REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

GEORGE DUVAL, ADVOCATE.

ASSISTANT REPORTER

C. H. MASTERS, BARRISTER AT LAW.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. REGISTRAR OF THE COURT.

VOL. 20.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.
1892.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

" " Samuel Henry Strong J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Christopher Salmon Patterson J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

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

ERRATA.

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

Page 65.—In caption note, in par. 2 line 4, and par. 3 line 5. For "51 V. c. 101 s. 58" read "51 V. c. 27 s. 58. Also on pp. 67, line 9 and 71, line 3.

Page 334.—Line 2 from bottom. For "Lisgar Election Case" read "Selkirk Election Case."

Page 635.—Line 9 from top. For "notice" read "notices."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

B.

B.

C.

TABLE OF CASES CITED.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

Mc.

N.

T.

U.

V.

W.

Y.

Cases appealed to the Privy Council :—

ROBINSON *v.* THE CANADIAN PACIFIC RAILWAY CO. Vol. 19, p. 292.

(Judgment of Supreme Court reversed. [1892] A.C. 481.)

BARRETT *v.* THE CITY OF WINNIPEG Vol. 19 p. 374.

(Judgment of Supreme Court reversed. [1892] A.C. 445.)

DUGGAN *v.* LONDON & CANADIAN LOAN CO. p. 481.

(Leave to appeal granted.)

MARTLEY *v.* CARSON p. 634.

(Appeal dismissed.)

MARITIME BANK *v.* RECEIVER-GENERAL OF NEW BRUNSWICK p. 695.

(Judgment of Supreme Court affirmed. [1892] A.C. 437.)

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF LISGAR.

1891

*Oct. 27.

*Nov.] 17.

THOMAS COLLINS (PETITIONER).....APPELLANT;

VS.

ARTHUR WELLINGTON ROSS (RESPONDENT)..... ..... } RESPONDENT.

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

Election Petition—Preliminary objections—R. S. C. ch. 9, s. 63—English general rules—Copy of petition—R.S.C. ch. 9, s. 9 (h)—Description and occupation of petitioner.

Held, affirming the judgment of the court below, that the judges of the court in Manitoba not having made rules for the practice and procedure in controverted elections the English rules of Michaelmas Term, 1868, were in force, (R.S.C. ch. 9, s. 63), and that under rule one of said English rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the sub-

---

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

1891

LISGAR ELECTION CASE.

ject of a substantial preliminary objection and fatal to the petition. Strong and Gwynne JJ. dissenting.

Held further, reversing the judgment of the court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal.

APPEAL from the judgment of the Court of Queen's Bench for Manitoba dismissing with costs, upon certain preliminary objections presented by the respondent, the petition presented to that court by the appellant under "The Dominion Controverted Elections Act," complaining, upon the grounds therein set out, of the undue election of the respondent as member of the House of Commons for the electoral district of Lisgar.

The court of Queen's Bench upheld the following objections, numbers two (2) and five (5):

Objection 2.—The name, residence, address and occupation of the petitioner are not set out in the said petition nor is any information or means given of identifying him, whereby the respondent is prevented from discovering whether there are any objections to the said petitioner.

Objection 5.—At the time of the presentation of the said petition at the office of the clerk of the court or prothonotary the petitioner did not leave a copy of the said petition with the said clerk or prothonotary for him to send to the returning officer of the said electoral district for publication, nor was any provision made for sending such copy to the said returning officer, nor did the petitioner furnish or pay to the said clerk of the court or prothonotary, or the returning officer, the costs, expenses and charges necessary for the publication of the said petition, pursuant to the provisions of the said act, and the rules and practice relating to the trial of election petitions, by reason whereof no copy of said petition was sent by said prothonotary to the said returning officer for publication as aforesaid, and

the same was not published by said returning officer in the said electoral district as provided by the said act.

The petition was styled as follows:—

"PETITION IN THE COURT OF QUEEN'S BENCH.

"THE DOMINION CONTROVERTED ELECTIONS ACT.

"In the matter of the election for the Electoral District of Lisgar for a member of the House of Commons, held on the twenty-sixth day of February, A.D. 1891, and the fifth day of March, A.D. 1891.

"Between THOMAS COLLINS, petitioner, and ARTHUR WELLINGTON ROSS, respondent.

"*To the Honourable the Judges of the Court of Queen's Bench for the province of Manitoba:*

"The humble petition of the above-named petitioner showeth as follows:—

"1. An election for a member of the House of Commons for the Electoral District of Lisgar, in the Province of Manitoba, was held on the twenty-sixth day of February and the fifth day of March last past.

"2. Your petitioner had a right to vote at the said election, &c."

Martin for appellant.

The second objection is that the name, residence, address and occupation of the petitioner are not set out in the petition, and the court proceeded largely upon this objection in making the order complained of.

The name of the petitioner, Thomas Collins, is given, and I contend that his residence, address and occupation need not be stated in the petition, either under the Controverted Elections Act, secs. 5 and 9, or under the English rules of 1868 (which, under section 63 of the act, are in force to a certain extent in Manitoba, no general rules having been promulgated by the Court of Queen's Bench under section 62). The

1891

LISGAR ELECTION CASE.

form given in rule 5 indicates that the residence, though not the occupation, should be given, although rule 2 does not require that the residence should be given. At the most the omission to insert the residence of the petitioner is merely a clerical error, and application having been made at the hearing before the court below for leave to insert it, an amendment should have been allowed. The appellant further submits that the onus being upon the respondent to establish this preliminary objection, he should have filed material impeaching or throwing doubts upon the status or identity of the petitioner: *The Megantic Case* (1); *The Montmagny Case* (2).

In any event the objection does not go to the substance of the petition, but is purely formal and should not prevail. The English rule, No. 60, says: "No proceedings shall be defeated by any formal objection." The appellant refers also to sub-section 44 of section 7 of the Interpretation Act. Maxwell on Statutes (3). See also portion of the judgment of Lord Coleridge C.J. in *Woodward* v. *Sarsons* (4), a decision under the Ballot Act; *Liverpool Borough Bank* v. *Turner* (5); and *Re Lincoln Election* (6).

The judgment of Baron Martin in *The Shrewsbury Petition, Young* v. *Figgins* (7), is a case very similar to the present.

The fifth objection, that at the time of the presentation of the petition the petitioner did not leave a copy of the petition with the clerk to be forwarded to the returning officer for publication in the electoral district, was a principal ground upon which the court below proceeded in dismissing the petition.

In answer to this objection I contend that this is not

(1) 8 Can. S. C. R. 169.
(2) 15 Can. S. C. R. 1.
(3) P. 460.
(4) L. R. 10 C. P. 750.
(5) 2 DeG. F. & J. 502.
(6) 2 Ont. App. R. 324.
(7) 19 L. T. N. S. 499.

a preliminary objection which can be taken under the provisions of section 12 of the act. It is not a preliminary objection or ground of insufficiency against the petition or petitioner or against any further proceeding on the petition. The statutory provision is in the nature of a collateral proceeding intended, not for the benefit or to protect either the petitioner or the respondent, but to give the electors of the electoral division notice that a petition is pending and with the object of thereby preventing any collusive withdrawal or settlement of the petition. Such being the obvious intention of the provision the court, by giving force to this objection, has actually consummated the very result which the legislature intended to prevent.

The provision of the rule, being remedial in its nature and in the public interest, is not imperative but directory merely, and the omission to comply with it is not fatal to the petition. Such omission could be equitably remedied by granting the petitioner an extension of time, or by staying proceedings on the petition unless the provision of the rule had been complied with.

McCarthy Q.C. and *Haggart* for respondent. With respect to objection two the learned counsel cited and relied on the *Youghal case* (1); *The Megantic case* (2); Lewis' Equity Drafting (3); Story's Equity Pleading (4); *Hunter* v. *Mountjoy* (5); *Campbell* v. *Andrews* (6); and as to objection five, cited Cunningham on Elections (7); Dom. Con. Elections Act (8); Maxwell on Stats. (9); *Noseworthy* v. *Buckland in the Moor* (10); *Wheeler*

(1) 1 O. M. & H. 291.
(2) 8 Can. S. C. R. 169.
(3) P. 186.
(4) 9th ed. pp. 19, 20.
(5) 2 Ch. Cham. 90.
(6) 12 Sim. 578.
(7) P. 572.
(8) R.S.C. c. 9 s. 9 ss. *h* and secs. 62, 63.
(9) 2nd ed. p. 452.
(10) L. R. 9 C. P. 233.

1891

LISGAR ELECTION CASE.

v. *Gibbs* (1); Hardcastle on Stat. Law (2); *Liverpool Bank* v. *Turner* (3); *Grace* v. *Clinch* (4); *Tipperary case* (5); *Knaresborough case* (6); *Boston case* (7); *Re South Renfrew* (8); Leigh & LeMarchant on Elections (9); Hardcastle on Elections (10), and English rules L and LX made under The Parliamentary Elections Act, 1868.

Sir W. J. RITCHIE C.J.—I think the second preliminary objection, viz., that the name, residence, address and occupation of the petitioner are not set out in the petition, is a purely formal one, and an amendment which appears to have been applied for should have been allowed. I cannot conceive that the sitting member could be in any way injured by the want of the "residence, address and occupation" of the petitioner, because he could have applied to a judge to stay proceedings till the same were furnished, or he could have raised an issue as to petitioner's right to vote at the election, as alleged by him in his petition, when in my opinion the burthen of establishing this status was on the petitioner, and failing to comply with which his petition would be dismissed.

As to the 5th objection which the court below sustained, stated shortly, it is, that no copy of the petition for transmission to the returning officer or cost of transmission, &c., was furnished by the petitioner to the prothonotary of the court when the petition was presented, by reason whereof no copy of said petition was sent by said prothonotary to said returning officer for publication, nor was same pub-

(1) 3 Can. S.C.R. 374.
(2) 2nd ed., p. 134.
(3) 2 De Gex. F. & J. 502.
(4) 4 Q. B. 606.
(5) 2 O'M. & H. 31.
(6) 3 O'M. & H. 141.
(7) 3 O'M. & H. 150.
(8) 1 Hodg. El. Cas. 556.
(9) P. 108.
(10) P. 17.

lished by the said returning officer in the said electoral district as provided by the Act.

By section 9 (*h*) of the Controverted Elections Act it is provided that on the presentation of the petition the clerk of the court shall send a copy thereof by mail to the returning officer of the electoral district to which the petition relates, who shall forthwith publish the same in such electoral district. The judges of the Court of Queen's Bench of Manitoba have made no rules under the 63rd section of the Act, which declares that in such a case:

> Until rules of court have been made by the judges of the several courts in each province in pursuance of this act, and so far as such rules do not extend, the principles, practice and rules, on which election petitions touching the election of members of the House of Commons in England were, on the twenty-sixth day of May, one thousand eight hundred and seventy-four, dealt with, shall be observed so far as consistently with this act they can be observed by the said courts and the judges thereof.

The English rules thus in force in Manitoba require the petitioner when filing the petition to leave with the clerk a copy of the petition to be sent to the returning officer. There was no compliance with this rule and no copy was ever sent to the returning officer. It appears to me this was by no means a mere formal proceeding, but an essential part of the presentation or filing of the petition, and unless the statute and rule were duly complied with there was no proper or due presentation or filing of the petition, and therefore the objection was a substantial objection as held by the court below.

STRONG J.—I think that in dealing with election cases it should be a golden rule that if there is any possible way of avoiding giving effect to technical preliminary objections and thus preventing the trial on the merits we should act upon it.

1891

LISGAR ELECTION CASE.

Strong J.

As regards objections two and five, I cannot say they are fatal; objection two might have been cured by amendment; and a stay of proceedings until compliance with the practice would have been sufficient as regards the fifth. I am of opinion the appeal should be allowed and the petitioner should be at liberty to amend his proceedings.

FOURNIER J.—I concur in the dismissal of this appeal.

TASCHEREAU J.—If I had been sitting in the court of first instance I should probably have said that the 5th objection should not prevail, and would have given time to prove the status, but the court below having maintained it, I do not think we should interfere.

GWYNNE J.—None of the objections in the present case are, in my opinion, good preliminary objections within the meaning of that term as used in the statute. The statute in effect incorporates the rules of court in England under the Act of 1868 in matters not provided for by the statute, and where no rules are made by the court having jurisdiction in election petitions in the province where they are filed. In this case the court of Manitoba has made no rules, and the English rules therefore apply and become incorporated with the statute as affects election petitions in the Province of Manitoba.

One of these rules provides that "no proceedings under the Parliamentary Elections Act shall be defeated by any formal objection." Now, the omission to set out the name, residence, address and occupation of a petitioner in the body of a petition, the name of the petitioner appearing as it does here in the heading of

the petition, thus:—*Thomas Collins*, petitioner, v. *Arthur Wellington Ross*, respondent—is, in my opinion, a mere formal objection; and any benefit to the respondent to accrue, or prejudice to be avoided by any of the omissions being supplied could be obtained by application to the court or a judge, as in an ordinary suit.

So, likewise, the not leaving a copy of the petition with the clerk of the court where the petition is filed, on the presentation of the petition, is a merely formal objection, and indeed the omission does not seem to work any peculiar prejudice to the respondent in any manner; and, if it did, that prejudice could be obviated by application to the court or a judge. The leaving a copy with the clerk does not so form part of the presentation of the petition that the omission to leave it would make void the filing of the petition. It is a proceeding wholly collateral to the petition and affords no reason why the respondent should not be required to answer the petition. In short, all the objections relied upon, so far as they are objections at all, are, in my opinion, merely formal and cannot therefore annul the petition. They are not, in my opinion, good preliminary objections, which term as used in the statute is, I think, applicable only to substantial objections either to the qualification of the petitioner or to the substance of the petition, or to some substantial reason why the matter of the petition should not be proceeded with.

PATTERSON J.—I concur in dismissing this appeal, and I do so with less regret than I should probably have felt if it were not apparent that the omissions that have proved fatal to the petition have arisen from want of careful attention to the 63rd section of the Controverted Elections Act, which, in the absence of rules made by the provincial court under section 62, gives

1891

LISGAR ELECTION CASE.

Patterson J.

the force of law in Manitoba to the English General Rules of Michaelmas Term, 1868. The first of those rules requires that when the petition is presented a copy of it shall be left to be sent to the returning officer under the provision which in our Act is subsection (*h*) of section 9.

I think the failure to leave the required copy, in consequence of which no copy was sent to the returning officer, is properly made the subject of a preliminary objection, and has been properly held to be fatal to the further proceeding upon the petition.

Two things are to be done together, as directed by rule I. One is the presentation of the petition by delivering it to the officer, and the other is the leaving with the same officer the copy for him to send to the returning officer. If the former act were omitted no one would contend that the omission was not fatal notwithstanding that a copy and notices had been served on the respondent, or contend that it could be cured by delivering the petition *nunc pro tunc*. The second requirement of the rule may seem less fundamental than the first, but it is something prescribed to be done by the petitioner at the institution of the proceedings, and it is not easy to find safe ground for holding one requirement to be less imperative than the other.

We must hold the petitioner to the duty cast upon him by the law, without speculating, as we have been invited to do, on the comparative importance to him or to the respondent of his doing what the rule directs, in order that the petition may be promptly published by the returning officer.

The other objection given effect to in the court below, viz., the omission to state in the petition the petitioner's residence, might have been rectified by the judge without prejudice to either side. That is one

test of an objection falling within the class of formal objections which by rule LX are not to defeat a proceeding under the act. See the *Shrewsbury case* (1), Cor. Martin B. ; *Aldridge* v. *Hurst* (2), per Grove J. If the respondent was really ignorant of the matter he could have been given time to make enquiries.

If the omission of any description of the petitioner, by residence or otherwise, were a matter of substance and not of form, and must be held fatal to the petition, the rule would have to be applied in every case, even though it should appear, or be admitted, that the respondent was well acquainted with the petitioner and had seen him sign and present the petition. There is no indication in the statute or the rules that a practice so rigid and so unlike that which prevails in ordinary litigation is contemplated.

It is on the first mentioned objection that I think the decision should be sustained, and the appeal dismissed.

Appeal dismissed with costs.

Solicitor for appellant : *J. Martin.*

Solicitors for respondent : *Haggart & Ross.*

(1) 19 L. T. N. S. 499.

(2) 1 C. P. D. 410, 417.

1891

*Oct. 29, 30.

*Nov. 17.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE COUNTY OF STANSTEAD.

TIMOTHY BYRON RIDER.....APPELLANT;

AND

SHIPLEY W. SNOW (PETITIONER).....RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE BROOKS.

Election appeal—Preliminary objections—Status of petitioner—Onus probandi—Equal division of court—Previous decision—Effect of.

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election.

On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed.

Held, per Sir W. J. Ritchie C.J. and Taschereau and Patterson JJ., that the *onus probandi* was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.

Per Strong J. that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence, the appeal should be allowed without costs.

Fournier and Gwynne JJ. *contra*, were of opinion that the *onus probandi* was on the respondent. *The Megantic Election case* (8 Can. S. C. R. 169) discussed.

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case.

APPEAL from a decision of the Superior Court for Lower Canada, District of Saint Francis. dismissing the

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

preliminary objections which had been filed by the appellant to the respondent's petition contesting appellant's election.

The preliminary objections filed by the appellant against the petition were 19 in number, but the only objection relied on by the counsel for the appellant on the present appeal was, viz: "14. Because the said petitioner had no right to vote at said election."

The 15th objection was as follows: "Because the said petitioner was guilty of unlawful acts and corrupt practices at and during said election, and was in consequence disqualified and not entitled to present the petition in this matter."

On the day fixed the petitioner adduced no proof. Appellant having stated that he desired to make proof applied to have the case continued. Petitioner insisted that if appellant intended to adduce any proof in support of his charges of corrupt practices he must furnish particulars. The court ordered particulars to be furnished the same day, and continued the case until the second day after.

When the day to which the case had been continued arrived the appellant declared that he had no evidence, and the case was then heard on the preliminary objections without evidence being adduced by either party and the judge dismissed the preliminary objections with costs.

In the Supreme Court when the appeal was called the question arose whether the judgment pronounced by the court in *The Megantic Election case* (1) was binding upon the court, the court in that case being equally divided and the following authorities were referred to by counsel for appellant: *Hadfield's case* (2), *In re Hall* (3); and counsel for respondent relied

(1) 8 Can. S. C. R. 169. (2) L. R. 8 C. P. 306.
(3) 8 Ont. App. R. 135.

1891

STANSTEAD ELECTION CASE.

on Black on Judgments (1), and *Beamish* v. *Beamish* (2).

Geoffrion Q. C. The petitioner's status having been objected to he was bound in *limine* to prove his quality or status as an elector.

The question thus raised as to the burden of proof is not a mere matter of practice or procedure, it involves an important principle of law. In this case there is a direct negation of an essential averment in the petition. In the absence of any legal presumption in favour of petitioner he must prove his qualification in *limine* before proceeding to deal with the merits of the petition.

