1887 by the legislature of Ontario, the following proviso was added to the clause :—

> But not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water (1).

Likewise, chapter 101 of the Revised Statutes of New Brunswick, 1854, tit. 22, s. 5, permits the granting of licenses "for fishing stations on ungranted shores, beaches or islands;" and this provision applied to tidal and non-tidal waters. In Prince Edward Island a statute was passed in 1862 (2) authorizing the Governor General in Council to issue

> any grant in fee * * * * or any lease for any term of years * * * of any part or parts of the hitherto ungranted portion of the sea-shore of this island, or of the shores of the bays and rivers thereof,

provided the consent of the riparian proprietors be first obtained. Similar statutes may have been passed by other provinces before confederation, although I am not in a position to say. With regard to the provinces where they have not been adopted I should think that the restrictions of Magna Charta, if ever in force, would continue to apply until removed by subsequent legislation of the legislatures of the provinces interested, as representing the public for whose benefit they exist.

The Dominion undoubtedly felt the weakness of its position when it invited the provinces to a compromise by 54 & 55 Vict., c. 7, (1891), which they refused to accept and so far their action, at least with regard to

(1) R. S. O. [1877] ch. 23, s. 47; R. S. O. [1887] ch. 24, s. 47.

(2) 26 Vict., ch. 6, ss. 1 & 2.

fresh navigable rivers, has been sanctioned by high judicial authority (1).

In *Steadman* v. *Robertson* and *Hanson* v. *Robertson* (2), overruling *Robertson* v. *Steadman* (3), Mr. Justice Fisher, in delivering the judgment of the Supreme Court of New Brunswick, said at page 599:

I have come to the following conclusions: that any lease granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal; that where the exclusive right to fish has been acquired by grant of the land through which such river flows there is no authority given by the Canadian Act to grant a right to fish; and also that the ungranted land being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and in such case is in the Crown as trustee for the people of the province, and a license to fish in such stream is illegal.

When the case came up before the Supreme Court of Canada in 1882 on the petition of right of *The Queen* v. *Robertson* (4), the majority of that court, composed of Ritchie C.J., Strong, Fournier and Henry JJ. likewise held:

That the ungranted lands in the province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a

(1) Early in 1871, when the treaty of Washington was being discussed by the British and American Commissioners, one of them being no less a constitutional authority than Sir John A. Macdonald, Canada was told in unequivocal words that the inshore fisheries were the property of the provinces. The 36th protocol records that "the American Commissioners inquired whether it would be necessary to refer any arrangement for purchase (of the use of these fisheries) to the Colonial or Provincial Parliaments. The British Commissioners explained that the fisheries, within the limits of maritime jurisdiction, were the property of the several British colonies, and it would be necessary to refer any arrangement which might affect colonial property or rights to the Colonial or Provincial Parliaments." (1 Revue Critique 324).

(2) 2 P. & B. 580.

(3) 3 Pugs. 621.

(4) 6 Can. S. C. R. 52.

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license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal.

In *Normand* v. *La Cie de Navigation du St. Laurent* (1), decided by the Court of Appeals of Quebec, composed of Dorion C.J., Monk, Ramsay, Tessier and Cross JJ., in 1879, it was held:

Que les lettres patentes pour lots de grève et à eaux profondes dans la rivière Saint-Maurice, rivière navigable, ont été légalement émises par le gouvernement de la province de Québec et qu'elles ne sont pas *ultra vires* de ce gouvernement.

And in the more recent case of *Thompson and Hurdman* v. *Attorney General of Quebec* (2), the same Court of Appeals composed of Baby, Bossé, Blanchet, Hall and Wurtele JJ., reaffirmed in 1895 the principle laid down in *Normand* v *La Cie du Navigation du St. Laurent* (1), and held that the Ottawa, although not navigable in its entire course, was a floatable river, and the property of the province of Quebec to the middle of the stream, Hall and Wurtele dissenting only upon the ground that the river was not floatable at the particular spot in question, namely the Chaudière Falls. Mr. Justice Blanchet said:

Ce principe ne peut être contesté et nos tribunaux l'ont reconnu dès 1854 dans la cause *Régina* v. *Baird* (3), et assez récemment dans la cause de *Normand et la Compagnie de Navigation du Saint Laurent* (1) dans laquelle cette cour, renversant le jugement du juge Polette à Trois-Rivières, a formellement déclaré que, parmi les attributions des différentes provinces par la section 92 de l'Acte de la Confédération de 1867, sont comprises celles d'administrer et de vendre les terres publiques et que ce droit renferme celui de vendre et de disposer des droits de grève ou des lots de grève formant partie du domaine territorial de la province, à condition toutefois de ne pas diminuer les avantages qu'offrent les rivières pour les fins de la navigation, dont le contrôle exclusif appartient à la Puissance du Canada.

Mr. Justice Bossé, delivering the judgment of the court, said:

(1) 5 Q. L. R. 215. (2) Q. R. 4 Q. B. 409.
(3) 4 L. C. R. 325.

De ce qui précède, il résulte que, lors des Lettres Patentes octroyées à Rowe et Hurdman, l'Etat, représenté par le gouvernement de la Province de Québec, était propriétaire des terrains et lots et pouvoirs d'eau qu'il a concédés par ces Lettres Patentes, et que s'il ne l'était pas, il l'est devenu par la construction des glissoires qui ont rendu l'Ottawa flottable et en ont permis l'exploitation en fait pour la descente des trains de bois.

The case of *Niagara Falls Park* v. *Howard* (1), just decided by the courts of Ontario, is almost as explicit. Chancellor Boyd, in a very elaborate judgment, held in the court below that a certain chain reserve along the banks of the Niagara River and the slope between the top of the bank and the water's edge formed part of the ungranted lands of the Crown, and as such belonged first to Upper Canada, then to the province of Canada, and on confederation became part of the public domain of the province of Ontario. This judgment was affirmed in appeal on the 10th of March, 1896, by Hagarty C. J., Burton, Osler and Maclennan JJ (2). Chief Justice Hagarty said:

I find that in 1871 Sir John A. Macdonald, then Minister of Justice, than whom few public men were better versed in the relations between the Dominion and the provinces and in the course of legislation preceding confederation, gives his official opinion that this chain reserve along the top of the river bank formed part of the Crown lands of the late province of Canada, and passed under the British North America Act, as lands belonging to the province of Canada at the union, to the province of Ontario.

It does not appear that this point were seriously contested. The whole subject of contention seems to have been as to whether the lands in question were Ordnance property or simply Crown lands. Mr. Justice Maclennan concludes:

I am of opinion, therefore, that the appellants have not made out that the land in question is land which answers the description in the 9th subsection of the 3rd schedule of the British North America Act, which it was necessary for them to do in order to sustain their appeal.

(1) 23 O. R. 1. (2) 23 Ont. App. R. 356.

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And finally in the case of *The Queen* v. *Moss* (1), our own court has very recently, 18th May, 1896, held unanimously that the title to the soil in the beds of navigable rivers is in the Crown in right of the province, and not in right of the Dominion (1). The learned Chief Justice, in delivering the judgment of the court, said:

> The bed of the River St. Lawrence at the date of confederation was vested in the Crown in right of the late province of Canada. It therefore formed part of the lands "belonging to that province" which the 109th section of the British North America Act declared should upon confederation belong to the province of Ontario, within the limits of which it was "situate."
>
> It was argued by the learned counsel for the Crown that the title to the soil in the bed of the river, including that of the channel between Sheik's Island and the north bank, was in the Dominion. It is, however, impossible to find any provision of the British North America Act which would have the effect of vesting the title to the beds of navigable rivers in the Crown otherwise than as representing the provinces.
>
> If in the case of *Dixson* v. *Snetsinger* (2), it was intended to decide that the title to the bed of the river was in the Dominion, I do not so far agree with that case. I find, however, in examining the report that the court expresses the opinion that the title was in the Crown, without distinguishing between the Dominion and the province.

If the proposition that the ownership of the fisheries and the exclusive right of fishing are to be considered as part of the ownership of the soil in the beds of the waters be correct, and I believe it cannot be disputed, it seems to me that according to the above decisions the title to the beds of fresh navigable rivers, and the right of fishing and of granting fishing licenses and leases in the same, is vested in the Crown in right of the provinces and not in right of the Dominion. On several occasions the provinces have claimed this right of ownership to the exclusion of the Dominion. They have granted beach lots and fishing licenses and leases

(1) 26 Can. S. C. R. 322. (2) 23 U. C. C. P. 235.

in navigable waters situate within their respective boundaries. Ontario and Quebec have passed special legislation to that effect; R. S. O. [1877], ch. 2, s. 35; R. S. O. [1887], ch. 24, s. 47; R. S. Q. [1888], art. 1375-1378; and this right, whatever it may be, whether governed by the principles of the English law or the French law, or any other law, must continue to exist, and be recognized unless taken away and transferred to the Dominion of Canada by the British North America Act. Has it been taken away? That seems to me the whole question. In my opinion, the British North America Act is not silent; it is not even open to any doubt; it is most explicit and fully supports the contention of the provinces.

Section 109 says:

All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union and all sums due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Section 117:

The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

The "public property not otherwise disposed of by this Act," is mentioned in section 108:

The public works and property of each province, enumerated in the third schedule to this Act, shall be the property of Canada.

THIRD SCHEDULE.

PROVINCIAL PUBLIC WORKS AND PROPERTY TO BE THE PROPERTY OF CANADA.

1. Canals with lands and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.

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5. Rivers and lake improvements.

6. Railways and railway stocks, mortgages and other debts due by railway companies.

7. Military roads.

8. Custom-houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the provincial legislatures and governments.

9. Property transferred by the Imperial Government, and known as Ordnance property.

10. Armouries, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes.

This court decided in 1881 that the soil and bed of the foreshore in the Harbour of Summerside, Prince Edward Island, is a "public harbour" within the meaning of section 108, and of the third schedule of the Act, and is the exclusive property of the Dominion, and to that extent that decision is binding upon me. Relying therefore upon the authority of *Holman* v. *Green* (1), I am of opinion that "public harbours" (whatever may be the meaning of the term within section 108 and the third schedule of the British North America Act, for I am not called upon to express any opinion upon that point under the Order of Reference), being the property of the provinces at the time of confederation, became the property of the Dominion, and that, as such proprietor, the Dominion became the owner of the soil and of the fisheries therein. The same rule should be applied to canals, lighthouses, piers, Sable Island, Ordnance property, lands set apart for general public purposes, and other public works enumerated in the third schedule, and also lands or public property assumed by the Dominion for fortifications or for the defence of the country under section 117. The Federal Act has made no other exception, and I am not prepared, for reasons of public policy, to extend its provisions. It might have been more

(1) 6 Can. S. C. R. 707.

politic and in the interest of the people of this Dominion, that the Constitutional Act should have placed the foreshore of the rivers and great lakes and all navigable waters upon the footing of public harbours; in fact, it is difficult to understand why a different rule should prevail in respect of these matters; but courts of justice cannot correct or amend the constitution or any other statute; they are bound by its terms and its plain meaning; and as I understand sections 109 and 117 of the British North America Act, they clearly mean that the provinces do retain all the ungranted beds of navigable and non-navigable waters within their respective limits, whether tidal or not, and consequently the ungranted fisheries therein, including the foreshore, subject only to the exceptions mentioned in sections 108 and 117 of the Act.

A contention has been advanced by the Dominion that the words "Rivers and Lake Improvements" mean "Rivers," and "Lake Improvements." This interpretation would lead to the absurd conclusion that the ungranted beds of non-navigable rivers are the property of the Dominion, while the "great lakes" would remain the property of the provinces, the word "Rivers" not being large enough to comprehend such lakes. The text has no punctuation. The *s.* thrown in at the end of the word "river" is, to my mind, a clerical error or misprint. It is not to be found in the Quebec Conference resolutions, nor in the address of the provinces to the Queen praying for the Confederation Act, which read "River and Lake Improvements." When the Act was first published in the two official languages in Canada, the Dominion authorities adopted as correct the following translation: "Améliorations sur les lacs et rivières" (1), which is also to be found in the address of the provinces to the Imperial Parliament.

(1) Can. St. 1867-68; Can. 31. V. ch. 1, s. 10.

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It was also urged by the Dominion that as the Dominion can exclusively make laws respecting "Sea-coast and Inland Fisheries," under section 91, par. 12 of the British North America Act, it can grant fishing leases or licenses purporting to convey the right of fishing, as it intends to do by section 4 of the Fisheries Act. It cannot thus exercise the right of the owners, the provinces. To hold otherwise would be to confound the ownership of, with the police jurisdiction over, navigable waters. Championnière, in his learned treatise "Eaux Courantes" n. 360, says:

> Le droit de pêche ne doit pas être confondu avec les règlements de police relatifs à l'exercice de ce droit et d'en surveiller l'exécution.

The Dominion may regulate the fisheries, for instance, the propagation and protection of the fish, the mode and season of fishing. I believe it may also exclude or admit foreigners, and declare as the Parliament of the late province of Canada did to a certain extent in 1858, by 22 Vict., ch. 86, s. 6, Consolidated Statutes of Canada, 1859, ch. 62, s. 3, that all subjects of Her Majesty, or only the inhabitants of Canada, may fish in the public fisheries of this country; it may also provide for a license or permit to fish and demand a reasonable fee for the same, before any one can exercise the right of fishing under a special grant from the province; but in making such regulations and provisions the Dominion must be careful not to destroy or injure the proprietary rights of the provinces. *Cushing* v. *Dupuy* (1); *Parsons* v. *The Citizens' Insurance Co.* (2). The Dominion cannot exercise the rights of the owner of the fisheries, as is intended by section 4 of the Canada Fisheries Act, and issue "fishery leases and licenses for fisheries wheresoever situated or carried on." Section 91 of the British North America Act does not grant any right of owner-

(1) [1880] 5 App. Cas. 409. (2) [1881] 7 App. Cas. 96.

ship in the fisheries; the Dominion does not own the fisheries any more than it owns the banks, railways, telegraphs or ships which it may regulate. I may here quote the language of the Privy Council in *St. Catharines Milling and Lumber Co.* v. *The Queen* (1). Lord Watson said:

> The fact that the power of legislating for Indians and for lands which are reserved to their use has been entrusted to the Parliament of the Dominion, is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

It was also contended that section 4 of the Fisheries Act comes within the power of the Dominion to raise money "by any mode or system of taxation." British North America Act, s. 91, par. 3. No doubt the Dominion can tax the fishermen as it may tax any other occupation or any other class of the community; it can also impose a tax upon the fish caught by them; but it must do so by another enactment than section 4 of the Fisheries Act. Its law must be a provision for a "tax," and not for the price of a "lease or license" of the right of fishing, which it does not possess.

The counsel for the Dominion has cited an Imperial statute (2) to show that the power to regulate trade and commerce must include the power to dispose of the fisheries, in fact the right of ownership. But that statute seems to lead to the very opposite conclusion. Section 7 says that:

> All such parts and right and interests as then belong to Her Majesty in right of the Crown of and in the shore and bed of the sea and of every channel, creek, bay, estuary and of every navigable river of the United Kingdom, so far up the same as the tide flows (and which are hereinafter for brevity called the foreshore) except as in this Act provided, shall, subject to the provisions of this Act, and subject also to such public and other rights as by law exist in, over or affecting the foreshore or any part thereof, be and the same are hereby transferred

(1) [1888] 14 App. Cas. 59. (2) 29 & 30 Vict. ch. 62.

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from the management of the Commissioners of Woods to, and thenceforth the same shall be, under the management of the Board of Trade.

Sections 14 and 15 provide for the mode of compensation to be paid to the Land Revenue of the Crown "for the transfer effected by this Act of the rights and interests of the Crown in the foreshore." We have no such statute in Canada, and if in England it was deemed necessary to have legislative enactment to vest the property rights of the Crown in the public fisheries of Great Britain in a special department of the public service, it seems to me conclusive that similar rights in Canada cannot be transferred to the Dominion or any one else without legislative action. The Imperial Parliament has not done so by the British North America Act, and the provinces, who, as owners of the fisheries, might perhaps do so, have on the contrary asserted in most emphatic terms that they intend to keep this part of their public property. The Dominion, therefore, has only a power to regulate the fisheries and to pass general laws to that effect, except as to public harbours and other Dominion property where it may act as proprietor and regulator.

Some allusion has been made to what is termed the *jus publicum* in tidal waters, which, it is claimed, should be held by the Dominion under the general power conferred on the Dominion by section 91 of the British North America Act, "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces." But is the ownership of the inshore fisheries one of the "matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces"? Can it be disputed that the provinces have not exclusive jurisdiction over the management

and sale of their public lands and property and civil rights in the province; sec. 92, pars. 5 and 13? Can it be denied that under sections 109 and 117 of the British North America Act, all ungranted lands, and generally all public property (with a few exceptions enumerated) continue to belong to the provinces? The Dominion may make laws concerning sea-coast and inland fisheries and shipping and navigation, and to that extent it is vested with the *jus publicum* in tidal and navigable waters, but in my humble opinion nothing more.

Finally, it is suggested that the ownership of the lands covered by sea, within the three miles limit, generally known as the foreshore, and of all lands covered by tidal waters, is subject, under section 109 of the British North America Act, to a "trust" or "interest" created by Magna Charta in favour of the public, which, since confederation, is held and represented by the Dominion for the benefit of the people of the Dominion at large, and is under the control of the Dominion Parliament. It is admitted that this suggestion, if well founded, would not apply to Ontario, where no tidal waters are to be found. In the face of the Civil Code and of the statutes in force in Quebec at the time of the union, it cannot be considered as applicable to that province. For reasons already advanced, nearly all the Maritime Provinces are free from the restrictions imposed by Magna Charta, if ever in force there.

But even if they were in force in all the provinces at the time of the union, can it be said that they constituted a "trust or interest" within the meaning of section 109 of the British North America Act? Was this "trust" or "interest" distinct from the province for whose benefit it was held by the Crown? It cannot be denied that this "trust" or "interest," whatever it was,

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existed before confederation, and was held down to the union, not by the Dominion which had no existence, but by the provinces. The "public" interested in the foreshore fisheries before confederation, was, therefore, the "public" of the province which held the same for its benefit only, and unless the "trust" or "interest" of this provincial public has been transferred to the Dominion by competent legislative authority, every province continues to hold the same for the benefit of its people, subject to the regulations of the Dominion. I have already endeavoured to show that no such transfer was made.

I have not been able to find any authority in point, although the reasoning in *The Queen* v. *Robertson* (1); *The Queen* v. *Moss* (2) and also *St. Catharines Milling and Lumber Co.* v. *The Queen* (3), and in other cases, seems conclusive both as to navigable and non-navigable waters, tidal or not. It is not surprising, therefore, to find decided expressions of opinion upon the point now under consideration on the part of some of the learned judges. In *The Queen* v. *Robertson* (1), Chief Justice Ritchie said:

> I am of opinion that the legislation in regard to inland and sea fisheries, contemplated by the British North America Act, was not in reference to "property and civil rights," that is to say not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern, and important to the public, such as the forbidding fish to be taken at improper seasons, in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national and provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously

(1) 6 Can. S. C. R. 102. (2) 26 Can. S. C. R. 322.
(3) 14 App. Cas. 46.

to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging, at the date of confederation, either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of claim; but on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. Nor can I discover the most remote indication of an intent to deprive either the provinces or the individuals of their proprietary rights in their respective properties; or in other words, that it was intended that the lands and their incidents should be separated, and the lands continue to belong to the provinces and the Crown grantees, and the incidental right of fishing should belong to the Dominion, or be at its disposal. I am at a loss to understand how the Dominion, which never owned the land, and therefore never had any right to the fishing as incidental to such ownership, without any grant, statutory or otherwise, without a word in the statute indicating the slightest intention to vest the rights of property or of fishing in the Dominion, without a word qualifying or limiting the right of property of the provinces in the public lands, can now successfully claim to have a beneficial interest in those fisheries, and authority to deal with such rights of fishing as the property of the Dominion, and claim to rent or license the same at large yearly rents, and appropriate the proceeds to Dominion purposes.

Mr. Justice Fournier said in the same case, page 138:

La section 91, sous-section 12 de l'acte de l'Amérique Britannique du Nord, en donnant au gouvernement fédéral le pouvoir de légiférer sur les pêcheries, ne lui en attribue pas le droit de propriété. Il ne les enlève pas des propriétaires ou possesseurs d'alors pour se les approprier. Ce n'est pas ainsi non plus que cette section a été interprétée par l'acte 31 Vic. ch. 60, passé très peu de temps après l'acte de Confédération. La section 2 déclare expressément que le Ministre de la Marine et des Pêcheries pourra, lorsque le droit exclusif de pêcher n'existe pas déjà en vertu de la loi, émettre ou autoriser l'émission de

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baux ou licences de pêche pour pêcher en tout endroit où se fait la pêche. Comme on le voit les droits de tous ceux qui avaient un intérêt ou une propriété dans les pêcheries sont respectés. Sous le rapport du droit de propriété, l'acte fédéral, ni l'acte des pêcheries n'ont fait de changement à l'état de choses existant avant la Confédération. La propriété est demeurée où elle était auparavant. Il n'y a donc, sous ce rapport, aucun empiétement de la part du pouvoir fédéral. Si l'action du département de la Marine n'a pas été conforme à ce principe, comme dans le cas actuel, cette action est nulle. Tout en respectant le droit de pêche comme propriété, le gouvernement fédéral ne peut-il pas y exercer, dans l'intérêt général de la Puissance, un droit de surveillance et de protection? Je crois que oui, et que c'est là précisément le but des pouvoirs législatifs qui lui ont été conférés à ce sujet. Il n'y a, suivant moi, aucune incompatibilité entre l'exercice de ce pouvoir et l'exercice du droit de pêche, comme droit de propriété en d'autres mains que ceux du governement. Le gouvernement fédéral peut, suivant moi, dire au propriétaire: "Vous ne pêcherez qu'en certaines saisons et qu'avec certains instruments ou engins de pêche autorisés." Cette restriction n'est pas une atteinte mais bien plutôt une restriction accordée à ce genre de propriété. C'est une réglementation, je dirai, de police et de contrôle sur un genre de propriété qu'il est important de développer et de conserver pour l'avantage général. On sait ce que deviendrait en peu de temps les pêcheries, s'il était libre aux particuliers de les exploiter comme bon leur semblerait. En peu d'années, leur aveugle avidité aurait bientôt ruiné ces sources de richesses et nos pêcheries, au lieu de revenir aussi riches et aussi fécondes qu'autrefois, retourneraient bientôt à l'état de dépérissement, sinon de ruine, où elles étaient avant d'avoir été l'objet d'une législation protectrice. Ce pouvoir de réglementation, de surveillance et de protection a été, avant la Confédération, exercé par chaque province dans l'intérêt public. C'est le même pouvoir qu'èxerce aujourd'hui le gouvernemeot fédéral. Pas plus que les provinces ne l'ont fait, il n'a le pouvoir de toucher au droit de propriété dans les pêcheries, son pouvoir se borne à en régler l'exercice.

### Mr. Justice Henry:

After a full consideration of the issues before us I think the appeal in this case should be dismissed. The British North America Act of 1867 conveys to the Dominion no property in the sites of the sea-coast or inland fisheries, as I construe it. In section 91, which defines the powers of the Dominion Parliament, we find included "Sea-coast and inland fisheries." That provision in the enumeration of the powers enables the Parliament of the Dominion to legislate on the subject, as it does in respect to matters such as "Shipping and navi-

gation," "Ferries," "Bills of exchange and promissory notes" and many others, without passing any right of property in the several subject matters. In fact, in my opinion the power under the Act is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient.

In *St. Catharines Milling and Lumber Company v. The Queen* in 1888 (1), Lord Watson, speaking for the Judicial Committee of the Privy Council, at page 55 and following, said:

By an Imperial statute passed in the year 1840 (2) the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the sovereign, but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown. That continued to be the right of the province until the passing of the British North America Act, 1867. . . . .

The Act of 1867, which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate provinces, under the titles of Ontario and Quebec, due provision being made (section 142) for the division between them of the property and assets of the united province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective provinces included in the union, on the one hand, and the Dominion on the other. The conflicting claims to the ceded territory maintained by the Dominion and the province of Ontario are wholly dependent upon those statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its pro-

(1) 14 App. Cas. 46. (2) 3 & 4 Vict., c. 35.

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ceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

Section 108 enacts that the public works and undertakings enumerated in schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of "lands set apart for general public purposes." * * *

* * Section 109 provides that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." In connection with this clause it may be observed that, by section 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that the interests in land, mines, minerals and royalties, which by section 109 are declared to belong to the provinces, include, if they are not identical with, the "duties and revenues" first excepted in section 102.

The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, *the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section* 108, *or might assume for the purposes specified in section* 117. Its legal effect is to exclude from the "duties and revenues appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Attorney General of Ontario* v. *Mercer*" (1).

See also *Attorney General of British Columbia* v. *Attorney General of Canada* (2).

(1) 8 App. Cas. 767. (2) [1889] 14 App. Cas. 295.

Now, one word with regard to the power of the provincial legislatures to pass provincial fishery laws, and I will conclude this branch of the reference. In passing these laws, I consider that the provinces have exercised a local power conferred upon them by section 92 of the British North America Act, which gives them jurisdiction over "the management and sale of public lands belonging to the province," par. 5, and "property and civil rights of the province," par. 13. The Privy Council has recognized that in several matters exclusively assigned to the Dominion, the provinces have a contingent jurisdiction, especially in a remarkable recent case relating to "bankruptcy and insolvency." *Attorney General of Canada* v. *Attorney General of Ontario* (1). Of course the provincial legislation must not be inconsistent with the Dominion regulations respecting "sea-coast and inland fisheries."

2. In respect of *Shipping and Navigation.*

I am of opinion that the grant by the province of ungranted water lots in navigable waters, outside the public harbours and other Dominion property, conveys to the grantee the right to build a wharf, warehouse, or other work, without the previous approval of the Dominion, provided that the work so constructed does not interfere with shipping and navigation, a question which, if disputed, should be left to judicial determination. As I read the Revised Statutes of Canada, chapter 92, I consider that they are not opposed to the erection of such work, for it seems to me that the Act is limited to cases where the work interferes with navigation. Sect. 2. See *Normand* v. *Cie de Navigation St. Laurent* (2); *The Queddy River Driving Boom Co.* v. *Davidson* (3); *Booth* v. *Ratté* (4).

(1) [1894] A. C. 189.
(2) 5 Q. L. R. 215.
(3) [1883] 10 Can. S. C. R. 222.
(4) 15 App. Cas. 188.

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I believe, moreover, that the Dominion has power to declare what shall be deemed an interference with navigation, and to require its previous sanction to any work in navigable waters. This power seems to come within section 91 of the British North America Act, which gives to the Parliament of Canada exclusive jurisdiction to make laws concerning "trade and commerce," and "shipping and navigation." *Pennsylvania* v. *Wheeling and Belmont Co.* (1). It also appears to me to be necessary to enable the Dominion, under section 132 of the Act, to carry out the treaties of the Empire securing to foreign nations the free navigation of the St. Lawrence and other rivers.

As to public harbours and other lands being the property of the Dominion, the Dominion alone can grant water lots in the same under sections 108 and 117 of the British North America Act.

ANSWERS TO QUESTIONS.

Having thus expressed my views upon the questions of law involved in the Order of Reference, I will now proceed to give seriatim my answers to the several questions submitted to this court.