In *The Megantic case* (3) there was an answer of the petitioner denying the truth of the matters set forth in the preliminary objections, and the court was equally divided and the judgment is not binding.

In *Duval* v. *Casgrain* (4) there were two different tribunals to deal with the petition, each having a separate and distinct jurisdiction with the danger of the one encroaching upon the rights or powers of the other, whereas now, under the law as it stands, one judge deals with the whole case.

The allegations of the petition are not supported by an affidavit, nor is there any *primâ facie* evidence whatever in support of the petition.

There can be no legal presumption in favour of petitioner in this connection, any more than there would be in favour of a person suing in his quality of executor or trustee, or a municipal elector asking for the annulment of a municipal election, when the quality or status of the party suing is put in issue.

It has been held in two recent cases in the province of Quebec, that when a defendant alleges want of

(1) Sec. 523.
(2) 9 H. L. Cas. 274.
(3) 8 Can. S.C.R. 169.
(4) 19 L. C. Jur. 16.

jurisdiction by *exception déclinatoire* the onus of proving that the court has jurisdiction is on the plaintiff; *McCready* v. *Préfontaine* (1); *Fraser.* v. *Gilroy* (2).

White Q.C. for respondent.

Upon reading the fourteenth and fifteenth objections together it is evident they can scarcely be treated as a distinct allegation that the petitioner was not a qualified voter of the county of Stanstead, or that his name was not upon the list of voters. They simply say that petitioner had no right to vote at said election because he was guilty of unlawful acts and corrupt practices at and during the said election, and was, in consequence, disqualified and not entitled to present the petition in this matter.

So interpreted the *onus probandi* was clearly upon the appellant.

But even if the fourteenth objection, taken by itself, could be taken as a denial of the petitioner's quality or status, the jurisprudence affecting the question of the *onus probandi* has been well settled in the province of Quebec; *Duval* v. *Casgrain* (3); the *Megantic Election case* (4).

In this latter case it was held that, "the court being equally divided the judgment of the court below stands confirmed without costs."

This judgment has been treated in the province of Quebec as settling the procedure to be adopted in this province.

Later, in 1887, the point was again brought to the attention of the Superior Court in the district of Saint Francis in the case of *Hutchison et al. Petitioners* v. *C. C. Colby*, respondent. In that case the respondent had by his preliminary objection specially denied that petitioners had the quality of voters at the time of the

(1) 18 Rev. Leg. 118.
(2) 19 Rev. Leg. 80.
(3) 19 L.C. Jur. 16.
(4) 8 Can S. C. R. 169.

1891

STANSTEAD ELECTION CASE.

election, or that their names appeared upon the voter's lists. When that case was put down for trial the petitioners brought the revising barrister with his lists, in order to prove their status. The judgment of the Superior Court on the preliminary objections was rendered on 22nd December, 1887, and was in these terms: "The court having heard the parties on the "preliminary objections, doth dismiss the same with "costs, except costs of witnesses which were unneces- "sary."

The state of the jurisprudence therefore in the province of Quebec, especially in the district of Saint Francis at the time when the preliminary objections in the present case were filed, was as above recited. If the petitioner had brought any witnesses he would have been condemned to pay his own expenses, as the court had already declared that it was unnecessary for him to bring such witnesses.

Sir W. J. RITCHIE C.J.—I am prepared to uphold what I said in the *Megantic Election case* (1). I think the burthen of proof was on the petitioner and therefore this appeal should be allowed and the petition dismissed.

STRONG J.—The onus of proof was on the petitioner, but the court below having been justified in following the Quebec jurisprudence and the *Megantic case* (1) decided by this court on an equal division, the appeal should be allowed without costs.

FOURNIER J.—Les objections préliminaires en cette cause sont nombreuses, mais une seule a été sérieusement plaidée. Cette cause a été inscrite pour la preuve

(1) 8 Can. S. C. R. 169.

sur les objections préliminaires devant la cour du district de St. François. Les principales objections sont :—

14. Parce que le pétitionnaire n'avait pas droit de voter à la dite élection.

15. Parce que le dit pétitionnaire s'était rendu coupable, pendant la dite élection, d'actes illégaux et de menées corruptrices et était en conséquence disqualifié et n'avait aucun droit de présenter la pétition en cette cause.

Au jour fixé pour la preuve le pétitionnaire n'en produisit aucune. L'appelant désirant faire preuve demanda la remise de la cause à plus tard. Le pétitionnaire Snow demanda des particularités des actes de corruption qui lui était reprochés et la cour les ordonna. Lorsque le jour fixé fut arrivé, l'appelant déclara qu'il n'avait aucune preuve à faire,—les objections préliminaires furent alors plaidées sans aucune preuve de part ni d'autre.

L'appelant prétendit qu'ayant nié par sa 14e objection le droit de voter du pétitionnaire, c'était à celui-ci à en faire la preuve et qu'il était obligé de produire les listes électorales pour prouver sa qualification. Il aurait peut-être pu en être ainsi, si l'appelant s'était borné à la dénégation de la qualité de voteur contenue dans la 14e objection ; mais par la 15e il ne s'en tenait plus simplement à une dénégation, mais il fait au contraire une allégation spéciale que le pétitionnaire a perdu son droit de voter parce qu'il s'est rendu coupable d'actes illégaux et de menées corruptrices à la dite élection, et qu'en conséquence il est disqualifié et n'a aucun droit de présenter la dite pétition.

Sur laquelle des deux parties retombait le fardeau de la preuve dans le cas actuel ? Toute la question se réduit donc à savoir qui devait commencer.

Autrefois devant les comités d'élection la pratique était d'obliger le pétitionnaire à faire preuve prélimi-

1891

STANSTEAD ELECTION CASE.

Fournier J.

nairement de sa qualification avant de procéder sur le mérite de la pétition. Cet ordre de procédure a été changé par l'acte des élections contestées 49 Vic. ch. 9, sec. 12, donnant au membre siégeant la faculté de présenter par écrit des objections préliminaires qu'il a à faire valoir contre la pétition ou le pétitionnaire, ou contre toute procédure ultérieure. La cour doit entendre les parties sur telles objections et les décider d'une manière sommaire.

La perte de la qualification par la commission d'actes illégaux ou par des menées corruptrices est sans doute un sujet d'objection préliminaire très sérieux dont le membre siégeant pouvait se prévaloir. S'il ne l'eût fait, le pétitionnaire eut sans doute été obligé, en procédant au mérite, de faire preuve de sa qualification de voteur ; mais il n'eut pas été obligé de prouver qu'il a perdu sa qualification par des actes illégaux ou des menées corruptrices. Ces faits forment régulièrement la matière d'une exception que l'appelant était libre de prendre ou de ne pas prendre. D'accusé qu'il était, il a jugé à propos de se faire accusateur, il en avait le droit. En agissant de cette manière à la qualité du pétitionnaire il s'est soumis aux conséquences de la maxime *excipiendo reus fit actor*. Il a voulu changer l'ordre de la contestation en affirmant que pour des faits spéciaux le pétitionnaire avait perdu sa qualification de voteur et il doit en faire la preuve. Il ne s'agit pas ici, comme l'a prétendu le savant conseil de l'appelant, de faire la preuve plus ou moins difficile d'une négation, mais bien de faire preuve de faits tout à fait matériels, comme des actes de corruption électorale ou d'autres actes illégaux. Il n'y a à cela aucune impossibilité ni théorique ni pratique, ce n'est pas la preuve d'une négation qu'on lui demande, c'est la preuve de faits spéciaux qu'il a affirmés et allégués.

Cette question est déjà venue plusieurs fois devant

les tribunaux et semblait avoir été réglée par la jurisprudence. Les savantes dissertations faites par les honorables juges de la Cour de Revision, à Québec, dans la cause de *Duval* v. *Casgrain* (1) me paraissent avoir épuisé les arguments à faire sur cette question. Le jugement de la cour a été que l'*onus probandi* retombât sur la partie qui avait plaidé par objection préliminaire le défaut de qualité du pétitionnaire.

Dans la cause de l'élection de Mégantic, *Fréchette* v. *Goulet et al.* (2), la même question fut soulevée et décidée par l'hon. juge Plamondon dans le même sens que la Cour de Revision. Les parties n'ayant point fait de preuve les objections préliminaires furent renvoyées. Ce dernier jugement fut porté en appel devant cette cour; elle est rapportée au vol. 8 des rapports de la Cour Suprême, page 169. Les juges furent également partagés d'opinion et les décisions confirmées en conséquence.

Bien qu'il n'y ait pas une majorité dans cette cour, la jurisprudence établie par la Cour de Revision de Québec, confirmée par le jugement de cette cour, a été suivie jusqu'ici. S'il s'agissait de revenir sur une décision qui aurait violé un principe de droit, ce serait notre devoir de le faire; mais il ne s'agit ici que d'une règle de jurisprudence, tout à fait indifférente en elle-même, qui pourrait tout aussi bien adopter l'affirmative que la négative sur cette question de savoir à qui il incombait de faire la preuve. Le seul intérêt qu'ont les plaideurs dans ces règles de procédure, c'est qu'elles soient fixées, afin de ne pas être exposés aux inconvénients qui pourraient résulter de l'incertitude à cet égard. Je ne vois aucun inconvénient à maintenir cette jurisprudence, tandis que de son changement il peut en résulter beaucoup pour les nombreuses contestations qui sont actuellement pendantes devant les tribunaux.

(1) 19 L. C. Jur. 16.
(2) 8 Can. S. C. R. 169.

1891

STANSTEAD ELECTION CASE.

Fournier J.

En outre, elle est suivant moi plus conforme au statut et à la maxime *excipiendo reus fit actor*.

Je suis d'avis que le jugement devrait ordonner à l'appelant de faire preuve sur ses objections préliminaires.

TASCHEREAU J.—I adhere to the views I expressed in the *Megantic Election Case* (1), but as it is the first time the court is called upon to decide whether or not a previous decision upon an equal division of its members is binding as an authority, with the consent of my learned colleagues, I will add that we are of opinion that such a decision is not binding (2), and therefore the preliminary objection taken in this case should prevail, the appeal be allowed and the petition dismissed with costs. This is the judgment which, in my opinion, Mr. Justice Brooks should have given, and should be the judgment of this court.

GWYNNE J.—I retain the opinion expressed by me in the *Megantic Election Case* (1), wherein Frechette was appellant and Goulet respondent that for the reasons there given, and upon the authorities there cited, the question upon whom lay the onus of proof upon a preliminary objection to an election petition affirming that the petitioner had no right to vote in whatever way the question might be decided was one affecting merely a point purely of procedure which it was within the competence of the election court conclusively to determine, and that therefore it was not a matter upon which this court should entertain an appeal. The case of *Frechette* v. *Goulet* (1), proceeded upon

(1) 8 Can. S. C. R. 169.

(2) See on this question *Beamish* v. *Beamish*, 9 H. L. Cas. 274; *Attorney-General* v. *The Dean, &c. of Windsor*, 8 H. L. Cas. 369; and *re Hall*, 8 Ont. App. R. 135; and *The Vera Cruz*, 9 P. D. 96.

the authority of the case of *Duval* v. *Casgrain* (1), in which case the Court of Review in the district of Quebec held, that in such a case the *onus probandi* lay upon the respondent, who had raised the preliminary objection by averring that the petitioner had no right to vote at the election against the return in which he was petitioning. The court which rendered that judgment was at the time the judgment was rendered the final court for deciding all questions arising upon preliminary objections to an election petition, and upon all questions of practice and procedure arising in the election court in which the petition was filed. When subsequently the same question was raised in this court from a like judgment rendered in the election court of the same district in *Frechette* v. *Goulet* (2) this court was equally divided, and the appeal against the judgment of the learned judge who had followed the practice as laid down by the Court of Review was dismissed without costs; the plain result of this dismissal was that this court declined to interfere with the judgment of the court below upon a question which was in truth only one of mere practice and procedure, and it is not surprising that thenceforth the election court, before which the present case was, should be of opinion, as it was, that this point of procedure was established in accordance with the judgment of the Court of Review in *Duval* v. *Casgrain* (1). That this court should now entertain an appeal from a judgment in a like case upon the same point which has followed the practice as so settled in *Duval* v. *Casgrain* (1), with the judgment in which case this court has in the case cited declined to interfere, seems to me, I must confess, scarcely seemly and not calculated to reflect credit upon the administration of justice.

But I am of opinion for the reason also given in

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

(2) 8 Can. S. C. R 169.

1891

STANSTEAD ELECTION CASE.

Gwynne J.

Frechette v. *Goulet* (1) that the judgment of the courts below upon the point of procedure under consideration was quite correct. The affirmation in a preliminary objection to an election petition, that "the petitioner had no right to vote," is not a joinder in issue upon anything alleged in the election petition—the petition is not before the court upon such an objection—the objection is a substantive affirmation put forward by the respondent as a sufficient reason why he should not be required to answer to, or join issue upon, anything in the petition. The sole duty of the court is to entertain the objection as one first suggested and raised by the respondent in justification of his not joining issue upon anything alleged in the petition. The statute provides that if a respondent has any objection to the status of the petitioner, he must present it by a preliminary objection filed within a limited time after the service of the petition. The status of the petitioner could only be affected by showing that he was not on the voters' list in use at the election. Now such an objection, standing by itself in the simple terms that the petitioner had no right to vote, is in truth an affirmation of a conclusion of law without the averment of any fact from which the conclusion is drawn. A right to vote at an election is a legal title incident upon the mere fact that the person claiming the legal right or title is on the voters' list when prepared and revised as required by law. The law expressly enacts that all persons who are on the voters' list so revised have the absolute right to vote at the election for which the list is prepared; an averment, therefore, that a person had no right to vote at a particular election is nothing more than an argumentative averment that he is not on the voters' list, for if he be on the voters' list governing at the election at which

(1) 8 Can. S. C. R. 169.

he claims to have a right to vote, his right to vote at that election is conclusive in law; the affirmation therefore in a preliminary objection merely that the petitioner had no right to vote at the election, of the return at which he complains, is nothing else than the averment of a conclusion of law without any fact being stated from which the conclusion is drawn, the only fact, however, from which it could be drawn being, that he was not upon the voters' list and so was not qualified to be a petitioner, and whether he was or was not on the voters' list was as much within the power of the respondent as of the petitioner to prove; so that upon whomsoever the learned judge in the court below might determine the *onus probandi* in such a case to be, no mischief or prejudice whatsoever could be caused to either party, and that an appeal should be entertained and the election petition should be dismissed because the court, following the practice as laid down several years ago by the Court of Review with the judgment of which court this court in *Frechette* v. *Goulet* (1) declined to interfere, decided that the *onus probandi* lay upon the respondent, seems to me, I must confess, to be calculated to bring the administration of justice in these election cases into discredit as tending to frustrate rather than to promote the ends of justice.

But in the present case I am of opinion that the true construction of the matters pleaded by the respondent by way of preliminary objection in the 14th and 15th paragraphs of his objections is, that he avers that the petitioner had no right to vote because the said petitioner was guilty of unlawful acts and corrupt practices at and during the election, and was in consequence disqualified and not entitled to present the petition in this matter. This is the only fact alleged from which the conclusion of law that the petitioner had no right to

(1) 8 Can. S. C. R. 169.

1891

STANSTEAD ELECTION CASE.

Gwynne J.

vote is drawn. This was the view taken by the learned judge in the court below. The learned counsel for the respondent in his argument before us wished to separate what appears to me to be but one objection into two; in my opinion they are inseparable, and this cannot be done. The paragraphs 14 and 15 are in truth, as it appears to me, inseparable and therefore, for the above reasons I am of opinion that the appeal should be dismissed with costs.

PATTERSON J.—I concur in the opinion that the onus was on the petitioner to prove his allegation that he had a right to vote at the election. He could not present the petition unless he had one of the two qualifications mentioned in the 5th section of the statute, and the form of the petition given in the rules follows an ordinary mode of pleading in requiring him to state the character in which he claims a right to call on the respondent to answer his charges. The shape in which the challenge of his claim is framed is of little consequence. If put in an affirmative form, alleging that he was not entitled to vote at the election, it is none the less a traverse of the allegation in the petition, like a plea that a plaintiff who sues as executor is not executor, putting him to the proof of the quality he asserts.

Instead of adducing such proof by production of the voters' lists, or in some other way, or asking for time to do so in case his reliance on some opinions which have been mentioned to us had led to his being unprepared at the moment, he took the risk of standing on his contention that it devolved upon the respondent to negative the alleged right. He could not therefore reasonably expect relief from this court, even if we could do more than give the judgment which the court below should have given by sustain-

ing the objection made to the petitioner and dismissing the petition.

The challenge of the quality of the petitioner is properly a preliminary objection. It is one of those specified in the statute. It has, however, been sometimes said that it may be incumbent on the petitioner to give evidence of his status at the trial of the petition. I do not so read the statute. I think the question must be decided on the preliminary objections. Why preliminary? Preliminary to what? Clearly, as I understand section 13, preliminary to the duty of the respondent to answer the petition. It must be settled that there is a good petition properly presented by a qualified person, and when that is done—in other words "within five days after the decision on the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same, if none are presented"—the respondent may file an answer to the petition, and if he does not file an answer the petition is all the same to be at issue. Section 5 shows what is here meant by the petition which, whether answered or not, is to be at issue. By that section a petition may be presented complaining of an undue return, an undue election, no return, a double return, or unlawful acts. Those are the matters to be answered after the preliminary matters are settled; the only matters which, in default of an answer, are *ipso facto* put in issue; and the only matters for investigation at the trial.

I am of opinion that we should allow the appeal and dismiss the petition.

Appeal allowed with costs and election petition dismissed with costs.

Solicitor for appellant: *J. S. Broderick.*

Solicitor for respondent: *William White.*

1891
*Oct. 27, 29.
*Nov. 17.

CONTROVERTED ELECTIONS FOR THE ELECTORAL DISTRICTS OF QUEEN'S COUNTY AND PRINCE COUNTY, P. E. I.

LOUIS H. DAVIES AND WILLIAM WELSH (RESPONDENTS)..... } APPELLANTS;

AND

WILLIAM HENNESSY (PETITIONER)...RESPONDENT.

STANISLAUS F. PERRY AND JOHN YEO (RESPONDENTS)..... ..... } APPELLANTS;

AND

SAMUEL J. CAMERON (PETITIONER)..RESPONDENT.

ON APPEAL FROM ORDERS OF CHIEF JUSTICE SULLIVAN OF THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Election petition—Preliminary objections—Personal service at Ottawa—Security—Receipt—R.S.C. ch. 9, ss. 8 & 9, sub-ss. e and g, and s. 10.

In Prince Edward Island two members are returned for the Electoral District of Queen's County. With an election petition against the return of the two sitting members the petitioner deposited the sum of $2,000 with the deputy prothonotary of the court, and in the notice of presentation of petition and deposit of security he stated that he had given security to the amount of one thousand dollars for each respondent "in all two thousand dollars" duly deposited with the prothonotary as required by statute. The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the judges, and acknowledged the receipt of $2,000, without stating that $1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.

Held, 1st. That personal service of an election petition at Ottawa with-

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

out an order of the court is a good service under section 10 of the Controverted Elections Act.

2nd. That there being at the time of the presentation of the petition security to the amount of $1,000 for the costs for each respondent the security given was sufficient. Sec. 8 and sec. 9, sub-sec. "*e*" ch. 9 R. S. C.

3rd. That the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment. Sec. 9 sub-sec. "*g*" ch. 9 R. S. C.

APPEALS from orders of Chief Justice Sullivan of the Supreme Court of Prince Edward Island, made on the twentieth day of July, A.D. 1891, dismissing certain preliminary objections filed by the appellants to the election petitions against them filed by the respondent.

[It was agreed that the appeal in the case of Prince County should follow the result of the decision in the Queen's County case.]

In the Queen's County case the petition was filed by the respondent, Hennessy, and copies of petition, notice of the presentation of same and of the security were served personally upon the appellants in the city of Ottawa, Ontario.

No order for service outside of the jurisdiction of the Supreme Court of P. E. Island was obtained in the matter of the petition.

The appellants filed preliminary objections to the petition and service which practically resolved themselves into two.

First, that the service of the petition, &c., at Ottawa, and out of the jurisdiction of the Supreme Court of P. E. Island, was illegal and void, having been made without any statutory authority or rule of the court, or special order of the judge permitting it.

Secondly, that no security was deposited pursuant to the statute, as each defendant was entitled to have $1,000 deposited as security for the costs that may be

1891

QUEEN'S COUNTY AND PRINCE COUNTY (P. E. I.) ELECTION CASES.

incurred by him, whereas, as a fact, the security was given by depositing $2,000 in one lump sum for the costs of the petition generally; and further, that the money constituting the deposit was not made with the proper officer, it being paid to a deputy of the Prothonotary, who gave the receipt, this deputy not being one of the officers named in sub-section *e* of section 9 of the Controverted Elections Act, as defined by sub-section *i* of section 2 of the said act, and the amending act of 1887, ch. 7 section 1.

Peters, Attorney-General for Prince Edward Island, for appellants.

With respect to the illegality of the service out of the jurisdiction, I submit as a general proposition that the power to serve process out of the jurisdiction of the court is not inherent in the court, and that apart from statute. the court has no power to exercise jurisdiction with respect to any person beyond its limits.

In support of this proposition I rely on the following authorities:—*Re Maugham* (1); *Ex parte Bernard* (2); *In re Busfield* (3); *In re Anglo African SS. Co.* (4); sec. 10 ch. 9 R. S. C.; Day's Common Law Procedure Act (5); Annual Practice, 1891 (6).

Next, as to the objection of the illegality of deposit. The deputy prothonotary is not the officer to receive deposit or give receipt. Sub-section (*e*) of section 9 says the security shall be given by a deposit of money with the "Clerk of the Court."

The interpretation clause sub-sec. *i*, as amended by 50-51 Vic. cap. 7, 1887, defines what officers are included in the expression "Clerk of the Court."

The prothonotary is one of those officers The deputy prothonotary is not.

(1) 22 W. R. 748.
(2) 6 Ir. Ch. R. 133.
(3) 32 Ch. D. 123.
(4) 32 Ch. D. 348.
(5) P. 46.
(6) P. 247.

The court has the right by rule to prescribe that the deputy shall be one, but it has not done so. Parliament has by statute chosen to name certain officers as the only ones authorized to do an act under the Controverted Elections Act. It gave power to the judges to name others. It did not give power to the local legislature, and the latter body cannot therefore, either directly or indirectly, by saying that the deputy shall have all the powers of the principal, confer on the deputy the specific powers the Dominion statute gives the prothonotary, and the prothonotary only.

Further, the deposit has not been legally made. It is, according to the receipt, a single deposit of $2,000 in the matter of the petition against both respondents.

There should have been separate deposits of $1,000 each as security for each respondent.

The 8th section of Controverted Elections Act allowing two or more candidates to be made respondents, and permitting their cases, for the sake of convenience, to be tried at the same time, explicitly enacts "as regards the security, and for all other purposes, such petition should be deemed to be a separate petition against each respondent." If, therefore, as regards security, the petition is a separate one against each respondent it follows that each respondent is entitled to have the security of $1,000 deposited as required by the 9th section "for the payment of all costs, charges and expenses that may become payable by the petitioner to member whose election is complained of." *Pease* v. *Norwood* (1).

This is a statutory right of the respondent and a statutory duty of the petitioner. It won't do to say that lumping the two sums together will do as well or be as good security. As a matter of fact it may not. One member may have his election voided and the

(1) L. R. 4 C. P. 247.

1891

QUEEN'S COUNTY AND PRINCE COUNTY (P. E. I.) ELECTION CASES.

other may retain his seat. Both elections may be voided, and on the other hand, after prolonged litigation, the petition may be dismissed as against both. One may appeal, the other may not. The first out of the fight might get an order for the payment of his costs, and so also might each and all of the witnesses summoned by petitioner, and eat the whole $2,000 up and nothing would be left for the other respondent. The two members elected may defend in common, and have a common interest, or they may be politically and otherwise opposed, and fight the petition on different grounds. Davies and Jenkins or Davies and Brecken were instances of one case; Davies and Welsh of the other. The court cannot take judicial notice whether they are united or opposed. Each member has his rights guaranteed by statute, and one of these rights is, that if his seat is attacked the person attacking shall deposit $1,000 "as security for all costs, charges and expenses that may become payable by the petitioner" (*inter alia*) to the member (not members) whose seat is complained of. It seems therefore that the deposit is illegal, and not in compliance with the act.

A. A. Morson for respondent: As to the payment of the $2,000. The main object of the statute was to have $1,000 deposited to answer any order that might be made as to costs or otherwise, as regards proceedings against each respondent petitioned against. In this case there are two respondents to the one petition, and the sum of $2,000 was deposited when such petition was presented; the receipt states that it was deposited as security in the matter of that petition, and the notice of the presentation of the petition, served on the appellants, with the copy of the deposit receipt, specifies particularly that $2,000 was deposited as security in the matter of the petition, viz., $1,000 for each respondent to the petition, and the respondent

submits that the deposit is to be appropriated to the objects designated by the depositor and not by the officer receiving it, and that in this case the notice was such an appropriation.

On the other objection that the money was not paid to the proper officer, the learned counsel referred to and relied on 50–51 Vic. ch. 7, sec. 1, and R.S C. ch. 1, sec. 7 sub-sec. 40, and as to the service—R.S.C. ch. 9, secs. 10–11; 36 Vic. c. 22, ss. 20–21. See also *Yardley* v. *Jones* (1); *Ablett* v. *Basham* (2); *Blackwell* v. *England* (3); *Walcot* v. *Botfield* (4); *The King* v. *Sargent* (5); *The Shelburne Election Case* (6).

Sir W. J. RITCHIE C J.—The preliminary objections in this case resolve themselves into the payment of the money to the deputy prothonotary, the insufficiency of the receipt and the insufficiency of the service. I think the payment to the deputy prothonotary was sufficient; the money is now in court subject to the order and disposition of the court under the terms of the statute.

As to the insufficiency of the receipt, the receipt is as follows:

PROTHONOTARY'S RECEIPT FOR DEPOSIT.

DOMINION OF CANADA,
Province of Prince Edward Island,
In the Supreme Court.

THE DOMINION CONTROVERTED ELECTIONS ACT.

Election of two members for the House of Commons, for the Electoral District of Queen's County, in province of Prince Edward Island, holden on the fifth day of March, A.D. 1891.

I hereby certify that I have this day received from Walter A. O. Morson, agent for William Hennessy, of Charlottetown, in said county, the sum of two thousand dollars in legal tender money of the Dominion of Canada as security in the matter of the petition of the said William Hennessy, this day filed with me against the return of Louis

(1) 4 Dowl. P.C. 45.
(2) 5 E. & B. 1019.
(3) 8 E. & B. 541.
(4) Kay 534.
(5) 5 T. R. 466.
(6) 14 Can. S. C. R. 256.

1891

QUEEN'S COUNTY AND PRINCE COUNTY (P. E. I.) ELECTION CASES.

Ritchie C.J.

Henry Davies and William Welsh at said election as members for the House of Commons for said electoral district.

Dated this 27th day of April, A.D. 1891.

(Signed) WILLIAM A. WEEKS,
Deputy Prothonotary.

The notice served with the copy of this petition and with the copy of this receipt was as follows:

Notice of presentation of petition and deposit of security.

Take notice that on Monday, the twenty-seventh day of April, A.D. 1891, the petition of William Hennessy, of Charlottetown, in Queen's County, was duly presented and filed with the prothonotary of the Supreme Court of the province against the return at said election of Louis Henry Davies and William Welsh as members for the House of Commons, in the electoral district of Queen's County, Prince Edward Island, for the reasons therein set forth. And further take notice that at the time of presenting said petition, security to the amount of one thousand dollars for each respondent, in all, two thousand dollars in legal tender money of the Dominion of Canada, was duly deposited with the said prothonotary as required by statute, and further take notice that the name and address of the agent of the petitioner is as follows:—

WALTER A. O. MORSON,
BARRISTER.

Office of MACLEOD, MORSON & MACQUARRIE,
Brown's Block, Charlottetown, P. E. Island.

Dated this 27th day of April, A D. 1891.

(Signed) WILLIAM HENNESSY.

To Louis Henry Davies and William Welsh.

Reading the petition, the copy of the receipt and this notice together, I think there was a full and substantial compliance with the statute, and there was at the time of the presentation of the petition security to the amount of $1,000 for the payment of all costs, &c., for each respondent. And as to the service, Mr. Davies swears:

AFFIDAVIT OF LOUIS H. DAVIES.

I, Louis H. Davies, of Charlottetown, Prince Edward Island, one of the members elected for the House of Commons for the electoral district of Queen's County, in said province, make oath and say:

I. That on Friday the first day of May last past, A.D. 1891, I was

served in the City of Ottawa, Province of Ontario, in said Dominion, with the annexed copies (1) of the election petition of William Hennessy of Charlottetown, in Queen's County (2); the notice of the presentation of the said petition and of the deposit of the security; and (3) the certificate of the receipt of the money deposited as security purporting to be signed by William A. Weeks, deputy prothonotary.

Now what does the statute say? The petition must be served on the respondent within a certain time. Here we have a personal service on the respondent at the city of Ottawa, from whence the writ issued for holding this election, and the place to which the writ was returned, and at the place where the Parliament was being held, the right to sit in which Parliament was by the petition brought in question. We cannot ignore such a service and say that there was in fact no service at all on the respondent which he is called on to answer.

I am of opinion that these appeals should be dismissed.

STRONG J.—The only two objections which were much insisted upon by the Attorney General were the insufficiency of the deposit and the invalidity of the service. As to the deposit I quite agree with what has been said by the Chief Justice.

The officers mentioned in the statute are the clerk of the peace and the prothonotary. In Prince Edward Island, there is a deputy prothonotary not appointed by the principal prothonotary but by the judges. The money was paid to a person who was an officer of the court, who has authority to receive money ordered to be paid into court, and it is now subject to the control of the court. The objection is a purely technical one, and I see no reason why we should not say that the deputy prothonotary was a proper officer to receive it just as much as if he had been appointed by the principal prothonotary This objection therefore fails.

I also think, after consideration, although at the argu-

1891

QUEEN'S COUNTY AND PRINCE COUNTY (P. E. I.) ELECTION CASES.

Strong J.

ment I took a narrower view, that when the legislature speaks of the service of an election petition within the jurisdiction it means to authorise service anywhere within the jurisdiction of the Dominion Parliament. These petitions are not personal actions, but more properly actions *in rem*. Their object is to oust a party from office and therefore these proceedings although *sui generis* are still in the nature of proceedings *in rem*, and I cannot think after the view taken by this court and by the Privy Council in the case of *Valin* v. *Langlois* (1), that such a narrow construction should be given to these words.

In the 10th section it is provided that:

> The notice of the presentation of a petition under this act and of the security, accompanied with a copy of the petition shall, within five days after the day on which the petition was presented, or within the prescribed time, &c., &c., be served on the respondent or respondents.

I do not think that parliament ever intended that a member while attending to his duty in parliament should be considered as exempt from service. Without some extraordinary reason to limit the service to certain parts of Canada would be to split up the act, and I therefore agree with the Chief Justice in saying that we should read the words of the section as meaning personal service within any place in Canada, and not within the limited jurisdiction of the court or judge appointed to hear the petition. It would be going back to a practice much more narrow and technical than that which prevailed when election petitions were tried by committees of the House; and the transfer of the jurisdiction to the courts was certainly intended rather to amplify than to abridge the former remedy. The appeals must be dismissed.

FOURNIER J.—La validité de l'élection des appelants

(1) 3 Can. S. C. R. 1; 5 App. Cas. 115.

a été attaquée par une pétition, dans laquelle tous deux sont assignés comme défendeurs. Ce procédé est permis par la section 8 de l'acte des élections contestées déclarant que plusieurs candidats pourront subir leurs procès en même temps sur une seule pétition,—mais que pour le cautionnement et toutes les autres fins de l'acte, la pétition sera considérée comme une pétition distincte contre chacun des défendeurs.

La section 9 déclare qu'au temps de la présentation de la pétition, un cautionnement sera donné par le pétitionnaire, pour le paiement des frais qui seront payables au membre dont l'élection est contestée ; que ce cautionnement consistera dans le dépôt de mille piastres entre les mains du greffier de la cour qui en donnera un reçu qui sera une preuve suffisante de ce dépôt. Ce reçu est en la forme donnée ci-haut (1), et est signé William A. Weeks, Deputy Prothonotary, pour la somme de deux mille piastres en argent de la Puissance, (*in legal tender of the Dominion of Canada,*) comme cautionnement sur la pétition de William Hennessy, produite contre l'élection de Louis Henry Davies et William Welsh, comme membres de la Chambre des Communes pour le district électoral de Queen.

Les appelants font objection à ce dépôt d'une somme de $2,000 en bloc, et prétendent qu'il aurait dû être fait en une somme de $1,000, pour chacun d'eux pour leurs frais respectifs.

L'avis de présentation de la pétition, du dépôt, du cautionnement que l'on trouve au dossier ne peut laisser de doute sur la destination de ce dépôt; il n'est pas fait pour l'usage commun des défendeurs, il est au contraire fait spécialement de la somme de $1,000 pour chacun des défendeurs en argent légal de la Puissance en la manière suivante :—

And, further, take notice that at the time of presenting said petition

(1) See p. 31.

1891

QUEEN'S COUNTY AND PRINCE COUNTY (P. E. I.) ELECTION CASES.

Fournier J.

security to the amount of one thousand dollars for each respondent, in all two thousand dollars, in legal tender money of the Dominion of Canada, was duly deposited with the said prothonotary as required by statute, and further, take notice that the name and address of the agent of the petitioner is as follows.

Cet avis prouve clairement que le dépôt a été fait, suivant le statut, de mille piastres pour chacun des défendeurs, en tout $2,000, ce qui était suffisant pour le nombre des défendeurs. Ces derniers reconnaissent avoir reçu cet avis.

Une autre objection c'est que le dépôt n'a pas été fait entre les mains de l'officier indiqué par le statut, que le député protonotaire n'est pas le "Clerk of the Court" mentionné dans le statut, et qu'un dépôt entre ses mains n'est pas fait suivant la loi. Cette prétention n'est pas fondée. L'acte d'amendement à l'acte des élections contestées, ch. 7, 50-51 Vict., dit que l'expression "the Clerk of the Court," signifie entre autres choses "le protonotaire" et l'acte d'interprétation, Stat. Rev. Can., ch. 1, sec. 7, s.s. 40, déclare entre autres choses que :—

Words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office and his or their lawful deputy.

Par les 4e et 5e objections les défendeurs se plaignent que l'avis de présentation de la pétition et de dépôt du cautionnement avec copie de la pétition ne leur ont pas été signifiés légalement, que la signification leur en a été faite à Ottawa, en dehors des limites de la juridiction de la Cour. Je ne crois pas qu'il soit nécessaire pour la décision de cette question d'entrer dans l'examen de la manière d'après laquelle la signification de ces documents aurait pu être faite d'après la loi de l'Ile du Prince-Edouard ou d'après les règles de pratique faite par la Cour Suprême de l'Ile à ce sujet en vertu de l'acte des élections contestées.

Pour que cette signification soit légale il suffit qu'elle ait été faite en la manière indiquée par l'acte d'élection. C'est sans doute pour obvier aux difficultés qui pourraient être causées par les différents modes de signification adoptés dans chaque province, que l'acte d'élections contestées en indique un qui peut être adopté sans difficulté dans toute la Puissance. C'est celui dont parle la section 10 de l'acte des élections contestées,—le service personnel ou au domicile. Il est dit dans la dernière partie de cette section que si le service ne peut être fait soit personnellement, soit à domicile, qu'alors la cour ou un juge peut ordonner qu'il soit fait d'une autre manière, à la demande du pétitionnaire. Cette disposition considère comme suffisante, la signification personnelle ou à domicile et ne décrète le recours à une autre manière que lorsque le service n'a pu être fait de l'une de ces deux manières. C'est donc un fait décrété que le service personnel ou à domicile sera légal, sans recours à l'autorité du juge ni à aucune autre formalité. Cette disposition devant avoir son effet dans toute la Puissance, il s'en suit que la signification personnelle faite aux défendeurs, en la cité d'Ottawa, est parfaitement légale.

Les autres objections concernant la juridiction et la forme de la pétition ne sont pas fondées non plus. Tous les faits qui, d'après le statut, doivent être allégués l'ont été et la pétition est dans la forme voulue. Toutes les objections sont renvoyées.

TASCHEREAU, GWYNNE and PATTERSON JJ., were also of opinion that the appeals should be dismissed.

Appeals dismissed with costs.

Solicitors for appellants: *Davies & Haszard.*

Solicitor for respondents: *W. A. O. Morson.*

1891

*Oct. 30.

*Nov. 2.

*Nov. 17.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF GLENGARRY.

RORERT R. McLENNAN (RESPONDENT)..APPELLANT;

AND

ANGUS CHISHOLM (PETITIONER).....RESPONDENT

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE MACLENNAN.

Election petition—Re-service of—Order granting extension of time—Preliminary objections—R.S.C. ch. 9, sec. 10—Description of petitioner.

On the 15th of April, 1891, the petitioner omitted to serve on the appellant with the election petition in this case a copy of the deposit receipt, but on the 20th of April applied to a judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario, was made and the petition was re-served accordingly with all the other papers prescribed by the statute. Before the order extending the time had been drawn up the respondent had filed preliminary objections, and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction the Court of Appeal, or a judge thereof, to extend the time for service of the petition beyond the five days prescribed by the act.

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service. R. S. C. ch. 9, sec. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the Township of Lochiel, in the County of Glengarry, without describing his occupation, and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the court below, that the petition should not be dismissed for the want of a more particular description of the petitioner.

---

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

1891

GLENGARRY ELECTION CASE.