To the 1st Question: The beds of the waters referred to in this question did not become the property of the Dominion, but, "subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same," and subject also to the regulations of the Parliament of Canada respecting "sea-coast and inland fisheries," "trade and commerce," and "shipping and navigation," remain the property of the province in which the same are situate, without any distinction between the various classes of waters, and without any exception whatever, save the

(1) [1855] 18 How. 421.

exceptions contained in sections 108 and 117 of the British North America Act.

To the 2nd Question: Yes, with the exception, perhaps, of the last part of section 9.

To the 3rd Question: Yes.

To the 4th Question: No.

To the 5th Question: Yes.

To the 6th Question: No.

To the 7th Question: Same answer.

To the 8th Question: Same answer.

To the 9th Question: The Dominion has no such jurisdiction, as already stated.

To the 10th Question: No. Section 4 of the Fisheries Act, when enforced outside public harbours and other Dominion property, is *ultra vires*. The other provisions of the Act appear to me to be *intra vires* as being mere regulations of the fisheries, with the exception of clause 22, which confers the right to use provincial vacant public property for fishing purposes, and with the exception also of certain clauses or parts of clauses, connected with section 4, or purporting to convey rights of fishing by lease, license or otherwise, for instance sections 8, par. 6; 14, par. 1; 16, par. 1; 21, pars. 1, 3 and 4.

To the 11th Question: Same answer.

To the 12th Question: The jurisdiction of the Dominion is limited to the passing of such general laws.

To the 13th Question: Clause 47 of R. S. O. ch. 24 is *intra vires*; and likewise the sections referred to of the Ontario Fisheries Act of 1892, except with regard to public harbours and other Dominion property within sections 108 and 117 of the British North America Act, and also when inconsistent with Dominion regulations on "Inland Fisheries."

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To the 14th Question: Yes, except when inconsistent with Dominion regulations on "Sea-coast and Inland Fisheries."

To the 15th Question: Yes.

To the 16th Question: Yes.

To the 17th Question: Yes.

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*Oct. 6, 8.

*Nov. 5.

THE HONOURABLE ARTHUR TURCOTTE (DEFENDANT)..... } APPELLANT;

AND

DAME JUSTINE DELPHINE DANSEREAU (PLAINTIFF)..... } RESPONDENT.

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

*Appeal — Jurisdiction — Judicial proceeding—Opposition to judgment—Arts.* 484-493 *C. C. P.—R. S. C. c.* 135, *s.* 29—*Appealable amount —*54 *& 55 V. c.* 25, *s.* 3, *s.s.* 4—*Retrospective legislation.*

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000.

MOTION to quash an appeal from the decision of the Court of Queen's Bench for Lower Canada (appeal side), District of Quebec, affirming the judgment of the Superior Court, District of Three Rivers, which dismissed the appellant's opposition to a default judgment entered against him in favour of the respondent.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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The plaintiff sued the defendant on 19th September, 1888, for $1,997.92, the claim being made up of the amount of two promissory notes with interest thereon from their respective dates of maturity to the date of action, and by the conclusions of her declaration further asked interest upon the sum so claimed from that date till payment and for costs. The defendant did not appear to the action and upon the 19th of October, 1889, the plaintiff caused a judgment by default to be entered against the defendant for $1,997.92 with interest on $1,500 (amount of the notes,) from the date of the action and on $497.92, (the interest accrued thereon,) from the 21st of September, 1888, (date of service,) until paid, and for costs.

On the 25th of April, 1892, the defendant filed an opposition to the judgment so entered asking to have it annulled and further setting up exceptions and pleas to the action. The plaintiff's opposition was dismissed with costs by the judgment of the Superior Court rendered on the 16th of November, 1892, which was affirmed by the decision of the Court of Queen's Bench now appealed from on the 5th of May, 1896. At the time of the filing of the opposition interest to the amount of $421.85 had accrued upon the judgment then attacked, making together with the judgment a total sum of $2,419.77 then exigible thereunder besides costs.

The respondent moved to quash the appeal on the grounds, that the matter in controversy did not amount to the sum or value of $2,000, and that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

*Lajoie* for the motion. The opposition is a defence or plea to the action and forms part of the proceedings upon the original suit, and is subject to the provisions concerning ordinary contestations (1) and consequently

(1) C. C. P. art. 490.

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the amount claimed in the declaration being less than $2,000 no appeal lies (1). Even considered as an opposition, it has been filed in a suit where the dispute is less than $2,000, and there is no appeal. *Gendron* v. *McDougall* (2). Interest cannot be added to raise the sum in dispute to the amount necessary to give the right of appeal. *Dufresne* v. *Guévremont* (3). The opposition and the judgment dismissing it were both in 1892, subsequent to the Act 54 & 55 Vic. ch. 25, and are subject to its provisions, as well as those of art. 2511, R. S. Q., which are the same in all respects. Wade Retroactive Laws, p. 218; *Williams* v. *Irvine* (4); *Couture* v. *Bouchard* (5).

*Languedoc* Q.C. for the appellant. In this case the plaintiff sued on promissory notes with interest calculated to date of action, but by law interest was still accruing from day to day (6); *Boswell* v. *Kilborne* (7); and was prayed for accordingly in the declaration. The judgment in 1889 granted precisely what had been prayed for; the condemnation and the prayer are identical, and consequently the Act 54 & 55 Vic. ch. 25 cannot apply, for there is no difference between the amount prayed for and the amount demanded. This Act does not operate retrospectively, as it affects an existing right; *The Attorney General* v. *Sillem* (8), *Taylor* v. *The Queen* (9); so the sum recovered by the judgment must be looked at to determine the right of appeal. *Macfarlane* v. *Leclaire* (10); *Bank of New South Wales* v. *Owston* (11); *Allan et al* v. *Pratt* (12);

(1) 54 & 55 Vic. ch. 25, sec. 3, sub sec. 4.
(2) Cass. Dig. 2 ed. p. 429.
(3) 26 Can. S. C. R. 216.
(4) 22 Can. S. C. R. 108.
(5) 21 Can. S. C. R. 281.
(6) C. S. L. C. ch. 64, sec. 7; 53 Vic. (D.) ch. 33, secs. 9 and 57; C. C. arts. 2318 and 2346.
(7) 12 Moo. P. C. 467.
(8) 10 H. L. Cas. 704; 33 L. J. Ex. 209.
(9) 1 Can. S. C. R. 65.
(10) 15 Moo. P. C. 181.
(11) 4 App. Cas. 270.
(12) 13 App. Cas. 780.

*Ayotte* v. *Boucher* (1); *Monette* v. *Lefebvre* (2); *Dawson* v. *Dumont* (3); *The Patapsco* (4).

The opposition filed by the appellant in 1892 is, under the Supreme Court Act a judicial proceeding which marks the date at which his interest must be considered. He could not then have settled without tendering interest if he had wished to do so. He contested the judgment as he then found it with interest accrued due on the principal and disputed the whole condemnation, in all exceeding the appealable amount. The opposition may technically be considered as a plea to the action, but it is one that challenged the case at a stage and in a condition when the amount of the demand of the plaintiff depended upon the whole judgment and exceeded the appealable amount.

THE CHIEF JUSTICE.—By her declaration, dated the 19th of September, 1888, the plaintiff claimed from the defendant the sum of $1,997.92 with interest and costs.

The amount was made up as follows:

1. A promissory note at 4 months, dated 18th May, 1883, for $1,000.

2. A promissory note at 4 months, dated 12th June, 1883, for $500.

3. Interest on the first note from the date it fell due to the date of the declaration, $300.

4. Interest on the second note from the date it fell due to the date of the declaration, $197.92.

On the 19th day of October, 1889, the Superior Court gave judgment for the plaintiff, by default, for $1,997.92 with interest on $1,500 from the 19th September, 1888 (the date of the declaration) and on $497.92 from the 21st September, 1888 (the date of the service).

On the 25th April, 1892, the defendant filed his opposition in the Superior Court to the judgment, because

(1) 9 Can. S. C. R. 460.
(2) 16 Can. S. C. R. 387.
(3) 20 Can. S. C. R. 709.
(4) 12 Wall. 451.

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the action had not been served on him; and no copy of the writ and declaration had been served on him or left at his place of business or domicile.

He also set out his defence on the merits.

On the 16th November, 1892, the Superior Court dismissed the opposition with costs.

From this last mentioned judgment the defendant (opposant) appealed to the Court of Queen's Bench (appeal side), which court, on the 5th day of May, 1896, affirmed the judgment of the Superior Court of the 16th November, 1892, with costs.

From this judgment of the Court of Queen's Bench the defendant has appealed to the Supreme Court of Canada.

The plaintiff has moved to quash because the matter in controversy in the case does not amount to the sum or value of $2,000, and that therefore the case does not come within the provisions of the Supreme and Exchequer Courts Act and consequently the Supreme Court has no jurisdiction to entertain the appeal.

I am of opinion that the opposition filed by the defendant for the purpose of having the judgment by default rendered against him vacated was "a judicial proceeding" within the meaning of section 29 of the Supreme Court Act.

In April, 1892, when the opposition was filed the amount due on the judgment which it sought to have annulled amounted to upwards of $2,000. From this it follows, without any necessity for further demonstration, that the matter in controversy in this "judicial proceeding" exceeded $2,000, and that therefore under section 29 the appeal is within the competence of this court.

It may be added that in the case of *Wallace* v. *Bossom* (1) the court held that a rule or order of the Su-

(1) 2 Can. S. C. R. 488.

preme Court of Nova Scotia setting aside an execution was a proper subject of appeal to this court.

The motion to quash must be refused with costs.

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GWYNNE J.—On the 19th September, 1888, the above respondent as plaintiff filed her declaration in an action brought in the Superior Court at Three Rivers, in the province of Quebec, by her as legatee under the will of the late S. A. Senecal, the deceased husband of the plaintiff and in his lifetime indorsee of two several promissory notes made by the appellant, the one dated the 18th of May, 1883, for the sum of one thousand dollars, payable four months after date, and the other dated the 12th of June, 1883, for the sum of five hundred dollars, payable four months after date, and by such her declaration she claimed the right in law to recover a judgment against the above appellant for the said respective principal sums made payable by the said several promissory notes, together with the legal interest recoverable in the said action for non-payment of the said notes at maturity. The action under consideration was instituted and the judgment thereon was rendered before the passing of the Act 54 & 55 Vic. ch. 25 sec. 3, sub-sec. 4, which enacts that "whenever the right of appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different," and this court has already held, (1), that the Act does not apply to actions commenced and argued and taken *en délibéré* for judgment prior to the passing of the Act; the amount therefore of the judgment against which an appeal is taken is in this case to be looked to and not the amount demanded whatever that may be held to be. It was argued that the judgment appealed against

(1) *Williams* v. *Irvine*, 22 Can. S. C. R. 108.

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is a judgment rendered since the passing of the Act upon an opposition, entered also since the passing of the Act, to the judgment rendered in the action upon the 19th of October, 1889, and that such opposition is to be regarded as a defence to the action. Granting it to be so taken it must be as a defence to the action in its then condition, and if successful would defeat the judgment and avoid it, but if unsuccessful would leave the action in *statu quo*, that is to say in judgment. The judgment appealed against discharged the opposition as unfounded; that judgment did not adjudge any amount to be recovered by force of it; the ground of the opposition was that the judgment of the 19th October, 1889, was obtained by fraud by reason of the defendant as was alleged not having been served with any proceeding in the action. The judgment declared this opposition to be unfounded and no sum of money being directly awarded by that judgment no comparison can be made between the amount demanded and any amount recovered by that judgment.

I am of opinion therefore that the motion to quash the present appeal, which is in substance and in its actual effect if successful against the judgment of the 19th October, 1889, must be refused.

SEDGEWICK, KING and GIROUARD JJ. concurred in the judgment of His Lordship the Chief Justice.

*Motion refused with costs.*

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

Solicitor for the respondent: *W. C. Languedoc.*

EDWARD C. TORROP (PLAINTIFF).....APPELLANT; 1896

AND *Nov. 5.

THE IMPERIAL FIRE INSURANCE COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Fire insurance—Conditions in policy—Breach—Waiver—Recognition of existing risk after breach—Authority of agent.*

A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed.

*Held*, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition.

*Held*, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach.

APPEAL from a decision of the Supreme Court of New Brunswick, setting aside a verdict for the plaintiff and ordering a nonsuit.

The action in this case was on a fire insurance policy on a spool and bobbin factory in New Brunswick and the machinery, engine and boilers therein. The amount of the insurance was $2,750 and was made payable to "Hon. George Irvine and John G. Walsh, Executors of the estate of the late Edward Burstall of Quebec," who held a mortgage on the insured property on which $4,000 was due at the time of the loss.

The company defended the action on several grounds. First, that under a condition indorsed on the policy making it void "if the said property should be sold or

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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conveyed, or the interest of the parties thereon changed, or if the policy should be assigned without the consent of the company obtained in writing therein" the policy had been forfeited by the insured giving a bill of sale of the property to McAllister & Mott, the local agents of the company at Campbellton, N.B., and afterwards making an assignment for benefit of his creditors of all his property, mentioning expressly all policies of insurance. Secondly, that the policy had been cancelled before loss by notice to the insured as authorized by a condition therein. Thirdly, that proofs of loss had not been given to the company within the time limited therefor by the policy.

At the trial the plaintiff contended that the bill of sale and trust deed not being absolute transfers of the property were not sufficient to avoid the policy; that if they were the company had subsequently, by attempting to cancel the policy, treated the risk as existing with knowledge of the transfers, the knowledge of McAllister & Mott being imputed to the company; that the policy was not cancelled as notice had not been given to the insured but only to his trustees, and moreover, that notice to the payees of the policy in Quebec was essential; and that the proofs had been put in after the limited time and not objected to which constituted a waiver of the condition.

The Supreme Court of New Brunswick decided the case in favour of the company on the two grounds that the transfers avoided the policy, and if not that it was cancelled.

*McLean* for the appellant. The policy was headed, "Maritime Provinces Branch, Campbellton Agency," and indorsed "McAllister & Mott, agents." So far as the public were concerned McAllister & Mott were

general agents with full powers. *Millville Ins. Co.* v. *Building Assoc.* (1); *Ins. Co.* v. *Wilkinson* (2).

Notice to the agents was notice to the company. *Bawden* v. *London, &c., Assurance Co.* (3); *Markey* v. *Mutual Benefit Ins. Co.* (4).

After breach the company may elect to keep the policy in force. *Wing* v. *Harvey* (5); *McQueen* v. *Phœnix Ins. Co.* (6).

The policy was not assigned. *Lazarus* v. *Commonwealth Ins. Co.* (7).

The attempt to cancel the policy was ineffectual as notice was not given to the assured. *Caldwell* v. *Stadacona Ins. Co.* (8).

*Pugsley* Q.C. and *Hanington* Q.C. for the respondent, were not called upon.

THE CHIEF JUSTICE.—(Oral.) We are all of opinion that the judgment pronounced by the Supreme Court of New Brunswick in this case was quite correct, with one exception. There is no doubt that the bill of sale to McAllister & Mott was "a change of interest," which avoided the policy under the first condition. The insured claimed that this forfeiture was waived, but McAllister & Mott, being agents only for the purpose of receiving applications and forwarding them to the head office, had no authority to waive it, and Whittaker, the resident secretary and the only person whose acts could bind the company, knew nothing of the bill of sale having been given, and could not be said to have elected to treat the policy as in force after a forfeiture of which he was ignorant. Therefore, without discussing any of the other questions that have been argued on behalf of the appellant, and

(1) 43 N. J. L. R. 652.
(2) 13 Wall. 222.
(3) [1892] 2 Q. B. 534.
(4) 103 Mass. 78.
(5) 5 DeG. M & G. 265.
(6) 4 Can. S. C. R. 660.
(7) 5 Pick. (Mass.) 76.
(8) 11 Can. S. C. R. 212.

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which are all fully and ably dealt with by Mr. Justice Barker, in his judgment in the court below, we are of opinion that the appeal fails on the ground mentioned and must be dismissed.

Further, we think the court below should have ordered the entry of a verdict for the defendants instead of directing a nonsuit, and their judgment should be varied in this respect

Subject to this variation the appeal is dismissed with costs.

*Judgment varied as above stated and subject thereto appeal dismissed with costs.*

Solicitors for the appellant: *Weldon & McLean.*

Solicitor for the respondent: *A. H. Hanington.*

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*Oct. 24.

*Dec. 9.

FARWELL & GLENDON (PLAINTIFFS)..... APPELLANTS;

AND

PHILIP JAMESON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Landlord and tenant—R. S. O.* [1887] *c.* 143, *s.* 28—*Construction of statute—Distress—Goods of person holding "under" tenant.*

The Ontario Landlord and Tenant Act (R. S. O. [1887] c. 143, s. 28) exempts from distress for rent the property of all persons except the tenant or person liable. The word "tenant" includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant.

*Held*, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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FARWELL v. JAMESON.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming by an equal division, the judgment of the Divisional Court (2).

The defendant is the owner of certain premises on Queen Street, Toronto, leased by him to one Armstrong. Armstrong assigned the lease to the London and Canadian Loan Co. and the plaintiffs on the 17th of April, 1895, had certain pianos, organs, etc., therein. For rent due under the lease the defendant distrained on the pianos on the 17th of April and sold them.

It appears that the London and Canadian Loan Co. were in possession of the premises as mortgagees, or as assignees; that they had sanctioned the putting up in the premises a notice that the premises were to let and to apply to William Parsons, agent. They had also entrusted Parsons with the key for the purpose of showing the premises to proposing lessees.

Parsons, it appears from the evidence, had authority to use the keys for such purpose, but he had no authority to make a lease; he had only authority to procure proposing lessees and to bring them to the London and Canadian who would determine whether in point of fact they would grant them a lease or not.

These being the circumstances the plaintiffs went to Parsons for the purpose of seeing the premises and of procuring a lease from him as the agent of the Loan Company, and a lease was entered into in April professing to be made between Parsons and the plaintiffs. It, however, seems clear that the plaintiff knew that Parsons was acting merely as agent for the London and Canadian Loan Co., and they took the premises from him as agent, although the lease is in the name of Parsons. After they moved their pianos and organs into the premises and were occupying it, the defendant, Jameson, the supreme landlord, came and distrained.

(1) 23 Ont. App. R. 517. (2) 27 O. R. 141.

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The question to be decided was whether or not the goods were liable to distress for rent, under section 28 of the Landlord and Tenant Act, which provides as follows in s.s. (1): "A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found upon the premises." By s.s. (3) "the word 'tenant' shall extend to and include the sub-tenant and assigns of the tenant, and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether he has or has not attorned to or become the tenant of the landlord."

The Divisional Court held that the goods were liable to distress and the Court of Appeal was equally divided on the question.

*Laidlaw* Q.C. for the appellants.

*Kilmer* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Court of Appeal affirming the judgment of the Queen's Bench Division in an action brought by the appellants against the respondent to recover damages for wrongful seizure of the appellants' goods, under colour of a distress for rent. The action was tried before the learned Chief Justice of the Queen's Bench, who dismissed the action, and this judgment was sustained by the Divisional Court. In the Court of Appeal the judges were equally divided in opinion, the Chief Justice and Mr. Justice Osler holding that the appeal should be dismissed, whilst Mr. Justice Burton and Mr. Justice Maclennan were of opinion that the appellants were entitled to recover and that the appeal should be allowed.

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The Chief Justice.

The respondent, being the owner of certain buildings and premises, made a lease to one Armstrong who assigned or sub-let to the London and Canadian Loan Co. as mortgagees. The mortgagees took possession and being so in possession entrusted the key of the premises to one Parsons, in order that he might show the premises to persons desiring to inspect them with the view of becoming lessees. The company did not, however, confer any authority on Parsons to let the premises or to put any person in possession of them. Parsons, however, without the authority or knowledge of his principals, executed an instrument purporting to be a lease, or an agreement for a lease, by himself to the appellants as monthly tenants, at the rental of $5 per month, for the purpose of storing pianos. The appellants took possession and placed their pianos on the premises. The head rent reserved by the original lease being in arrear the respondent distrained upon and sold the appellants' goods found upon the premises. The appellants then brought this action.

A single question of law is involved in the case, depending on the construction of section 28 of the Landlord and Tenant Act, R. S. O. ch. 143. By the 28th section of that Act (sub-section 1) it is enacted that:

> A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises.

And by sub-section three of the same section it is provided that:

> The word "tenant" in this section shall extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the consent of the tenant during the currency of the lease, or while rent is due, or in arrear, whether he has attorned to or become the tenant of the landlord or not.

It is clear that there is no pretence for saying that the appellants were, under the circumstances stated, either

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the tenants or assigns of the original tenant, Armstrong, or of his assignees the London and Canadian Loan Company. Nor can it be said that the appellants were in possession with the consent of the head tenant or of his assigns, the company. The question then is confined to this: Can it be said that within the proper meaning and construction of the Act the appellants were in "under" the assignees of the lease, the London and Canadian Loan Company? It is well observed by Mr. Justice Burton in his judgment that the statute was a remedial law and as such is entitled to a liberal interpretation. It appears, however, to me, that it is not necessary to invoke this rule in the present case inasmuch as it cannot possibly be predicated of the appellants that they were in possession under the London and Canadian Loan Company, who had neither originally authorized their taking possession, nor adopted the unauthorized act of Parker, their agent, in letting them into possession. It cannot be disputed that, as regards the company, the appellants were neither lessees nor licensees, but were mere trespassers, and as such were liable to be ejected at any time.

It is said, however, on behalf of the respondent, that the appellants must be considered as persons in under the London and Canadian Loan Company, for the reason that, in an action of ejectment or trespass brought against them by the company, they would be estopped from disputing the company's title and would be precluded from setting up any title paramount which they might acquire, and the case of *Doe Johnson* v. *Baytup* (1), was relied on as an authority for this proposition. I am not prepared to go as far as Mr. Justice Burton and Mr. Justice Maclennan, who were of opinion that in an action of ejectment or trespass against the appellants the company would have been obliged to prove title.

(1) 3 A. & E. 189.

On the contrary I concede that in such a case the appellants would have been estopped from denying the title of the company whose agent, Parker, had without their authority, knowledge, or privity, let the appellants into possession. The well known case before cited, which the respondent relies on, is a clear authority for this. There the keys of the premises, consisting of a house and garden, had been entrusted to a caretaker for the same purpose as the key had been left with Parker in the present case, in order that persons desiring to view the premises, which were advertised to be let, might inspect them. This agent handed over the keys to the defendant, who obtained them for the pretended purpose of taking vegetables from the garden, and the defendant, having thus got into possession, attempted to set up an adverse title against the lessor of the plaintiff, which, as might have been expected, he was held to be estopped from doing. I see no distinction between *Doe Johnson* v. *Baytup* (1) and the present case, and in an action of trespass or ejectment brought against the appellants by the London and Canadian Trust Co., I have no doubt it would be conclusive authority against the appellants.

That conclusion is, however, in my opinion, in no way decisive of the question we are called upon to determine in this appeal.

In *Doe Johnson* v. *Baytup* (1) the lessor of the plaintiff was held entitled to succeed, not because the defendant in fact went in under him, but for the reason that, having obtained possession from an agent of the plaintiff, who would herself have been estopped from setting up title against the plaintiff, the defendant was estopped from saying that he did not go in under the plaintiff, although this was at variance with the truth, inasmuch as the agent or caretaker had no authority from the lessor of the plaintiff to let the defendant into possession.

(1) 3 A. & E. 189.

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As I have said, the same reason would have applied if an action of trespass or ejectment had been brought by the company against the respondents; they would have been debarred from setting up title, not because in fact they went in under the company, but for the reason that the circumstances under which they acquired possession were such as to estop them from showing the real facts.

With this estoppel between the company and the appellants we have nothing to do in the present case. We are here to pronounce upon the real facts, and to say whether in truth the appellants went in under the company within the meaning of the statute. The respondent cannot in this action, on any principle I am aware of, claim the benefit of an estoppel which would have operated in favour of the company and against the appellants.

The benefit of the doctrine of estoppel is confined to parties and privies, and for the present purpose the respondent, who is of course not a party, is in no way in privity with the company.

Were we to give effect to the argument based on this principle of estoppel, by shutting out evidence of the real state of the case, we should be doing nothing less than adding words to the statute by extending its plain terms, which only include those who in point of fact went in under the tenant, to those who might be estopped from denying that they so took possession, although such denial was in accord with the facts. In no case ought such a construction of the plain words of an Act of the legislature to prevail, much less in the case of a beneficial enactment where reason and justice and the plain object of the statute all call for a contrary construction.

The appeal must be allowed, the judgment for the respondent vacated, and judgment entered for the

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appellants for $550 the amount of damages agreed on by the parties.

The appellants must have their costs here, in the Court of Appeal and in the Divisional Court.

*Appeal allowed with costs.*

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Kilmer & Irving.*

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1896

*Oct. 14.
*Dec. 9.

THE MONTREAL ROLLING MILLS COMPANY (DEFENDANT)..... APPELLANT;

AND

MARY ANN CORCORAN (PLAINTIFF)...RESPONDENT.

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

*Master and servant—Negligence—"Quebec Factories Act"—R. S. Q. arts. 3019-3053—Art. 1053 C. C.—Civil responsibility—Accident, cause of—Conjecture—Evidence—Onus of proof—Statutable duty, breach of—Police regulations.*

The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture to be inferred from the circumstances proved.

*Held*, that in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.

The provisions of the "Quebec Factories Act," (R. S. Q. arts. 3019 to 3053 inclusively) are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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THE MONTREAL ROLLING MILLS CO. v. CORCORAN.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, affirming the decision of the Superior Court for the District of Montreal, which awarded damages in the sum of $3,000 in favour of the plaintiff on account of the death of her husband, an engineer in the employ of the defendants, which occurred accidentally whilst he was employed at his work about the machinery of the engine room.

The plaintiff alleged that the engine room was dark and contained a dangerous belt and a large fly-wheel neither of which was protected as required by law; that while the deceased was working as engineer he was caught either by the one or the other and instantly killed; and that the want of covering on the belt and fly-wheel constituted gross negligence and imprudence on the part of the defendant. The pleas set out that there was a sufficient protection around the machinery and that the accident was entirely due to the negligence, imprudence and carelessness of the deceased, and by a subsequent plea that the accident was caused by fortuitous circumstances and the act of God for which the defendants were not responsible.

The evidence shewed that the engine room was lighted as well as such rooms usually are; that the engine and apparatus were in good order doing its work in a proper manner; and that a railing three and a half feet in height, consisting of two rows of iron pipe, surrounded the fly-wheel and belt-pulley. The deceased was alone in the engine room when the accident occurred and when the witnesses arrived after the alarm they discovered the body of the deceased scattered about the room as described in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

*McGibbon* Q.C. and *Riddell* for the appellant. The employer cannot be treated as an insurer of the employee;

his liability is limited by the civil code. *Mercier* v. *Morin* (1); *Smith* v. *Baker* (2). There is no direct or sufficient evidence as to how the accident occurred, it is a mere matter of conjecture to be inferred from certain facts proved. Beven on Negligence, p. 133, and cases there cited. The onus of proof was on the plaintiff to shew that defendant's fault actually caused the accident; C. C. arts. 1053, 1054; *Morgan* v. *Sim* (3); *Badgerow* v. *Grand Trunk Railway Co.* (4); *Wakelin* v. *London and South-Western Railway Co.* (5).