APPEAL from the decision of the Honourable Mr. Justice Maclennan, dismissing the preliminary objections to the election petition in this case.

The petition was presented on the 14th day of April, 1891, against the return of the appellant as a member of the House of Commons for the Electoral District of Glengarry at the elections held on the 5th day of March, 1891, and prayed that it be determined and adjudged that the appellant was not duly elected or returned and that the election and return should be declared void in consequence of corrupt practices having been committed by the appellant and his agents, and that the appellant should be disqualified by reason of having personally committed corrupt practices.

On the 15th April, 1891, the appellant was served with a copy of the said petition, and also with the notice of the presentation of a petition and the notice of agency.

On the 20th day of April, 1891, there having been no copy of the deposit receipt served, the petitioner obtained an order from Mr. Justice Maclennan, bearing date the 20th day of April, 1891, extending the time for service of the petition.

On the 20th day of April, 1891, being the last day for that purpose as provided by section 12 of said act, the appellant filed and presented to the court certain preliminary objections and grounds of insufficiency to the said petition and against any further proceeding thereon. These objections were dismissed.

On the 23rd of April another copy of the petition and the notice of the presentation of the petition and of the security and the deposit receipt were served on the appellant.

On the 27th day of April, 1891, an application was made by the present appellant to Hon. Mr. Justice

1891

GLENGARRY ELECTION CASE.

Maclennan, on notice, to set aside the order granted by him on the 20th day of April, 1891.

On the 27th day of April, 1891, the application came on for argument before Mr. Justice Maclennan, and on the 28th day of April, 1891, an order was made by the learned judge dismissing the motion with costs.

The present appellants appealed from the decision of Mr. Justice Maclennan on the said motion to the Court of Appeal for Ontario. Such appeal came on for argument on the 19th of May, 1891, when the said court dismissed the said appeal with costs.

Thereupon, and after the determination of the appeal, the present appellant filed preliminary objections to the said petition which preliminary objections are the second set served, and are as follows:

1. "The address, occupation or calling of the petitioner are not set out in the said petition, nor is any other information or means furnished therein or thereby of identifying him, whereby the respondent is prevented from discovering whether there are or are not any objections to the status of the said petitioner, or to his being a person who had a right to vote at the election to which the said petitioner relates."

2. "There is no evidence, nor is it alleged in said petition or otherwise, that the said petitioner had a right to vote at the election to which said petitioner relates."

3. "There is no evidence, nor is it alleged in said petition or otherwise, that the petition was signed by the petitioner as required by said act."

4. "If the said petition was presented no notice of the presentation thereof, and of the security required to be given by the petitioner, was, within the time limited by the said acts and the rules of this honourable court, nor at any other time, served upon the respondent, in consequence whereof there is no jurisdiction in this

honourable court, or any judge thereof, to proceed further in the said matter of the said petition."

5. "No copy of any deposit receipt for such security, if given by the registrar of the Court of Appeal for Ontario, was served upon the respondent within the time limited by the said acts and rules of this honourable court, or at any other time, in consequence whereof there is no jurisdiction in this honourable court, or any judge thereof, to proceed further in the matter of the said petition."

6. "If the petition in this matter has been filed no security for the payment of all costs, charges and expenses that may become payable by the petitioner has been given by or on behalf of the petitioner, and no deposit of the sum of $1,000 in gold coin or Dominion notes has been made by or on behalf of the petitioner with the Registrar of the Court of Appeal for Ontario, as required by said acts."

7. "There was no power or jurisdiction in the Court of Appeal or judge thereof to extend the time for service of the petition beyond the five days prescribed by the act, as there was no difficulty in effecting service of said petition within the said five days, and there were no special circumstances of difficulty in effecting service to justify the order made by the Honourable Mr. Justice Maclennan on the 20th day of April, 1891."

Mr. Justice Maclennan on the 26th September, 1891, disallowed the preliminary objections.

Dalton McCarthy Q.C. for appellant.

S. H. Blake Q.C. for respondent.

STRONG J.—I think the points relied on by the appellant's counsel are even more technical and trivial than in the preceding case. The service in this case was, no doubt, a perfect and regular service. The petitioner

1891

GLENGARRY ELECTION CASE.

Strong J.

admitted that he had not originally served a copy of the deposit receipt, and having applied for an extension of time for service that he might cure the omission his application was granted, and he subsequently re-served the copy of the petition and other necessary documents. Now, the other party contends that he is debarred from doing what this perfectly valid order allowed him to do. It is sufficient to state the objection to show that it cannot prevail.

The Chief Justice and the others members of the court concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Tiffony & MacDonnell.*

Solicitors for respondent: *McDonald, McIntosh & McCrimmon.*

J. H. ASHDOWN (PLAINTIFF).....APPELLANT; 1891

AND *Mar. 12.

THE MANITOBA *FREE PRESS* COMPANY (DEFENDANTS)..... } RESPONDENTS. *Nov. 17.

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

Libel—Provisions of act relating to newspapers—Compliance with—Special damages—Loss of custom—50 Vic. cc. 22 and 23 (Man.).

By section 13 of 50 Vic. c. 22 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vic. c. 23, "An Act respecting newspapers and other like publications." By section 1 of the latter act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published; by section 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher of the newspaper and of all the proprietors; by sec. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; and sec. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, 1. That 50 Vic. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That sec. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne J. dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under sec. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

---

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

1891

ASHDOWN
v.
THE MANITOBA FREE PRESS COMPANY.

5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shown.

By sec. 11 of the Libel Act actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed. *Held*, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong J.—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given, or otherwise evidence of the special damage is inadmissible.

APPEAL from a decision of the Court of Queen's Bench, Man. (1), setting aside a verdict for the plaintiff and ordering a new trial.

This was an action against the Manitoba *Free Press* Company for publishing in the *Daily Free Press* and and in the *Weekly Free Press* an article alleged by the plaintiff to be libellous and to have caused him damage by loss of reputation and by injury to his business. The facts of the case are sufficiently set out in the above head-note and in the judgment of this court.

The plaintiff obtained a verdict for $500 which the full court set aside and ordered a new trial. From that decision he brought the present appeal.

McCarthy Q.C. for the appellant. The defendants should have pleaded the statute 50 Vic. ch. 22 if they wished to obtain the benefit of it. Folkard on Libel (2) states what evidence is admissible under a plea of not guilty.

The declaration was not made by the proper person. *Bank of Toronto* v. *McDougall* (3); *Freehold Loan & Savings Co.* v. *Bank of Commerce* (4).

(1) 6 Man. L.R. 578.
(2) 4 ed. pp. 372-374.
(3) 15 U.C.C.P. 475.
(4) 44 U.C. Q.B. 284.

The learned counsel also contended that it was incumbent on the defendants to prove the truth of the affidavit and that it conformed to the requirements of the act.

Robinson Q.C. for the respondents cited, as to the contention that the statute should have been pleaded, *Williams* v. *The East India Co.* (1); *Sissons* v. *Dixon* (2); and as to the declaration being sufficient, *Moyer* v. *Davidson* (3); *DeForrest* v. *Bunnell* (4); *Mowat* v. *Clement* (5).

McCarthy Q.C. in reply referred to *The King* v. *Hart* (6).

Sir W. J. RITCHIE C.J.—Ch. 23 s. 5 of 50 Vic. (Man.) directs that "such affidavit or affirmation shall be in writing and signed by the person or persons making the same, and may be taken before any justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench."

If this document was sworn or affirmed before such a commissioner then the act was complied with, because the act to which alone we can look gives such a commissioner the necessary authority to administer or take the affirmation, just as the statute might have authorized the swearing of the affidavit or the affirmation to be taken before a notary public, or any other person that the legislature deemed suitable to act in such a capacity. We can only look to the act and be governed by it and by it alone.

Whether the documents were sworn to, as Mr. Luxton thinks they were, or were solemnly declared and affirmed, as the contents state and as Mr. McKilligan's verification at the bottom indicates, does not

(1) 3 East 192.
(2) 5 B. & C. 758.
(3) 7 U.C.C.P. 521.
(4) 15 U.C. Q.B. 370.
(5) 3 Man. L.R. 585.
(6) 10 East 95.

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Ritchie C.J.

appear to me material, inasmuch as either swearing or affirming would be a compliance with the statute, though I should, if it were necessary to determine this point, certainly be prepared to hold that the contents of the document which states that "I, William F. Luxton, &c., do solemnly declare and affirm that," &c., and the attesting clause "solemnly declared and affirmed before me at, &c., John B. McKilligan, a commissioner, &c.," should be taken, in the absence of any positive evidence to the contrary, as proof that the documents were affirmations and not affidavits.

I think if a certified copy of the affidavit or affirmation is to be received in evidence as *primâ facie* proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, as provided by section 13 of the act which is as follows:

> 13. In all cases a copy of any such affidavit or affirmation, certified to be a true copy under the hand of the prothonotary or deputy clerk of the Crown and Pleas having the custody of the same, shall be received in evidence as *primâ facie* proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and any such copy so produced and certified shall also be received as evidence that the affidavit or affirmation of which it purports to be a copy has been sworn or affirmed according to this act and shall have the same effect for the purposes of evidence as if the original affidavit or affirmation had been produced and had been proved to have been duly so certified, sworn and affirmed by the person or persons appearing by such copies to have sworn or affirmed the same.

a fortiori, the original must be held to have a similar, if not greater effect.

I think there is nothing in the other objections raised and I therefore agree with the court below that defendants are within the protection of the statute; that special damages are neither claimed nor proved, and consequently to enable plaintiff to recover it was necessary for him to prove actual malice or culpable negligence, on neither of which questions were the

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Ritchie C.J.

jury enabled to agree; and therefore the jury having disagreed on both of these two questions, one or the other of which it was essential to plaintiff to establish to enable him to recover, I think there should be a new trial, and therefore this appeal will be dismissed.

STRONG J.—I am of opinion that Mr. Luxton, the managing director of the company, was the proper person to make the affidavit or affirmation required by secs. 1 and 3 of 50 Vic. ch. 53 (Manitoba). The stat. 50 Vic. ch. 22 (Manitoba) which requires the proof of actual malice or culpable negligence where special damages are not claimed is expressly made applicable to corporations by sec. 13 which enacts that "no person, persons or corporation who has or have not complied with the 'Act respecting newspapers and other like publications' passed in the present session shall be entitled to the benefit of this act," and sec. 3 of 50 Vic. ch. 53, by which last mentioned statute the affidavit or affirmation is made requisite, is to the same effect; "no person or persons or corporation who has or have not complied with the provisions of this act shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during the present session."

It is therefore very plain that an affidavit was required in the case of publication by an incorporated company. Then who was the person to make such an affidavit? The statutes give no indication of this. The corporation itself clearly could not make the affidavit and the provisions of the 6th section are not applicable to corporations but to ordinary partnerships. It seems, therefore, that the affidavit or affirmation must be made by some principal officer of the corporation, and if this be so I am opinion that the managing director was

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Strong J

the appropriate person. The case of *Kingsford* v. *The Great North-Western Railway Co.* (1) is an authority for this conclusion.

As regards the sufficiency of the paper filed with the prothonotary as an affirmation I have had some doubts, but I have arrived at the same conclusion on this point as the court below. There was a literal compliance with the terms of the act. The statute requires an affirmation and an affirmation was made and filed. I do not think we are to read into the statute the qualification that an affirmation was only to be sufficient when the person making it was a Quaker, or one of the class who, having conscientious scruples about swearing, have the privilege given them of affirming. That would be to add to the statute in a way which upon consideration (although I at first thought differently) would be inadmissible having regard to the principles of strict construction which now prevail.

The objection that "John B. McKilligan" before whom the affirmation purports to have been made was not proved to have been a commissioner having authority to take affidavits is answered by the rule "*omnia præsumuntur rite esse acta*" and by the authorities quoted in the judgment of the learned Chief Justice in the court below, particularly what Lord Abinger C. B. says in *Burdekin* v. *Potter* (2); and *Cheney* v. *Courtois* (3), which last case appears to be exactly in point. There an affidavit was, in order to the validity of a bill of sale, required by statute to be filed with the bill of sale in the Court of Queen's Bench. The affidavit purported to have been sworn before a Commissioner of the Court of Exchequer, and it was objected that the party relying on a due compliance with the statute was

(1) 16 C. B. N.S. 761. (2) 9 M. & W. 13.
(3) 13 C. B. N.S. 639.

bound to prove that the person signing as a commissioner was in fact one. Erle C.J. there says:

> I am of opinion that the statute intended to require the formality and sanction of an oath, and unless it were shown to my satisfaction that the person before whom the affidavit was sworn had no power to administer an oath I should be bound to presume *omnia rite esse acta*. It was the duty of the officer of the Court of Queen's Bench not to file the bill of sale unless it was accompanied by an affidavit properly sworn and attested. We must presume that he has done his duty.

Applying what was thus laid down as law by Chief Justice Erle to the present case, I say it was the duty of the prothonotary not to file this affidavit unless he was satisfied that Mr. McKilligan was a commissioner, a fact which he could easily have ascertained by a reference to the rolls or records of the court of which he was himself the custodian. In the case of an affidavit filed with a deputy clerk of the crown that officer, if he has any doubt, can easily resolve it by a reference to the prothonotary. There was, therefore, a *primâ facie* presumption that the affirmation was regularly taken before a person having authority to receive it, and it was for the plaintiff to displace that presumption if able to do so.

As regards the substance of the declaration there is, in my opinion, a literal and exact compliance with the requirement of the statute. The 2nd section of the act prescribes what must be the contents of the declaration or affidavit. It requires that the real and true names, addresses, descriptions and places of abode of the printers and publishers as well as of the proprietors of the newpaper shall be set forth. This in the case of a newspaper published by an incorporate company as the *Free Press* is, and printed by the company itself, is sufficiently complied with by stating, as the declaration does, the fact that the corporation is the proprietor of the paper and that the corporation itself prints and publishes it. This is so plain and self-evi-

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Strong J.

dent that I do not feel called upon to take up time and space in the reports by entering upon a demonstration to show that as regards proprietorship in the case of a corporation the names of the shareholders and a statement of their shares and interests need not be given as in the case of a partnership or unincorporated company; and further that when the corporation is stated in the declaration (or affidavit) to be its own printer and publisher, as in the present case, there is no necessity for stating the names of the persons, viz.: The foreman, proof-readers, type-setters, press-men, and newsboys, employed in the mechanical work of printing and in the publication and sale of the newspaper.

The defendants have, therefore (subject only to the question of pleading which I will refer to hereafter), brought themselves within the protection of the statute unless we can hold that the plaintiff is within the exception excluding from its operation cases where special damages are claimed. I take it to be clear that where special damages are sought to be recovered in an action for libel, or in an action for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and that in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is not admissible, and that this rule is not confined to cases of verbal slander where the words are not actionable *per se*, cases in which special damage is a necessary ingredient in the cause of action. In Odgers on Libel (1) I find the following passage which appears to me applicable as showing that the allegations at the conclusion of the third and fourth counts are averments of general and not of special damages. The learned writer says:

(1) 2nd ed., p. 302.

And here note the distinction between the loss of individual customers and a general diminution in annual profits. Loss of custom is special damage and must be specifically alleged and the customers' names stated in the record. If that be done the consequent reduction in plaintiff's annual income can easily be reckoned. But if no names be given, it is impossible to connect the alleged diminution in the general profits of plaintiff's business with defendant's words; it may be due to fluctuations in prices, to change of management, to a new shop being opened in opposition, or to many other causes. Hence, such an indefinite loss of business is considered general damage and can only be proved when the words are spoken of the plaintiff in the way of his trade and so are actionable *per se*. For there the law presumes that such words must injure the plaintiff's business and therefore attributes to those words the diminution it finds in plaintiff's profits. See *Harrison* v. *Pearce* (1).

The learned writer is no doubt here referring to cases of verbal slander, but it must be the same in cases of actions for written defamation as in those where the cause of action is for words spoken which are actionable *per se*. This consideration gets rid of any difficulty which might seem to arise from *Evans* v. *Harries* (2) and *Riding* v. *Smith* (3), which were both actions for verbal slander of the plaintiff in his trade and in which it was held that evidence of loss of custom generally was admissible under similar allegations to those in the present case as proof of general damages. It is therefore clear, both on authority and principle, that the declaration does not claim special damages and that the plaintiff did not bring himself within the exception of such cases provided for by the 11th sec. of ch. 22.

The question for decision is therefore (apart from the point of pleading) reduced to this: Did the plaintiff prove to the satisfaction of the jury either actual malice or culpable negligence on the part of the defendants in publishing the articles complained of?

(1) 1 F. & F. 567. (2) 1 H. & N. 251.
(2) 1. Ex. D. 91.

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Strong J.

I do not see how it is possible to say, in the face of the fact that the jury were unable to agree to an answer to the second and third questions put to them by the learned judge, that they have found at all upon these vital questions. It is apparent upon the record before us that upon these the essential points they differed, and that there was no finding. The questions were clearly and explicitly framed, in these words:

Question 2. Was the defendant guilty of actual malice in the publication of the article complained of?

Question 3. Was the defendant guilty of culpable negligence in its publication?

The jury declare that by reason of difference of opinion amongst them they are unable to answer either.

I agree with the Chief Justice of Manitoba that after this positive declaration of an inability to agree to answers to these two direct questions it is impossible to hold that a negative answer to them is to be implied from the affirmation elicited by the 5th question, which inquired whether Mr. Luxton *bonâ fide* believed the publications to be true. It appears therefore that the real issues, viz., whether there was malice or negligence, have never been passed upon by the jury and that being so no other alternative was open to the court but to send the action down for a new trial.

As regards the question of pleading I think the onus must always be on the defendants, in cases under this statute, to bring themselves within the provisions in question by showing that they had filed the affidavit or affirmation, and as it is for them to prove this it is also incumbent on them to plead a compliance with the prescribed requirements. But it would be out of the question to determine this appeal on any such ground as this. The point does not seem to have been

taken either at the trial or before the court in *banc.* The notice of appeal to the Court of Queen's Bench, indeed, does not even assign it as a ground of objection. It was therefore taken here for the first time, and that being so of course no effect ought to be given to it. I think, however, it would be better to make the record perfect by adding the plea, and for that purpose I should be prepared to give leave to amend.

Subject to a variation of the rule of the court below by directing an amendment for the purpose above mentioned I am of opinion the appeal should be dismissed with costs.

GWYNNE J.—The only question which, in my opinion, arises in this case that it is necessary to consider is whether or not the defendants are entitled to the benefit of the provisions of the Manitoba Statute, 50 Vic. ch. 22, an act respecting the law of libel. By the 13th section of that act it is enacted that:

> No person, persons or corporation who has or have not complied with the act respecting newspapers and other like publications passed in the present session shall be entitled to the benefit of this act.

Now by that act respecting newspapers, &c., 50 Vic. ch. 23, Manitoba, it is enacted in its 3rd section that:

> No person or persons or corporation who has or have not complied with the provisions of this act shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during this present session.