The "Factories Act" is restricted by its last article, (3053), and the civil laws as to the civil responsibility of employers remain unaffected. The Act is penal only in its operation, and the proprietor is relieved from infractions committed without his knowledge. It is *quasi* criminal and provides no additional civil responsibility. (R. S. Q. arts. 3040, 3041, 3042, 3044, 3046, 3053;) *Atkinson* v. *Newcastle Waterworks Co.* (6); *Wilson* v. *Merry* (7), per Lord Chelmsford at p. 341; *Hildige* v. *O'Farrell* (8), per Deasy L. J. at p. 497; *Cowley* v. *Newmarket Local Board* (9). Even if the statute can have any application it has been satisfied. The machinery was guarded as far as practicable (10), and no reasonable person would take other precautions; *Nichols* v. *Hall* (11); *Cooper* v. *Woolley* (12). Usual and ordinary precautions are sufficient; *Ross* v. *Hill* (13). The statute calls for nothing unreasonable or unusual. Deceased understood the risks of his employment; *volenti non fit injuria*. *Brousseau* v. *Boulanger* (14); *Montrambert* v. *Sapanel* (15); *Blot* v.

(1) Q. R. 1 Q. B. 86.
(2) [1891] A. C. 325.
(3) 11 Moo. P. C. 307.
(4) 19 Ont. R. 191.
(5) 12 App. Cas. 41.
(6) 2 Ex. Div. 441.
(7) L. R. 1 H. L. Sc. 326.
(8) L. R. Ir. 6 C. L., 493.
(9) [1892] A. C. 345.
(10) R. S. Q. art. 3024.
(11) L. R. 8 C. P. 322.
(12) L. R. 2 Ex. 88.
(13) 2 C. B. 877.
(14) Q. R. 6 S. C. 75.
(15) S. V. 74, 2, 316.

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THE MONTREAL ROLLING MILLS CO. v. CORCORAN.

*Société des mines de Layon* (1). If, as suggested, the accident was due to experiments deceased was making with the machinery, or to any imprudence, however slight, on his part, there is no recourse in damages, Dalloz vo. "Ouvrier" no. 104; *Sarault* v. *Viau* (2); *Archambault* v. *Dominion Barb Wire Co.* (3); *Currie* v. *Couture* (4). The test is whether there was such negligence that ordinary care could not have prevented the accident; *Radley* v. *London and North-Western Railway Co.* (5). The directions to deceased were that the machinery should be stopped when its parts required attention or repairs, and we must attribute the accident to his disobedience or imprudence in the engine room; *The Globe Woollen Mills* v. *Poitras* (6); *Roberts* v. *Dorion* (7). A person in his own wrong cannot recover; *Headford* v. *McClary Manufacturing Co.* (8).

*Guerin* for the respondent. The court below was entitled to draw necessary inferences from the facts proved and thus establish the presumptions against the defendant, (C. C. art. 1238). The "Quebec Factories Act" provides cumulative penal liabilities and saves the civil responsibility for infraction of its provisions, in addition to the penalty by art. 3053. The case of *Wakelin* v. *London and South-Western Railway Co.* (9), must be distinguished as it was governed by the special statutes relating to railways; and in a similar manner we must distinguish the other railway cases cited on behalf of the appellant. We rely upon the findings, in the courts below, that the appellants were liable for neglect in not adequately protecting their machinery.

The judgment of the court was delivered by :

(1) S. V. 78, 1, 148.
(2) 11 R. L. 217.
(3) 18 R. L. 57.
(4) 19 R. L. 443.
(5) 1 App. Cas. 754.
(6) Q. R. 4 Q. B. 116.
(7) Q. R. 4 Q. B. 117.
(8) 24 Can. S. C. R. 291.
(9) 12 App. Cas. 41.

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THE MONTREAL ROLLING MILLS CO. v. CORCORAN.

Girouard J.

GIROUARD J.—On the 11th December, 1893, about 11 o'clock in the morning, Wilson, an experienced engineer in the service of the appellants for a couple of years, was in charge of the engine and machinery of the mills belonging to the appellant in the city of Montreal. Suddenly a strange noise was heard throughout part of the large building. A rush was made to the engine room where the engine and machinery were found running in perfect order, but poor Wilson was dead, his body being scattered around the room, frightfully mutilated. How did the accident happen? No one can tell. Wilson was alone as usual. Several hypotheses, theories and suppositions were made, but it is not upon conjectures that the civil responsibility of the master towards his employees or their heirs can rest. Art. 1053 of the civil code declares, not that every person is responsible for the damage which he may possibly have caused, but that every person "is responsible for the damage *caused by his fault* to another, whether by positive act, imprudence, neglect or want of skill."

Volumes have been written upon the interpretation and application of this simple principle of justice, recognized by the laws of every civilized nation, and the decisions are almost innumerable. For the purposes of this case, it is sufficient to refer to two recent *arrêts* of the Cour de Cassation of France. In the first case (1), decided in 1884, the court held:

Une action en responsabilité ne peut être utilement exercée, qu'autant qu'une relation nécessaire et directe rattache le préjudice allégué par le demandeur à la faute qu'il impute au défendeur.

See also the reporter's note.

In the last case (2), decided in 1890, the court held:

Attendu qu'il n'y a lieu à l'application générale de l'article 1382 C. Civ., qu'autant qu'une faute a été commise par un tiers et que cette faute a causé un préjudice à celui qui réclame des dommages-intérêts.

(1) *Roncin* v. *Garnier* Dal. 84, 1 367.

(2) *Léguillon* v. *Panthion* Pand. Fr. 90, 1, 495.

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THE MONTREAL ROLLING MILLS CO. v. CORCORAN.

Girouard J.

The reporter adds in a note:

L'action en responsabilité n'est recevable qu'en autant qu'il existe une relation directe et nécessaire entre le préjudice allégué par le demandeur et la faute qu'il impute à son adversaire.

All cases of this kind, therefore, involve the determination of certain facts, which must be proved by direct evidence or by presumptions weighty, precise and consistent. It is this proof that is entirely wanting in this case.

The same rule of law prevails under the English jurisprudence. In *Wakelin* v. *London and South-Western Railway Co.* (1), the House of Lords held:

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual headlight, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff. This verdict having been set aside by the court, an appeal was taken to the House of Lords, where it was held, affirming the decision of the court, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company were not liable.

Lord Chief Justice Coleridge said, in *Smith* v. *Baker* (2):

If there were 500 acts of negligence and none of them caused the injury to the plaintiff, such acts of negligence would not give a cause of action. Here it was left wholly in doubt as to how the plaintiff was injured. It was the plaintiff's duty to make that clear.

This decision was reversed by the House of Lords, but on another point.

See also *Farmer* v. *Grand Trunk Railway Co.* (3).

The judgment of the Superior Court, and the majority of the Court of Appeals, for Chief Justice Lacoste and

(1) 12 App. Cas. 41. (2) 5 Times L. R. 519.
(3) 21 O. R. 299.

Mr. Justice Hall were dissenting, is based entirely on the fact that the fly-wheel and machinery were not securely guarded or fenced, contrary to the provisions of the "Quebec Factories Act" (1). But these provisions are mere police regulations which subject the employers and even, in certain cases, the employees, to fine and imprisonment, but they do not affect, in any manner whatever, the civil responsibility of the employer. Art. 3053 of the same statute has so declared in express words:

> The provisions of the civil laws of this province concerning the responsibility of the employer towards his employees, are in no manner considered as being modified or changed by the provisions of this section.

In England, Scotland, Ontario, and other colonies where the Factories Act and other similar statutes have been adopted, which however do not contain any such enactment as article 3053 of the Quebec Act, it is a question remaining yet unsettled whether the breach of a public statutory duty, such as the duty to fence round machinery, gives a right of action to the person damnified by the breach. See *Couch* v. *Steel* (2); *Wilson* v. *Merry* (3); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4); *Finlay* v. *Miscampbell* (5); Addison on Torts (6); Austin, The Law relating to Factories (7).

Lord Chelmsford, in *Wilson* v. *Merry* (3), said:

> The statutable duty is, no doubt, created absolutely for the purposes of the Act; but it is a duty which, if unperformed, can only be enforced by the penalty; and this for the protection of the public is be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable.

(1) R. S. Q. art. 3024.
(2) 3 E. & B. 402.
(3) L. R. 1 H. L. Sc. 340.
(4) 2 Ex. D. 441.
(5) 20 O. R. 29.
(6) 6 ed. p. 75.
(7) Ed. 1895 p. 18.

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Girouard J.

It is not necessary to dwell any longer upon this branch of the case, as it is not even pretended that the want of guard or fence was the cause of the accident.

Subject to these explanations, and without expressing any opinion as to whether the "Quebec Factories Act" is intended to protect employees in charge, we entirely concur in the elaborate opinion of Mr. Justice Hall, and are of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *McGibbon, Davidson & Hogle.*

Solicitors for the respondent: *Madore & Guerin.*

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*Oct. 13.

*Dec. 9.

JOSEPH LEFEBVRE (PLAINTIFF).....APPELLANT;

AND

BENJAMIN AUBRY (DEFENDANT).....RESPONDENT.

JOSEPH LEFEBVRE (DEFENDANT).....APPELLANT;

AND

BENJAMIN AUBRY (PLAINTIFF).....RESPONDENT.

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

*Partnership—Division of assets—Art.* 1898 *C. C.—Mandate—Debtor and creditor—Account.*

In the province of Quebec, where there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply.

Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatory of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received.

*PRESENT :—Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), in united cross actions, between the appellant and respondent, reversing the decisions of the Superior Court, District of Montreal, sitting in review and restoring the judgments of the trial court. By consent of the parties, under the provisions of the statute of 59 Victoria, chapter 14, section 2, the appeal was heard before the Supreme Court of Canada constituted of four judges.

There were cross actions between the parties. 1. An action by Lefebvre against Aubry to rectify a partnership account to the extent of $154.00. 2. An action by Aubry against Lefebvre, claiming 1st, a sum of $1,700, as his share of the book debts of a dissolved partnership, which formerly existed between Lefebvre, Bisaillon and Aubry; and 2nd, a sum of $311.00 alleged to be due him by Lefebvre on a rectification of the accounts of a second partnership between him and Lefebvre.

The cases were united by order of the court, and tried as one case. The Superior Court allowed the claim of $154.00, in the action of Lefebvre vs. Aubry, but declared it more than compensated by the larger amount found to be due by Lefebvre to Aubry in the action of Aubry against Lefebvre. In the second action, the court disallowed Aubry's claim of $311.00 for rectification of the accounts of the second partnership, and allowed his claim for his share of the book debts of the first partnership, to the extent of $1,331.00, but deducted therefrom the $154.00 allowed Lefebvre in the first action, and the further sums of $500.00 and $250.00 found to have been paid to Aubry on account of his share of these book debts, the result being that Lefebvre was condemned to pay Aubry $427.00, with costs of both actions.

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Both parties inscribed in review and the Court of Review holding that, by law, Aubry had no action against Lefebvre to recover any share that might be due him in the book debts of a dissolved partnership, the only recourse open to him being to take an action *pro socio* against his partners for an account, reversed the judgment of the Superior Court, dismissed Aubry's action against Lefebvre with costs, and maintained the action of Lefebvre against Aubry for $154.00, with costs. On appeal to the Court of Queen's Bench, the judgment of the Court of Review was reversed with costs and the original judgment of the Superior Court restored.

The respondent supported the judgment of the Court of Queen's Bench, restoring that of the Superior Court, the questions being as to Aubry's right to proceed by action for money received, against his ex-partner, for his share of the book debts collected by the latter, and Lefebvre's plea that Aubry's share in these collections had been paid and compensated.

*Geoffrion* Q C. and *Martineau* for the appellant. Respondent's action was a mere after thought and irregular in form. He could only take the action *pro socio* for partage with all parties interested impleaded. *Dorion* v. *Dorion* (1); *Hunt* v. *Taplin* (2); *Bouthillier* v. *Turcotte* (3); *Thurber* v. *Pilon* (4); *Spencer* v. *Spencer* (5); *Cartier* v. *Chevalier* (6).

The rules for partition of successions apply to commercial partnerships, (C. C. 1898); and there should be a general marshalling of the assets; C. C. 703; Pothier, Société, 134, 135, 161, 167; As to the partition of book-debts, see 6 Aubry & Rau, p. 661, n. 6; 3 Demante, no. 164 *bis* 1. As to the obligations of the mandatary

(1) 20 Can. S. C. R. 430, per Taschereau J., at p. 446.
(2) 24 Can. S. C. R. 36.
(3) 1 L. C. Jur. 170.
(4) 4 L. C. Jur. 37.
(5) 2 Y. & J. 249.
(6) S. V. 1825-'27, 2, 232.

see Gillouard Mandat, nos. 141, 145, 158. There were no proper books kept and the court below acted upon circumstantial inferences, which are not binding as findings on matters of fact.

As the respondent's case in review was practically dismissed on appeal, there is error in the condemnation for costs in review given against the appellant; likewise as to costs of respondent's defence, which was also dismissed. *Ætna Life Insurance Co.* v. *Brodie* (1).

There could be no legal compensation or set-off as against the claim for money overpaid by the appellant. Further, the sum sought to be set-off was not clear and liquidated, (*claire et liquide*). Again, there can be no compensation between two separate actions.

*Bonin* Q. C. and *Lafleur* for the respondent. We admit that a clerical error occurred in the matter of the costs awarded in appeal.

The partnership was dissolved prior to the action, consequently there could be no action *pro socio*; Art. 1897 C. C.; *DeMontigny* v. *DeBellefeuille* (2) and authorieties there cited; Pothier, Société, nos. 157, 172. The suit was to recover a share of what the defendant as mandatary had actually collected, the uncollected debts being treated as uncollectable. There is no partition of moneys necessary; C. C. 1122; 15 Dem. no. 673; 11 Laurent, no. 45. No action for account is necessary as against an agent, the action for debt and for money had and received would lie. Pothier, Société, no. 134; *Leclerc* v. *Roy* (3); *Dubord* v. *Roy* (4); *Joseph* v. *Phillips* (5). The Code of Civil Procedure, (art. 20), requires no special form of action, and on the other hand all the facts were brought before the court, taken

(1) 5 Can. S. C. R. 1.
(2) 30 L. C. Jur. 299.
(3) 1 Rev. de Leg. 351.
(4) 1 Rev. de Leg. 352.
(5) 19 L. C. Jur. 162.

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into consideration and adjudicated upon. This court should not interfere to disturb the findings on objections involving merely matters of form. There can be no analogy in this case to *Dorion* v. *Dorion* (1), to *Hunt* v. *Taplin* (2), but we rely upon the authorities cited with approval by Mr. Justice Taschereau in *Dorion* v. *Dorion* at page 437.

The judgment of the court was delivered by:

GIROUARD J.—Cet appel a été entendu devant quatre juges du consentement des parties.

Ce procès est le fruit d'une mauvaise tenue de livres de deux sociétés commerciales faisant pour près de cinquante mille piastres d'affaires par année, que l'appelant et l'intimé, deux commerçants de chevaux sans instruction, avaient formées pour le commerce de chevaux et qu'ils ont administrées pendant près de cinq ans sans teneur de livres et avec l'aide plus ou moins régulière et intelligente de la femme de Lefèbvre. L'une, et la dernière par ordre de date, avait été formée en 1891 entr'eux seuls, lors de la dissolution de la première, formée en 1888 avec un troisième associé du nom de Bisaillon, pas mieux instruit que ses compagnons. Après dissolution, un compte et un partage des biens de chaque société furent arrêtés entre les parties qui se donnèrent devant notaire une quittance finale et réciproque, excepté à l'égard des dettes actives de Lefebvre, Aubry et Bisaillon, établies à $5,000, et quelques piastres, bonnes et mauvaises, que Lefebvre fut autorisé à collecter et diviser également entre les trois associés, aussitôt les collections faites.

Lefebvre, après avoir collecté ce qu'il pût, dont il remit $1,331 à Bisaillon "comme étant sa part", et $750 à Aubry, s'aperçoit qu'il y a, dans la préparation du compte de la première société, une erreur de $154

(1) 20 Can. S. C. R. 430. (2) 24 Can. S. C. R. 36.

en sa faveur contre Aubry. De suite, sans l'inviter à régler au sujet de la balance qui lui était due au sujet des dettes actives, il le poursuit en réformation de compte et demande une condamnation contre lui pour la dite somme de $154. De son côté, Aubry, au lieu de plaider compensation pour autant et de faire une demande incidente pour le surplus, prend une action séparée contre Lefebvre, alléguant qu'il a découvert dans la préparation du compte de la deuxième société une erreur en sa faveur contre Lefebvre au montant de $311, et qu'en sus, il lui est dû $1,700 pour sa part des dettes actives, en tout $2,011. Il ne songe même pas à lui donner crédit des $750 qu'il avait reçues à compte.

Puis Aubry plaide à l'action de Lefebvre qu'il n'y a pas d'erreur et que même au cas où il y en aurait une, sa demande est plus que compensée par ce qu'il lui doit du chef des dettes actives. Lefebvre répond entre autres choses que la compensation ne peut avoir lieu, attendu que toute somme qu'Aubry peut réclamer de ce chef ne forme pas une dette claire et liquide et peut uniquement faire l'objet d'une action *pro socio*.

Avant l'enquête et du consentement des parties, les deux causes furent unies.

La cour Supérieure à Montréal, Davidson J., reconnut l'erreur de $154 alléguée dans la cause de Lefebvre, mais rejeta celle de $311 dans celle d'Aubry, déclara néanmoins la première compensée par autant que Lefebvre lui devait pour sa part des dettes actives qu'il fixa à $1,331, et faisant en sus déduction de $750 payées, rendit jugement contre lui en faveur d'Aubry pour la balance, savoir $427, avec dépens.

Pas satisfait de ce jugement, Lefebvre inscrit en revision. Aubry en fait autant. La cour de Revision juge que la compensation ne peut avoir lieu et qu'Aubry n'a que le recours à l'action *pro socio*. Elle main-

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tient par conséquent l'action de Lefebvre, et rejette celle d'Aubry avec dépens.

Aubry se pourvoit devant la cour d'Appel qui infirme le jugement de la cour de Revision, adopte les conclusions de la cour de première instance et condamne Lefebvre aux dépens des deux actions devant toutes les cours :

Considering that there was a final settlement and partition of the first partnership and that the active debts which remained undivided were divided by the operation of law between the three partners, and that it appears in evidence that the respondent was entrusted with the collection of such active debts and was authorized to receive the shares of his former partners as their mandatary :

Considering that a mandator has a direct action against his mandatary for moneys collected and not paid over, and that in the present case the appellant's recourse was by such an action for the amount received on his account and not by an action *pro socio*.

Lefebvre appelle de ce jugement devant cette cour et nous demande de déclarer que la compensation ne peut avoir lieu.

Nous partageons le sentiment de la cour d'Appel. L'article 1898 du Code Civil déclare que le partage des biens d'une société, sauf certains usages particuliers, doit se faire suivant les règles concernant le partage des successions. Or, c'est un principe élémentaire que dans les successions, les créances se divisent de plein droit, s'il n'y a partage au contraire entre les parties. (1). L'action que peut exercer l'associé, dans un cas comme celui-ci, c'est celle résultant du mandat en reddition de compte contre l'associé qui s'est chargé de la collection des dettes de la société, ou encore celle en recouvrement de deniers reçus, comme celle d'Aubry v. Lefebvre; Art. 1713 C. C., *Dubord* v. *Roy* (2) ; *Joseph* v. *Phillips* (3).

(1) 11 Laurent no. 45 ; Pothier, Société, no. 172 ; 4 Marcadé, no. 639 ; *Provin* v. *Mellière* S.V. 67, 1. 234 ; 15 Demolombe, no. 673 ; 6 Aubry v. Rau, p. 660 ; C. C. 1121, 1122.

(2) 1 Rev. de Leg. 352.

(3) 19 L. C. Jur. 162.

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Cette conclusion s'impose dans l'espèce. La position de Lefebvre serait-elle meilleure si l'action d'Aubry était réellement *pro socio* ? N'avons-nous pas devant nous toutes les parties intéressées à ce partage des dettes actives de la première société ? Bisaillon déclare qu'il a retiré tout ce qu'il en attendait et qu'il n'a plus d'intérêt, le surplus consistant en mauvaises dettes. Tous les détails de ce compte des dettes actives ont été examinés par des experts et débattus par les parties devant trois cours, sans qu'il soit possible pour Aubry d'espérer plus que Bisaillon n'a eu. Lefebvre admet qu'il a collecté $3,600 *à peu près*, ou $1,200 pour chaque associé. Bisaillon est plus précis ; il dit qu'il a reçu $1,331. Il n'est que juste de condamner Lefebvre à payer le montant de ses collections et d'accorder à Aubry le même montant qu'il a payé à Bisaillon. C'est ce que deux cours ont fait, et ce serait rendre un mauvais service aux parties que de leur permettre de recommencer leurs débats dans une action *pro socio*. Nous ne connaissons dans notre système de procédure aucune formule particulière d'action. L'article 20 du Code de Procédure dit qu'il suffit d'énoncer de bonne foi les faits et les conclusions. Nous avons tous les faits et toutes les parties intéressées devant nous, et nous ne voyons aucune raison de changer les conclusions auxquelles sont arrivées et la cour de première instance et la cour d'appel, savoir d'allouer à Aubry $1,331, sauf à déduire les $154 et les $750, en tout $427.

L'appelant soumet incidemment que la cour d'appel fait évidemment erreur, lorsqu'elle le condamne à payer les frais de la revision demandée par Aubry, et aussi ceux de sa défense à l'action de Lefebvre, où il nie l'erreur que ce dernier alléguait. L'erreur alléguée par Lefebvre, il est vrai, a été reconnue par toutes les cours ; mais la cour d'appel et la cour supérieure

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l'ont déclarée compensée, et par conséquent, c'est avec raison qu'elle a été renvoyée avec dépens.

Quant aux frais de revision d'Aubry sur sa propre inscription, ils n'étaient pas évidemment dûs par Lefebvre; puisque Aubry a perdu sa cause même en appel au sujet de l'erreur de $311 et que le jugement de la cour Supérieure a été confirmé purement et simplement. Néanmoins, la jurisprudence de cette cour a toujours été de ne pas intervenir sur une simple question de frais, et cette règle doit être surtout suivie quand il s'agit d'un simple incident du procès. *De minimis non curat lex.* Il est possible encore que la cour d'appel ait pris en considération la conduite, non sans reproche, de l'appelant dans toute cette malheureuse affaire. C'est lui qui le premier s'est adressé aux tribunaux, au lieu d'inviter son ancien associé à soumettre leurs différends au jugement d'arbitres, ainsi qu'il en avait le droit par ses deux actes de société.

Cependant, l'avocat de l'intimé a admis devant nous qu'il y avait erreur quant à ces frais de revision, et, en face de cette admission, il est difficile de ne pas en donner le bénéfice à l'appelant. Le jugement de la cour d'appel est donc confirmé, excepté à l'égard des frais encourus sur l'inscription d'Aubry en revision, lesquels seront supportés par lui seul. Comme ce point n'est qu'un léger incident de l'instance et que l'appelant est mal fondé au mérite de son appel, il est condamné aux frais encourus devant cette cour.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Martineau & Delfausse.*

Solicitors for the respondent: *Taillon, Bonin & Morin.*

COOPER AND SMITH AND JOHN C. SMITH (DEFENDANTS)..... } APPELLANTS;

AND

THE MOLSONS BANK (PLAINTIFFS)..RESPONDENTS.

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*May 21, 22.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Debtor and creditor—Security for debt—Security realized by creditor—Appropriation of proceeds—Res judicata.*

If a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security the bank is not obliged, so long as the paper so deposited remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the merchant's debt and must be credited to him.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favour of the defendants.

The defendants, Cooper & Smith, carried on business in Toronto as manufacturers of boots and shoes up to August 24th, 1893, when they suspended payment. By an agreement made in 1891 with the plaintiff, the Molsons Bank, the firm became entitled to a line of credit in the bank to $150,000 on terms of depositing customers' notes as collateral security, representing as nearly as possible the amount discounted for the firm. At the date of the suspension the bank held notes discounted for the firm aggregating in amount $145,000, some of which matured at different dates in September and the balance in December, 1893. The action in which this appeal was taken was on the last mentioned

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 146. (2) 26 O. R. 575.

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notes four in number, amounting in all to $50,000. There was a judgment against the defendants for over $80,000 and a suit pending for about $7,000, when this action was brought.

In 1893, before the maturity of the notes sued on in this case, a dividend was about to be declared in the estate of the defendants and the bank claimed to rank for the full amount of their judgment without crediting the moneys received on the collaterals of which over $80,000 had been collected. An issue was directed to try out this question resulting in the contention of the bank being upheld. On the trial of the present action the defendants urged that, the whole debt due the bank having then matured, the appropriation must be made and the moneys collected applied either on the previous judgments or on the notes in suit. The trial judge held that he was bound by the finding on the trial of the issue, and gave judgment for the plaintiffs for the full amount sued for. On appeal to the Divisional Court that judgment was set aside and the action dismissed, the court holding that the time had arrived when the bank was bound to elect as to the appropriation and not having elected to apply it to the judgment formerly obtained, it must go in payment of the notes in suit which it more than satisfied. On further appeal the Court of Appeal, Maclennan J. dissenting, reversed the judgment of the Divisional Court and restored that given on the trial, on the ground, first, that the matter was *res judicata* by the finding on the issue, and secondly, that independently of that finding, the bank were entitled to hold the moneys received from collaterals until all other sources of payment of their debt were exhausted. The defendants then appealed to this court.

For a fuller statement of the facts see the judgment of the court.

*Foy* Q.C. for the appellants. The question for decision on this appeal simply amounts to this: Can a creditor who has in hand a large sum of money collected from his debtor's assets, which were mortgaged to the creditor and deposited for the express purpose of securing payment, obtain judgment for the full amount of his original debt or only for the balance after deducting the cash on hand?

A mortgagee in possession must account for all moneys he has received or, with due diligence, should have received. *Benning* v. *Thibaudeau* (1); *Ontario Bank* v. *Chaplin* (2); *In re Rochette* (3); *In re Oxford & Canterbury Hall Co.* (4); and see *Eastman* v. *Bank of Montreal* (5).

We are not estopped by the findings on the issue tried before Mr. Justice Rose in 1894. That was decided on a different state of facts from those now before the court. See *Heath* v. *Overseers of Weaverham* (6); *Concha* v. *Concha* (7).

At all events, the estoppel should have been pleaded. *Hughes* v. *Rees* (8); *Outram* v. *Morewood* (9); *Edevain* v. *Cohen* (10).

*Shepley* Q.C. for the respondent. The finding on the issue is *res judicata* as to appropriation of proceeds of collaterals and it cannot be litigated again. *In re South American & Mexican Co.* (11); *Flitters* v. *Allfrey* (12); *Rhodes* v. *Moxhay* (13).

Even if not *res judicata* the decision of Mr. Justice Rose was right. The creditor can claim his full debt from the debtor and exhaust other sources of payment

(1) 20 Can. S. C. R. 110.
(2) 20 Can. S. C. R. 152.
(3) 3 Q. L. R. 97.
(4) 5 Ch. App. 433.
(5) 10 O. R. 79.
(6) [1894] 2 Q. B. 108.
(7) 11 App. Cas. 541.
(8) 10 Ont. P. R. 301.
(9) 3 East 346.
(10) 43 Ch. D. 187.
(11) [1895] 1 Ch. 37.
(12) L. R. 10 C. P. 29.
(13) 10 W. R. 103.