Now the force of these two clauses of these acts is to make every provision of the act respecting newspapers, 50 Vic. ch. 23, apply to the case of corporate bodies equally as to individuals who should seek the benefit of any of the provisions of 50 Vic. ch. 22, and precisely in the same manner and to the same extent, the object of the legislature, in my opinion, being to

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Gwynne J.

provide for every person who should be libelled in a newspaper the same means of redress by criminal or civil process, and the same power of selection of the person or persons against whom such redress should be sought, namely, either against some individual persons filling the position of printer, or of publisher, or of owners or part owner of the newspaper in which the libel is published, and who derive profit from its publication, whether such proprietors or proprietor should or should not constitute a body corporate. This reasonable intention of the legislature is, to my mind, abundantly apparent from the language used. It never could have been their intention that a corporate body should have greater license than non-corporate proprietors of a newspaper to publish, or greater facility in escaping responsibility if they should cause to be published, libels in their paper. The first section then of the act 50 Vic. ch. 23, although it commences with the words, "no person shall print or publish," &c., must, by force of the above section 3 of the same act and of section 13 of 50 Vic. ch. 22, be read thus:

> No person, persons or corporation shall print or publish, or cause to be printed or published in Manitoba, any newspaper, pamphlet or other paper containing public news or intelligence or serving the purpose of a newspaper, or for the purpose of posting for general circulation in detached pieces as such newspaper, until an affidavit or affirmation, made and signed as hereinafter mentioned, shall have been delivered to the prothonotary of the Court of Queen's Bench or the Deputy Clerk of the Crown and Pleas for the district in which such newspaper, pamphlet or other paper is printed or published.

Then section 2 enacts that:

> Such affidavit or affirmation shall set forth the real names, additions, descriptions and places of abode of every person who is or is intended to be the printer or publisher of the newspaper, pamphlet or other paper mentioned in such affidavit or affirmation, and of all the proprietors of the same, and also the amount of the proportional shares of such proprietors in the property of the newspaper, pamphlet or other paper, and the true description of the house or building

wherein such newspaper, pamphlet or other paper is intended to be printed, and the titles of such newspaper, pamphlet or other paper.

Then by section 6 it is enacted that:

Where the persons concerned as printers and publishers of any newspaper, &c., together with such number of proprietors as are hereinbefore required to be named in such affidavits or affirmations as aforesaid do not altogether exceed the number of four persons, the affidavit or affirmation required shall be sworn, affirmed and signed by all the said persons, and when the number of all such persons exceeds four the same shall be signed and sworn, or affirmed by four of such persons, but the same shall contain the real and true names, description and places of abode of every person who is or who is intended to be the printer or printers, publisher or publishers, and of so many of the proprietors as are hereinbefore for that purpose mentioned, of such newspaper, pamphlet or other such paper as aforesaid.

Then by the 8th section it is provided that such affidavits and affirmations shall in all cases or proceedings touching or concerning any matter or thing contained in any such newspaper, &c., which may be taken against every person who has signed and sworn or affirmed such affidavit or affirmation, and against every person who has not signed or affirmed the same but who is mentioned therein to be a proprietor, printer and publisher of such newspaper, &c., shall be admitted as sufficient evidence of the truth of the matters which are by the act required to be set forth in such affidavit or affirmation, and which are therein set forth.

Then by the 10th section it is provided that in some part of every newspaper, pamphlet or other such paper aforesaid there shall be printed the real name, addition and place of abode of every printer and publisher thereof, and also a true description of the place where the same is printed, subject in case of default to a penalty of $80.00, to be recovered from the person who knowingly and wilfully prints or publishes any such newspapers, &c., not containing the particulars aforesaid.

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Gwynne J.

Now as the act declares that "no person, persons or corporation" shall be entitled to the benefit of the act respecting the law of libel, viz., 50 Vic. ch. 22, who has not or have not complied with the provisions of 50 Vic. ch. 23, it is, in my opinion, obvious that the provisions of the latter act in every particular apply to corporate bodies equally as to individual proprietors of newspapers, and we have no right to hold that some only of those provisions apply to corporations and others to individuals, and so render the security or facilities for obtaining redress the public were intended to have in the case of libels published in newspapers less efficient in the case of a libel published in a newspaper owned by a body corporate than in the case of a libel published in a newspaper owned by persons not incorporated; and we must, in my opinion, hold that in the case of a body corporate being proprietors of a newspaper the same necessity exists for giving the real names and addresses of some individual persons or person as printers or printer, publishers or publisher, and proprietors or proprietor, or owners of shares in such body corporate equally as in the case of a newspaper owned by persons not incorporated; and if this be not done in the case of a corporation equally as in the case of a newspaper owned by persons not incorporated the act 50 Vic. ch. 23 is not complied with, and the corporation in such case is not entitled to the benefit of 50 Vic. ch. 22.

Now the document filed as and by way of the affidavit or affirmation required by the statute is an affirmation made by a Mr. Luxton, who styles himself managing director of the defendant company, who affirms that the Manitoba *Free Press* Company, a company incorporated under the laws of Manitoba, is the printer, publisher and sole proprietor of the newspaper named *The Manitoba Daily Free Press* and also of *The*

1891

ASHDOWN
v.
THE MANITOBA FREE PRESS COMPANY.

Gwynne J.

Manitoba Weekly Free Press in which respective papers of the dates of the 25th and 30th May, 1889, were published the libels complained of, and in that published on the 25th of May the only notice professing any compliance with sec. 10 of 50 Vic. ch. 23 that was inserted was as follows :

Manitoba *Free Press* published every day except Sunday at 6 a.m. at Winnipeg by the Manitoba *Free Press* Company.

W. F. LUXTON,
Managing Director and Editor in Chief.

while in that of the 30th of May, 1889, the only notice inserted was as follows :

MANITOBA FREE PRESS,
WEEKLY EDITION.

Published every Thursday at the Manitoba *Free Press* building, Winnipeg, Man., by the Manitoba *Free Press* Company.

W. F. LUXTON,
Managing Director and Editor in Chief.

Now neither the affirmation so filed nor the notices published in the respective newspapers in which the libels complained of appeared constituted, in my opinion, a compliance with the provisions of the 50 Vic. ch. 23; they were rather, in my opinion, in plain contravention of the requirements of the act. The defendants, therefore, in the present case, were not entitled to the benefit of 50 Vic. ch. 22, and the plaintiff is entitled to retain his verdict and to have judgment in his favour entered thereupon. The appeal therefore, in my opinion, should be allowed and judgment be ordered to be entered in the court below for the plaintiff on the verdict rendered in his favour. In this view of the case it is a matter of no importance that the jury have not answered the question put to them as to actual malice in the publications complained of.

PATTERSON J.—This is an action of libel. The de-

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Patterson J.

claration contains four counts. The first and second counts are alike but refer to different publications of the article charged as libellous, the first count being for the publication of the article in the *Manitoba Weekly Free Press*, and the second for publication of the same article in the *Manitoba Daily Free Press*, and both of those counts charging generally that the defendants falsely and maliciously printed and published of the plaintiff the words contained in the article, not alleging special damage, and indeed not containing any allegation of damage.

The third and fourth counts, again, are alike, charging the same publications of the article but each beginning with the averment that the article was published in relation to the plaintiff and to the carrying on by him of his business of a hardware merchant, and concluding:

> Whereby the plaintiff has been and is greatly injured in his credit and reputation, and also has been greatly injured in his credit and reputation as a hardware merchant and in his said business, and has experienced and sustained sensible and material diminution and loss in the custom and profits of his said trade and business by divers persons, whose names are to the plaintiff unknown, having in consequence of the committing of the said grievances by the defendants avoided the plaintiff's said shops, stores and warehouses, and abstained from being customers of the plaintiff as such merchant as aforesaid, as they otherwise would have been but for the committing of the said grievances by the defendants.

And the declaration concludes with a general claim for $10,000 damages. The pleas are: 1st. Not guilty; 2nd. As to the third and fourth counts, that the plaintiff did not carry on the business of hardware merchant as alleged; 3rd and 4th, held bad on demurrer; 5th, that the defamatory allegations are true.

The questions upon this appeal turn upon two statutes of Manitoba. One statute (1) enacts that:

(1) 50 Vic. ch. 22.

11. Except in cases where special damages are claimed the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of.

13. No person, persons or corporation, who has or have not complied with the "Act respecting Newspapers and other like publications," passed in the present session, shall be entitled to the benefit of this act.

The other is the act thus referred to in section 13 (1). The provisions in question are contained in sections 1, 3 and 5:

1. No person shall print or publish, or cause to be printed or published in Manitoba any newspaper, pamphlet or other paper containing public news or intelligence, or serving the purpose of a newspaper, or, for the purpose of posting for general circulation, in detached pieces as such newspaper, until an affidavit or affirmation, made and signed as hereinafter mentioned, containing the matters hereinafter mentioned, shall have been delivered to the prothonotary of the Court of Queen's Bench, or the Deputy Clerk of the Crown and Pleas for the district in which such newspaper, pamphlet or other paper is printed or published.

3. No person or persons or corporation, who has or have not complied with the provisions of this act, shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during this present session.

5. Every such affidavit or affirmation shall be in writing, and signed by the person or persons making the same, and may be taken before any justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Section 4 prescribes the contents of the affidavit and I think nothing turns upon it. In my opinion the section is satisfied by this document.

Section 6 requires that when the persons concerned as printers and publishers of any newspaper, together with the proprietors, do not exceed four in number the affidavit or affirmation must be made and signed by them all, but if they are more than four then it is to be made and signed by four of them. That does not appear to be applicable to a case like this one

(1) 50 Vic. ch. 23.

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Patterson J.

where the sole proprietor and publisher is a corporation. Therefore there is no reason for denying that an affidavit or affirmation by the managing director of this corporation satisfies section one, which does not say who is to make it.

There was no finding of actual malice or culpable negligence. The jury gave a general verdict for the plaintiff for $500 but did not answer three out of the five questions left to them by the judge. Two of those three questions on which the jury could not agree asked if the defendants were guilty of actual malice or culpable negligence in the publication of the article, the third related to the affidavit and will be noticed presently. The two on which they agreed were the following:

4. Was the article complained of merely a fair and reasonable defence against attacks previously made upon the defendant company or its publications by the publishers of the *Sun* newspaper ?

To which they answered "No"; and

5. Did Mr. Luxton when the publications in question were made *bonâ fide* believe them to be true in fact? If it is not proved to your satisfaction that he did not so believe, answer the question in the affirmative.

They answered this question in the affirmative. Mr. Luxton was the writer of the article and the managing director of the company.

A new trial was ordered on the ground that the jury had really disagreed. The appellant contends that that is an erroneous view of the matter and that he is entitled to retain his verdict for $500.

The first question is whether the statute was complied with in respect of the affidavit or affirmation so as to dispense with proof of actual malice or culpable negligence.

There was, no doubt, evidence of actual malice sufficient to go to the jury, and perhaps, also, of cul-

pable negligence; but I apprehend that when the statute makes proof of those things, or of one of them, essential to the maintenance of the action the issue thus thrown upon the plaintiff is, like any other issue, to be proved to the satisfaction of the jury. If that is not done, as it was not done in this case, the issue is not proved and the plaintiff fails. Hence the importance of the inquiry whether the defendants have brought themselves within the protection of the statute.

Now let us look at the affidavit or affirmation.

It is made by Mr. Luxton. It commences thus :

I, William Fisher Luxton, of the city of Winnipeg, in the county of Selkirk, journalist, do solemnly declare and affirm :

And after stating all that the statute requires it to state, it concludes :

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the "Act respecting Extra-Judicial Oaths."

Solemnly declared and signed before me at the city of Winnipeg, in the county of Selkirk, this 19th day of December, A.D. 1887. } (Sgd.) W. F. LUXTON.

(Sgd.) JOHN B. MCKILLIGAN,
A commr., &c.

One objection made is that John B. McKilligan was not proved to be a justice of the peace or a commissioner for taking affidavits to be used in the Queen's Bench. That is an objection to which we should not pay any attention. It was urged before us stoutly enough, but at the trial where everybody evidently knew Mr. McKilligan there is no trace of it. It was debated whether or not Mr. Luxton had sworn to the statement before Mr. McKilligan or had merely affirmed, and after the judge had charged the jury he was recalled to be further examined about the document. Mr. McKilligan was then mentioned, as he

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Patterson J.

had been during the regular examination of Mr. Luxton and of the secretary of the company, the prothonotary who produced the document which had been filed in his office not being asked anything about him any more than the other witnesses, but he was mentioned only in this manner:

> His Lordship—Tell the jury what you did on the occasion when you said you swore to these affidavits?
>
> A. My recollection is that I swore to it, that is, the form being recited to me by Mr. McKilligan and I kissed the book, the ordinary form "So help me God." There are circumstances that go to corroborate that the affidavit or affirmation, whatever it is called, was made in my own office and in my room; Mr. Campbell, who was acting for me, brought Mr. McKilligan there and I have a bible there and it is used for that purpose. That goes to confirm that circumstance.

It is palpable that witness, counsel, judge and jury knew that Mr. McKilligan was a proper person to administer the oath or take the affirmation.

The main question, and in fact the only question, made at the trial respecting the document is whether it is an affidavit or an affirmation within the meaning of this particular statute.

The jury were asked to find whether it was sworn to or only affirmed, and they could not agree upon the fact.

I speak of the document in the singular though there were two. They were *fac similes*, one of them relating to the daily paper and the other to the weekly.

The argument in support of the objection is that the statute requires an affidavit or sworn statement when the deponent has no conscientious scruples about taking an oath and that the affirmation is permitted only in case of persons who have such scruples, or when the deponent belongs to some religious body the members of which are excused from being sworn.

It may be that some idea of that sort was in the mind of the draftsman who framed the clause of the

1891

ASHDOWN
v.
THE MANITOBA FREE PRESS COMPANY.

Patterson J.

statute, but he certainly has not conveyed it by the language he has used. Literally read the clause gives an option to swear or affirm. There are statutes which permit a witness at the trial of a civil or criminal case to make a solemn affirmation instead of giving his evidence on oath, provided he belongs to one of certain religious denominations, or provided he has conscientious objections to being sworn, and the same privilege is extended to some proceedings out of court. The English statutes on the subject down to 17 & 18 Vic. ch. 125 are cited by the appellant in his factum, and may, together with later statutes, be found noticed in Taylor on Evidence (1). We may refer also to such provisions as those contained in the Criminal Procedure Act (2), and in the act respecting oaths of allegiance (3), as examples of greater care in the particular in discussion, the right to affirm in place of swearing being given only to those persons who have that right in civil cases.

The class of persons is thus defined by reference to the legislation concerning the mode of giving testimony in civil actions. There is no assumption of the existence of the right to substitute affirmation for oath as belonging to any class apart from legislation.

But the argument for the appellant requires us to read into this statute something which the legislature has not expressed, in place of understanding the language in its literal meaning which gives the option to swear or to affirm. In this case the deponent has affirmed, he "solemnly declares and affirms," the word "affirm" not being, as it would seem, indispensable, and probably not being intended to be used in a statutory declaration under the Dominion act. I think a declaration under the third section of

(1) 8 ed. p. 1181, sec. 1389. (2) R.S.C. c. 174, s. 219.
(3) R.S.C. c. 112, s. 3.

1891

ASHDOWN v. THE MANITOBA FREE PRESS COMPANY.

Patterson J.

that act—the act respecting extra-judicial oaths (1)—would satisfy the Manitoba statute, but in this case the deponent does not merely solemnly declare, he uses the expression given by the Manitoba statute and solemnly affirms.

Thus it appears to me that the statute was complied with by the filing of the document in evidence, even though it may not have been sworn to and although Mr. Luxton may not be a person who could assert a statutory privilege to give his evidence in a civil action on solemn affirmation in place of on oath.

I am unable to see anything in the contention that the statute ought to have been pleaded. There is nothing in question but a rule of evidence Malice has always to be established. It is of the essence of the charge. But whereas it is in other cases *primâ facie* proved by the publication of the defamatory words a different rule is applied to newspapers. That is the law of the land and the plaintiff knows the law. He has access to the documents filed with the prothonotary and can satisfy himself before he brings his action as to what proof he requires.

I do not see my way to hold that we can properly order a judgment for the defendant, and am of opinion that our proper course is simply to dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Aikins, Culver, Patterson & McCleneghan.*

Solicitors for respondents: *Archibald, Howell & Cumberland.*

---

(1) R. S. C. c. 141.

GEORGE WHELAN (CAVEATEE).....APPELLANT; 1891

AND *Mar. 13, 16.
*Nov. 17.

MARY RYAN (CAVEATOR).....RESPONDENT.

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

Assessment and taxes—Tax sale—Irregularities—Validating acts—Crown lands—45 *V. c.* 16 *s.* 7 (*Man.*)—51 *V. c.* 101 *s.* 58 (*Man.*)

Lands in Manitoba assessed for the years 1880–1, were sold in 1882 for unpaid taxes. The statute authorising the assessment required the municipal council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all real and personal property mentioned in said roll, but no such by-law was passed in either of the years 1880 or 1881. The lands so assessed and sold were formerly Dominion lands which were sold and paid for in 1879, but the patent did not issue until April, 1881. The patentee sold the lands, and after the tax sale a mortgage thereon was given to R. who sought to have the tax sale set aside as invalid.

45 V. c. 16, s. 7 (Man.) provides that every deed made pursuant to a sale for taxes shall be valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from its execution, and 51 V. c. 101 s. 58 (Man.) provides that "all assessments heretofore made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."

Held, affirming the judgment of the court below, Patterson J. dissenting, that the assessments for the years 1880–1 were illegal for want of a by-law and the sale for taxes thereunder was void. If the lands could be taxed the defect in the assessments was not cured by 45 V. c. 16 s. 7, or by 51 V. c. 101 s. 58, which would cure irregularities but could not make good a deed that was a nullity, as was the deed here.

Held, per Gwynne J., Patterson J. *contra*, that the patents for the lands not having issued until April, 1881, the said taxes accrued due

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

1891

WHELAN v. RYAN.

while the lands vested in the Crown, and so were exempt from taxation.

Held per Strong J., following *McKay* v. *Crysler* (3 Can. S. C. R. 436), and *O'Brien* v. *Cogswell* (17 Can. S.C.R. 420), that the operation of 45 V. c. 16 s. 7 is restricted to curing the defects in the proceedings for the sale itself as distinguished from the proceedings in assessing and levying the taxes which led to the sale.

APPEAL from a decision of the Court of Queen's Bench, Man. (1) reversing the judgment at the trial in favour of the caveatee.

This was an issue under the Real Property Act of Manitoba under the following circumstances. The land originally belonged to the Dominion Government and was sold in 1879 to one Graham, who paid the purchase money in full but did not obtain a patent until April, 1881. Graham, in 1882, conveyed the land to one Casey, who, in May, 1882, gave a mortgage to Mary Ryan, the respondent.