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before resorting to the securities. *Commercial Bank of Australia* v. *Wilson* (1); *Athill* v. *Athill* (2); *Young* v. *Spiers* (3); *Eastman* v. *Bank of Montreal* (4); *Beaty* v. *Samuel* (5); *Lewis* v. *United States* (6).

THE CHIEF JUSTICE.—The facts which have given rise to this appeal, and as to which there is no dispute, may be stated as follows: The appellants, Cooper & Smith, in June, 1891, carried on business in partnership at Toronto. The respondents are a bank having a branch or agency office at the same place. The appellants having applied to the respondents for a line of credit, the respondents' manager, Mr. Pipon, on the 13th June, 1891, wrote and addressed to the appellants a letter in the terms following:

> I am pleased to inform you that our board have granted you a line of credit to $150,000 to be secured by collections deposited, rate 6 per cent, one quarter commission on all checks and collections outside of this city, as agreed upon with your Mr. Mason.
>
> Yours truly,
> C. A. PIPON,
> Manager.
>
> The meaning of the above is not that the advance shall be fully covered by collections, but as near as you can.

In the interval between the date of this letter and the 24th of August, 1893, when the appellants stopped payment, the respondents made large cash advances to the appellants. These advances were made in the way of discount by the respondents of the appellants' promissory notes. The appellants, in conformity with the terms of the letter of the respondents' manager of the 13th of June, 1891, handed to the respondents from time to time large numbers of their customers' notes, as collateral security for the advances so made. A list of

(1) [1893] A. C. 181.
(2) 16 Ch. D. 211.
(3) 16 O. R. 672.
(4) 10 O. R. 79.
(5) 29 Gr. 105.
(6) 92 U. S. R. 618.

these collateral notes was kept in a book to which the appellants' book-keeper affixed the following memorandum: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made by the bank in discounts and overdrafts."

The collateral notes so deposited, as they matured, were from time to time withdrawn by the appellants for collection, other similar notes, all being paper received by the appellants from their customers, being substituted for those so withdrawn.

In August, 1893, the appellants stopped payment. At the time of their failure the respondents held ten promissory notes of the appellants, maturing at various dates between the 4th of September and the 14th December, 1893, for the aggregate amount of $145,000. All of these notes had been discounted by the respondents, and the appellants had received the proceeds. The appellants were also indebted to the respondents in the sum of $1,907, being the balance of their overdrawn account.

The respondents, at the date of the appellants' failure, held as collateral securities, under the agreement of June, 1891, customers' notes which the appellants had deposited with them to the amount of about $105,000. Of course no withdrawal of these collateral notes was permitted by the respondents after the suspension. From that date these notes were collected by the respondents directly, and the question involved in this appeal is, what application the respondents were bound to make of the moneys so received. As the principal notes fell due the bank sued the appellants upon them and recovered judgments, and before the end of September, 1893, they had recovered five several judgments upon five of the appellants' notes, for sums aggregating $83,000. In the first of these actions, in

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which judgment was recovered on the 14th of September, 1893, the respondents sued upon a note for $30,000, due on the 4th of that month, and in that action gave the appellants credit for $6,921.32, the amount which had up to that time been collected on the collateral notes. In the subsequent actions, however, the bank did not credit the moneys which they had in the meantime collected on the collaterals, and they issued executions for the full amount of all their judgments. The proceeds of the collaterals the bank retained as a reserve fund, carrying it to the credit of the appellants in what they called a "suspense account."

Under the respondents' executions, and the executions of other creditors of the appellants, the sheriff seized a large quantity of goods and chattels the property of the appellants, and having sold the same held the proceeds for distribution under the Creditors' Relief Act, the amount realized not being sufficient to pay off all the execution creditors in full.

On the 4th of October, 1893, the appellants made, not a general but a specific assignment for the benefit of their creditors of certain book debts and other credits and property not comprising such as had been seized by the sheriff.

On the 27th November, 1893, the respondents commenced an action against the appellants upon another promissory note (the sixth) which had fallen due on the 22nd of September, 1893, for $5,000, and also for $1,907 the amount of the overdrawn account.

In the beginning of November, 1893, the appellants raised the contention that they were entitled to have credit, upon the executions in the sheriff's hands, for money up to that time collected by the bank on the collateral notes, amounting, as it was alleged, to about $17,000, and an application was made, to compel the

respondents to give such credit, to the master in chambers who refused the application, which refusal having been upheld on appeal to Mr. Justice MacMahon, in chambers, the appellants further appealed to the Divisional Court of Queen's Bench. Upon this last mentioned appeal the Divisional Court, on the 29th December, 1893, made an order discharging the order of the master and that of Mr. Justice MacMahon confirming it, and directing an issue to be tried upon the question:

Whether, before or since the recovery of the judgments above mentioned, the said bank have received any payments which ought to be applied in satisfaction, in whole or in part, of such judgments or any of them, and if so when such payments (if any) ought to be so applied, and to what extent.

This issue, together with one which had been previously directed by an order of Judge McDougall, the County Court Judge, to the same effect, was tried before Mr. Justice Rose, on the 13th April, 1894, who, having reserved the case for consideration, subsequently, and on the 20th April, found that the respondents had not received any payment which they were bound to apply as contended, and subsequently an order was made, dated the 23rd of May, 1894, declaring that the respondents, up to the 20th April, 1894, had not received any payments which, either at the time of the receipt thereof ought to have been, or at the date of the said order ought to be, applied in satisfaction in whole or in part of the judgments or any of them.

The present action was commenced on the 2nd of June, 1894. It was brought to recover the last four of the ten notes aggregating $50,000, which all fell due in December, 1893, and the defence set up was payment or satisfaction in whole or in part by the money received by the respondents on the collateral notes. The appellants also, by way of counter claim, prayed for an account of what the bank had collected on the col-

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lateral notes and for a declaration that the appellants were entitled to credit on the notes discounted for all sums received by the respondents on the collateral notes, and were entitled to thereafter receive credit on the appellants' notes sued upon, for all moneys the respondents might thereafter collect on the collateral notes or any of them.

The respondents joined issue on the statement of defence and did not reply specially either to the defence or counter claim. At the trial of the action on the 18th of April, 1895, it was admitted that the bank had up to that date received upon the collaterals over and above the sum of $6,921.32 which was credited in the action on the first note, the sum of $82,135, none of which had as yet been applied in any way to reduce the debt due by the appellants. Mr. Justice Rose, who tried the action (without a jury), gave judgment for the respondents for the full amount of the notes sued upon, holding that the respondents were not obliged to credit the money in their hands against the notes in question, but were entitled to retain the fund so realized as a reserved fund, carrying the amount to the credit of a "suspense account," thus following his previous decision on the trial of the issue, which the learned judge considered *res judicata* of the question involved. The appellants appealed from that judgment to the Divisional Court, which court set aside the judgment and dismissed the action, for the reasons stated in a judgment delivered by Mr. Justice Street, in which it was held that the respondents were bound to apply the money in reduction of the appellants' debt to the respondents, and that no such application having been previously made it ought to be applied *pro tanto* in payment of the notes sued upon.

I have taken the foregoing statement of the facts, which are in no way disputed, from the judgments of Mr. Justice Maclennan and Mr. Justice Street.

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The respondents then appealed to the Court of Appeal, and that court allowed the appeal and restored the judgment of Rose J. The present appeal is from this order.

From this judgment of the Court of Appeal Mr. Justice Maclennan dissented.

The learned Chief Justice and Mr. Justice Burton held that the bank were not bound to apply the money received from the collateral notes, but were entitled to hold that money as a reserve fund carried to the credit of a suspense account.

Mr. Justice Osler proceeded entirely upon the ground of estoppel, holding that the judgment on the trial of the issues operated as *res judicata* of the question involved in the present action.

Mr. Justice Maclennan was of opinion that the respondents had a right to hold the money which they had received from the collateral notes in suspense until all the notes became due, but that as soon as the notes which were sued on in this action (which were the last in point of date to become due) had matured the bank ought to have applied the funds in their hands to the reduction of the aggregate debt.

The object of the bank in not applying the money received by them was in order that they might prove for their whole debt unreduced by any payments, and so obtain a larger dividend of the money levied under the execution, and remaining in the sheriff's hands to be applied on the executions *pro ratâ* under the Creditors' Relief Act.

Although the bank credited the amount they had collected from the collaterals to an account in its books, called a suspense account, it does not appear that they set apart the fund or separated it in any way from their other moneys with which they carried on their business as bankers. The presumption there-

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fore is that they have been and are making profit of this money belonging to the appellants, for which they render no account to the appellants and give them no credit by way of interest or otherwise, whilst at the same time they are seeking to charge the appellants with interest on the judgments which they have recovered.

As regards the point of estoppel, I am of opinion that it constitutes no answer to the counter claim of the appellants. Under the system of pleading introduced by the Judicature Act, it has been decided that *res judicata* as a defence, or as a reply to a counter claim, must be specially pleaded. This was decided by the English Court of Appeal in the case of *Edevain* v. *Cohen* (1).

This consideration alone is sufficient to dispose of the question of estoppel, and upon it I am of opinion that we ought to decide this point against the respondents, for, having regard to the way in which the appellants were forced into the trial of the issues, which involved no question of fact but a mere question of law, no amendment ought to be permitted. Further, I agree with the view of Mr. Justice Maclennan that the question litigated in this action, brought to recover on notes which were not even due when the issue was directed, cannot be considered as the same identical question as that involved in the issues, although it may depend on the same principle of law, and might therefore, according to the established rules of judicial comity, be binding upon inferior tribunals and courts of co-ordinate jurisdiction, though not *res judicata* binding on appellate jurisdictions. I consider, therefore, that the whole question as to the rights of the appellants and the obligations of the respondents as to the application of this money in the hands of the latter, derived from the collaterals, is at large.

(1) 43 Ch. D. 187.

I entirely agree with the proposition that a creditor holding a collateral security (by which term I understand a security co-ordinate with the obligation for the principal debt, and co-ordinate with any other security held for that debt, and not as implying a secondary or subordinate security only to be resorted to after prior securities have been exhausted) (1), cannot be compelled by his debtor to release his security by turning it into money to be applied in reduction of the debt, but is at liberty to sue for and recover the full amount of his debt whilst continuing to hold his security unrealized. This was always the law in the case of mortgagees, and was acted on in the administration of assets until altered by statute.

The creditor had the right to reserve any security which had not been liquidated or realized, in order that he might exercise his own judgment as to the most advantageous time and manner of realizing it.

The remedy of the debtor, if he objected to such reservation, was to pay the debt in full and thus redeem the security. The principle upon which courts of equity acted was that the mortgagee or secured creditor was entitled to make the most of his securities.

Thus a mortgagee out of possession was entitled to proceed (to the great oppression of the debtor, it is true) concurrently with an action on the covenant, an action of ejectment and a bill of foreclosure, and in practice these concurrent proceedings were generally resorted to. As Sir W. Page Wood L.J., says in *Kellock's Case* (2):

> Courts of equity allow the mortgagee to proceed at one and the same time with a bill to foreclose, an action on the covenant and an action of ejectment. They do so upon this principle, that the mortgagee has a right to say "the bargain by my debtor is that he will pay me, and I am entitled to insist upon that. I have also the pledge

(1) *Athill* v. *Athill*, 16 Ch. D. 211. (2) 3 Ch. App. 776.

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in my hands which no one can take from me without paying me in full, and it is for me to say when I will choose to realize that pledge." The pledge may be of very great value at one time and not of much value at another time, and the bankruptcy rule prevents the creditor from taking any benefit by his personal demand against the debtor except on the terms of selling at a time when the property pledged may perhaps not sell for half as much as it would fetch if the creditor could choose his time for realizing it.

In the case of *Mason* v. *Bogg* (1), the question arose before Lord Cottenham what were the rights of a creditor who held a security in the case of the administration of assets under a decree where the estate was insolvent. It was contended against the creditor that in such a case he was bound first to realize his security, or, as in bankruptcy, to value it, and then restrict his proof in the administration suit to the balance. This contention was however repelled by the Lord Chancellor, who thus lays down the rule :

> A mortgagee has a double security, he has a right to proceed against both and to make the best he can of both. Why he should be deprived of this right because the debtor dies and dies insolvent, it is not very easy to see.

This rule has since, both in England and in the province of Ontario, been altered by statute as regards administration suits, and the rule which always prevailed in bankruptcy procedure, requiring the creditor to value or realize his security, and give credit for the valuation or amount realized, has been substituted for it.

In *Kellock's Case* (1) the question arose in a winding-up proceeding and it was there held by the Lords Justices that the creditor was not bound to follow the bankruptcy rule but was entitled to the benefit of that which prevailed in the Court of Chancery in administration suits. This rule, which entitles a secured creditor to choose his own time for turning his security into money, has, however, no application to the case of

(1) 2 Mylne & C. 447. (2) 3 Ch. App. 776.

a creditor who has actually realized his security. In such case the money coming into the creditor's hands must be treated as payment in full, or *pro tanto* as the case may be, for the reason of the rule that the creditor is not bound to realize his security but may retain the same in order that he may sell to the best advantage then ceases to exist.

Another rule, which at first sight would seem to furnish an argument for the respondents here, was that the creditor is not bound to accept a partial payment; it is his right to say to the debtor, I will not be paid in driblets; pay me in full and redeem my security or leave me to do the best I can with it.

To apply these principles to the present case, I quite agree that so long and so far as the collateral notes remained unpaid in the respondents' hands there was no obligation to give any credit in respect of them, and the bank was entitled to sue for and recover judgments for the full amount of the direct notes constituting the principal debt due to them by the appellants. So soon, however, as money came into their hands by the payment of the collaterals, which they were bound to use due diligence in enforcing payment of, they were in the position of a creditor who had agreed to receive and who had received a partial payment, and were bound to appropriate those moneys in the payment, in the first place of interest and then to the reduction *pro tanto* of so much of the principal debt as had fallen due.

In the first instance the bank did this by giving credit in the first action which it brought for the sum then in hand received from collaterals. The device of carrying moneys so received to the credit of a suspense account seems to have been an after-thought resorted to for the purpose of obtaining a larger dividend out of the fund in the hands of the sheriff.

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That the receipt by a creditor of the proceeds of a collateral security is to be treated as a payment is shown by the case of *Peacock* v. *Pursell* (1). There the creditor had been asked to accept a current bill of exchange, of which the debtor was the holder, in part payment, the balance of the debt being paid in cash. The creditor refused to accede to this, but agreed to retain the bill as collateral security. When the bill became due it was not paid, and the creditor, by neglecting to give notice of dishonour, lost recourse upon the drawer. The court held that by this neglect the creditor was in the same position as if the amount of the bill had been paid to him. The court there, treating the case as one in which the bill had been paid, held that a payment would have operated *ipso facto* in satisfaction of the debt without requiring any act of appropriation by the creditor.

Erle C. J. says:

> The legal effect of taking a bill as collateral security is, that if when the bill arrives at maturity the holder is guilty of laches and omits duly to present it and give notice of its dishonour, if not paid, the bill becomes money in his hands as between him and the person from whom he received it. That being so the plaintiffs' debt is satisfied.

Willes J. delivered judgment to the same effect, saying:

> But if the creditor, when the bill falls due, is guilty of laches, whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment * * By their laches the plaintiffs have converted this into a money payment.

This case shows clearly that if a creditor accepts from his debtor a negotiable security, the amount of which is afterwards paid to the creditor by a party to the bill, that operates at once as a payment of the principal debt.

It may be said, however, that whilst that may be so where the amount realized from the collateral

(1) 14 C. B. N. S. 728.

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security is sufficient to satisfy the whole debt, yet where it is not equivalent in amount to the principal debt the creditor is not bound to treat it as a partial payment since he is not obliged to accept payment in driblets. Had I not been successful in finding an authority directly in point I should however, nevertheless, have considered that a creditor who takes a collateral for less than the amount of his debt impliedly agrees that the money realized from such security shall be treated as a partial payment.

This indeed was the decision of the court in *Benning* v. *Thibaudeau* (1), a case decided upon an appeal from the courts of the province of Quebec, but depending upon principles of law identical with those we have to apply in the present case. Moreover, the result of a contrary decision would, as will be made apparent hereafter, have been so unjust and unreasonable to the debtor and his other creditors that for that reason it was considered inadmissible. Whilst I say this of *Benning* v. *Thibaudeau* (1), I am far from saying that, decided as it was upon the law of Quebec, it was a decision directly binding upon the Court of Appeal.

The case of *Thompson* v. *Hudson* (2) is, however, a case directly in point in the appellants' favour.

The defendant in that case, in order to secure two several debts to the North-Eastern Railway Company, had made two separate mortgages to trustees for the railway company. By the rule prevailing in courts of equity which has obtained the denomination of the consolidation of securities, the mortgagees, having their two mortgages in hand, were entitled to treat the two debts as consolidated into one single liability, and for that consolidated debt to hold both the mortgaged estates as security for the aggregate debt, as was contended by the defendants' counsel and conceded by

(1) 20 Can. S. C. R. 110.

(2) L. R. 10 Eq. 497.

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counsel for the plaintiff in the case of *Thompson* v. *Hudson* (1).

The mortgagees there having sold, under their power of sale, one estate for a price less than the whole amount of the debt, sought to do precisely what the respondents seek to do here, viz.: to hold the money so produced by the sale of part of the security as a reserve or suspense fund, and to go on charging interest on the whole debt, treating the money accruing from the sale as money which they were not bound to deduct from their debt.

The chief clerk took the account on this footing, but on appeal to the Master of the Rolls the contrary was determined, and that for reasons entirely applicable to the present case. Sir Roundell Palmer and Sir R. Baggally, arguing for the mortgagees, insisted that "the principle is that a mortgagee is not bound to receive payment of his debt by driblets." The observations of the Master of the Rolls have a direct bearing upon the contention of the bank in the case before us, viz.: that it is entitled to hold the money it has derived from the collaterals as a reserve fund put in a suspense account, whilst the money itself, as we are entitled to presume, is mixed with the general funds of the bank and used in carrying on its banking business, a presumption which the device of book-keeping resorted to does not remove.

Lord Romilly M. R. says:

> The railway company had then in hand upwards of £20,000, after all interest and costs had been paid, which was the property of Hudson. What were they to do with it? They might pay it over to him; they were not bound to do so; but I think it impossible that they can contend that they are entitled to keep this money, to make interest upon it for ten years, and still to charge interest on the whole amount due to them on the larger sum * * It is a case of this description: A mortgagee in possession with a power of sale sells a large portion of the estate, say over half, and receives purchase money sufficient to

(1) L. R. 10 Eq. 497.

pay all interest and costs and half the principal due. Can the mortgagee say, I will charge interest in future on the whole debt and only allow the mortgagor the rents received for the unsold moiety and nothing in respect of interest on the money received and employed by the mortgagee? I think not. I am of opinion therefore that the third exception must be allowed and that the proper mode of adjusting the account in such a case is to wipe off so much of the principal as the surplus of the purchase money, after payment of interest and costs, will discharge, and then go on with the account as against a mortgagee in possession with an altered and diminished debt. See what injustice a different rule would inflict. * * It is true, as said by counsel for the railway company, that a mortgagee is not obliged to accept payment of part of the debt, and that the whole must be paid if any, but then why do they retain £20,000 belonging to Mr. Hudson? If they merely kept down the interest and paid the balance over to Mr. Hudson I should assent, but not when they actually keep in their hands and make interest on the sums received at a rate if employed in the conduct of the railway, as I assume it to have been, at least as great as they are able to charge Mr. Hudson on this account.

The order made by the Master of the Rolls was that the purchase money received by the mortgagees should be deducted from the capital secured by the mortgage.

This case in all essential principles appears to me to be an authority for the appellants in the present case, and to shew conclusively that if the bank purposes (as of course it does) to retain the moneys coming into their hands as the proceeds of the collateral notes, they were bound to apply those moneys in reduction of their debt, as well to such parts of it as are in judgment as to such not recovered, by first crediting these receipts on the interest and deducting the balance from the principal of the debt due to them by the appellants. The proposal to retain the money in a reserve fund until it is to the advantage of the bank to apply it—(that is for an indefinite time for none of the learned judges in the Court of Appeal suggest any determinate time at which the appropriation ought to be made) is totally inadmissible consistently with what is laid down as law in *Thompson* v. *Hudson* (1).

(1) L. R. 10 Eq. 497.

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As to the case decided by the Privy Council of the *Commercial Bank of Australia* v. *Official Assignee of Wilson* (1), it has in my opinion no application whatever to the present appeal; the bank in that case were not bound to apply the funds which the guarantors had placed in their hands under an express agreement that it should not be applied in payment of the debt of the principal debtor.

The appeal must be allowed, the order of the Court of Appeal and also that of the Divisional Court discharged, and a judgment based upon the counter claim entered, declaring that the appellants are entitled to have all moneys received by them as the proceeds of promissory notes lodged by them with the respondents as collateral security under the agreement of the 13th of June, 1891, in the pleadings mentioned, duly applied and credited to them in account, the said moneys so received being first applied in payment of interest and the balance in reduction of principal. The judgment must further direct that an account be taken upon the principle above indicated, and that the judgments recovered and executions issued by the respondents do stand as security only for the balance found to be due to the respondents on taking the account directed.

The respondents must pay the costs of this action in this court and in all the courts below, up to the present time, such costs to be deducted from the amount found due to the respondents.

Further directions and subsequent costs must be reserved.

TASCHEREAU J.—I am of opinion that the appeal should be allowed with costs. I adopt the reasoning of Street and Maclennan JJ. in the courts below.

(1) [1893] A. C. 181.

SEDGEWICK, KING and GIROUARD JJ. concurred in the opinion of the Chief Justice.

*Appeal allowed with costs.*

Solicitors for the appellants: *Foy & Kelly.*

Solicitors for the respondents: *Maclaren, Macdonald, Merritt & Shepley.*

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NIAGARA DISTRICT FRUIT GROWERS' STOCK COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

ANGUS CHARLES STEWART, JOHN WALKER AND SOLON WOOLVERTON (DEFENDANTS)... RESPONDENTS.

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*Oct. 21, 22.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Principal and surety—Guarantee bond—Default of principal—Non-disclosure by creditor.*

W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash but at the end of each season he was in arrear in his remittances which he attributed to slow collections and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the compamy discovered that W. had collected moneys of which he had made no return and brought an action to recover the same from the sureties.

*Held,* reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of preceding years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial in favour of the plaintiff company.

The facts of the case are thus stated by Mr. Justice Maclennan in the Court of Appeal:

"The plaintiffs are themselves an agency company and their business is to sell fruit for the growers and producers thereof on commission. They employed the defendant, R. B. Walker, to act as agent at London, to receive, take charge of and to sell the fruit and produce which the company's customers might send to him. They had a written contract with him, dated the 20th of July, 1894, in which he covenanted with them:— 1. To act as their agent for seven months from date, to receive, take charge of, sell and dispose of for cash only, all fruit or produce shipped or forwarded to him from time to time by the company's customers, and for the purposes of the agreement payments made within seven days, but not later, of the sale or disposal, were to be considered as cash. 2. To keep full and correct entries in a book to be kept for that purpose of the following matters and things, namely: (1.) The quantity of fruit or produce contained in each consignment. (2.) The name of the person from whom received. (3.) The date when received. (4.) The names in full of the persons or firms to whom sold. (5.) The date of the sale. (6.) The selling price. (7.) The sum of money received. (8.) The date when received. (9.) The amount of freight and other expenses paid. 3. He was at all times during the continuance of his engagement diligently and faithfully to employ himself in the performance of his duties as agent. 4. He was well, truly and faithfully to account for and promptly pay over daily, and every day, to the credit of the company at the Traders Bank, all and every sum and sums of

(1) 23 Ont. App. R. 681.

money which should from time to time, or at any time, be received or come into his hands, and conduct himself with fidelity, integrity and punctuality in and concerning the matters and things which should or might be reposed or entrusted to him in the course of his employment. 5. He was to give and render to the company just and true accounts daily, and every day, unless otherwise directed by the company, of all moneys, business dealings and transactions whatsoever, in relation to the company's business. 6. He was on Tuesday to render to the company's secretary and president a complete statement according to forms furnished for that purpose by the company of the business done during the week ending on the Monday of the same week, each business week, for the purpose of such statements, to begin on Tuesday morning and to end on the following Monday evening. The company were to pay him monthly as long as the engagement lasted, and he fulfilled its terms, a commission of seven per cent on gross sales when the money for all sales had been deposited in bank to the company's credit, such commission to be in lieu of salary and all expenses. And he was to be responsible to them for the selling price of all goods sold by him whether he should actually receive the purchase price or not, and he was to bear all the risks of bad debts arising from such sales.

"It was also provided that in the event of any neglect or violation on the part of the agent of any of the foregoing covenants, conditions or agreements the company might forthwith discharge him. And the company were to furnish him with an agency book, agent's tissue account sales book, tags, weekly report forms, monthly report forms and agent's pay sheets, which were to be returned to the company, together with all books used by him in the business at the expiration of

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the term of the employment. The company required Walker to furnish sureties for the performance of his duties under the agreement and they gave him a printed form of bond for the purpose, and he procured it to be executed some time after the date of the agreement, and that is the bond on which the appellants have been held liable in this action. It recites the employment of Walker by the company as their agent, and that the bondsmen had become sureties for his faithfully serving and accounting to the company in manner thereinafter mentioned so long as his service continued, and the condition is that he should faithfully serve and should from time to time, and at all times, promptly account for and pay over and deliver up to the company all moneys, securities for money, goods and effects whatsoever which he should receive for the use of the company or their customers, and should not embezzle, withhold or allow or permit to be embezzled or withheld any such moneys, securities for money, goods and effects as aforesaid or any books, papers or writings of the company.

"There had been a similar contract between the company and Walker, and a similar bond of suretyship by the same bondsmen during the three preceding years. This action is on the bond of 1894 to recover from the sureties a sum $1,774 which it is alleged Walker, the agent, received for the plaintiffs but failed to account for. And the defence is that he was unfaithful in the former years to the knowledge of the plaintiffs, and had in other years, with their knowledge, appropriated money of theirs to his own use; that in employing him again in 1894 the plaintiffs held him out contrary to the fact as a trustworthy agent, and that the bondsmen became his sureties in ignorance of his defalcations and in the belief that he had theretofore been faithful."

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The trial judge found that the company had no knowledge of the true nature of the agent's default and gave judgment against the defendants for the amount claimed. The Court of Appeal reversed this judgment proceeding almost entirely on the evidence of the president. The company appealed to this court.

*Moss* Q.C. and *Meyer* for the appellant. The finding of the trial judge as to the plaintiff's want of knowledge was a finding of the fact on the whole evidence which the Court of Appeal should have accepted. *Grasett* v. *Carter* (1).

There was no fraudulent concealment as there was no duty on the part of the company to disclose. *Davies* v. *London and Provincial Ins. Co.* (2); *Town of Meaford* v. *Lang* (3); *Mayor of Durham* v. *Fowler* (4).

*Armour* Q.C. for the respondents. The agent having been in default at the end of 1893 the company was bound to inform the sureties of the fact before re-employing him. *Smith* v. *Bank of Scotland* (5); *Railton* v. *Mathews* (6); *Phillips* v. *Foxall* (7); *Adjala* v. *McElroy* (8); *Mayor of Kingston* v. *Harding* (9).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I need not state the facts established by the evidence as they are accurately and fully set forth in the judgment of Mr. Justice Maclennan in the Court of Appeal.

There can be no doubt but that the several appointments of R. B. Walker, as the appellants' agent for the several years 1891, 1892, 1893 and 1894, were all independent of each other and that the contracts of

(1) 10 Can. S. C. R. 105.
(2) 8 Ch. D. 469.
(3) 20 O. R. 541.
(4) 22 Q. B. D. 394.
(5) 1 Dow 272.
(6) 10 Cl. & F. 934.
(7) L. R. 7 Q. B. 666.
(8) 9 O. R. 580.
(9) [1892] 2 Q. B. 494.

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suretyship entered into by John Walker and the respondent Stewart, for those years respectively, were distinct and independent contracts. The question is, therefore, as regards the point of law, precisely the same as if other persons than John Walker and Stewart had been sureties in the years preceding 1894, or, as if there had been no sureties in respect of those preceding years.

It is also beyond question that R. B. Walker had in each year before his re-appointment settled, in a manner satisfactory to the appellants, the balance due from him in respect of his agency for the preceding seasons.

Further, it is not pretended that there was any direct communication between the appellants and the sureties, the bond in each case having been sent in blank to R. B. Walker in order that he might return it executed by sufficient sureties, there being no stipulation by the appellants that the sureties for the previous year should again become bound.

The question is, therefore, simply this: Were the appellants under any legal obligation spontaneously to communicate to the sureties the fact, that in the years anterior to 1894 the agent, although he had at last and before his re-appointment duly accounted for his receipts, and to the satisfaction of the appellants discharged his debt to them, had not done so promptly and in accordance with the terms of his agreement with the company?

It is now a well-established proposition of law that one who takes from a surety a guarantee or other security for the fidelity of an agent in his employment, is not, as in the case of a contract of marine insurance, under any obligation to disclose all facts material to be considered by the proposed surety. The case of *North British Insurance Co.* v. *Lloyd* (1), which has never

(1) 10 Ex. 523.

been doubted, is a sufficient authority on this head. In *Davies* v. *London and Provincial Insurance Co.* (1), Mr. Justice Fry says:

It has been argued here that the contract between the surety and the creditor is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been held that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord Westbury in *Williams* v. *Bayley* (1), one which "should be based upon the free and voluntary agency of the individual who enters into it."

The case of *Railton* v. *Mathews* (2), which was strongly relied on by Mr. Armour in his very able argument at this bar, does not appear to me to go the length contended for. That was an appeal from Scotland in an action which had been tried by a jury, and in which there had been an application for a new trial (on the ground of misdirection) which the Court of Session had refused to grant. The appeal was heard before Lord Cottenham and Lord Campbell, who reversed the decision of the Scotch court. There are, no doubt, in the judgment of Lord Cottenham, some expressions favourable to the view contended for by the respondents in the present appeal. These expressions seem to me, however, to be *dicta* merely, and to be neutralized by other passages in the same judgment, which indicate that the true ground of decision was the misdirection involved in the charge of the judge at the trial who had instructed the jury that:

The concealment to be undue must be wilful and intentional, with a view to the advantage they (the creditors) were thereby to receive.

Lord Cottenham on this proceeds to say:

The charge, therefore, I conceive, was not consistent with the rule of law. I think that it narrowed the question for the consideration

(1) 8 Ch. D. 475. (2) L. R. 1 H. L. 200.

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of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

At page 939 of the report, Lord Cottenham himself defines the question which he considered *sub judice* as follows:

> The real question is whether the way in which the learned judge put this case to the jury and described to them the duty they had to perform, was, or was not, consistent with and properly applicable to the issue raised for their consideration.

And at page 940 there is this further passage:

> Now when the issue in this case was tried, such being the points between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them.

Lord Campbell, in his judgment, even more distinctly proceeds on the same grounds. He points out that the direction of the judge at the trial that

> the concealment being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive,

involved a misconception of the law; and on this ground he decides for the appellants, without in any way adverting to the merits, or laying down, as a matter of law, that the non-disclosure complained of was sufficient to avoid the cautionary security.

I cannot, therefore, consider *Railton* v. *Mathews* (1) a decisive authority governing the present case to such an extent as to have required Mr Justice Street, in deciding not only on the law but on the facts also, to have held that the evidence before him disclosed a case of undue concealment. Further, in this explanation of the decision of the House of Lords in *Railton* v. *Mathews* (1), we have the support of the Court of Exchequer in *North British Insurance Co.* v.

(1) 10 Cl. & F. 935.

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*Lloyd* (1), where Pollock C. B., in delivering the judgment of the court, uses this language :

In *Railton* v. *Mathews* (2), the point decided by the concurrent judgments of Lord Campbell and Lord Cottenham was in effect that it was not necessary, in order to render a concealment by a person fraudulent, that it should be made with a view to the advantage that person was thereby to receive, the Lord Justice Clerk having left that to the jury as part of a more complex definition of fraud.

I have considered it important to point out the distinction between *Railton* v. *Mathews* (2) and the case now before us, for the reason that in some respects that case in its facts resembles the present, for there, as here, the non-disclosure of previous defaults and misconduct complained of had relation to a previous employment of the agent, and there, as here, there was no direct communication between the creditor and the sureties, the bond of the latter having been obtained through the intervention of the principal debtor. Neither of these points was, however, touched upon in the judgments delivered, nor was there any observation on them called for. If this explanation of the case of *Railton* v. *Mathews* (2) is not adopted I do not see how that case can possibly be reconciled with the subsequent decision of the House of Lords in *Hamilton* v. *Watson* (3).

*Smith* v. *Bank of Scotland* (4), approved by Lord Cottenham in *Railton* v. *Mathews* (2), is also distinguishable. Pollock C. B., in *North British Insurance Co.* v. *Lloyd* (1), thus states the *ratio decidendi* in this case :

In *Smith* v. *Bank of Scotland* (4), decided by Lord Eldon and Lord Redesdale, they evidently proceeded on the ground of a representation to the surety of trustworthiness in the principal known or believed by the bank to be true.

(1) 10 Ex. 523.
(2) 10 Cl. & F. 935.
(3) 12 Cl. & F. 109.
(4) 1 Dow 272.

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Moreover, in *Smith* v. *The Bank of Scotland* (1), the defalcation of the principal debtor had been in the course of the same employment to which the cautionary security was applicable. It was also held that the security applied to past as well as to future transactions.

In *Lee* v. *Jones* (2), a case decided by the Exchequer Chamber in 1864, on appeal from the Court of Common Pleas, the question was really not one of undue concealment, but of misrepresentation, for the creditor who had prepared the instrument executed by the surety had introduced into it recitals which not only suppressed the truth, but were actually so misleading as to be equivalent to false representations of the true facts.

I now proceed to call attention to some decisions in which it appears to have been considered, even as a matter of law, that there was no obligation on the intended creditor to disclose to the proposed surety defaults of the debtor, under circumstances like the present, in the course of previous and distinct employment, or even previously incurred and continuing liabilities under the same contract.

*Wythes* v. *Labouchere* (3) was a case before Lord Chelmsford. After expressing approval of the decision of the Court of Exchequer in *North British Insurance Co.* v. *Lloyd* (4), the Lord Chancellor proceeds to say:

> The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render the position more hazardous.

In *Hamilton* v. *Watson* (5), Lord Campbell had previously laid down the rule to be that the creditor was not bound to exercise his judgment as to what it

(1) 1 Dow 272.
(2) 17 C. B. N. S. 482.
(3) 3 DeG. & J. 593.
(4) 10 Ex. 523.
(5) 12 Cl. & F. 109.

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was material for the surety to know, and to that extent to make disclosure of everything to the proposed surety, saying:

> If such was the rule it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; for all these things were extremely material for the surety to know.

This case of *Hamilton* v. *Watson* (1) was sought to be distinguished on the ground that it had only application to a suretyship undertaken towards a particular class of creditors, namely, bankers. I deny, however, that any such distinction exists, and whatever may be said to the contrary in judicial *dicta* and in text books, I venture to maintain that there is no judicial authority requiring us to treat the language of Lord Campbell as laying down anything less than a general rule.

*Roper* v. *Cox* (2), a decision of the Court of Common Pleas, in Ireland, also appears to me to be a strong authority in support of this appeal. It was an action upon a guarantee given by a surety for a tenant to his landlord. The defence was that under the same tenancy the principal had previously been largely in arrear for rent, and had been guilty of gross irregularities in not observing the stipulations of his lease, and that the plaintiff (the landlord) had omitted to communicate these to the defendant. A defence embodying these allegations was demurred to and the demurrer was allowed.

An American case, the *Home Insurance Company* v. *Holway* (3), although of course not an authority in any way binding on us, is well worthy of consideration. The circumstances there were very similar to those in the appeal before us, and the numerous American

(1) 12 Cl. & F. 109. (2) 10 L. R. Ir. 200.
(3) 39 Am. Rep. 179.

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authorities to the same effect cited in the judgment give it great weight.

On the whole, therefore, if this appeal is to be considered as depending on principles of law and on decided cases, it appears to me that Mr. Justice Street's judgment was in all respects correct.

It is, however, not to be assumed that the case is altogether governed by legal considerations. In *Lee* v. *Jones* (1), Blackburn J. says:

> I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that must generally be a question of fact proper for a jury.

Applying this principle to the case before us, I am not able to say that the non-disclosure by the appellants of the want of punctuality in making payment and in settling balances by R. B. Walker, under his former agencies, in any way implied a representation to the respondents when they entered into the bond sued upon that he had punctually performed his undertakings in respect of such previous employments. He had at that time, to the satisfaction of the appellants, discharged himself from all prior liabilities. That the appellants were bound to inquire into Walker's expectations as to how he was going to pay the note he had given in settlement of the balance due on account of the business of 1893, and surmise that he could only do this out of his receipts for 1894, is a proposition to which I cannot assent. The creditor is not bound to make himself a detective for the benefit of the surety. On the whole I think the law, as embodied in the decided cases, entirely supports Mr. Justice Street's judgment; and if the question is to be regarded as one of fact, no other conclusion could, on the evidence before him, be reasonably arrived at than that which he came to.

(1) 17 C. B. N. S. 482.

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As regards the request not to give notice to the sureties, made by Walker to the appellants, that had no reference to any further suretyship which might be entered into by the respondents. It was a mere request to forbear from enforcing the sureties' liability under the current bond, the arrearages secured by which were soon after settled to the satisfaction of the respondents.

In my opinion the appeal must be allowed, the order of the Court of Appeal vacated, and the judgment of the trial judge restored with costs to the appellants in all the courts.

*Appeal allowed with costs.*

Solicitor for the appellants: *Geo. W. Meyer.*

Solicitors for the respondents: *Teetzel, Harrison & McBrayne.*

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JACQUES SÉNÉSAC (PLAINTIFF) .....APPELLANT;

AND

THE CENTRAL VERMONT RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

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*Oct. 30.

*Dec. 9.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

*Railway company—Negligence—Sparks from engine or "hot-box"—Damages by fire—Evidence—Burden of proof—Art. 1053 C. C.—Questions of fact.*

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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SÉNÉSAC v. THE CENTRAL VERMONT RAILWAY COMPANY.

APPEAL from a judgment of the Superior Court of Lower Canada, District of Montreal, (sitting in review), dismissing plaintiff's action (1).

The appellant sued to recover damages for the destruction of certain buildings and their contents, and consequent loss of business, by a fire at Stanbridge station on the line of the respondent's railway, which, as he alleged, was caused by sparks falling from a passing train and, through the carelessness of the train-crew in neglecting to extinguish the fire in respondent's woodshed thereby occasioned, spread with a strong wind until it became a general conflagration destroying a large portion of the village. At the time of the fire the company's agent was absent and it did not appear that there was a night watchman or any other person in charge of the station grounds or buildings. The appellant's case rested upon circumstantial evidence, there being no proof that the fire was actually communicated from the engine or train which passed a short time previously, but it was urged that from the facts proved there was an irresistible conclusion that the fire was caused either by sparks from the engine or a "hot-box" on one of the cars. The courts below considered that there was no proof that the fire was caused by the act, imprudence, neglect or want of skill of the defendant, and dismissed the plaintiff's action with costs.

*Geoffrion* Q.C. for the appellant. The absence of any proof in rebuttal of the presumptions from the facts proved by the plaintiff, produces the irresistible conclusion that the fire was communicated from their passing train to the open woodshed, from which it spread and became a disastrous conflagration. The fault must be imputed to the defendant who carried

(1) Q. R. 9 S. C. 319.

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on a dangerous traffic there without proper precautions. It is responsible under the law of the province of Quebec for damages caused by fire originating from the trains, even when all possible precautions have been taken. C. C. art. 1053; *Grand Trunk Railway Co.* v. *Meegan* (1); *Jodoin* v. *The South-Eastern Railway Co.* (2); *Leonard* v. *Canadian Pacific Railway Co.* (3); *North Shore Railway Co.* v. *McWillie* (4); 12 Demolombe, par. 653; 6 Laurent, pp. 201, 202, 203; 2 Aubry & Rau, s. 194. Persons carrying on dangerous enterprises must pay for damages suffered in consequence. *Saint Charles* v. *Doutre* (5); *Drysdale* v. *Dugas* (6). In Abbott on Railways (7), there is a full examination of the authorities on negligence by railway companies.

The judges in the courts below erred in their appreciation of the facts and held in this case in the same manner as had been held in the case of Lamoureux, reported as *Central Vermont Railway Co.* v. *La Compagnie d'Assurance Mutuelle de Montmagny* (8), from which case only a portion of the evidence was admitted by consent. The court should have given effect to the additional proofs given in the present case which establish negligence on the part of the respondent.

*Greenshields* Q.C. and *Lafleur* for the respondent. We rely on the want of proof to connect the fire with any act, neglect or imprudence of the defendant; the evidence on these points was considered and found insufficient in the courts below.

Findings on matters of fact ought not to be disturbed on appeal. *Grasett* v. *Carter* (9); *Bickford* v. *Hawkins* (10); *Arpin* v. *The Queen* (11); *Cossette* v. *Dun* (12).

(1) M. L. R. 1 Q. B. 364.
(2) M. L. R. 1 S. C. 316.
(3) 15 Q. L. R. 93.
(4) 17 Can. S. C. R. 511.
(5) 18 L. C. Jur. 253.
(6) 26 Can. S. C. R. 20.
(7) P. 414 *et seq.*
(8) Q. R. 2 Q. B. 450.
(9) 10 Can. S. C. R. 105.
(10) 19 Can. S. C. R. 362.
(11) 14 Can. S. C. R. 736.
(12) 18 Can. S. C. R. 222.

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The use of steam engines on a railway cannot be imputed as a fault to a company under statutory protection. *New Brunswick Railway Co.* v. *Robinson* (1); *Phillips* v. *Canadian Pacific Railway Co.* (2). The doctrine of statutory protection was not discussed in *North Shore Railway Co.* v. *McWillie* (3). The case of *Smith* v. *London and South-Western Railway* Co. (4) dealt with proximate cause, which is altogether wanting here.

The fire was not caused either directly or indirectly by any fault or negligence of the respondent or its employees. Every practically sufficient device and apparatus to prevent the emission of fire was in use. *Bourassa* v. *Grand Trunk Railway Co.* (5); *Canada Southern Railway Co.* v. *Phelps* (6); *Port Glasgow & Newark Sailcloth Co.* v. *Caledonian Railway Co.* (7); Redfield on Railways (8). In the cases cited by the appellant there was abundant proof of negligence, so those cases cannot apply here where that proof is wanting.

Precautions not enjoined by the legislature need not be observed by a railway company in the ordinary course of its traffic. *Grand Trunk Railway Co.* v. *Godbout* (9); *Vanwart* v. *New Brunswick Railway Co.* (10).

The company cannot be condemned for probable cause. So far as the appellant's property was concerned the cause of the fire is too remote, it was not directly communicated either from the train or from the woodshed; *Canada Southern Railway Co.* v. *Phelps* (6); *Central Vermont Railway Co.* v. *Stanstead and*

(1) 11 Can. S.C.R. 688.
(2) 1 Man. L. R. 110.
(3) 17 Can. S. C. R. 511; M. L. R. 5. Q. B. 122.
(4) L. R. 5 C. P. 98; L. R. 6 C. P. 14.
(5) Q. R. 4 S. C. 361; 4 Q. B. 235.
(6) 14 Can. S. C. R. 148.
(7) 30 Sc. Law Rep. 587.
(8) 6 ed. p. 470.
(9) 6 Q. L. R. 63.
(10) 17 Can. S. C. R. 39.

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*Sherbrooke Mutual Fire Insurance Co.* (1). The onus of proof was upon the plaintiff and he failed to establish presumptions requiring rebuttal; *Mattoon* v. *The Fremont, Elkhorn & Missouri Valley Railroad Co.* (2). The state of the weather or strength of the wind imposed no extraordinary duty upon the railroad company. *Blue* v. *The Aberdeen & West-End Railroad Co.* (3).

The judgment of the court was delivered by:

GIROUARD J.—On the 25th day of April, 1889, about two o'clock in the morning, the appellant's store and other buildings, situated at Stanbridge station on the railway line of the respondent, were consumed by fire. He contends that the fire was caused by a spark from the engine of one of the company's trains, and through the fault, negligence, imprudence or want of skill of its employees and servants, and demands $30,000 damages. Another similar case had been previously taken by one Lamoureux and others against the Mutual Insurance Co. of Montmagny, and the said railway company defendant in warranty, for loss arising out of the same fire. The Court of Appeal held in the latter case that the plaintiff in warranty had failed to prove that the fire was caused by any fault of the railway company. In the present case, the evidence adduced in the case of Lamoureux was filed by consent of parties and some additional evidence was also adduced, which did not however change substantially the evidence already taken as to the origin of the fire. Both the Superior Court and the Court of Review were of the opinion that the origin of the fire was still a mystery. There seems to be no doubt that it originated in the woodshed of the company, but this is not sufficient to constitute a fault within art. 1053 of the Civil Code. After

(1) Q. R. 5 Q. B. 224.
(2) 61 Am. & Eng. Railroad cases, 469.
(3) 116 N. C. 955.

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Girouard J.

carefully examining the proofs the learned judges found there was no ground for interfering with the judgment already rendered. The jurisprudence of the Privy Council and of this court has been not to disturb judgments appealed from upon mere questions of fact, unless clearly wrong or erroneous. *Arpin* v. *The Queen* (1); *Schwersenski* v. *Vineberg* (2); *Gravel* v. *Martin* (3); *Canada Central Railway Co.* v. *Murray* (4); *Allen* v. *Quebec Warehouse Co.* (5). We cannot see that there was any mistake in the appreciation of the facts by the courts below, and we are unanimously of opinion that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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

Solicitors for the respondent: *Greenshields & Greenshields.*

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*Nov. 3.

*Dec. 9.

BUDGE McLAUGHLIN.....APPELLANT;

AND

JAMES DEVINE McLELLAN AND INGERSOLL McLELLAN ..... } RESPONDENTS.

IN THE MATTER OF THE ESTATE OF JOHN A. P. McLELLAN, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Will—Execution of—Testamentary capacity.*

A testator, during the time he gave the instructions for drafting and when he executed his will, was suffering from a disease which had the effect of inducing drowsiness or stupor but as the evidence showed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take, and the instrument itself when subsequently read over to him, it was held to be a valid will.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 14 Can. S. C. R. 736.
(2) 19 Can. S. C. R. 243.
(3) Beauchamp's Digest p. 108.
(4) 8 App. Cas. 574.
(5) 12 App. Cas. 101.

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MCLAUGHLIN v. MCLELLAN.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the decree of the Judge of Probate for the County of Colchester by which the will of the late John A. P. McLellan was declared valid.

The following statement of the case is taken from the judgment of the court pronounced by His Lordship Mr. Justice Sedgewick :—

" One John A. P. McLellan died on the 21st of January, 1894, in the 78th year of his age, having on the previous day executed the will which is in controversy in this case. The deceased left him surviving his widow Lavinia, two sons, James Devine and Ingersoll, two married daughters, Sarah Hill and Phoebe Budge, and three grandchildren, Eustis McLellan, child of a deceased son, and Pineo McLaughlin and the appellant Budge McLaughlin, children of a deceased daughter. The estate was appraised at $29,914.18, of which amount $6,660 represented real estate. The objects of the testator's bounty were his two sons, his two daughters and his three grandchildren. The two sons received the major portion of the property. The will in question was prepared by a magistrate, Mr. Fulmore, who was a neighbour of the testator. Doctor Fulton had visited the deceased on the afternoon of the 18th, and finding him in a weak condition advised him to settle his business. Mr. Fulmore was sent for and immediately came to him. The two sons of the testator were present, as well as the physician, and there was considerable discussion between the deceased and his sons as to what disposition should be made of the property. Mr. Fulmore took full notes of the conclusions arrived at. After the details had been completed he went home, prepared the will, and returned two hours afterwards, when it was read to the deceased by Mr. Fulmore in the presence of the deceased's two

(1) 28 N. S. Rep. 226.

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sons. He thereupon executed it in the presence of two witnesses, and on the following day he died. There is no doubt but that during the time he was giving instructions, as well as at the time when he executed the will, he was in a drowsy condition, and that there was difficulty in keeping his mind in such a state of activity as to obtain from him what his real wishes were. As his medical attendant said: 'He was in a dozing condition.'

"On the 17th of November, 1894, a citation issued from the Probate Court of the County of Colchester at the instance of the executors named in the will, calling upon all parties interested to appear before the court with the view of having the will proved in solemn form under the statute in that behalf, and upon that citation a contest was had. Budge McLaughlin, Pineo McLaughlin, and William A. Austin (executor of a deceased son of the testator) contested the admission of the will to probate upon three grounds, viz.:—

"1st. Testamentary incapacity on the part of the testator;

"2nd. Undue influence on the part of the two sons; and

"3rd. That the will was not duly witnessed.

"A large number of witnesses were examined and the Judge of Probate decided in favour of the will. Upon appeal to the Supreme Court of Nova Scotia this judgment was unanimously confirmed; and it is from that judgment that this appeal is taken."

*Mellish* for the appellant. At the time the will was made the testator was in a weak condition bodily and mentally, suffering from a disease which caused him to continue nearly all the time in a state of drowsiness or stupor and exhaustion which incapacitated him and made him indifferent about his affairs. The will was not his spontaneous act but was made at the instance

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of the two sons who are the principal devisees. He was at the time incapable of comprehending the extent of his property or of recollecting the nature of the claims of those whom, by the will, he excluded from a just participation in his estate. *Harwood* v. *Baker* (1). When the capacity is thus impaired strict proof must be made by the propounders of the will; *Durnell* v. *Corfield* (2); *Mitchell* v. *Thomas* (3); *Barry* v. *Butlin* (4). The circumstances are such as excite suspicion; *Tyrrell* v *Painton* (5). Beneficiaries who propound a will must show that it is a righteous transaction; *Fulton* v. *Andrew* (6). As to *indicia* of incapacity, and disposing mind, see *Marsh* v. *Tyrrell* (7); *Combes' Case* (8); *Sefton* v. *Hopwood* (9).

*Lawrence* for the respondents. The evidence of the physician in attendance, and those present when the instructions were given, when the will was read out and at its execution, shews that although the testator had to be frequently roused up out of sleep, yet when awake he was very clear in his memory and intelligent in describing what he wished to have done with his property, mentioning reasons for certain dispositions and so forth. He mistook the legal rights of his wife, but this was merely a mistaken idea of the marriage laws. The exclusion of the grandchildren as beneficiaries was made deliberately after discussing the subject. The onus is upon those who attack the will after probate to shew incapacity. *Brown* v. *Fisher* (10); *Walker* v. *Smith* (11); *Maxtin* v. *Martin* (12); *Hall* v. *Hall* (13); *Menzies* v. *White* (14).

(1) 3 Moo. P. C. 282.
(2) 1 Rob. Ecc. 51.
(3) 6 Moo. P. C. 137.
(4) 2 Moo. P. C. 480.
(5) [1894] P. D. 151.
(6) L. R. 7 H. L. 448.
(7) 1 Hag. Ecc. 133.
(8) Moo. K.B. 759.
(9) 1 F. & F. 578.
(10) 63 L. T. 465.
(11) 29 Beav. 394.
(12) 15 Gr. 586.
(13) 1 P. & D. 482.
(14) 9 Gr. 574.

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Sedgewick J.

The judgment of the court was delivered by:

SEDGEWICK J.—We are of opinion that the judgment of the learned Judge of Probate, confirmed upon appeal by the unanimous judgment of the Supreme Court of Nova Scotia, ought not to be disturbed. In my judgment the evidence is conclusive upon the question of testamentary capacity. It is true that the disease from which the testator was suffering had the effect of inducing drowsiness or stupor, but it is to my mind proved to a demonstration by the evidence of not only the two sons, but of the magistrate who drew the will, and the doctor himself, that the testator thoroughly understood and appreciated not only the instructions he was giving to the draftsman as to the form which his will should take, but the instrument itself when it was subsequently read over to him. Neither is there anything, in my view, in support of the contention that the testator was unduly influenced by the two sons in making the will he did. The objection seems to be that the two sons obtained the "lion's" share of the estate. The widow, who receives her dower only in the real estate, does not complain. I am not aware that there is any principle of law which compels a testator to divide his estate in equal proportions among his children or his children's children.

Upon the last ground I have only to observe that, in my view, the evidence shows conclusively that the will was executed by the testator in the presence of two witnesses, and that these witnesses signed at his request and in his presence, and in the presence of each other, pursuant to the provisions of "The Wills Act."

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *James F. McLean.*

Solicitor for the respondents: *F. A. Laurence.*

THE SHIP "CUBA" (DEFENDANT).....APPELLANT; 1896

AND *Nov. 2, 3, *Dec. 9.

RONALD McMILLAN AND OTHERS (PLAINTIFFS).....} RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, (NOVA SCOTIA ADMIRALTY DISTRICT.)

*Maritime law—Collision—Rules of the road—Narrow channel—Navigation, rules of—R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" ships—"Meeting" ships—"Passing" ships—Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 & 37 V. (Imp.) c. 85, s. 17—Manœuvres in "agony of collision."*

If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.

If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port and the vessels were rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.

The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop and reverse if necessary, when approaching another ship so as to involve the risk of a collision, is not to be considered as a fact contributing to a collision, provided the same could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident.

Excusable manœuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.

The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard, (art. 21), does not override the general rules of navigation. *The Leverington* (11 P. D. 117) followed.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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THE SHIP CUBA v. MCMILLAN.

APPEAL from the judgment against the Steamship "Cuba" in the Nova Scotia Admiralty District of the Exchequer Court of Canada (McDonald C. J.) (1), deciding that she was wholly to blame for a collision which occurred between her and the Steamship "Elliott" in the Harbour of Sydney, Cape Breton, on the 25th September, 1895.

A sufficient statement of the case and the questions at issue appear in the judgment of the court delivered by His Lordship Mr. Justice King.

*Mellish* for the appellant. The findings by the trial judge, based principally on evidence taken before a referee, are clearly erroneous in view of the particular rules of navigation (2) applicable in this case. Arts. 15 and 21 cannot apply. There is no evidence that any but the red light of the "Elliott" was visible to the "Cuba" up to the time of the collision. Art. 15 does not apply by night where both green and red lights are seen anywhere but ahead. The ships were not "end on," but the "Cuba" was kept a point to a point and a half on the "Elliott's" starboard bow, and consequently they were "crossing" ships. *The Constitution* (3); *The Rona* (4); *The Henry* (5).