The lands were assessed by the municipality of Lorne, where they were situate, for the years 1880 and 1881, and in March, 1882, they were sold for the two years' taxes. The appellant, Whelan, claims title from the purchaser at this tax sale. He applied to the district registrar for a certificate of title, whereupon the said Mary Ryan filed a caveat against the granting of such certificate claiming that the said lands were exempt from taxation in 1880–1 as being Crown lands, or, if they were liable to be taxed, that the proceedings therefor were so irregular that there was no real assessment for those years.

The statutes of the province under which the assessments were made in the said years require each municipal council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all the real and personal property mentioned in said

(1) 6 Man. L. R. 565.

1891

WHELAN v. RYAN.

roll. No such by-law was passed by the municipality of Lorne in either of the years 1880 or 1881. It was claimed, however, that this defect was cured by the provisions of the following later statutes, namely, 45 Vic. ch. 16 sec. 7 which makes valid any deed given in pursuance of a tax sale, notwithstanding any informality in or preceding such sale, unless questioned within one year from its execution, and 51 Vic. ch. 101 sec. 58 which provides that "all assessments heretofore made and rates struck by the municipality are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby." The Chief Justice of Manitoba, who tried the case, gave effect to this contention, but his decision was overruled by the full court.

S. H. Blake Q.C. for the appellant cited *Rorke* v. *Errington* (1); *Claxton* v. *Shibley* (2); *Fitzgerald* v. *Wilson* (3); *Church* v. *Fenton* (4).

Gormully Q.C. for the respondent referred to *McKay* v. *Crysler* (5) and *O'Brien* v. *Cogswell* (6).

Sir W. J. RITCHIE C.J.—I think this appeal should be dismissed. There never was a legal assessment of the lands in question in this case in the years 1880 and 1881, the lands never having been assessed in the manner prescribed by law, and no by-law having been passed for levying a rate after the final revision of the roll in either of the years 1880 or 1881 for the alleged taxes for which the land was sold, the law requiring such a by-law to be passed, and consequently there can be no assessment of taxes for those years when there have been no taxes legally imposed; and if no taxes legally levied and no assess-

(1) 7 H. L. Cas. 617.
(2) 9 O. R. 451; 10 O. R. 295.
(3) 8 O. R. 559.
(4) 5 Can. S. C. R. 239.
(5) 3 Can. S. C. R. 436.
(6) 17 Can. S. C. R. 420.

1891

WHELAN v. RYAN.

Ritchie C.J.

ment, there was, in my opinion, no authority to sell and any such sale was void.

STRONG J.—I am of opinion that the tax sale under which the appellant claims was void and that the deed made in pursuance of it was a nullity.

The title and the facts are concisely stated at the beginning of the judgment given by the learned Chief Justice by whom the issue was tried.

The taxes for which the land was ostensibly sold were those claimed for the years 1880 and 1881.

The original contract for purchase from the Dominion Government was entered into by Adam Wilson Graham, under whom the respondent claims title, on the 4th of September, 1879. The patent was issued to Graham on the 27th September, 1881, at which date the purchase money was paid in full. On the 6th of March, 1882, the lands were sold for taxes by the municipality of Lorne, and on the 12th March, 1883, a deed was executed by the municipality purporting to convey them to John D. MacIntosh, the purchaser at the tax sale, under whom the appellant claims title. Therefore the taxes for which the municipal authorities assumed to sell were taxes claimed to have accrued due whilst the legal title to the lands was vested in the Dominion Government.

The lands of the Dominion are by the British North America Act expressly exempted from provincial taxation.

A question has been raised as to the liability to taxation of lands which the Dominion Government have contracted to sell to a purchaser whose contract is a subsisting one. It was argued before this court, and also in the courts below, that so long as the Dominion retains, in addition to the legal title, a beneficial interest, as it undoubtedly does in the case of lands agreed to be

1891

WHELAN v. RYAN.

Strong J.

sold but which have not been fully paid for, the interest of the purchaser of such lands cannot be made the subject of taxation by provincial legislation. In the present case, as I have before stated, the purchase money was not paid until after the alleged assessment of the taxes for 1881. The legislature of Manitoba has made provision for the assessment and sale of the interests of purchasers of Dominion lands, expressly reserving the rights and interest of the Crown as represented by the Dominion. The 11th subsection of the 39th section of 43 Vic. ch. 1, which was passed on the 4th February, 1880, clearly implies that the interest of a purchaser of Crown lands, or his pre-emption right, should be liable to taxation and sale saving the rights of the Crown. The learned Chief Justice was of opinion that the legislature of Manitoba had the power thus to impose taxation on the interests of purchasers in unpatented Dominion lands, saving the interest of the Crown, and that by the section referred to they exercised this power, or rather indicated that the general provision for taxing lands included such interests. I am not at present prepared to say that this was not a correct conclusion, but as this appeal can be decided upon other grounds I refrain from expressing any opinion on the point.

The next inquiry, however, which is as to the legality and sufficiency of the assessment of the taxes for which the lands were sold, must be answered adversely to the appellant. As regards the taxes claimed for both the years 1880 and 1881 it appears to me to be very clear that there was no imposition of rates such as the law required, and consequently the land was sold for taxes not legally due. The legality of the taxes claimed for those two years depends on different statutes, that for 1880 being regulated by 43 Vic. ch. 1 and that for 1881 by 44 Vic. ch. 3, but they each contain a clause, iden-

1891

WHELAN v. RYAN.

Strong J.

tical in terms, providing that the council shall in each year after the revision of the roll pass a by-law "for levying a rate on all the real and personal property in the said roll to provide for all the necessary expenses of the said municipality." Then not only did the appellant fail to prove that there was any such by-law for either of these two years, but the respondent, so far as it was possible to do so, established that there was none. Mr. Crawford, the clerk and treasurer of the municipality and the custodian of its records, being called upon to produce the by-law under which the rate was levied in 1880, answers: "I cannot. I don't think there ever was one. I cannot find one." And being asked as to a by-law in 1881, he says he cannot produce that for the same reason. He adds: "The minutes do not show that there was one passed and I cannot find that there was any such by-law." And to the question: "You would know if there was one passed?" He answers: "Yes, certainly." The same witness also produced the minute book and no trace of any by-law for either year was found in it.

After this evidence it is useless to talk of presumptions; the fact is established that there never was a by-law in either year. It is true that it does appear that on the 2nd August, 1880, a resolution was passed that a rate of five mills on the dollar be struck on the total of the assessment roll and a similar resolution was passed on the 11th July, 1881. But these resolutions are not the equivalents of by-laws, not being passed with the same solemnities and being wanting moreover in the seal of the municipality and the signature of its head officer which are required to be affixed to every by-law. Therefore there was no valid or legal rate for these two years 1880 and 1881 and the imposi-

tion of the taxes for which the land was sold was wholly illegal and void.

Then sec. 58 of 51 Vic. cap. 101 is invoked. This statute was not passed until 18th May, 1888, more than five years after the deed was executed. It is as follows: "All assessments made and rates heretofore struck by the municipality are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby." Against giving this the *ex post facto* effect contended for the most rigid construction must be adopted, and I think the plain answer to it is that given by Mr. Justice Bain that it is to be restricted to defective proceedings in the nature of irregularities and not to absolute nullities such as we have here. And further that, as Mr. Justice Killam points out, it is to be read as applying only to validate existing rates and assessments for the purpose of subsequent proceedings to be afterwards taken for their enforcement, and not as making good sales made on the basis of absolutely void proceedings. The legislation appears to have been passed in the interest of municipalities and not in aid of purchasers. The rates being satisfied by the sale the municipality has no longer any interest inasmuch as no rates or assessments any longer exist to which the clause can apply. Lastly the 45 Vic. ch. 16 sec. 7 is insisted upon as an enactment curing all defects as well in the assessment as in the sale and giving to the deed by itself the effect of conferring an indefeasible title without regard to the validity of the assessment.

In *O'Brien* v. *Cogswell* (1) I rested my judgment upon a construction which restricted a section, similar in its terms to this, to irregularities and defects in the proceedings for sale as distinguished from the proceedings for the assessment and levying of the tax. The

(1) 17 Can. S.C.R. 420.

1891

WHELAN v. RYAN.

Strong J.

latter procedure I considered to be analogous to an adjudication whilst the sale is in the nature of an execution.

In the Ontario statute in question in *McKay* v. *Crysler* (1) the language did not admit of this so easily. I say this, however, not by way of questioning the decision of the court in that case by which I am of course bound; I merely wish to point out that *McKay* v. *Crysler* (1) was a stronger case for the absolute construction contended for by the appellant than either *O'Brien* v. *Cogswell* (2) or the present case. Here the words are "notwithstanding any informality or defect in or preceding such sale." These words I construe, as I did similar words in *O'Brien* v. *Cogswell* (2), as applying only to informalities and defects in the sale or in the proceedings relating to the sale. I think I am entitled so to confine the words "preceding such sale," and to read them as referring to the preliminaries of the sale as distinguished from the levying of the assessment and the imposition of the tax, for the reason that in so doing I am carrying out the principle laid down by the court in *McKay* v. *Crysler* (1) (in which at the time I certainly did not concur) that the courts are bound to place on such enactments as these the most restricted construction possible in order to prevent the gross violation of common right and justice which would follow if a comprehensive construction were adopted. At all events *McKay* v. *Crysler* (1) and *O'Brien* v. *Cogswell* (2) have settled, so far as this court is concerned, a principle of construction applicable to this section which makes it impossible to construe it as the appellant contends. If it is asked what scope or application can then be given to this clause I answer that there is abundant room for its application since it shuts out all

(1) 3 Can. S.C.R. 436. (2) 17 Can. S.C.R. 420.

objections on the ground of irregularity in the preliminaries of the sale such as irregular advertisements and other defects of a similar kind.

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

1891
WHELAN
v.
RYAN.
Strong J.

FOURNIER J. concurred in the judgment of the Chief Justice.

GWYNNE J.—Upon a true construction of the British North America Act in connection with the Manitoba Act, Dominion statute 33 Vic. ch. 3, lands in the province of Manitoba do not, in my opinion, become subject to municipal taxation until the issue of letters patent therefor, and consequently the land in question was not liable to taxation prior to the 8th day of April, 1881. I am of opinion further that, assuming the land in question to have been liable to taxation in 1880 and 1881, the matter relied upon as evidencing the assessment of the land and the imposition of a tax thereon in those years did not operate as an assessment of the land and the imposition of any tax thereon in those years. What was done appears to have been done in open and wilful disregard of the law relating to the assessment of and levying a tax upon land in the province; and I am of opinion further that the statutes of the province of Manitoba relied upon as making valid deeds executed to give effect to sales of land for taxes have no application to deeds executed by the heads of municipalities purporting to convey lands as sold for arrears of taxes in cases where in point of law the land so purported to be sold was not liable to be assessed and taxed by the municipality; nor to cases where, although liable to be assessed, no assessment was in point of fact made as required by law, but on the contrary, as in

1891

WHELAN v. RYAN.

Gwynne J.

the present case, the essential steps required by law to be taken to effect a valid assessment and a valid imposition of a rate never were taken, and the law in that respect was utterly disregarded and as it were set at defiance. It would, in my opinion, be a monstrous perversion of justice to construe those statutes either as enabling the head of the municipal institutions in the province to confiscate at their pleasure the lands of individuals by executing deeds as upon a sale for arrears of taxes during a period when the lands were not liable to be assessed, or when the land so purported to be sold had not been assessed as required by the law in order to subject lands to taxation by municipalities, or to make valid deeds which had been executed under such circumstances. The appeal therefore, in my opinion, must be dismissed with costs.

PATTERSON J.—The lands in question were sold for taxes on the 6th of March, 1882, under a warrant under the hand of the warden and seal of the municipality bearing date the 21st of January, 1882, and the deed was made to the purchaser by the warden and treasurer on the 12th of March, 1883. The sale had been duly advertised according to statute, except that the notice omitted to state that the sale was to begin at noon.

Under the law of Manitoba lands are liable to be sold for taxes when the taxes are two years in arrear. The two years' alleged arrears in this case were for 1880 and 1881.

It is objected that the land was not taxable in 1880 because the patent from the Crown did not issue until April, 1881. But the patentee, Wilson, had bought and paid for the land in December, 1879, and the patent, though not issued until 1881, merely carried out the sale of 1879. It has been argued that no

interest in the land was created by the purchase and payment, and in effect that the title remained so absolutely in the Crown that it was still a matter of mere bounty to grant the land. The patent does not so treat the matter, but on the contrary states that the land was granted because the grantee was found to be "duly entitled thereto—the said lands being part and parcel of those known as 'Dominion Lands' and mentioned in the Dominion Land Act of 1879." The rights of purchasers are recognised in that act in various ways. Section 31, which declares that payments for lands purchased in the ordinary manner shall be made in cash, except in the case of payments in scrip or in military bounty warrants, refers to lands of the class of those now in question. These lands were purchased in the ordinary manner and paid for in scrip. By section 82 the entry, receipt or certificate of the agent who sold the lands entitled Wilson to maintain suits at law or in equity against any wrongdoer or trespasser on the lands as effectually as he could do under a patent of the land from the Crown. A person who obtained a homestead entry had a right given in nearly the same terms to maintain actions, but there are several provisions relating to free grant lands which, under the principle *expressio unius est exclusio alterius*, rather go to emphasise the right of a purchaser in the ordinary way. Such *e.g.* is subsection 13 of section 34 which declares that the title shall remain in the Crown until the issue of the patent, and that such lands shall not be liable to be taken in execution before the issue of the patent; and such also is subsection 17 which forbids assignments of homestead rights before the issue of the patent except as elsewhere mentioned in the act. There is no restriction upon assignments by a purchaser in the ordinary way. If it should happen that, either innocently or fraudu-

1891

WHELAN v. RYAN.

Patterson J.

lently, another person purchased the same land and obtained a patent for it the first purchaser could, under section 78, have the patent annulled—as was done in several cases to be found in the Upper Canada and Ontario reports under a similar jurisdiction, in one of which cases, *Stevens* v. *Cook* (1), land bought and paid for by one man had, through an oversight, been sold again and patented to another man.

Nor must we hastily concede the law to be, as urged in argument, that the purchaser would be without legal remedy in the event, if such a thing were supposable, of being refused his patent. It is not necessary, however, to discuss that hypothetical position, and it is therefore unadvisable to do so.

It is, in my opinion, manifest from the provisions of the Manitoba Municipal Corporations Act 1880, under which the assessment was made, that every interest in land, except the interest of the Crown and some others specially exempted, was made taxable. There was no difference of opinion on that point in the court below, and I shall adopt what was said upon it by the learned Chief Justice of Manitoba in place of making an independent examination of the statute:

> It was only by sec. 271 of 46 & 47 Vic. c. 1 that provision was made in express terms for unpatented lands being under certain circumstances liable to taxation. By sec. 20 of 43 Vic. c. 1 the council was to assess and levy on the whole real and personal property within its jurisdiction except as hereafter provided, &c., the first exception from taxation mentioned, sec. 23, being real estate vested in or held in trust for Her Majesty, but the legislature plainly intended that lands occupied, though unpatented, should be included among the property liable to taxation, because sec. 39 subsec. 11 makes express provisions for the effect of a sale in the case of land sold for taxes before the issuing of letters patent from the Crown, so that such cases should in no way affect the rights of Her Majesty in the land but only transfer to the purchaser such rights of pre-emption, or other claim, as the holder of the land or any other person had acquired; the previous municipal

(1) 10 Gr. 410.

1891

WHELAN v. RYAN.

Patterson J.

acts 36 Vic. c. 24, 38 Vic. c. 41 and 40 Vic. c. 6, all contain similar provisions. There can, I think, be no doubt that even before the passing of 46 & 47 Vic. c. 1. s. 271, lands purchased from the Crown were liable to taxation before the issuing of the patent, and on default in payment could be sold so as at all events to transfer the interest of the holder though leaving the rights of Her Majesty intact, and imposing on the Crown no obligation to recognise the purchaser or tax sale.

The policy of the law and the obligations of ownership in a new country, where the improvements resulting from municipal expenditure enure to the common benefit of all the owners of land, concur with the provisions of the statute which aim at making all who enjoy the benefits bear their share of the burdens.

There is an Upper Canada case of *Ryckman* v. *Van Voltenburg* (1), in which the contest was between a tax title and the patent which was issued, many years after the tax sale, to the representative of the original nominee of the Crown. The case would appear, if time were taken to examine it which I do not propose to do, to be more like the present case in principle than at first sight it would seem to be, and the concluding passage of the judgment of Draper C.J. would be seen to be, *mutatis mutandis*, appropriate to the Manitoba law. He said:

> I do not see how proper effect can be given to the provision of the assessment laws without holding that the sheriff has power to convey away the present right and future acquired title of the party in whose favour the description for grant issued.

The "description for grant" indicated that the person named was entitled to the patent, and all lands "described as granted," were taxable.

The circumstances that the lands in this case were Dominion lands, while in Upper Canada they belonged to the province under whose legislation they were taxed and sold, is not a distinction that affects the question. No right of the Dominion is touched by the

(1) 6 U. C. C. P. 385.

1891

WHELAN v. RYAN.

Patterson J.

tax sale. What is assessed and sold, either before or after the patent, is the interest of the purchaser.

But it is further objected that these lands, if liable in 1880 to taxation, have not been legally sold. It is said that the rates were not imposed as the statute directed by by-law passed after the final revision of the roll, but only by resolution passed before the roll was finally revised. It is also said that the assessment itself was irregular because the council passed a resolution in each of the years 1880 and 1881 that the lands in the municipality should be assessed or taxed at the uniform rate of $3 an acre. The municipal law in force in each of those years (1),—not the same statute in 1881 as in 1880, for among the annual crops in that fertile country, one that never fails is a statute re-enacting or changing the municipal law—required the assessors to prepare an asessment roll in conformity with a schedule, in which after diligent inquiry they were to set down all the information therein contained, and were to notify each person assessed, if known, of the amount of his assessment. One item, for which the schedule provides three columns, is headed "assessment," the three sub-heads being "Real," "Personal" and "Total" —but what "Assessment" means in relation to the supposed or the actual value of land is not explained. Provision is made for the person assessed furnishing information to the assessors, and the notice given him, if he is known, enables him to appeal to the Court of Revision if dissatisfied with what the assessors do. It happens in this case that the rolls when looked at show that the land in question was assessed at $3 an acre, the same amount mentioned in the resolution of the council, but there is not a word in evidence to discredit the work of the assessors as being strictly what the

(1) 43 V. c. 1, s. 21 ; 44 V. c. 3, s. 24.

statutes required. I see nothing whatever in the objection.

Another complaint is that the notice of sale failed to state, as according to the statute it ought to have stated, that the sale of the lands on the list would begin at 12 o'clock noon. There is no pretense that the omission did any harm. The sale took place before an audience which no one says would have been larger if the hour had been named. I should gathe from what a witness wh was at the sale says that it began some time after noon, and this particular land was not the first sold. The treasurer, who conducted the sale, was a witness at the trial but he does not appear to have been asked at what time of day he began the sale. The defect in the notice was certainly an irregularity, but it cannot be used, as was attempted, as evidence that the sale was not fairly and openly and properly conducted. It does not touch the conduct of the sale, and some other evidence which seems to have been expected to show improper conduct among the bidders, or a combination not to bid against each other, failed to show any such thing. The conduct of the sale is unimpeached.