Article 21 is to be observed in narrow channels even when no other ship is in sight; *The Rhondda* (6); but when ships are approaching, no matter where, "so as to involve risk of collision," arts. 15, 16 and 18 must still be observed; *The Leverington* (7). The "Elliott" violated arts. 18 and 21. The roadstead of Sydney Harbour is a narrow channel; *The Santanderino* (8); and the "Elliott" entered on the same side as the vessel in that case. There is a statutory presumption

(1) 5 Ex. C. R. 135.
(2) R. S. C. c. 79, s. 2, arts. 15, 16, 18, 21 and 22.
(3) 10 L. T. N. S. 894.
(4) 2 Asp. Mar. Cas. 182.
(5) 12 W. R. 1014.
(6) 8 App. Cas. 549.
(7) 11 P. D. 117.
(8) 3 Ex. C. R. 378; 23 Can. S. C. R. 145.

that she was at fault; Marsden on Collisions (1). It is no answer to say that this fault did not contribute to the collision; *The Santanderino* (2). In the cases of *The Santanderino* (2) and *The Virgil* (3), a speed of eight or nine knots was held to be too great; the "Elliott" did not slacken, stop or reverse, but went on at the rate of eight and a half knots. The assessor reported the first course of the "Cuba" as safe and proper. When the ships afterwards approached "so as to involve risk of collision" articles 16 and 21 applied, and not article 21. The "Cuba" might obey art. 16 in any way she saw fit *The Beyrl* (4); Marsden on Collisions (5). The "Elliott" was not justified in departing from her course as she did when there was no risk of collision. The "port helm" rule is no longer law; art. 22; Marsden on Collisions (6); *The Germany & The City of Quebec* (7). Had the "Elliott" continued to reverse, the collision could have been avoided. *Nord Kap* v. *Sandhill* (8). Art. 18 has this object in view. *The Beyrl* (4); *The Ebor* (9). The "Elliott" was warned by the "Cuba's" lights that she was going to port; still she kept on at full speed for ten or fifteen minutes, till after the Cuba's port light was shut out and by this fault made the collision inevitable. *The Arratoon Apcar* (10); *The Manitoba* (11). If both ships were to blame, each ought to bear a moiety of the damages (12); *The Beyrl* (4).

*Harris* Q.C. for the respondents. As Sydney Harbour is a "narrow channel" the duty of both ships was to alter their courses to starboard; see rule 21. The

(1) 3 ed. p. 41.
(2) 3 Ex. C. R. at p. 385.
(3) 2 Wm. Rob. 201.
(4) 9 P. D. 137.
(5) 3 ed. p. 472.
(6) P. 422.
(7) 2 Stu. V. A. 158.
(8) [1894] A. C. 646.
(9) 11 P. D. 25.
(10) 15 App. Cas. 37.
(11) 122 U. S. R. 97.
(12) R. S. C. c. 79, s. 87.

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"Cuba" infringed this rule and cannot be excused under art. 23 unless it was not her default that caused the accident. *The Arklow* (1). They were "passing" ships and no special rules applied; they were subject only to the rules of good navigation. The ship in default risks all consequences and cannot charge the other ship with breach of other rules in order to meet her default. *The Jesmond & The Earl of Elgin* (2); *The Free State* (3); *The Araxes & The Black Prince* (4); Marsden on Collisions (5). The "Cuba" should have reversed the moment there was risk of collision; she did not, but the "Elliott" did both slacken and reverse; *The Emmy Haase* (6). The speed of the "Elliott" was safe as the night was fine and clear; see Marsden (7). In the "agony of collision" the "Elliott" was deceived by the "Cuba" blowing two blasts (art. 19) and then throwing her head to starboard, and was justified in then going full speed ahead to clear her; Marsden (8); *The Khedive* (9). This manœuvre was a necessity to be judged by the officer in charge of the "Elliott"; *The Ceto* (10).

This court will not upon disputed facts involving nautical questions, reverse a decree of the Admiralty Court. *The Julia* (11); *The Araxes & The Black Prince* (4).

The judgment of the court was delivered by:

KING J.—This is an appeal from a judgment of the Admiralty Court of the district of Nova Scotia, holding the steamship "Cuba" to be wholly responsible for a collision with the steamship "Elliott."

(1) 9 App. Cas. 136.
(2) L. R. 4 P. C. 1.
(3) 91 U. S. R. 200.
(4) 15 Moo. P. C. 122.
(5) Pp. 41, 55, 352, 355.
(6) 9 P. D. 81.
(7) Pp. 350 *et seq.*
(8) Pp. 50 422, 480, 481.
(9) 5 P. D. 1; 5 App. Cas. 876.
(10) 14 App. Cas. 670.
(11) 14 Moo. P. C. 210.

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The collision took place in the channel leading to the inner harbour of Sydney, C.B., about half-past seven o'clock in the evening of September 25th, 1895. The night was clear and the lights distinctly visible. The "Elliott" from Charlottetown, P.E.I., for Sydney, arrived off Low Point at the mouth of the entrance and stopped for a pilot. When the pilot came aboard the vessel was headed up channel at the full speed of eight knots on a course west by south, which would also take her towards the opposite or northerly side of the channel. This was to comply with the article which requires that

> in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fair-way or midchannel which lies on the starboard side of such ship.

The channel from Low Point to South-East Bar at the entrance of the inner harbour is about four miles in length with a mean width of about a mile and a quarter. It has been held to be a narrow channel within the meaning of the rule. *The Santanderino* (1). A much larger body of water—the Straits of Messina—has been also so held. *The Rhondda* (2).

When the "Elliott" had proceeded upon her course awhile the masthead light of a vessel was seen over the south-east bar moving in a northerly direction across the mouth of the harbour. Presently it became stationary and then the green and red side lights became visible as well, moving down channel. These lights continued to be seen on board the "Elliott" (according to the testimony of those on board of her) for about ten minutes, bearing about a point, or a point and a half, on the port bow.

The approaching vessel (which turned out to be the "Cuba" outward bound with a cargo of coal for Halifax) also saw the red light of the "Elliott" at a distance of a

(1) 3 Ex. C. R. 378. (2) 8 App. Cas. 549.

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couple of miles and bearing (according to the witnesses for the "Cuba") about a point, or a point and a half, on her starboard bow. Each vessel was very soon able to make out the course of the other.

The mere discovery of a strange light does not necessarily immediately bind the person in charge of a vessel to follow any particular rule, but as soon as he has an opportunity of ascertaining by reasonable care and skill what the strange vessel is, and what course she is pursuing, then the rule which is applicable to the circumstances at once becomes binding on him. Marsden on Collisions (1). And when once the above condition exists the rules applicable to the navigation of a vessel are those appropriate to such condition of things and are to be consistently applied, and a vessel is not to be thrown from one rule to another by changes of condition.

Before considering what rule was applicable to the condition of things it may be convenient to follow the courses pursued by both vessels down to the time of the collision.

When those in charge of the "Elliott" saw that the approaching ship remained upon the same bearing from her for a considerable length of time—one of the most usual indications of a risk of collision and especially so as her two side lights continued always visible—the "Elliott's" helm was still further ported.

The result that might have been expected was that the red light of the "Cuba" would alone be left in sight, but this did not follow, indicating that the Cuba was responding to the movement of the "Elliott" by a still further starboarding of the helm. The vessels were then about a quarter of a mile apart. The "Elliott" then put her helm hard to port and the "Cuba" turned sharply to port shutting out her red light, and at the same time or almost immediately afterwards, and when the

(1) P. 353.

vessels were about a couple of cable lengths apart, blew two blasts of her whistle indicating that she was directing her course to port. The "Elliott" then reversed her engines but perceiving almost immediately that the bow of the "Cuba" was turning to starboard instead of to port her engines were set going again at full speed with the hope of clearing the "Cuba" by crossing her bow. The vessels were, however, now too close together and in a few moments the "Cuba's" bow struck the "Elliott" obliquely on the port side a little abaft amidships.

It appears that the object of the pilot of the "Cuba" throughout was to pass to starboard of the "Elliott." He conceived that the vessels were in the position of "crossing" ships with the obligation upon him as having the "Elliott" on his starboard bow, of keeping out of her way, but with the choice of means of accomplishing this resting with him. And the contention on the part of the "Cuba" is that the means adopted would have proved sufficient if the "Elliott" had in turn complied with her co-ordinate obligation to keep her course, art. 22 providing that "when one of two ships is to keep out of the way, the other shall keep her course."

It was argued—and expressions in the judgment seem to favour the contention—that the rule as to steam vessels keeping to their starboard side of the channel overrides the general rule of navigation, but it is decided otherwise in *The Leverington* (1).

Then as to the rules applicable to the case. It is clear that the vessels were not "meeting" ships. They would have been so if the statement made by the pilot of the "Elliott" is correct that the "Cuba" was right ahead, but on cross-examination he withdraws this and puts her on the port bow where the proved courses of both

(1) 11 P. D. 117.

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vessels, and the testimony of all the other witnesses, show her to have been. Upon the whole evidence for the "Elliott" it is clear that the position of the "Cuba" was a point or a point and a half on her port bow and of course in such position her red light could alone be visible to the "Cuba," and consequently the vessels were not end on or "meeting" vessels.

Then, in the next place, were they "crossing" ships as contended by the appellants? In such a relative position the lights are red to green or green to red. According to the testimony of those on board the "Cuba" such was the case, for they say that the "Elliott's" red light was a point or a point and a half on their starboard bow which would, of course, make the "Cuba's" green light alone visible to the "Elliott;" and their testimony is corroborated by the pilot of the "Elliott" in a sworn statement made by him before the Board of Pilot Commissioners forming part of the evidence in this case. He there says that the "Elliott" showed her red light and the "Cuba" her green light, and says nothing at all about both side lights of the "Cuba" being visible to the "Elliott." On the trial he says that his statement before the commissioners was not correct and agrees with the master of the "Elliott," and with her lookout and other witnesses, that both side lights of the "Cuba" were seen and so continued for some time.

It is not necessary to decide between the conflicting testimony because the learned judge has adopted the account given by the master of the "Elliott" and other witnesses on board of her, who state explicitly that both lights of the "Cuba" were, at first and for a long time, seen by them.

Accepting this finding, in accordance with the practice, it follows that the vessels were not "crossing" ships, but rather were what are known as "passing" ships, one illustration of which, as given in the

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Board of Trade diagrams, is when the red (or green) light of one vessel (the "Elliott") is dead ahead of the other (the "Cuba)." In such cases no statutory rule is imposed because, unless there is a change in the course of one or both of the vessels, they will go clear of each other, and no statutory rule is made to meet the case but it is left to the operation of the rules of good seamanship.

The result is that in porting her helm the "Elliott" violated no statutory rule, and acted consistently with good seamanship.

The "Cuba," on the contrary, appears to have been at fault in several respects. In the first place in persisting, without good reason for it, in keeping on the wrong side of the fair-way or midchannel, and needlessly interfering with the navigation of a vessel in her proper water.

Secondly, in starboarding her helm instead of porting it when it was seen that the "Elliott's" helm was hard to port, and when the vessels were rapidly approaching each other.

The following is from the evidence of Capt. Svensden of the "Cuba":—

Q. Now you say that you noticed that the "Elliott" had her helm to port when she was five or six cable lengths from you?

A. Yes, sir.

Q. That was before you put your helm to starboard?

A. That was at the same time I put my helm to starboard.

Q. It was after you saw that, that you put your helm to starboard?

A. Hard to starboard, yes, sir.

Q. When you saw that her course was directed to starboard you put your helm hard-a-starboard?

A. Yes, sir, and blew two whistles.

Q. If you had then put your helm hard-a-port would you not have passed around her port side?

A. Yes, I might have passed on her port side.

Q. Would you have passed on her port side and gone clear?

A. Yes, sir.

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It seems to us, as it did to the learned Chief Justice sitting in Admiralty, and to the assessor, that the course of those in charge of the "Cuba" in starboarding her helm at this juncture was wholly wrong, and shows a want of reasonable care and skill to prevent the ship from doing injury. And that it was an efficient cause of the collision that followed cannot be doubted.

Then again, when the "Cuba" signalled that she was directing her course to port the rules made it obligatory that the ship's course should be in accordance with the signal. But instead of this her engines were reversed and under the effect of this her head turned to starboard, and according to the evidence of the master this was the known consequence of a reversing of her engine. The effect of this change of manœuvre was to confuse the "Elliott" people. They had reversed their engines on hearing the "Cuba's" signal but, on perceiving that the "Cuba's" head was turning to starboard instead of to port, they started their engine again at full speed ahead. Of course no blame can be imputed to the "Elliott" in this connection.

There was, then, a want of proper skill and care on the part of the "Cuba" directly conducing, as an efficient cause, to the collision unless, by the exercise of reasonable care and skill, those in charge of the "Elliott" could have avoided the mischief.

It is contended that the "Elliott" was guilty of a breach of art. 18 which requires that every vessel under steam, when approaching another ship so as to involve risk of collision, is to slacken her speed, or stop and reverse if necessary. It is contended that the non-observance of this rule either wholly occasioned the collision, or so contributed to it as to render the "Elliott" subject to a moiety of the loss under the rules in Admiralty and the terms of the statute. Under the Imperial Act 36 & 37 Vic. ch. 85, sec. 17, a ship infringing any of the

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statutory regulations for preventing collisions is to be deemed in fault unless it is shown, to the satisfaction of the court, that the circumstances of the case made departure from the regulation necessary.

Under the prior Acts it had been held in *Tuff* v. *Warman* (1), and other cases, that though the plaintiff had infringed the regulations, and by his negligence had brought the ships into danger, yet if the defendant could, by reasonable care, have avoided the collision the plaintiff could recover. Those prior Acts had made the circumstance that the collision was occasioned by non-observance of the rules a material ingredient in determining the blame. The changes in the law effected by the Act of 1873 are stated by Lords Blackburn and Watson in *The Khédive* (2).

The effect of that Act is to impose on a vessel that has infringed a regulation which is *primâ facie* applicable to the case the burden of proving, not only that such infringement did not contribute but that it could not by possibility have contributed, to the collision.

Our Act uses the language of the earlier English Act 17 & 18 Vic. ch. 104, and enacts (3), that:

> If in any case of collision it appears to the court * * that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel * * shall be deemed to be in fault unless it can be shown, to the satisfaction of the court, that the circumstances of the case rendered a departure from the said rules necessary.

Accordingly, it would still seem to be necessary, under our Act, to consider whether the non-observance of the rule complained of did, or did not, in fact contribute to the collision.

Apart from statutory definitions of blame or negligence there seems no difference between the rules of law and of admiralty as to what amounts to negli-

(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(2) 5 App. Cas. 876.

(3) R. S. C. ch. 79, sec. 5.

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gence causing collision. Per Lord Blackburn in *Cayzer* v. *Carron Co.* (1); *The Khedive* (2). As applied to the case before us the principle is that a non-observance of a statutory rule by the "Elliott" is not to be considered as in fact occasioning the collision, provided that the "Cuba" could, with reasonable care exerted up to the time of the collision, have avoided it. *The Bernina* (3).

Assuming that the "Elliott" ought to have slackened speed prior to the act of the "Cuba" in putting her helm hard to starboard, the omission to do so would have led to no injurious consequences if the "Cuba" had put her helm to port as she ought to have done instead of to starboard. And the engines of the "Elliott" were reversed when once it was seen that the "Cuba" definitely intended to cross her bows. Again, no means of preventing the collision were open to the "Elliott" after the "Cuba's" failure to carry out the manœuvre she had signalled. What was done then by the "Elliott" was done in what is called the agony of a collision brought about by the other vessel, and no blame is imputable for not continuing to keep her engine reversed.

For these reasons we think that the judgment appealed from is right and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Ross, Mellish & Mathers.*

Solicitors for the respondents: *Harris, Henry & Cahan.*

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(1) 9 App. Cas. 873.

(2) 5 App. Cas. 876.

(3) 12 P. D. 36.

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

SALES & HALLIDAY (PLAINTIFFS)...RESPONDENTS.

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*Oct. 21.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railway Co.—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.*

In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie &c. Co. for carriage to Merlin and that on receipt by the Lake Erie Company of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin.

*Held*, reversing the decision of the Court of Appeal, that as to the goods delivered to the G. T. R. to be transferred to the Lake Erie as alleged, if the cause of action stated was one arising *ex delicto* it must fail as the evidence showed that the goods were received from the G. T. R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. to the consignors; and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. provided among other things, that the Co'y. would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.

*Held* further, that as to the goods delivered to the companies other than the G. T. R. to be transferred to the Lake Erie, the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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lading contained no clause, as did those of the G. T. R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie, and such finding should not be interfered with.

*Held* also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

It is highly improper, in a statement of claim, to anticipate and reply to matters of defence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the plaintiff at the trial.

The facts of the case are sufficiently set out in the above head-note, and more fully in the judgment of the court.

*Riddell* for the appellant. The defendant can take advantage of the terms and conditions of the contract made with the several companies to whom the goods were first delivered. *Bristol & Exeter Railway Co.* v. *Collins* (1); *Richardson* v. *Canadian Pacific Railway Co.* (2).

The defendant had possession of the goods as a gratuitous bailee and is not liable for their loss in any event. *Lord* v. *Midland Railway Co.* (3); *Giblin* v. *McMullen* (4).

*Thomson* Q.C. (*Tilley* with him) for the respondents. An action may be brought against a second carrier directly. *Hooper* v. *London & North-Western Railway Co.* (5).

The trial judge found that the goods were destroyed by negligence of defendant's servants. That finding

(1) 7 H. L. Cas. 194.
(2) 19 O. R. 369.
(3) L. R. 2 C. P. 339.
(4) L. R. 2 P. C. 317.
(5) 50 L. J. 103.

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was affirmed by the Court of Appeal and cannot now be disturbed.

The defendant cannot raise new issues not contained in the pleadings. *Collette* v. *Goode* (1).

The judgment of the court was delivered by:

GWYNNE J.—This action is brought by the respondents as plaintiffs against the defendants for the loss of goods alleged to have been entrusted to them and charging them both in their character of carriers and of warehousemen. The statement of claim does not in terms allege that the goods were entrusted to them as common carriers, but sets forth the facts which are relied upon by the plaintiffs in a special manner, leaving it to the court to determine what is the liability of the defendants to the plaintiffs, if there be any, which these facts if established disclose. The plaintiffs sue both as consignees of the goods and also in right of the consignors under an assignment from them of all their rights and causes of action. The cause of action alleged against the defendants as carriers is contained in the first nine paragraphs of the statement of claim. After alleging themselves to be general merchants carrying on business at the village of Merlin in the county of Kent in Ontario, and that the defendants are *carriers of goods for hire* whose line of railway passes through the said village, the plaintiffs in the third paragraph of the statement of claim allege that, between the months of November, 1894, and February, 1895, they purchased certain goods for the purposes of their business from the persons and firms thereinafter mentioned, *and directed the said persons and firms to ship such goods to them by the respective routes thereinafter mentioned, including in each case transit for part of the distance over the defendants' line of railway, to the end*

(1) 7 Ch. D. 842.

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*that such goods might be delivered by the defendants* to the plaintiffs at the said village of Merlin. In the fourth paragraph the plaintiffs then allege the purchase by them of several parcels of goods from divers persons and firms trading at divers places in the province of Ontario, which goods were by such respective persons and firms at divers dates, stating the respective dates, *delivered*, some to the Grand Trunk Railway Company, some to the Michigan Central Railway Company, some to the Canadian Pacific Railway Company, some to the Erie and Huron Railway Company, and were subsequently by such respective railway companies *delivered to the defendants*, and that a small parcel of goods of the value of $10 was delivered by the persons from whom such goods were purchased to the *defendants themselves* at the city of London. The plaintiffs in another paragraph allege that

by reason of the purchase by the plaintiffs of the said goods from the said respective persons and firms, and by reason of the delivery thereof as aforesaid, the same became and were the property of the plaintiffs and the defendants became and were liable to the plaintiffs for the carriage and delivery thereof to the plaintiffs.

And in another paragraph they allege that

*The said respective companies to whom said goods were originally delivered as aforesaid issued their bills of lading or receipts to the consignors of the said goods respectively*, and the said bills of lading or receipts were indorsed and delivered in the ordinary course to the plaintiffs, *and by reason of such indorsement and delivery the said goods became and were the property of the plaintiffs.*

Then in another they alleged that

by certain indentures of assignment, made and executed *before the commencement of this action*, the said consignees duly assigned, transferred and set over to the plaintiffs all rights they respectively had against the defendants in, under and by virtue of the said bills of lading or receipts or otherwise in respect of the said goods.

Then the statement contains a paragraph, apparently framed with the intention of serving either as an aver-

ment of a contract for carriage in fact entered into by the defendants, or as a statement of what in the opinion of the plaintiffs was the contract and the duty to be implied in law from the facts stated, as follows:

Upon the delivery of the said goods to the defendants as aforesaid, *the same being duly consigned and addressed to the plaintiffs at the said village of Merlin*, it became and was the duty of the defendants to safely and securely carry the said goods at reasonable speed to the said village of Merlin and there deliver the same to the plaintiffs within a reasonable time, *and the said defendants received the said goods and undertook to carry and deliver the same as aforesaid for reward to the defendants.*

The cause of action against the defendants in their character of carriers concludes with an averment that the defendants have wholly neglected and refused and still neglect and refuse to deliver the said goods to the plaintiffs.

The plaintiffs then in the 10th and 11th paragraphs of their statement of claim insert allegations which constitute no part of the province of a statement of claim, that is to say, allegations by way of anticipation of a defence which might or might not be set up, in order to state what, if set up, the plaintiffs would have to say in answer to it, after the manner of the old inconvenient system of pleading in chancery by charges and counter-charges; such matter constitutes matter of replication only and should never be inserted in a statement of claim, as having a tendency to entrap the defendant into believing it was intended as a statement of facts to be answered, which it is not; it might also embarrass the plaintiff himself, if because of his having inserted in his statement of claim his answer to the defence suggested by anticipation he should neglect to reply it to the defence if set up. The insertion of such matter in a statement of claim is emphatically condemned by the Court of Appeal in Chancery in England in *Hall* v. *Eve* (1), and in *Dawkins* v. *Lord Penrhyn* (2).

(1) 4 Ch. D. 345, 347. (2) 6 Ch. D. 324.

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No objection however having been taken by the defendants to this mode of pleading, and they having answered the statement of claim as it is in all its material parts, I only mention the matter lest it should be supposed that if passed over without notice this species of allegation in a statement of claim is approved of by the court. We must deal with the issues as raised upon the record so as to avoid as best we can either party being now prejudiced by the improper insertion of this matter in the statement of claim.

The plaintiffs then in the 12th and 13th paragraphs of their statement of claim allege a contract of bailment made and entered into between the plaintiffs and defendants upon which, as is alleged, the defendants received and held the goods for storage for the plaintiffs and for delivery thereof to the plaintiffs when requested, for reward to the defendants, and by way of breach of that contract the plaintiffs allege that the defendants so neglected to keep the said goods securely that they suffered them to be lost and destroyed through negligence and the lack of proper care of the defendants and their servants. The plaintiffs have also inserted a paragraph containing a claim for the conversion of the said goods by the defendants to their own use.

To this statement of claim the defendants plead as follows:

1st. They deny the allegations in the statement of claim and put the defendants to proof thereof.

2nd. They say that they did not contract as alleged in the plaintiffs' statement of claim either with the plaintiffs or their assignors (the consignors of the said goods) for the carriage or safety of the goods in question while in transit or otherwise.

3rd. They say that they carried the goods in question, the said goods were transported safely to their desti-

nation and the plaintiffs were duly notified of their arrival, or were aware of the same, and neglected to remove the said goods, *but left them in the defendants' hands at the plaintiffs' own risk.*

4th. They say that if the said goods were destroyed as alleged in the plaintiffs' statement of claim such destruction arose without any negligence on the part of the defendants.

Upon this statement of defence the plaintiffs joined issue.

The issues so joined came down for trial before a judge without a jury, and the whole burden of proving every material fact alleged in their statement of claim was by the form of the first paragraph of the defendants' statement of defence cast upon the plaintiffs. At the trial the plaintiff Sales, having been called as a witness on behalf of the plaintiffs, produced a paper which shewed the names of the several persons and firms from whom the plaintiffs purchased the respective goods, and the dates of such purchases and the value of the said several parcels of goods respectively, amounting on the whole to $2,880.80; this paper was marked at the trial as ex. 4. He also produced instruments under the seals of the said respective persons, consignors of the said goods, whereby they respectively assigned and transferred to the plaintiffs all their respective rights, claims and demands against the defendants in any way arising out of the shipment of the said goods, or for the failure to deliver the same or for the loss of the said goods or any of them, but the plaintiffs did not produce any of the bills of lading or receipts issued and delivered to the consignors by the railway companies other than the defendants, through whose railways respectively the goods were shipped to the plaintiffs. The witness then proceeded to shew that the plaintiffs had received

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from the defendants notice of the arrival at the station at Merlin of almost if not of all of the said goods.

Evidence was then largely entered into, given by the witness Sales and several other witnesses, for the purpose of establishing that the goods were wholly destroyed while in the possession of the defendants after their arrival at Merlin by a fire caused, as the plaintiffs contended, by the negligence of the defendants. No evidence was offered of any express contract entered into between the plaintiffs and the defendants as to the warehousing of the goods after their arrival at Merlin. The goods were not shewn to have been in the possession of the defendants after their arrival at their station at Merlin other than as having been carried by them on their railway to Merlin; they remained in their possession subject to their lien for the cost of carriage, although no longer liable as carriers but as warehousemen. At the close of the plaintiffs' case counsel for the defendants having insisted that there was no evidence competent to charge the defendants *as common carriers*, and that there was no evidence of any privity of contract between the plaintiffs and the defendants, the learned judge expressed the opinion that there would be such a contract if the defendants received the goods to carry them to their destination from the companies who originally had received them, they acting as agents of the plaintiffs, and he asked if the bills of lading or receipts issued by those companies shewed that the goods were received to be forwarded from the terminus of the railway of such companies, whereupon, those bills of lading not having been produced by the plaintiffs, it was agreed that the defendants should put in a form of each of the bills of lading issued by the several companies to whom the goods had been delivered by the respective consignors.

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The defendants thereupon entered into evidence by way of answer to the plaintiffs' evidence as to the negligence charged by them to have been the cause of the fire by which the goods had been destroyed; upon the close of their evidence the hearing of the cause was postponed to a future day, when, the said forms of railway bills of lading having been furnished as agreed, the case was heard by the learned judge, who held that as to the goods delivered by the consignors to the Michigan Central Railway Company and as to a small parcel delivered to the Canadian Pacific Railway Company on the 24th June, 1895, the defendants were not liable for the reason that there was no privity of contract between the plaintiffs and defendants as to these goods, it appearing by the form of the bill of lading issued by the said respective companies for those goods that the said respective companies made a through contract for the conveyance of those goods to their destination at Merlin. With these bills of lading or the goods covered by them we have nothing to do on this appeal. As to the residue of the goods he held first that, all those which were delivered by the Grand Trunk Railway Company to the defendants, the defendants received them *as common carriers without any special contract*, and subject therefore to the common law liability of common carriers, but he further held that as to these goods and as to the residue of the goods, no matter in which capacity the defendants were in possession of them at the time of the fire, namely, whether as carriers or as warehousemen, the defendants were liable, for that he found as a matter of fact that the fire was occasioned by their negligence. In order to prevent a reference to the master to ascertain the value of the goods destroyed by the fire in accordance with this finding of the learned judge the parties agreed that in the event of the defendants being ulti-

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mately held to be liable, the values as stated in the exhibit four at the trial should be accepted as correct. The total value of the goods so agreed upon is $2,280.80, for which judgment was rendered against the defendants, and an amended exhibit four, showing only the goods covered by such judgment and their value, and the railway company to which each parcel of such goods was delivered and the *date of the form* of the bills of lading issued by the said respective companies for the carriage of such goods, was agreed upon by the parties as being correct and is in the case presented to us on this appeal. Upon appeal to the Court of Appeal at Toronto that court affirmed the judgment of the learned trial judge, and held that the cause of action stated in the statement of claim was one charging the defendants as common carriers, with an alternative statement charging that if they had become warehousemen of the goods they were liable as such for the loss of the goods by negligence of the defendants, their servants and agents, and that the defendants, not having pleaded any exemption from liability for negligence, if such a defence had been open to them, could not be heard to say that they were exempt from liability for the negligence which they considered to have been fully established by the evidence.

If the statement of claim does state a cause of action against the defendants upon their common law liability apart from any contract, and if the evidence shews the goods to have been received by them to be carried subject to such liability, and that the goods were destroyed by fire while in the possession of the defendants after they carried the goods to their destination and their common law liability *as common carriers* had been determined, then no doubt the only question would have been whether or not the evidence relied upon as the cause of the fire was sufficient to charge

the defendants with the loss in the character of warehousemen, but the contention of the defendants is that no cause of action against the defendants upon their common law liability as common carriers is stated in the statement of claim, but on the contrary that the only cause of action stated therein is one founded on contract and that on an absolute contract, and that no such, nor any contract between the defendants and the plaintiffs, is proved. The statement of claim does not allege that the goods were delivered to and received by the defendants to be carried by them subject to their common law liability *as* common carriers and yet an allegation that they had been so delivered and received seems to be *the material fact* necessary to be alleged in order to fix the defendants with such liability. The statement of claim however omits, and as it would seem designedly omits, this material allegation; and such material fact not having been alleged we can not, I think, say that upon the face of the statement of claim the cause of action stated is one against the defendants upon their common law liability *as* common carriers. While there is no such allegation in the statement of claim there is the allegation that upon delivery of the said respective goods to the defendants, they "undertook to carry and deliver the same as aforesaid for reward to the defendants," words which are certainly open to the construction that the defendants contracted with the plaintiffs to carry and deliver the goods to them for reward to be paid by them to the defendants, and so a sufficient averment of a delivery of the goods to the defendants and the receipt thereof by them upon an express contract for their carriage to their destination; and as this statement of claim cannot be construed as containing two distinct causes of action in respect of the carriage and non-delivery of the goods, but only one cause of

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action, whatever that may be, it does seem to be more susceptible of the construction that the cause of action alleged is one arising out of an express contract, and not one founded upon receipt of goods by the defendants *as* common carriers and upon their common law liability as such. But the plaintiffs having alleged that the defendants duly received the goods by delivery to them from other railway companies, who had received them under contracts alleged to be in the plaintiffs' possession, it is obvious that until those contracts should be produced it would be quite impossible for a court to say that the defendants had incurred any liability whatever to the plaintiffs. This was the view which was entertained by the learned trial judge also, as appears by his having made the inquiry as to their contents above stated when it was agreed that forms of the bills of lading upon the terms of which the several goods were received by the railway companies to whom they were delivered by the consignors should be supplied instead of the originals in the plaintiffs' possession but not produced by them. It was upon perusal of these forms that the learned trial judge held that as to the goods delivered to the Michigan Central Railway Company and the small parcel delivered to the Canadian Pacific Railway Co. on the 24th January, 1895, the defendants had incurred no liability whatever to the plaintiffs' while upon his construction of the bills of lading issued by the Grand Trunk Railway Co. he was of opinion that the receipt of those goods by the defendants from the Grand Trunk Railway Co. was a receipt by them for the carriage of the goods by the defendants *as* common carriers apart from any contract.

Now the goods received by the defendants from the Grand Trunk Railway Co., as appears by the plaintiffs' amended exhibit four, amount in value to $1,866.83, or four-fifths of the amount for which judgment has been

rendered against the defendants; all of the goods to the above value were received by the company upon contracts in the terms contained in the bills of lading issued therefor respectively, whereby the Grand Trunk Railway Co. acknowledged the receipt by them of the several goods addressed to the plaintiffs at Merlin aforesaid and *to be sent* by the said company *subject to the terms and conditions* on the said bills of lading respectively mentioned, all of which are agreed to by the shipping note delivered to the company at the time of giving this receipt therefor as a special contract in respect of such property.

Upon these bills of lading were indorsed conditions *subject to which* the contracts contained in the bills of lading were made, among which were conditions to the effect following:—1. That the company should not be liable for damages occasioned by, among other things, wet, fire, heat, frost, &c. 2. That goods consigned, whether on a through rate or otherwise, to a place beyond the line of the Grand Trunk Railway Co., should, if a connecting carrier be named (which is the present case) be handed over to the carrier so named and that in such case the Grand Trunk Railway Co., in handing over the goods should be held to be agents of the owners, and should not be liable for any future loss or damage whatever. 3. That goods unloaded by owners should not be stored on the railway premises without the station agent's permission, and whether unloaded by owner or carrier, the goods stored on the railway premises should be subject to storage charges *and should be at the sole risk of the owners as to any damage to them by fire however caused* and to every loss or damage whatsoever, and should be removed from the railway premises forthwith upon notice.

And finally it was expressly provided that "all the provisions of this contract shall apply to and for the

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benefit of every carrier" to whom goods might be delivered under it as fully as to the company.

This form of contract appears to have been prepared for the express purpose of providing for the transport of goods received under bills of lading in this form to their final destination, over, it may be, many connecting lines, upon the terms contained in the bills of lading issued by the company first receiving the goods, while relieving that company and each carrier in succession from liability for loss or damage not occurring while the goods should be in their own possession, thus obviating the consequences of the judgments in *The Bristol and Exeter Railway Co.* v. *Collins* (1); *Coxon* v. *Great Western Railway Co.* (2); and cases of that class. The true construction of the contracts appears to me to be that thereby the consignors, whether on their own behalf or as agents of the plaintiffs matters not, undertook and agreed that delivery of the goods by the Grand Trunk Railway Co., (they acting as the plaintiffs' agents) to the defendants, while relieving the former from all liability for future loss or damage, should be taken and held to be a delivery of the goods to the defendants to be carried by them upon the special terms contained in the bills of lading issued by the Grand Trunk Railway Co. The contracts were in substance severally one for the transport of the goods to their final destination, for part of the distance by the Grand Trunk Railway Co. and for part by the defendants, but in both cases subject to the terms and conditions mentioned in the bills of lading issued by the Grand Trunk Railway Co. The goods therefore amounting in value to $1,866.83, which were received by the Grand Trunk Railway Co. under bills of lading in the form which has been produced

(1) 7 H. L. Cas. 194; 5 Jur. N. S. (2) 5 H. & N. 274.

as introduced into use by them in 1892, must be held to have been received by the defendants not *as* common carriers apart from any contract, but under a special contract. If then the statement of claim can be construed as the statement of a cause of action arising *ex delicto* apart from any contract the plaintiffs must fail as to those goods, for the evidence shows that the defendants received them for carriage under the terms and provisions of a special contract; if the statement of claim is to be construed as a statement of cause of action founded upon contract, the contract so alleged being an absolute contract unqualified by any conditions, then as to the above goods the plaintiffs still must fail for the contract proved is a special contract creating only a limited liability, in which case there was no occasion for the defendants to plead specially the terms which showed the contract to be of a limited character and not the absolute unconditional one stated in the statement of claim. The authorities upon this point are numerous. *Latham* v. *Rutley* (1); *White* v. *Great Western Railway Co.* (2); *York, Newcastle & Berwick Railway Co.* v. *Crisp* (3); *Walker* v. *York & North Midland Railway Co.* (4); *Austin* v. *Manchester, Sheffield, &c. Railway Co.* (5); *Shepherd* v. *Bristol and Exeter Railway Co.* (6).

In this country, where railway companies receive goods for the purpose of being conveyed to places very remote and over many independent but connecting lines, contracts in this form seem to be necessary and to be framed as well in the interest of the owners as of the carriers. The owners thereby secure a continuous and speedy conveyance of their goods to their final destination, while they can have no

(1) 2 B. & C. 20.
(2) 2 C. B. N. S 7.
(3) 14 C. B. 527.
(4) 2 E. & B. 750.
(5) 16 Q. B. 600.
(6) L. R. 3 Ex. 189.

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difficulty in determining which carrier of several is the one to be charged with a loss or damage occurring during the transit of the goods, for as the first receiving carrier is made liable until he can prove his delivery of the goods to the next, so each carrier in succession upon delivery of the goods to the next will take the receipt of the latter for his own security and discharge from liability under the contract

As to the goods covered by the bills of lading issued by the Canadian Pacific Railway Co., in the form in use in the year 1882, amounting in value to $190.85, and as to the amount covered by their bills of lading introduced into use in 1894 amounting in value to $38.74, and as to the goods covered by the bills of lading issued by the Erie and Huron Railway Co., amounting in value to $169.98, and the small parcel covered by the bill of lading in the Grand Trunk Railway Co's. form of 1889 amounting in value to $4.31, these call for different considerations. There is no substantial difference in the terms of these several bills of lading as to the question under consideration. The above respective companies received the goods covered by these several bills of lading, to be sent to the address of the plaintiffs at Merlin, a point upon the railway of the defendants', *subject to* the terms and conditions stated in the said respective bills of lading "and agreed to by the shipping note delivered to the company at the time of giving this receipt therefor," and there is no such special agreement as that contained in the before considered bill of lading of the Grand Trunk Railway Co., namely, that "all the provisions of this contract shall apply to and for the benefit of every carrier to whom goods shall be delivered under it as well as to the company." Among the conditions however to which the contract contained in the said bills of lading are made subject are the following:

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5th. In all cases where herein not otherwise provided the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's sheds or warehouse if there be convenience for receiving the same at their final destination, or when the goods have arrived at *the place to be reached by the said company's railway.* The warehousing of all goods will be at the owner's risk and expense, and if the company are unable to store or warehouse goods received by them they shall have the right to place such goods in any warehouse that may be available at the risk and expense of the owner of the property so stored, and all charges for storing, warehousing and conveyance shall form an additional lien on said goods.

10th. That all goods addressed to consignees at points beyond the places *at which the company have stations,* and respecting which no direction to the contrary shall have been received *at those stations,* will be forwarded to their destination by public carrier or otherwise as opportunity may offer without any claim for delay against the company for want of opportunity to forward them, or they may at the discretion of the company be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such conveniences for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be complete and all responsibility of the said company shall cease when such carriers shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance ; *and it is expressly declared and agreed* that the Canadian Pacific Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest the points or places which they are consigned to or beyond their said limits.

13th. Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty-four hours after its arrival.

A comparison of these conditions with the conditions in *Collins* v. *Bristol and Exeter Railway Co.*, to be found set out at large in 3 Jur. N. S. 141 and in Lord Chancellor Chelmsford's judgment in that case in the House of Lords (1), will shew that, whatever may have been the intention of the framer of these bills of lading, there is no great difference between them, so

(1) 5 Jur. N. S. 1374.

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little indeed as to make it a question of great nicety to determine whether the present case, if the loss had occurred while the goods were *in transitu*, should or should not be governed by *Bristol and Exeter Railway Co.* v. *Collins* (1). The question appears to me to be so nice that I do not propose to determine it in the present case inasmuch as it appears to me to be clear that all of the goods covered by these bills of lading now under consideration had arrived at their final destination on the defendants' railway, and at the time of their loss were in the possession of the defendants under the liability of warehousemen, their liability *quâ* carriers being determined. The question as to these goods therefore can be determined upon the contract of bailment for storage declared upon in the statement of claim, and as there are no conditions in the bills of lading covering these goods similar to those in the Grand Trunk Railway Co.'s bills of lading in the form of 1892 already dealt with, providing that all the conditions in the bills of lading should apply to and for the benefit of all subsequent carriers of the goods equally as to the first receiving carrier, we must, I think, hold that after the arrival of the goods now under consideration at the defendants' station at Merlin the defendants held them thenceforth in their possession subject to a liability for all loss or damage occasioned by their negligence, just as they would have in the case of goods carried by them to their destination upon a bailment for carriage *as* common carriers; and it having been found by two courts and the judgment of five judges that the goods while in such possession were destroyed by a fire occasioned by the negligence of the defendants, with which finding I do not think we should interfere, our judgment must be against the defendants for the sum of $403.88, the value of those goods.

(1) 7 H. L. Cas. 194.

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As to the small parcel of goods of the value of $10 covered by the bill of lading issued by the defendants themselves at London we must, I think, hold the defendants not to be liable upon the ground that the contract contained in that bill of lading expressly provided that the owners should incur all risk of loss of goods in the charge of the defendants as warehousemen after the arrival of the goods at their destination. It is very natural that railway carriers, whose proper business is not that of warehousemen and who only undertake that business as it were of necessity and for the convenience of the plaintiffs, although for reward, should limit their liability as to goods so left in their possession by a condition of this nature.

The result will be that the appeal must be allowed in part and that the judgment be ordered to be entered for the defendants in the court below as to the goods of the value of $1,866.83 covered by the bills of lading of the Grand Trunk Railway Co. in their said form of 1892, and as to the parcel covered by the bill of lading issued by the defendants themselves, and upon the issues joined in respect of the cause of action stated in the first nine paragraphs of the statement of claim as to carriage of the goods, but for the plaintiffs for the sum of $403.88 in respect of the residue of the goods upon the contract of bailment for storage in the statement of claim pleaded. The appeal is allowed with costs in this court and in the Court of Appeal in Ontario.

*Appeal allowed with costs.*

Solicitors for the appellants: *Patterson, Leggatt, Murphy & Sale.*

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

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*Oct. 23.

*Dec. 9.

THE CORPORATION OF THE CITY OF TORONTO ..... ..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY.... ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipal Corporation — By-law—Assessment — Local improvements — Agreement with owners of property—Construction of subway—Benefit to lands.*

An agreement was entered into by the corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made running east on King Street to the limit of the subway, the street being lowered in front of the company's lands which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway.

*Held*, that to the extent to which the lands of the company were cut off from abutting on the streets as before the work was an injury, and not a benefit to such lands and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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Notice to a property owner of assessment for local improvements under sec. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result the judgment of the Court of Appeal (23 Ont. App. R. 250) was affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of MacMahon J., who quashed a by-law no. 3245 of the city assessing the railway company for a portion of the cost of certain work as a local improvement.

Three by-laws, nos. 3244, 3245 and 3246 were quashed by Mr. Justice MacMahon, but the city only appealed in respect to no. 3245. Mr. Justice Osler, who delivered the judgment of the Court of Appeal, thus states the material facts:

"Appeal from the judgment of MacMahon, J., quashing city by-laws 3244, 3245, and 3246.

"These by-laws were passed in connection with the work known as the King Street Subway. No. 3244 was for the construction of a sewer, no. 3246 for the construction of a plank sidewalk, and no. 3245 for the construction of a scoria and tamarac block roadway on King Street, between the east limit of the King Street Subway and Dufferin Street. On the argument the appeal was abandoned as to the sewer and sidewalk by-laws, and confined entirely to so much of the judgment as dealt with the roadway by-law no. 3245. Broadly stated the contention on the part of the city was that the whole work was a mere local improvement, the cost of which was chargeable to the frontagers by force of the city by-law providing that all works of that description should be executed and

(1) 23 Ont. App. R. 250.

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charged for as local improvements under the local improvement clauses of the Municipal Act.

"The railway company on the other hand contended that the work being a part of the works connected with the construction of the subway, and a necessary part of the subway and works, no part of the cost could be directly thrown upon them as for a local improvement. The construction of these works became necessary, it was said, in consequence of an agreement between the city and the several railway companies interested, and of an order in council passed under section 74 of the Railway Act, R. S. C. ch. 109, and that to a work so done the local improvement clauses of the Municipal Act were inapplicable.

"For some years previous to 1887 it had become evident that the great danger to the public caused by the level railway crossing on King Street West would by some means have to be effectually provided against, and on the 21st of October, of that year, an agreement was made between the several railway companies and others interested, and the City of Toronto, reciting that in the interest of the public safety it was necessary that the railway tracks should be altered, etc., and that certain of the tracks should be removed from their then location and placed elsewhere, 'thereby bringing the several railway tracks crossing King Street West together as closely as possible, and facilitating the crossing of the same by an overhead bridge, or a subway, or other improved crossing.' The agreement then went on to provide for carrying out that preliminary by means of mutual conveyances of the necessary land, and the city and the Canadian Pacific Railway thereby consented and agreed to the removal and re-adjustment of the railway tracks and other works upon and in King Street West, as provided in the first clause of the agreement.

"It was then agreed that 'in the event of the alteration of the railway crossing upon or over King Street at any time or times hereafter, under or pursuant to any order or orders in council made on the report of the Railway Committee of the Privy Council of Canada, and whether such alteration shall consist of a level crossing and the erection and maintenance of a gate and guards, or of the construction of an overhead bridge upon, over and along, or a subway upon, in and under' King Street aforesaid, and the necessary works connected therewith, no one of the said several parties should be entitled to claim compensation for injury or damages which might be done to or suffered by them in respect of their lands or other property by reason of the construction, making or maintenance of any such changes, alterations or improvements. On the 28th of November following, a report of the Railway Committee of the Privy Council was approved by the Governor General, setting forth that the Council had had under consideration a report from the Railway Committee with reference to certain representations of the City Council of Toronto and others with regard to the dangerous character of the present level railway crossings of King Street West, and that after hearing the parties interested at a meeting called for the purpose when a proposition was made on the part of the City Council to construct the necessary works for carrying the street under the railway tracks, provided the railway companies paid a fair proportion of the cost, the Railway Committee declared it necessary for the public safety, and recommended that the Corporation of the city of Toronto be authorized and required to carry the said street under the tracks of the said railway companies by a bridge and subway with necessary approaches, and to execute all the works required to that end, said bridge and subway to be built in accordance

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with plans and specifications to be prepared by the Corporation and approved by the Minister of Railways and Canals.

"The report then proceeds to apportion the cost of the work; so much to be paid by each railway company; so much to be paid by the Municipality of Parkdale; and the City of Toronto to contribute the sum of $80,000, or such other sum in excess of or below the estimate of the cost of the works (deducting the payments made by other parties), as should cover the whole expenditure on the works. It was further recommended with respect to the maintenance and repair of the said bridge, subway and approaches, that the City of Toronto be required to maintain and repair the masonry work and all work appertaining to the public roadway and sidewalks

"In the course of the next few years following the passage of the order in council, the bridge and subway and approaches were constructed by the City, and the respondents duly paid their share of the cost thereof. The roadway for the cost of the construction of part of which they are assessed commences at Dufferin Street, and runs east on King Street a distance of 896 ft., to the easterly limit of the east incline of the subway. On the north side of King Street a frontage of 449 ft. of the respondent's property is assessed, of which all but 157.10 feet is on the incline or approach of the subway, King Street being for that distance lowered by excavations for the purpose of the subway in front of their property. Going further east it is of course lowered much more until at the extreme west end of the subway itself the excavation reaches a depth of 17 feet, but here the respondent's property has not been assessed."

*Robinson* Q.C. and *Caswell* for the appellant.

*Armour* Q.C. and *MacMurchy* for the respondent.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario affirming an order of Mr. Justice MacMahon quashing a by-law of the City of Toronto, number 3245, passed on the 23rd April, 1894, and intituled:

A by-law to provide for borrowing money by the issue of debentures secured by local special rates for the construction of a Scoria and Tamarac Block Roadway on King Street between the east limit of King Street Subway and Dufferin Street in wards nos. 5 & 6.

The order of Mr. Justice MacMahon quashed also two other by-laws numbered respectively 3244 and 3246 and passed on the same day, the one for issuing debentures secured by local special rates for the construction of a sewer and the other for the construction of sidewalks on King Street in the city of Toronto within the same limits as those mentioned in by-law 3245. From the order quashing the other two by-laws there has been no appeal; the material however upon which Mr. Justice MacMahon proceeded in the motion before him is before us and although we are only dealing with the appeal which is limited to the by-law 3245, the evidence before us which relates to all of the by-laws may throw light upon the contention of the appellants and the respondents respectively, that of the former, in substance, being that they were in due form exercising their legal rights in providing for the construction of the works mentioned in the by-laws as what are termed local improvements, while that of the respondents is that the appellants, wholly illegally and under colour merely of the powers vested in them by the Ontario Municipal Act as to local improvements, passed the by-laws for the purpose of evading thereby responsibilities which as the respondents contend the appellants had themselves assumed and undertaken in respect of a work constructed wholly in the interest of the public and wholly outside of the line of lands benefited by what are called local improvements.

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On the argument of this appeal before us it was admitted by the learned counsel for the appellants that if the block pavement of King Street as altered in accordance with the terms of the order in council of the 28th November, 1887, comes within the work as described in that order to be performed by the appellants, as to so much and such part of the work mentioned in the by-law 3245, as comes within the said order in council the by-law cannot be supported and this appeal must fail, but it is contended by the appellants that as to so much, if any, of the pavement work within the limits mentioned in the by-law as does not come within the description of the work mentioned in the said order in council as to be undertaken and executed by the appellants, the by-law should be maintained and this appeal allowed.

The whole question involved in the appeal therefore is: Should the by-law have been quashed in whole or only in part?

In determining this question we must read the order in council in the light of and in connection with the agreement of the 21st of October, 1887, which was in evidence and is before us There can, I think, be no doubt that by the excavation of King Street to the depth as appears of 17 feet for the purpose of constructing the subway where the railway bridge over the street has been erected, such depth gradually deminishing to the summit of the approaches on either side constituted, to a greater or less extent the cutting off of the lands there, which formerly had their frontage abutting on the street from fronting and abutting on the street as altered.

This so cutting off of those lands from fronting and abutting on the street constituted as is apparent not a benefit but a very plain and manifest damage to those lands for which all the owners thereof would have

been entitled in law to compensation, all claim for which compensation the Canadian Pacific Railway Company and all the other parties to the indenture of the 21st October, 1887, who were owners of land fronting and abutting on the street, released and abandoned.

Now, the first question which arises here is: Can the block pavement of the street as lowered to the extent which has been necessary for constructing the subway in the interest of the general public, the natural and direct effect of which work has been to inflict special damage upon the adjoining lands by cutting them off from the frontage and abuttal which they formerly had upon the street, be held to be a work of local improvement within the meaning of the Municipal Act and for the construction of which the corporation had any authority to impose and levy a special tax for the purpose of paying for such work upon the adjoining lands as being lands specially benefited by the work? The tax which in a case of local improvement they are authorized to impose is a special rate, to be assessed upon real property specially *benefited* by a work, proportional to the *benefit* conferred by the work upon the lands assessed. Now although the Municipal Act provides means for ascertaining and determining *the amount* of the rate which is fairly chargeable upon the respective lands upon which the special tax is authorized to be charged, it is impossible in my opinion for us to hold that the Act gives any authority to the corporation to levy upon the land of the railway company, or of any other persons as owners of lands similarly situate, a special tax for paving with wooden blocks, stone, or otherwise a street from fronting and abutting upon which the lands proposed to be assessed have been so cut off as the respondents' lands have been by the excavation necessary for the construction of the subway constructed by the appellants in accordance

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with the terms of the order in council of the 28th November, 1887.

The appellants admit, that for the distance of 300 feet on either side of subway work, and for which distance it was necessary to construct a stone or brick retaining wall for the purpose of preventing the lands outside the limits of the street from falling down into the roadway, the adjoining lands are not chargeable; but the paving of the roadway with blocks for the distance to which the retaining wall extends is no more within the terms of the order in council than is the paving of any other part of the approaches to the subway, and the true reason, as it appears to me, why the lands of the respondents cannot be charged with any part of the cost of the pavement for the distance to which the retaining wall extends is that, for this distance at least, the lands sought to be charged have been so cut off from the street as to be no longer within the category of lands fronting and abutting upon the street and liable to a special tax as for a benefit specially conferred upon the lands. The question now arises: Is the responsibility of the appellants to bear the cost of the pavement to be limited to the distance to which the retaining wall extends or does it extend for any and if any what distance further? To the extent to which damage is done to adjoining lands by the excavation to form the approaches they must be, and for the same reason as the lands within the limits of the retaining wall are held to be, removed from the category of lands assessable as for local improvement for benefit conferred upon the land by the pavement done upon the street. The subway was a work plainly designed and constructed as a public work in which the general public, the corporation as representing the inhabitants of the city, and the railway companies were the sole parties interested. The corporation, in consideration

of the moneys paid and payable by the railway companies as prescribed by the order in council as their contribution to the cost of the work, undertook to construct and when constructed to maintain the subway and its approaches as such public work, the respondents and all others the owners of adjoining lands abandoning and releasing all claims for damage done to their lands by the excavation of the street necessary for the performance of the work. It seems but reasonable therefore to hold that to the full extent of the space between the summit of the approaches on either side of the subway proper, the work is, as being a work designed and constructed in the interest of the general public, wholly removed from the application of the clauses of the Municipal Act as to local improvements and the imposition of a special tax upon lands benefited by such improvement. The Court of Appeal for Ontario, as appears by the judgment of Mr. Justice Osler who read the judgment of the court, were of opinion that the evidence shews that the paving work done within the limits mentioned in the by-law was work done as part of the subway and was not, in fact, undertaken under the clauses of the Municipal Act relating to local improvements. There is much in support of this view as to the whole work, while as to the work upon the subway proper and its approaches there can, I think, be no doubt entertained. The city engineer in charge of the construction of the subway made his report to the city council dated the 27th of August, 1890, while the construction of the subway and its approaches was in progress, recommending the construction of the pavement, as a scoria block and wooden block pavement between Dufferin Street and a point 3,000 feet easterly. The only part of this distance not included within the space occupied by the subway and

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its approaches was, as appears by the evidence offered by the appellants, 1,126 feet of roadway upon the former level of King Street measured easterly from Dufferin Street in front of 941 feet of frontage belonging to the city corporation and of 185 of frontage belonging to the respondents. The above report of the city engineer was adopted by the council on the 1st September, 1890, and the by-law was not passed until the 25th April, 1894. Now the scoria block pavement included in the by-law is shown to have been put upon the subway proper, that is to say, the space under the railway bridge, and though included in the estimate of the engineer as for local improvement and in the by-law passed in April, 1894, was in the month of October, 1893, charged by the city corporation to the subway as part of its cost amounting to the sum of $13,327.97. Then again the roadway on the approaches was paved with squared tamarac block sawn to a size so as to be fitted close together. This material and this mode of paving the approaches were adopted as best suited to the steep grade in the approaches, and but for that grade round cedar blocks which are those in ordinary use would have been used. King Street upon its former level extending from Dufferin Street in front of the 1,126 feet above mentioned to the summit of the western approach to the subway was paved with the round cedar blocks. The whole distance was constructed as one work by day labour, the corporation determining as they thought fit the cost of the scoria block pavement and charging it to the subway and determining in like manner the pavement of the roadway both on the approaches and on the level and charging the cost so determined of the roadway between the tracks of the street railway to the street railway company under an agreement with them and the balance to the by-law

3245, but making no difference as to the cost upon approaches where the squared tamarac blocks were used, and upon the part of King Street the level of which remained unaltered between Dufferin Street and the summit of the western approach to the subway. This evidence is sufficient, I think, to warrant the conclusion that, in fact, both the scoria pavement of the subway proper, and the tamarac block pavement on the approaches were works which, whether absolutely necessary or not to be done as in compliance with the order in council, were done by the city corporation under the advice of the engineer for the purpose of constructing in the most perfect manner the work which they had undertaken to construct and maintain as a public work designed in the interest of the general public, and not at all under the clauses of the Municipal Act relating to local improvements.