The policy of the legislation in Manitoba seems to be, as it has been for many years in Ontario, to make tax titles unimpeachable after a reasonable time has been allowed for questioning the regularity of the proceedings under which the land has been assessed and sold. With this object various enactments have from year to year been included in the municipal statutes. These enactments are not all identical in their wording. It would be unwise to attempt an exposition of any of them beyond what the present case calls for. The sale, it will be remembered, was in 1882, and the deed was made by the treasurer on the 12th of March, 1883. On

1891

WHELAN v. RYAN.

Patterson J.

the 29th of April, 1884, was passed the act 47 Vic. ch. 11, which declared in section 340, that:

> All lands heretofore sold for school, municipal or other taxes, for which deeds have been given to purchasers, shall become absolutely vested in such purchasers, their heirs or assigns, unless the validity thereof has been questioned in the manner above mentioned before th first day of January, 1885.

The manner above mentioned was "before some court of competent jurisdiction, by some person interested in the land sold," by section 338 which referred to prospective sales.

This section 340 appears to me to conclude the contest. The argument to the contrary is that the land cannot be held to have been sold for taxes unless there were taxes due and in arrear for two years, and the two learned judges who, in the court below, held against this tax title adopted that reading of the section, and moreover held that, by reason principally of the want of a by-law striking the rate in 1880 and 1881, and the striking of it in the former year before the roll was finally revised, no taxes were due. That is an extreme view of the law which would render these curative provisions of little use, and by perpetuating the uncertainty of the validity of any tax title discourage all persons except speculators from buying at a tax sale, and ensure the sacrifice of the land. I think, with deference to those learned judges, that they have misunderstood the Ontario decisions on which they found their opinions. There has been some difference of opinion as to whether a cognate provision of the Ontario statutes was satisfied if any taxes remained in arrears at the time of the sale or whether it was not essential that some taxes had been due for the specified time which was once five and afterwards three years. I myself held the latter opinion. It had been held that sales were void if made for more

—sometimes a very little more—than the amount of taxes strictly demandable. The curative provision was apparently intended to correct that construction of the law, and prevent a man who let his taxes go unpaid for the five or three years from escaping the consequence of his default by pointing to some error in the figures.

But whatever may have been the views taken on that point the question has usually been whether the taxes were not paid, as in *Hamilton* v. *Eggleton* (1) and in *Donovan* v. *Hogan* (2), or had not been shown to have been *de facto* assessed, as was held in this court in *McKay* v. *Crysler* (3). Where, as expressed by Wilson J. in *Jones* v. *Cowden* (4),

there is no reason to doubt that the land was actually though perhaps not formally taxed

the deed was held valid, as it was in *Jones* v. *Cowden* (4), though that case was ultimately decided on the registry laws. I may refer, also, to the language of my brother Gwynne in *Hamilton* v. *Eggleton* (1) and in *McKay* v. *Crysler* (3) as to the cure of all defects and irregularities when the taxes had been allowed to go unpaid for the full period of five or three years.

But all this discussion seems futile in the face of the sweeping clause contained in an act passed in 1888 (5).

All assessments made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby; but this section shall not in any way affect any appeal or cases pending at the time of the coming into force of this act, when the validity of any such assessment is brought in question.

The present case does not come within the saving proviso, and I am unable to see how we can give effect to the language of the clause, which is to my appre-

(1) 22 U. C. C. P. 536.
(2) 15 Ont. App. R. 432.
(3) 3 Can. S. C. R. 436.
(4) 34 U. C. Q. B. 345, 361.
(5) 51 Vic. ch. 27 s. 58 (Man.).

1891

WHELAN v. RYAN.

Patterson J.

hension very plain and unambiguous, unless we hold the assessments and rates now in question to be valid and binding.

In my opinion we should allow the appeal and restore the judgment pronounced by the Chief Justice at the trial.

Appeal dismissed with costs.

Solicitors for appellant: *Mulock & Robarts.*

Solicitors for respondent: *Martin, Curtis, Anderson & Bearisto.*

THE ELECTRIC DESPATCH COMPANY OF TORONTO (PLAINTIFFS). } APPELLANTS;

AND

THE BELL TELEPHONE COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

1891

*Mar. 19.

*Nov. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Construction of—Telephone service—Transmission of message—Use of wire.

The Bell Telephone Co. carried on the business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the Elec. Desp. Co., agreeing, among other things, not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Elec. Desp. Co. The G. N. W. Tel. Co. afterwards established a messenger service for the purposes of which the wires of the Telephone Co. were used. In an action for breach of the agreement with the Elec. Desp. Co. and for an injunction to restrain the Telephone Co. from allowing their wires to be used for giving orders for messengers, etc.:

Held, Ritchie C.J. doubting, that the Telephone Co., being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the Telephone Co. was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the defendants.

The action is brought by the plaintiffs for breach of

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

(1) 17 Ont. App. R. 292. (2) 17 O. R. 495.

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

an agreement entered into with them by the defendants and asks for damages and for an injunction.

Before the date of the said agreement the defendants in connection with their regular telephone business had been and on that date were carrying on a messenger business at their said central office, where they kept messengers for the delivery of messages, letters and parcels throughout the city of Toronto and its suburbs and had been in the habit of receiving at said central office, by means of their telephones and wires, orders from the lessees of said telephones and others for the services of messengers.

At this time the plaintiffs were carrying on in the city of Toronto the business of the district telegraph and telephone exchange system including telegraph signalling and despatching and delivering messages, goods and parcels by messengers or vehicles, and they possessed and used in such business several lines of telephonic communication in the said city of Toronto, and they had in their employ a number of messengers for the delivery of messages, letters and parcels throughout the said city of Toronto and its suburbs, and an action had been brought by the Canadian Telephone Company (whose interests were subsequently acquired by the Bell Company) against the plaintiffs, and for the purpose and with the view of settling the disputes, as well between the parties to that action as between the defendants and the plaintiffs, an agreement was entered into between the said parties.

By the first clause of the agreement, the defendants covenant and agree :—"That they will and hereby do bargain, sell, assign, and set over to the said Electric Despatch Company, their successors and assigns, for the period of ten years from the 1st day of October, in the year of Our Lord 1882, all the messenger, cab, city express, cartage and livery call business,

now carried on in the city of Toronto by the said Bell Telephone Company, and such other and further business rights and privileges as are hereinafter mentioned, together with the good-will of the said business.

By the 8th clause the defendants covenant and agree :—"That they will place in direct communication with the Electric Company's office all subscribers to their telephone exchange system who desire to order messenger, cab, city express or livery service, and give the Electric Company free communication with the subscribers to the Bell Company telephone system in the same manner as telephone exchange subscribers are now furnished communication with one another.

In the sixteenth clause the defendants expressly agree "that they will in no manner and at no time during the term of this agreement, transmit or give directly or indirectly free or for remuneration any messenger orders to any person or persons, company or corporation, except the Electric Despatch Company as herein set forth, and that from and after the first day of October next, being the month of October, 1882, they will cease to do any such business as herein agreed to be done by the Electric Despatch Company."

The substance of the plaintiffs' complaint is that in or about the early part of the month of July, 1887, the defendants entered into an agreement with the Great North-West Telegraph Company, in which they agreed to render to the latter company the same services, and to grant to them the same privileges, that they had already agreed to grant to the plaintiffs.

At the trial judgment was given in favour of the defendants, the trial judge holding that the messages sent by persons using the wires were not transmitted

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

by the company. On appeal to the Court of Appeal the judges were equally divided and the appeal was dismissed. The plaintiffs appealed to the Supreme Court of Canada.

Robinson Q.C. and *Moss* Q.C. for the appellants. As to messages being "transmitted" by telephone see *The Attorney General* v. *The Edison Telephone Co.* (1). The plaintiffs' claim is not against public policy. *Printing and Numerical Registering Co.* v. *Sampson* (2); *Ontario Salt Co.* v. *Merchants Salt Co.* (3).

The learned counsel also cited *Pugh* v. *The City and Suburban Telephone Co.* (4); *Tipping* v. *Eckersley* (5); *Mogul SS. Co.* v. *McGregor* (6).

Lash Q.C. and *Wood* for the respondents referred to *Smith* v. *The Gold and Stock Telegraph Co.* (7); *Commercial Union Telegraph Co.* v. *New England Telephone Co.* (8).

Sir W. J. RITCHIE C.J.—I have entertained some doubts as to the questions involved in this case which are not entirely removed, but as the other members of the court are unanimous I will not delay the decision.

STRONG J.—I have had some doubt in this case on the question of public policy but my general impressions, as I stated some years ago in *The Ontario Salt Co.* v. *The Merchants Salt Co.* (3), are strongly against avoiding contracts on that ground in cases which have not been the subjects of previous decision. I think, therefore, that I ought not to give effect to these doubts. I concur in the judgment of my brother Gwynne.

(1) 6 Q. B. D. 244.
(2) L. R. 19 Eq. 462.
(3) 18 Gr. 540.
(4) 27 Al. L. J. 163.
(5) 2 K. & J. 264.
(6) 23 Q. B. D. 598.
(7) 49 N. Y. (S. C.) 454.
(8) 61 Verm. 241.

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Gwynne J.

FOURNIER J.—I agree that this appeal should be dismissed.

GWYNNE J.—The question raised by this appeal is simply one as to the construction of an agreement entered into between the appellants and the respondents under the seals of the respective companies and bearing date the 12th day of September, 1882. By that agreement, after reciting among other things that the respondents were then carrying on in the city of Toronto a general district messenger, cab, city express, cartage and livery call business, which they had agreed to sell and the appellants had agreed to purchase upon the terms thereinafter contained, it was witnessed that the respondents did thereby bargain, sell, assign and set over unto the appellants for the period of ten years from the 1st day of October then next, all the messenger, cab, city express, cartage and livery call business then carried on by the respondents in the city of Toronto, and such other and further business, rights and privileges thereinafter mentioned together with the good-will of the business. Now the messenger business so then carried on by the respondents, and so sold to the appellants, was carried on in this manner. The respondents kept a large staff of messenger boys, and when requested by any of the lessees of their telephone instruments to send a messenger boy to such lessee, or to deliver a message for such lessee, they did so by one of their messenger boys, making a charge to the person so served; so likewise when requested by any such lessee to send to such lessee or to any place for such lessee at his request a cab, city express, cart or livery vehicle, or horse, or the like, they did so, in like manner making a charge for such service to the person for whom it was rendered. This being the nature of the business which the respond-

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Gwynne J.

ents were carrying on under the name of a "General District messenger, cab, city express, cartage and livery call business," which they had agreed to sell and had sold to the appellants, the agreement proceeds to provide the means for giving effect to the sale so that it should commence to take effect upon the 1st day of October then next, from and after which day the respondents covenanted to cease to do any such business. The means so provided are as follows: Paragraph 2 of the agreement provides that the respondents will, on or before the 1st day of October then next, transfer the telephone line wires of all cabmen, carters, city expressmen and liverymen who are subscribers to the telephone exchange system from the central office of the said respondents to and through a twenty-five wire magnets telephone switch placed in the central office of the appellants by and at the expense of the respondents for the free use of, and to be operated by, the appellants during the term of the agreement, in such manner and so that all telephone communications over the said telephone line wires of such cabmen, carters, city express and livery men, must pass through said switch in the central office of the appellants. By paragraph 2*a* the respondents agree to transfer to the appellants all existing contracts for cab, livery, express or cartage service, but that if any parties to such contracts should insist on the respondents carrying out the said contracts the appellants should place such parties in direct communication with the respondents as requested during the existence of such contracts, and that the respondents should collect the rates collectable for any services rendered and account to the appellants therefor.

By paragragh 3 the respondents covenanted that the telephone lines of all cabmen, carters, city express and livery men who should thereafter become subscribers

to the respondents' exchange system should be connected only through the appellants' central office as above stated.

By paragraph 4 that the respondents will erect and connect such wires as are necessary for the transmission of communications between the twenty-five wire switch placed in the central office of the appellants as before mentioned and the respondents' central office free of expense to the appellants, and that the appellants should have the free and continuous use of said switch and lines during the continuance of the agreement.

By paragraph 5 that they will maintain and keep in repair the said lines and switch free of expense to the appellants.

By paragraph 6 that they will immediately upon the said lines being transferred as above agreed notify the said cabmen, carters, city express and livery men of the transfer of said lines, constituting the office of the appellants a branch or switch station of the respondents, and that in future the fares payable for each cab, express waggon or livery vehicle ordered through the respondents' telephones will be due and payable to the appellants.

Now it is admitted that every thing so undertaken to be done by the respondents has been done, and that the appellants by the switch placed in their central office have been put into direct communication with all cabmen, carters, city express and liverymen who are subscribers to the respondents' telephone exchange system, and lessees of their telephone instruments who can communicate with each other without the intervention of the respondents or of their servants in their central office. It is contended, however, on the part of the appellants, that if any lessee of a telephone instrument of the respondents should make use of such instru-

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Gwynne J.

ment for the purpose of requesting any other lessee of such an instrument to send to the former a messenger boy, cab, express cart, or livery carriage, &c., that inasmuch as such request would pass through the central office of the respondents such use by any lessee of the respondents of the telephone instrument leased to him would constitute a breach by the respondents of their covenant contained in the agreement, which is as follows, namely:

> That they will in no manner and at no time during the continuance of this agreement transmit or give, directly or indirectly, free or for remuneration, any messenger, cab, city express or livery orders to any person or persons, company or corporation, except the Electric Company as herein set forth, and that from and after the first day of October next they will cease to do any such business as herein agreed to be done by the Electric Company.

The argument in support of this construction of the above covenant is that when one lessee of a telephone instrument of the respondents holds communication with another lessee of such an instrument the communication, whatever it may be, is transmitted over the wires which are the property of the respondents from the one lessee to the other, and that therefore the respondents are the persons who "transmit" that communication, although their sole act and part in the matter is causing the wire extending from the telephone instrument of the one lessee, at the request of such lessee, to be connected with the telephone instrument of the other lessee in utter ignorance of the nature of the communication intended to be passed from one to the other, and that in case such communication should prove to be a request made upon the person receiving the communication to send a messenger to the person sending it that becomes a breach by the respondents of their covenant. The whole question is, therefore, reduced to this: Is this the true sense in which the word "transmit" is used in the covenant?

Doubtless the word "transmit" is an accurate expression to make use of in relation to every message which is sent from one subscriber to the respondents' telephone exchange system to another. Every message is transmitted from one person to another along the respondents' wires, but in such case the person who transmits the message is no other than the sender of it. The wires constitute the mode of transmission by which the one lessee transmits the message along the wires to the other. It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said within the meaning of the covenant to transmit a message of the purport of which they are ignorant. The contention of the appellants in effect operates to construe the respondents' covenant as if it was thus expressed:

That they will not transmit or give directly or indirectly, or suffer or permit any lessee of any of their telephone instruments to make use of any of such instruments for the purpose of transmitting or giving any messenger, cab, city express or livery order to any person or corporation except the appellants.

The respondents' covenant is, in my judgment, open to no such construction. The business which the respondents made over to the appellants was simply that which the respondents had been carrying on. As to all cabmen, carters, city express, or liverymen, which were or should become subscribers to the respondents' telephone exchange system, they have been placed in direct communication with the appellants by the switch placed in the appellants' central office as had been agreed upon, and no complaint is made of any breach by the respondents of their covenant as regards any of such persons; any lessee, however, of a telephone instrument might through his instrument ask any other lessee to

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Gwynne J.

send him a cab or an express cart, equally as a messenger boy, and if the non-interference by the respondents to prevent one of the subscribers to their telephone exchange system from asking another subscriber to send him a messenger would constitute a breach by the respondents of their covenant, so also would the respondents' non-interference to prevent any subscriber from asking another to send a cab or express cart. Now the messenger boy business which the respondents formerly carried on, and which they made over to the appellants, was conducted in this manner. When a lessee of one of their telephone instruments called upon the respondents and requested them through the telephone to send a messenger to him, or to any place for him, they executed the order making a charge for so doing to the person from whom they received the order. The object of the respondents' covenant seems to be to provide that if, after the first of October then next, when the respondents covenanted to cease carrying on the messenger boy, cab, city express and livery order business which they had previously carried on, they should receive any order to send to or for any person a messenger boy, cab, city express, cart, &c., &c., they would transmit the order to the appellants to be executed instead of executing it themselves as they had previously done. This seems to me to be the natural construction of the language used in the covenant. To be in a position enabling the respondents to "transmit" an order to the appellants it must have been given to them and received by them. It is a strained and unnatural construction of the language used to say that an order given through the telephone and sent by one lessee of the respondents' telephone instruments to another is an order given to and received by the respondents. It is assumed by the appellants that while the respondents themselves

carried on the business no lessee of any of their telephone instruments could have transmitted through his telephone a request to another lessee to send to the former a messenger, or a cab, city express, or the like, but there is no foundation for any such assumption. The respondents could not have deprived any lessee of the right to use his instrument for the purpose of transmitting to another lessee a request to execute any such order, nor could the respondents have deprived the party receiving such an order of his right to execute it. The appellants' contention, however, is that it is now incumbent upon the respondents, by reason of their covenant, to intercept in their central office, as it is contended they can, an order not addressed to them—but to intercept all orders passing along the wires from one lessee to another which asks for a messenger or a cab, city express or the like, and that unless the respondents so intercept such orders and send them to the appellants the covenant of the respondents is broken. Now in point of fact the respondents have no means whatever of knowing the nature of any communication passed along the telephone wires from one lessee of a telephone instrument to another until the communication has passed through and has already been received by the party to whom it is addressed, and then only by the adoption of a practice by no means commendable, and which, though it may be within their power, certainly constitutes no part of any duty the respondents are called upon to discharge, namely, of employing persons for the special purpose of spying and prying into every communication which passes along the wires from one lessee to another in order to discover whether any of such communications contains a request for a messenger, cab, city express or the like to be sent anywhere. Such an interpretation of the respondents' covenant

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Gwynne J.

would, moreover, involve a violation of every lease of an instrument which was in existence in September, 1882, when the agreement was entered into, and the substitution of new leases restraining the lessees from ever transmitting through their instruments an order for a messenger boy, cab, or city express or any livery order to any other lessee than to the appellants, and restraining any lessees other than the appellants receiving any such order from another lessee from executing it under penalties sufficient to protect the respondents from the breach of their covenant which, as is contended, would be involved in such transmission of such a message.