It only remains to consider the point urged by the learned counsel for the appellants—that although the by-law should be quashed as to the work done upon the subway and its approaches it should be maintained as to the 185 feet of the respondents' property fronting on the level street west of the western approach; but a by-law which must be quashed as regards about three-fourths of the distance purported to be affected by it cannot possibly be maintained as to the residue which might have been assessable if it had not been wrongfully coupled with work not assessable under the clauses relating to local improvements. But there is another objection urged by the respondents affecting the validity of the by-law, namely, they insist that they never had any notice served upon them as required by the 622nd section of the Act. It is of the utmost importance that the corporation when professing to exercise the very extensive powers given by the Act to the council in those local improvement clauses

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should be prepared always to prove strict compliance with the provisions of the Act requiring notice to be given to the parties intended to be affected by the proposed assessment. In the present case the only evidence upon the point offered by the appellants is contained in an affidavit of a person who deposes that on the 11th February, 1891, he posted notices in the usual form, of the sitting of the Court of Revision with regard to the assessment for a scoria and wooden block pavement on King Street between Dufferin Street and the King Street Subway, to all parties, including the Canadian Pacific Railway Company, whose names are on a list annexed to his affidavit. Evidence of this nature is plainly defective, for it is the province of the court upon view of the notices said to have been mailed, and not of a deponent, to decide whether they do or do not comply with the requirements of the Act. The evidence produced constitutes a deposition as to a point of law and cannot be accepted as evidence that the notices said to have been mailed were in fact such as the law required.

The appeal must be dismissed with costs as the by-law must be quashed *in toto*.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Wells & MacMurchy.*

THE NEWS PRINTING COMPANY OF TORONTO (DEFENDANTS)..... } APPELLANTS;

AND

MACRAE & MACRAE (PLAINTIFFS)..RESPONDENTS.

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*Sept. 29.
*Oct. 13.
*Oct. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Time limit—Commencement of—Pronouncing or entry of judgment—Security—Extension of time—Order of judge—Vacation—R. S. C. c.* 135, *ss.* 40, 42, 46.

On the trial of an action for libel the plaintiffs obtained a verdict which the Divisional Court set aside. The Court of Appeal allowed the appeal and restored the judgment at the trial, reducing the amount of damages by a specified sum.

*Held*, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the Court of Appeal, and the time for appealing therefrom to the Supreme Court ran from the pronouncing and not from the entry of such judgment. *O'Sullivan* v. *Harty* (13 Can. S. C. R. 431); *Walmsley* v. *Griffith* (13 Can. S. C. R. 434); and *Martley* v. *Carson* (13 Can. S. C. R. 439) followed.

By sec. 42 of the Supreme and Exchequer Courts Act (R. S. C. c. 135) a court proposed to be appealed from or a judge thereof may allow an appeal after the time prescribed therefor by sec. 40 has expired, but an order extending the time will not authorize the Supreme Court or a judge thereof to accept security after the 60 days have elapsed.

The delay of 60 days for appealing to the Supreme Court prescribed by sec. 40 of the Act is not suspended during the vacation of the court established by its rules.

MOTION before Mr. Cassels, the Registrar in Chambers, to allow security for costs of appeal.

The circumstances under which the application was made are sufficiently set out in the judgment.

*MacTavish* Q.C. for the motion. *Sinclair* contra.

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THE REGISTRAR.—On the 9th September last an application was made before me sitting in chambers, on behalf of the above named appellants, "for an order extending the time for the allowance of the security for the costs of the respondents in this court until the said 9th day of September, 1896."

The judgment sought to be appealed from was rendered by the Court of Appeal for Ontario on the 30th day of June, 1896.

I dismissed the application on the ground that I had no jurisdiction to extend the time.

On the 29th September last MacTavish Q.C. moved for an order allowing the bond filed in this court on the 1st of September last as security for costs of an appeal from the said judgment.

Upon this application Mr. MacTavish, and Mr. Sinclair who appeared for the respondents, both agreed that the bond should be considered unobjectionable provided the right to appeal was held to exist.

Mr. MacTavish produced the following order made by the Honourable Mr. Justice Osler, of the Court of Appeal for Ontario, in chambers on the 18th September, 1896:

Upon the application of the above named defendants, upon hearing read the affidavit of William Henry Irving, the affidavit of Hubert H. Macrae and the exhibits therein referred to, and the defendants' counsel undertaking to get the appeal down for the October sittings of the Supreme Court if the rules or practice of the court admit of the same being done, and upon hearing counsel as well for the plaintiffs as the defendants.

1. It is ordered that the time for the filing and allowance of the security required by the rules of the Supreme Court be extended up to and inclusive of the 30th day of September instant.

2. And it is further ordered that the costs of and incidental to this application be costs in the appeal to the plaintiffs in any event of the appeal.

Mr. MacTavish also read a number of affidavits

and produced a copy of the certificate of the Court of Appeal of the 30th June, 1896, which appears not to have been entered until the 21st September, 1896, subsequent to the obtaining of the order from Mr. Justice Osler hereinbefore recited, and subsequent to the application to me first above mentioned.

Mr. MacTavish contended as follows:

1. That the time of vacation of the Supreme Court did not count in the sixty days within which, according to sec. 40 of the Supreme and Exchequer Courts Act, the appeal should have been brought. Therefore the application was in ample time.

2. That if the time of vacation did count, the order of Mr. Justice Osler had the effect of extending the 60 days, and that during such extended time this court or a judge thereof might allow the appeal.

3. That in any event the 60 days counted, not from the time when the judgment was *pronounced*, but from the time it was *entered*.

4. That the respondents' solicitor waived the requirement as to the time and consented to an extension of it.

I propose to deal with these contentions in the inverse order to that in which I have stated them.

1st. As to the waiver. I see nothing in any of the affidavits to lead me to believe that the respondents' rights were in any way waived by his solicitor.

2nd. As to the contention that the time runs in this case from the entry of the judgment and not from the pronouncing of it. I am of opinion that there are no circumstances connected with the settlement of this order in appeal which will bring it within the exception to the ordinary rule laid down in *O'Sullivan* v. *Harty* (1); *Walmsley* v. *Griffith* (2); and *Martley* v. *Carson* (3). And see also per Ritchie C. J. in *Vaughan*

(1) 13 Can. S. C. R. 431. (2) 13 Can. S. C. R. 434.
(3) 13 Can. S. C. R. 439.

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v. *Richardson* (1); and per Ritchie C. J. in *City of Winnipeg* v. *Wright* (2). There was no necessity to speak to the minutes; as a matter of fact they were not spoken to before either a judge or the court, and it is apparent from the facts set out that the judgment was as simple a one to settle as could well come before the registrar.

The action of the appellants' solicitor in applying for the order of Mr. Justice Osler, and in making the application to me to extend the time, *before* the judgment was entered, shows that he himself, then at least, must have been of the opinion that the time for appealing ran from the pronouncing of the judgment.

3rd. As to the contention raised on the order of Mr. Justice Osler.

That order purports to extend the time for the filing and allowance of the security "required by the rules of the Supreme Court." Now the filing and allowance of the security is not required by the rules of the Supreme Court, but by the Supreme and Exchequer Courts Act, sec. 46. Rule 6, the only rule relating to the security, provides merely for the necessary evidence being furnished to the Supreme Court that the requirement of the statute in this regard has been complied with. Section 46 is as follows:

46. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court:

2. This section shall not apply to appeals by or on behalf of the Crown, in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of *habeas corpus*. 38 V. c. 11, s. 31; 42 V. c. 39, s. 14.

Section 40 provides as follows:

(1) 17 Can. S. C. R. at p. 705. (2) 13 Can. S. C. R. at p. 444.

40. Except as otherwise provided every appeal shall be brought within sixty days from the signing, or entry, or pronouncing of the judgment appealed from.

Several classes of cases are otherwise provided for—Criminal appeals, Exchequer Court appeals, Election appeals; and by sec. 42 it is provided as follows:

42. Provided always, that the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal, notwithstanding that the same is brought within the time hereinbefore prescribed in that behalf; but in such case, the court or judge shall impose such terms as to security or otherwise as seems proper under the circumstances; but the provisions of this section shall not apply to any appeal in the case of an election petition. 38 V. c. 11, s. 26.

It has been decided that approving the security is a mode of allowing the appeal. *Fraser* v. *Abbott* (1). When a judge of the court below, or of the Supreme Court, has made an order approving the security the appeal is no longer subject in any way to the jurisdiction of the court below; see *Lakin* v. *Nuttall* (2); *Walmsley* v. *Griffiths* (3); *Starrs* v. *Cosgrave Brewing & Malting Co.* (4); with the exception of the settlement of what is called the "Case," which, if it cannot be settled by agreement between the parties, has, under the provisions of sec. 44 of the Supreme and Exchequer Courts Act, to be settled by a judge of the court below.

In *Re Smart* (5), it was held that in a *habeas corpus* appeal, in which no security has to be given, the bringing of the appeal is the filing of the "Case" in the Supreme Court.

As I understand it, the right of appeal is one which is not subject in any way to the discretion of any court or judge, but is a right given *de plein droit*, to be

(1) Cass. Dig. 2 ed. p. 695, no. 125.
(2) 3 Can. S. C. R. 691.
(3) Cass. Dig. 2 ed p. 697, no. 129.
(4) Cass. Dig. 2 ed. p. 697, no. 130.
(5) 16 Can. S. C. R. 396.

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exercised as a matter of course if exercised within the limited time. Some classes of appeals, however, are an exception to this principle; for instance, appeals under the Winding-Up Act, and appeals *per saltum*, which need not be considered now.

But how if the time has elapsed, if the 60 days have passed? Is there any remedy for a person wishing to bring an appeal?

There is none within the jurisdiction of the Supreme Court or a judge of that court; see *Walmsley* v. *Griffiths* (1); and other cases have been decided laying down the same principle.

Sec. 46 says the security may be approved of by the court below or a judge thereof, or by the Supreme Court or a judge thereof.

That, however, is subject to the provision as to time contained in sec. 40.

But sec 42 comes in and provides a remedy. It says "the court proposed to be appealed from, or any judge thereof, may, under special circumstances, *allow an appeal*, notwithstanding that the same is not brought within the time hereinbefore prescribed in that behalf."

Now it seems to me that the order of Mr. Justice Osler must have been made in view of this section. It is the only section under which the court below or a judge of that court could deal with an appeal which has not been brought within the time limited by sec. 40.

In Rule 70 of the Supreme Court, which relates to extending or abridging time, the words "court or a judge" mean the Supreme Court or a judge of that court. See rule 76.

I am asked, I believe, to infer that Mr. Justice Osler was under the impression that he could extend the time for appealing and that the Supreme Court or a

(1) Cass. Dig. 2 ed. p. 670, no. 6.

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judge thereof could allow the appeal within such extended time.

But section 42 confers no such power on a judge of the court below. Under that section he *may allow the appeal*, but not extend the time to permit the Supreme Court or a judge thereof to allow it.

In *Vaughan* v. *Richardson* (1) the present learned Chief Justice says: "The expression 'allow an appeal' [in sec. 42] means only that the court or judge may settle the case and approve the security."

Therefore under this section, the only remedy for the appellant is to go to the Court of Appeal or a judge thereof.

Lastly, with respect to the contention, that the time of vacation of the Supreme Court did not count in the 60 days mentioned in sec. 40.

This is an important question, and so far as I know has never been definitely passed upon by the Supreme Court or any of the judges. In only two cases has the point been touched upon, *The Bank of British North America* v. *Walker* (2) and *O'Sullivan* v. *Harty* (3).

In *The Bank of British North America* v. *Walker* (2), an application came before Mr. Justice Strong (the present Chief Justice) in chambers, in August, 1881, to allow the deposit of $500 as security and he refused the application on the ground, 1. That the application should not have been made in chambers during vacation, not being urgent; and on the further ground, 2. That the application should have been on notice.

Now the statute at that time was not as it now is, but every appeal had then to be brought within 30 days, and at the time the application was made the 30 days had expired. The judgment had been rendered on the 27th June, so that the appellant could be in no worse position by waiting till after vacation and the application was not urgent.

(1) 17 Can. S. C. R. 703. (2) Cass. Dig. 2 ed. 706.
(3) 13 Can. S. C. R. 431.

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Mr. Justice Fournier, when the application was renewed before him after vacation, on the 13th of September following, did approve of the security. This would be conclusive that Mr. Justice Fournier, at any rate, was of opinion that the time of vacation did not count, if it were not that the case came subsequently before the court on a motion to quash the appeal, and on that motion the majority of the court held (Mr. Justice Fournier being one) that the appeal was in reality an appeal *per saltum*, and that the section limiting the bringing of an appeal in that way did not apply to such appeals, which were provided for by a separate Act passed in amendment of the original Supreme Court Act. Under the Supreme and Exchequer Courts Act, R. S. C. ch. 135, consolidating and amending the various statutes relating to the Supreme Court, appeals *per saltum*, like other appeals, would now appear to be governed by sec. 40 respecting time.

The only other case in which the point was raised was *O'Sullivan* v. *Harty* (1). In that case the Court of Appeal held that the time of vacation in that court did not prevent the time from running, and refused to allow an appeal because the security was not given within the 30 days.

The Supreme Court allowed the appeal upon the ground that the time counted from the *entry of the judgment* under the circumstances of that case, and it did not decide in any way the other question. The only remark made with reference to it was by Sir Wm. Ritchie. He said:

> It is claimed that in Ontario the time for appealing should run from the time the judgment is pronounced, and that as the judgment in this case was pronounced before vacation the application should have been made during vacation. I was of opinion at first that the

(1) 13 Can. S. C. R. 431.

party was not obliged to apply during vacation, but this application need not be decided on this point.

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If any inference at all can be drawn from this it seems to me it is that although *at first* of the impression stated, the learned Chief Justice upon consideration was not able to come to that conclusion. Perhaps the inference ought to be that he had not found it necessary to give sufficient consideration to the point to come to any conclusion at all about it.

There are two cases, however, in which the question has been raised as to whether the time for filing the case fixed by rule 5 of the Supreme Court should be considered as running during vacation.

In *Herbert* v. *Donovan* (1), a motion was made to dismiss an appeal for want of prosecution. The judgment of the Court of Appeal was pronounced on the 30th June, 1885. On the 3rd July following the appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count he did not further prosecute his appeal. Notice of motion to dismiss was given on the 17th September, 1885, and was heard by Mr. Justice Henry who held, on the 3rd October, that under the circumstances the time for filing the case should be extended to the 10th October, and dismissed the motion but without costs. The learned judge did not say that he was of opinion the time of vacation did not count, nor did he express the opinion that it did. He had power in such case, under rule 70 hereinbefore mentioned, to extend the time whether vacation counted or not, and he did extend the time.

The other case referred to, *McArthur* v. *McDowall*, was one in which an application was made in vacation (17th August, 1892), to Mr. Justice Patterson to extend the time for filing the case. There is no written

(1) Cass. Dig. 2 ed. 706, no. 149.

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judgment by the learned judge but he made an order extending the time, and so far as I have been able to ascertain the facts he made it notwithstanding the contention of the solicitor for the respondent that it was not a necessary application because the time of vacation did not count, nor a proper application for vacation because not a matter of urgency, the learned judge's opinion being that it was the duty of the appellant to file his case in vacation and that the time for filing the case did count in vacation.

I infer that if Mr. Justice Patterson held that vacation did not interrupt the time fixed by the *rule* of the Supreme Court, he would also have held that it did not interrupt the time fixed by the *statute*.

These are all the cases in the Supreme Court, so far as I am aware, bearing on the question.

I have given the question careful consideration and investigation, and I have come to the conclusion that the Court of Appeal of Ontario, the Court of Queen's Bench, appeal side, of Quebec, the Supreme Court of New Brunswick, the Supreme Court of Nova Scotia, have not, indeed, so far as I can find, no court of any of the provinces has, attempted to limit in any way the provision of section 40. I have not overlooked the cases referred to by Mr. MacTavish, and I have seen many others, but they nearly all turn upon rules which are very different from ours. The question is: Has the Supreme Court, by its rules with respect to vacation, intended to interfere with sec. 40? I cannot come to the conclusion that it has. I think the statute when it says "every appeal," means just what it says, and not every appeal unless the time of vacation of the Supreme Court intervenes, so far as applications to that court or a judge thereof are concerned. I believe the judges of the Supreme Court when making rules under sec. 109 did not think it would insure "the

better attainment of the objects" of the Act to make any such limitation, even if they thought they had the power. I can foresee that in a great many cases, if it were held otherwise, where judgments are delivered within the 60 days prior to the vacation of the Supreme Court, an appellant will wait and make his application to this court or a judge thereof after vacation, although if applying to his own court he might have to apply very much sooner.

It has been attempted to show that the appellant in this case would have made his application sooner if the Registrar had not been absent. But although the Registrar is not bound to sit in vacation, his jurisdiction is not taken away during vacation, and I have never known any difficulty arise in disposing of an application of urgency.

The appellant seems to have been under the impression that this court or a judge thereof had power to extend the time for appealing and instead of filing his bond within the 60 days and giving notice of an application to have it allowed, he waited *till after the time had elapsed* before filing his bond, and then applied for an indulgence which could not be granted to him under the statute, that is, an extension of time to bring his appeal.

I have looked at the following cases, among others: *Wilby* v. *Standard Ins. Co.* (1); *Anderson* v. *Thorpe* (2); *Hespeler* v. *Campbell* (3); *Hogaboom* v. *Cox & Co.* (4); *Fournier* v. *Ledoux* (5); *Chapman* v. *Real Property Trust* (6); *Crom* v. *Samuels* (7); *Runtz* v. *Sheffield* (8); *Wallingford* v. *Mutual Society* (9); *Steedman* v. *Hakim*

(1) 10 Ont. P. R. 34; and H. & L. p. 80.
(2) 12 Gr. 542.
(3) 14 Ont. P. R. 18.
(4) 15 Ont. P. R. 127.
(5) 13 L. C. Jur. 332.
(6) 7 Ch. D. 732.
(7) 2 C. P. D. 21.
(8) 4 Ex D. 150.
(9) 5 App. Cas. 685.

1896

THE NEWS PRINTING COMPANY OF TORONTO v. MACRAE.

The Registrar.

(1); *Sugden* v. *Lord St. Leonards* (2); *Re Coulton* (3); *Re Tussaud* (4).

The application is refused with costs.

An appeal was taken to Mr. Justice Girouard in chambers, who affirmed the decision of the Registrar in the following judgment:—

GIROUARD J.—This is an appeal from the order made by the Registrar in chambers dismissing an application for allowance of security under section 46.

*O'Gara* Q.C. for the motion. *R. V. Sinclair contra.*

The contentions before the Registrar were four in number.

1. That the time of vacation of the Supreme Court did not count in the 60 days within which, according to sec. 40 of the Supreme and Exchequer Courts Act, the appeal should have been brought.

2. That if the time of vacation did count the order made by Mr. Justice Osler on the 18th September last, set out by the Registrar in the reasons given by him for his decision, had the effect of extending the time within which this court or a judge thereof might allow the appeal.

3. That in any event, the 60 days counted, not from the time when judgment was pronounced, but from the time it was entered.

4. That the respondent's solicitor waived the requirement as to time and consented to an extension of it.

On the argument before me, O'Gara Q.C. for the applicants abandoned the first and fourth grounds and relied only on the second and third grounds stated. But after reading the considered judgment of the Registrar, I have come to the conclusion that, for the

(1) 22 Q. B. D. 16.
(2) 1 P. D. 209.
(3) 34 Ch. D. 22.
(4) 31 Sol. J. 703; 36 Sol. J. 22.

reasons given by him, the applicants must fail, not only in the contentions which have been abandoned, but also in those which have been argued before me, and that the appeal from the Registrar should be dismissed with costs.

*Motion refused with costs.*

1896

THE NEWS PRINTING COMPANY OF TORONTO v. MACRAE.

Girouard J.

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THOMAS B. MARTIN (PLAINTIFF).....APPELLANT;

AND

WILLIAM SAMPSON AND H. R. ANGUS (DEFENDANTS).....RESPONDENTS.

1897

*Jan. 15.

*Jan. 25.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Time limit—Commencement of—Pronouncing or entry of judgment—Security—Extension of time—R. S. C. c. 135, ss. 40, 42, 46.*

On the trial of an action to set aside a chattel mortgage the plaintiff obtained a declaration that the mortgage was void and an order setting it aside without costs. This decision was reversed on appeal and the action dismissed, with costs both in the Court of Appeal and in the court below, by a judgment pronounced on the seventh of November, 1895. The minutes of judgment were not settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal refusing costs to one of the respondents and changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit.

An application was made to the Registrar of the Supreme Court, sitting as judge in chambers, more than sixty days after the judgment was pronounced, for approval of security under sec. 46 of the S. & E. C. Act:

*Held*, per Gwynne J. affirming the decision of the Registrar, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and the application was too late.

1897

MARTIN v. SAMPSON.

MOTION by way of an appeal from the decision of the Registrar sitting as Judge in Chambers dismissing an application made for approval of security under section 46 of the Supreme and Exchequer Courts Act.

The action was brought by an assignee for the benefit of creditors to set aside a chattel mortgage, which was alleged to be void on the ground that the affidavit of *bona fides* was incorrect and insufficient under the statute. During the pendency of the action, by consent of the parties, the property mortgaged was sold and the proceeds deposited in the Bank of Hamilton to abide the final judgment. In the trial court the judge held that the chattel mortgage was void, and directed that it should be set aside without costs. An appeal to the Court of Appeal for Ontario by the mortgagee was allowed and the action dismissed with costs both in appeal and in the court below. This judgment was rendered on the 7th November, 1895, and the plaintiff did not move for approval of security for costs to be given on an appeal to the Supreme Court of Canada until the 8th January, 1896, when he made an application to that effect before Mr. Justice Osler, one of the judges of the Court of Appeal for Ontario. Assuming that the time for bringing the appeal, as limited by section 40 of the Supreme and Exchequer Courts Act, began to run from the pronouncing of the judgment, the application was too late, but the plaintiff contended that the time ran from the entry of the judgment and not from the date when it was pronounced, and consequently that his application was within the prescribed time.

The facts upon which the plaintiff's contention was based, appeared from affidavits filed to be as follows:— After the rendering of the judgment on the 7th November, 1895, the solicitors for the appellant, (the mortgagee), served the usual notice for settlement of

the minutes of the judgment and in their draft minutes as served included a direction that costs should be paid both to the appellant and the respondent the mortgagor (he having been joined in the action and named with the mortgagee, the appellant, as a defendant), but the plaintiff contended that although named as a respondent in the appeal, the mortgagor was never actually a party to the appeal and was not represented by counsel nor heard upon the appeal. The draft minutes also contained a direction that the Bank of Hamilton should pay over the funds on deposit there to the defendant, the mortgagee. Upon the settlement of the minutes the Registrar of the Court of Appeal held that the mortgagor had not been a party to the appeal and was not entitled to costs on appeal, but to verify the minute in his own book he undertook to refer to the Chancellor's note book in order to ascertain whether in fact the mortgagor had been present or represented by counsel, and his minute having been confirmed by the Chancellor's note of the case, he decided that the mortgagor was not entitled to any costs of appeal. He also refused to make the direction as to payment by the bank as drafted by the solicitors, as the bank was not a party, but he altered the draft minutes by making the provision in this respect to read as a declaration that the defendant, mortgagee, was entitled to the moneys on deposit. No objection was taken by either side to this alteration, nor to the alteration of the draft minutes respecting payment of costs to the mortgagor, and the minutes were not spoken to before either a judge or the court, but the plaintiff on the application to be allowed to give security which he made to the judge of the Court of Appeal, (Osler J.) contended that as the subject-matter of these alterations was substantial, and that as until the minutes

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MARTIN v. SAMPSON.

were finally settled and entered the plaintiff could not know exactly from what he had to appeal, therefore under the Supreme Court decisions on the subject the time should run only from the entry of the judgment, and that in any event, if the judge held that the time ran from the pronouncing of the judgment he ought to extend the time under the provisions of the 42nd section of the Supreme and Exchequer Courts Act.

After conferring with Maclennan J., Osler J. held that the time ran from the date when the judgment was pronounced and that the application was too late, and also refused to extend the time.

The plaintiff, appellant, then made application to the Registrar of the Supreme Court upon the same grounds, and the Registrar having heard counsel came to the same conclusion as Mr. Justice Osler as to the application having been made too late, which was the only question before him, there being no power in the Supreme Court or a judge of that court to enlarge the time for appealing.

GWYNNE J. on appeal from the Registrar, confirmed his decision with costs.

*Motion dismissed with costs.*

*George Kidd* for the appellant.

*Hamilton Cassels* for the respondents.

# INDEX.

*Conditions precedent—Formal notice of claim—Pleading—Money had and received—Special pleas.*] Where an express company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed. *Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson v. Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430) distinguished.—In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action. THE NORTHERN PACIFIC EXPRESS CO. *v.* MARTIN *et al.* — — — — — — — 135

2——*Statute of Frauds—Memorandum in writing—Repudiating contract by.*] A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. MARTIN *v.* HAUBNER — — 142

3——*Contract—Subsequent deed—Inconsistent provisions.*] C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co. all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co., who immediately cut off from the works of C. the supply of gas, and an action was brought to prevent such interference. *Held*, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained. CARROLL *et al. v.* THE PROVINCIAL NATURAL GAS AND FUEL COMPANY OF ONTARIO — — — — — — 181

4——*Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*] A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction, the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient. *Held*, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer. *Held* also, that the contractors could proceed by action if payment on a monthly certificate was withheld and were not obliged to wait the final completion of the work before suing. MURRAY *v.* THE QUEEN — — 203



5——*Resolutory condition—Conditional sale—C. C. arts.* 379, 2017, 2083, 2085, 2089—*Hypothecary creditor—Unpaid vendor—Property real and personal—Immovables by destination—Movables incorporated with the freehold—Severance from realty.*] An action was brought by L. to revendicate an engine and two boilers under a resolutory condition (*condition resolutoire*) contained in a written agreement providing that, until fully paid for, they should remain the property of L. and that all payments on account of the price should be considered as rent for their use, and further that, upon default, L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a sawmill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building but the engine had been taken out and was lying in the mill-yard, outside of the building. While in this condition the defendants hypothecated the mill property to B. and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. B. intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothecs upon the lands. *Held*, that the agreement between L. and the defendants could not be considered a lease but was rather a sale subject to a resolutory condition with a clause of forfeiture as regards the payments made on account. But whether the agreement was a lease or a sale on condition, L. having, as re-