It is impossible, in my opinion, to conceive that the parties to the agreement ever contemplated that a request sent by one lessee of the respondents' telephone instrument to another for a messenger boy or a cab or city express to be sent anywhere could constitute a breach by the respondents of their covenant. What the parties did contemplate I have no doubt was, that the respondents should cease to carry on the messenger boy, cab and express order business which they had previously carried on, and that if they should be asked as they formerly had been by any of their lessees for a messenger boy they would transmit the order to the appellants to execute and would not execute it themselves, and as it is admitted that the respondents never have committed any breach of the covenant by neglecting to send to the appellants any such order addressed to and received by them, nor any breach unless it can be held that an order spoken into his telephone instrument by one lessee and so addressed and sent to another and not intercepted by the respondents, and diverted from its original destination and given instead to the appellants, should constitute a breach of their covenant; and as I am of opinion that

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Patterson J.

the respondents' covenant is not open to any such construction the appeal must, in my opinion, be dismissed with costs.

PATTERSON J.—I cannot say that I have any doubt about this case. I entirely concur in the construction of the contract presented in the divisional court by the Chancellor and Mr. Justice Ferguson, and in the Court of Appeal by Mr. Justice Osler and Mr. Justice Maclennan.

The messenger business, though it may require telephone communication to enable it, in these days of telephones, to be successfully carried on, is no more a branch of the business of a telephone company than any other enterprise in which the company may choose to engage, such for example as a grocery, as was suggested during the argument by one of my learned brothers. The contention of the appellants involves the assertion of the right of the company to refuse the use of its lines,—those lines in respect of which a servitude is imposed on the public highways, street, bridges, watercourses and other such places (1); for sending an order for a messenger, or for groceries, to any other shop but its own. It may be, though I doubt it, that if brought to the test of strict law the abstract right to establish such a monopoly could be maintained, but it would be a rash thing to make the experiment, and I have no idea that clause 16 of the contract with the appellants was framed with any such purpose or understanding. The language of the clause creates no difficulty in my mind. The agreement on the part of the Bell Company is contained in paragraphs numbered from 1 to 16, and one numbered 2*a*. Number one is the general assignment of the business and good-will, and the others are mainly oc-

(1) 43 V. c. 67 s. 3 (*D*).

1891

THE ELECTRIC DESPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA.

Patterson J.

cupied with details of what is in a general way covered by number one. No details specially referable to the good-will of the business are given till we come to the last paragraph. It was to be expected that orders would, for a while at all events, continue to come to the Bell Company for cabs or messengers. What was to be done with them? Those are the orders which I understand paragraph 16 to refer to. It is more general than paragraph 8 which refers to orders of the same kind, number 16 not being confined to orders coming over the wires. As well expressed by the learned chancellor "both stipulations are *in pari materiâ*, and are such as are usual in the case of a sale of a business and good-will to prevent the seller from taking an active part, whether directly or indirectly, in derogating from the value of the property and good-will sold and transferred."

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for respondents: *Kingstone, Wood & Symons.*

JOSEPH POIRIER (DEFENDANT).....APPELLANT; 1891

AND *Mar. 11, 12.
*Nov. 17.

JEAN BAPTISTE BRULÉ (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Trustee—Conditions to be performed by cestui que trust—Failure of—Revocation by grantor.

By deed between B. grantor of the first part, certain named persons, trustees, of the second part, and P. grantee of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside the trial judge held that B. when he executed it was ignorant of its nature and effect and set it aside on that ground. The full court, on appeal, dissented from this finding of fact, and varied the judgment by directing that the trustees should reconvey the property to B. on the ground that P. had failed to perform the conditions he had agreed to by the deed. On appeal to the Supreme Court :—

Held, affirming the decision of the court below, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed, and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a reconveyance of the property.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment of the trial judge in favour of the plaintiff. The facts of this case

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

1891

POIRIER v. BRULÉ.

are sufficiently set out in the above head-note, and in the judgment of Mr. Justice Strong.

S. H. Blake Q.C. for the appellant cited *Hall* v. *Hall* (1); *Phillips* v. *Mullings* (2); *Campbell* v. *Edwards* (3); *Henry* v. *Tupper* (4); *Bryant* v. *Erskine* (5).

Gemmill for respondent referred to *Roberts* v. *Brett* (6); *Goodall* v. *Elmsley* (7); *Coatsworth* v. *City of Toronto* (8).

Sir W. J. RITCHIE C.J.—The learned trial judge thought:

> The fact that the covenants or the deed have not been performed is not necessary for the decision of this case. The main question is: Did the plaintiff understand what he was doing when he signed the deed? Taking into consideration his great age and the non-intervention of a professional or an interested person on his behalf, the deed was undoubtedly executed under the influence of his spiritual adviser, Father Jonckau and without independent advice. I exonerate Father Jonckau from being influenced by any improper motives but he was guided apparently in the matter by the defendant Johnson. In deeds of this character the absence of a power of revocation and the improvidence of the transaction, independent of the question whether or not the grantor understood what he was about, will in certain cases induce the court to set aside a deed, but on the evidence of the case before me and from the surrounding circumstances I think this deed cannot stand. The plaintiff did not understand the settlement he was making and in coming to this conclusion I am supported by the authorities of *Dutton* v. *Thompson* (9) and *Griffiths* v. *Robins* (10) and *Wollaston* v. *Tribe* (11).

With regard to the costs, as Johnson admitted he had never acted in the trusts of this settlement, that he had refused to furnish a copy of the deed to his *cestui que trust*, although payment was offered for such

(1) 8 Ch. App. 430.
(2) 7 Ch. App. 244.
(3) 24 Gr. 152.
(4) 29 Verm 358.
(5) 55 Me. 153.
(6) 18 C.B. 561.
(7) 1 U.C.Q.B. 457.
(8) 10 U.C.C.P. 73.
(9) 23 Ch. D. 278.
(10) 3 Madd. 191.
(11) L. R. 9 Eq. 44.

copy, from thus refusing plaintiff the information he was entitled to receive and from the fact of his being the author of the impeached deed he did not think him entitled to costs and made no order in respect thereof; he directed Poirier to pay plaintiff's costs and directed an account of the live stock (not being the produce of the stock on the farm when taken over by Poirier) sold by Poirier to be taken and the value paid by Poirier to plaintiff; deeds in defendant's possession to be deposited in court and proper conveyances made at the cost of the trust estate by Johnson to plaintiff, injunction to be made perpetual and Poirier to give up possession forthwith of plaintiff's property.

On appeal to the full court this decree was varied, the court refusing to rectify or to set aside the deed and declare it void, but affirmed the decision on the ground that the conditions to be performed by Poirier had not been carried out.

From the purport and intention of this deed, and the object it was intended to compass, I think the performance of the covenants must be considered in the nature of conditions precedent, and it having been clearly established as a question of fact to the satisfaction of the court of first instance that these stipulations had been completely set at nought by Poirier, the court of appeal agreeing in this conclusion, I do not see how justice can be done otherwise than by confirming the judgment of the court of appeal and dismissing this appeal.

STRONG J.—This is an appeal from a judgment of the Supreme Court of British Columbia pronounced in an action in which the respondent was plaintiff and the appellant and one Edward Mainwaring Johnson were defendants. By the statement of claim the respondent impeached and sought to have set aside or

1891

POIRIER v. BRULÉ.

Strong J.

rectified the deed hereafter mentioned. The learned Chief Justice of British Columbia prefaces his judgment with a concise statement which gives the terms and effect of the deed and embodies the material facts of the case. It is as follows:

In and previous to the year 1882 the plaintiff, a French-Canadian farmer, was entitled for his own sole benefit to sections 45 and 46 in Sooke district, and a cottage and some live and dead stock thereon. The plaintiff being of very advanced years, as was also his wife, and the defendant Poirier, also a French-Canadian, being a neighbour and ostensibly at least a farmer, and a much younger man, it appears to have been suggested that Brulé should make over all his property both land and chattels to Poirier, in consideration of his supporting and providing for the plaintiff and his wife during their lives, at the termination of which Poirier was to hold the same for his own benefit. After a good deal of preliminary negotiation, the precise nature of which was much disputed but which in our opinion it is neither possible nor necessary for us now to decide, a deed was executed dated 12th of September, 1883, and made between Brulé of the first part (therein called the grantor) the defendant Poirier (called the grantee) of the second part, and Father Jonckau, O. M. I. (deceased September 7th, 1888, before the institution of this suit June 22nd, 1889) and the defendant E. M. Johnson (called the trustees) of the third part. This deed was duly registered in the Land Registry Office. It recites the general intention and conveys the land to the trustees as joint tenants in fee on the trusts thereinafter mentioned. It also conveys to them the chattels mentioned in the schedule to be applied on the same trusts as nearly as may be as the land. The trusts declared are if Brulé survive Poirier in trust to reconvey to Brulé. If Poirier survive Brulé and shall during the lifetime of the latter and his wife have performed and fulfilled the stipulations in the deed separately enumerated and intended for the support or for the advantage and security of the grantor then the trustees after the death of Brulé and his wife are to convey to Poirier for his own benefit, as well the lands in question as also the live and dead stock enumerated in the schedule. But no trust is declared in the contingency of Poirier surviving Brulé and having neglected to perform the stipulations set out in the deed. Nor is there any provision for terminating the arrangement during the lifetime of both parties in case of Poirier's continued neglect.

The respondent's statement of claim distinctly alleges that the appellant had failed to perform the

covenants of the deed which were expressly made conditions precedent to the trust which was limited in his favour in case of his survival of the respondent.

The statement of defence on the other hand alleges performance by the appellant of those conditions.

The action was tried before Mr. Justice Drake without a jury, and that learned judge pronounced a judgment in favour of the respondent, ordering that the deed should be set aside upon the ground that the respondent had not understood the nature of the settlement he was making.

Against this judgment the present appellant appealed to the full court, whereupon the order now under appeal was made varying the original judgment by discharging so much of it as set aside the deed and substituting therefor a direction that the appellant should forthwith reconvey the lands and reassign the chattel property to the respondent.

Mr. Justice Drake at the trial found that the covenants entered into by the appellant, and which as I have said were conditions precedent to any trust arising in his favour on the death of the respondent, had not been performed. In his written judgment he says :

> The evidence shows that after the first year but a small portion of the obligations of the defendant Poirier have been performed, and he has dealt with the live stock as his own which under the deed did certainly not belong to him, and were not to become his property until after the death of the grantor.

And in his judgment on the appeal the learned chief justice says :

> The judge below has found, and we agree with him, that those stipulations have been completely set at nought by Poirier.

And Mr. Justice McCreight also says :

> I think there is no case shown for rectification or rescission, but I think there is an equity open to the plaintiff by which the decision of my brother Drake may be supported. His judgment states that the

1891

POIRIER v. BRULÉ.

Strong J.

covenants of the deed have not been performed by the defendant, and the evidence decidedly points in that direction.

We must, therefore, in view of these concurrent judgments in both the courts below, take it to be established as a fact that Poirier had failed to perform the obligations which by the deed he had undertaken. According to the clear and distinct terms of the deed the contingent trust in his favour had therefore entirely failed, and he and the trustee consequently held the property of the respondent freed from any trusts except those in the respondent's own favour, the deed containing no ulterior trust and making no express provision for the disposition of the property in this event of the respondent's non-performance of his covenants. But it is clear beyond doubt that when property is conveyed to a trustee upon trusts which fail the trustee does not himself acquire the beneficial interests but holds the property thenceforth as a trustee for the settlor in whose favour the law raises a resulting trust. It is equally clear that when property is in the hands of a trustee merely for the benefit of the settlor himself he can at any time revoke such trusts and call upon the trustee to reconvey to him.

In the present case both these elementary principles of courts of equity relating to trusts have been rightfully applied by the court below.

By reason of the appellant's failure and neglect to perform his covenants the contingent trust limited in his favour in the event of his surviving the respondent has failed and cannot possibly arise.

Then the only remaining trusts are in favour of the respondent himself, and these he is at liberty to put an end to at his option and to call on the trustee to reconvey.

1891

POIRIER v. BRULÉ.

Strong J.

I am therefore of opinion that the judgment appealed against was entirely right, and that the reasons assigned for their conclusion in the judgments of the Chief Justice and Mr. Justice McCreight are in all respects a correct application of well-settled principles of equity to the facts established by the evidence.

Whilst I say this I am far from differing with the view of Mr. Justice McCreight that the deed was not sustainable upon the ground he proceeded upon, with this exception, however, that I incline to agree with the full court in thinking that the lapse of time was sufficient to bar the respondent's right to a rescission. We need not, however, consider this. It is impossible that the judgment of the full court, proceeding as it does upon the clearest principles of the law of trust, can be in any way successfully impugned.

Leave was given by the court to amend the statement of claim by claiming a reconveyance, and although this has not been formally done we may consider the case as if the record had been actually amended. I quite agree that it was a proper case in which to give leave to amend.

It is to be observed that the order in appeal does not affect that portion of the decree made by the court of first instance which directs an account to be taken of the live stock and personal estate sold or disposed of by Poirier. This direction therefore still stands. I think it was a proper direction.

The learned counsel for the appellant suggested that an account should be directed of what Poirier had expended in the performance of his covenants, and that this should be allowed to him. I cannot assent to such an account. To give such a direction would, it seems to me, be in effect to give damages to a man who has broken his covenants in respect of what he has done and expended towards a performance of them,

1891

POIRIER v. BRULÉ.

Strong J.

in which performance, however, he has ultimately failed. An account directed for such a purpose would not, in my opinion, be justified by any principle of either law or equity. The appeal must be dismissed with costs.

FOURNIER, GWYNNE and PATTERSON JJ. concurred in the appeal being dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Theodore Davie.*

Solicitor for respondent: *J. Rolland Hett.*

THE MARITIME BANK OF THE DOMINION OF CANADA (PLAINTIFFS) ..... } APPELLANTS ;

1891

*Mar. 13.
*Nov. 17.

AND

R. A. & J. STEWART (DEFENDANTS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Final Judgment—Judicial discretion—R. S. C. c. 135 ss. 2 (e) and 27.

The defendants to an action in the High Court of Justice for Ontario were made bankrupt in England, and the plaintiffs filed a claim with the assignee in bankruptcy. The High Court of Justice in England made an order restraining the plaintiffs from proceeding with their action and a like order was made by a Divisional Court Judge in Ontario perpetually restraining plaintiffs from proceeding but reserving liberty to apply. This latter order was affirmed by the Divisional Court and the Court of Appeal, and plaintiffs sought an appeal to the Supreme Court of Canada.

Held, that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act.

Held, per Patterson J., that if it were a final judgment the order the plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which sec. 27 of the Supreme Court Act does not allow an appeal.

MOTION to quash for want of jurisdiction an appeal from the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which an order of Rose J. staying proceedings in the cause was upheld.

The facts material to the motion are sufficiently stated in the above head-note and in the judgment of Mr. Justice Patterson. The judgment of Rose J. on

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

(1) 13 P.R. (Ont.) 491. (2) 13 P.R. (Ont.) 262.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

the application for the order is reported in the Ontario Practice reports (1).

McCarthy Q. C. and *Ferguson* Q. C. for the motion, cited *Phosphate Sewage Co.* v. *Molleson* (2); *Virtue* v. *Hayes* (3); *Ontario & Quebec Railway Co.* v. *Marcheterre* (4); *McKinnon* v. *Kerouack* (5).

Robinson Q. C. and *Gormully* Q. C. *contra* referred to *McHenry* v. *Lewis* (6); *Barrett* v. *Day* (7); *Lawrance* v. *Norreys* (8).

Sir W. J. Ritchie C.J., and Strong, Fournier and Gwynne JJ., were of opinion that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act, and that the appeal should be quashed.

PATTERSON J.—Two actions, one commenced on the 15th of March, 1887, and the other on the 12th of March, 1888, on a number of bills of exchange, &c.

The defendants are bankrupts. A receiving order was made in their bankruptcy in England on the 15th of March, 1887, the same date as the writ in the first action, and a year before the issue of the writ in the second.

The plaintiff bank is also being wound up under the Canadian Winding-up Act, and these actions are brought by the liquidators by order of the court.

On the 17th of September, 1887, the liquidators filed in the English Bankruptcy Court a claim for the same debts for which these actions are brought.

Orders were made in the English court restraining the prosecution of these actions on the third of March,

(1) 13 P. R. (Ont.) 86.
(2) 1 App. Cas. 780.
(3) 16 Can. S.C.R. 721.
(4) 17 Can. S.C.R. 141.
(5) 15 Can. S. C. R. 111.
(6) 22 Ch. D. 397.
(7) 43 Ch. D. 435.
(8) 15 App. Cas. 210.

1888, in the first action, and on the 29th of May, 1888, in the other.

On motion of the defendants orders have been made in these actions staying proceedings for ever, but reserving leave to apply.

The plaintiffs desire to appeal from those orders, and the question of our jurisdiction to hear the appeal depends on the view proper to be taken of the character of the orders.

Are they final judgments within the meaning of that term as used in the Supreme and Exchequer Courts Act (1), in sections 24 and 28 ?

If they are final judgments an appeal will lie unless forbidden by section 27 which enacts that

No appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same ; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions, suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court.

The expression

"Final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded (2).

The case of *Harley* v. *Greenwood* (3) was decided in 1821 under the act 49 Geo. III c. 121, which enacted (4)

That it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c., without relinquishing such action,"

And

That the proving or claiming a debt under such commission shall be

(1) R.S.C. c. 135.
(2) Sec. 2 (*e*).
(3) 5 B. & Al. 95.
(4) In sec. 14.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

Patterson J.

deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed.

It was shown by Bayley J., who delivered the judgment of the court, that the commencement of an action in one court does not destroy the right of the party to commence an action for the same debt in another court; that while the pendency of another action might be pleaded in abatement, it could not be pleaded in bar; and that to restrain a creditor from commencing an action until the commission was superseded might be very injurious to him, perhaps leading to his debt being barred in the interim by the statute of limitations; and it was held that the words of the statute would be satisfied and a very beneficial remedy given to the creditor by holding that when a creditor has proved his debt and afterwards brings an action the bankrupt may, under the act, apply to the Chancellor to expunge the debt, or to the court in which the action is brought to stay the proceedings.

Now we need not follow the process of evolution by which, three quarters of a century after the passing of the act 49 George III, the law took the slightly different form in the English Bankruptcy Act, 1883, sections 9 and 10.

That inquiry, and the effect upon us in this country of the English statute, and the question of election which was dealt with in terms by the act from which I have quoted, would doubtless be proper topics for discussion if we were hearing the appeal. I cite the case of *Harley* v. *Greenwood* (1) for the assistance it gives in dealing with the two points on which our decision has at present to turn. It supports the view that this order is not a final judgment, inasmuch as it suspends only and does not put an end to or finally determine and conclude the action, and it also supports the

(1) 5 B. & Al. 95.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

Patterson J.

contention that the order is made in the exercise of the judicial discretion of the court or the judge who made the order. Whatever may be the grounds on which the orders are to be considered as having been made; whether on the idea that the plaintiffs elected to proceed in the bankruptcy court; or on the ground that our courts are required by the effect of the English statute to act as auxiliary to the court of bankruptcy; or that on some considerations of comity it is proper to do so, the order must, as I apprehend, be regarded as an exercise of discretion. The propriety of what was done, in view of all the considerations to be taken account of, is quite a different thing. That question has been debated at least three times before the courts below, and the plaintiff may have no just cause to repine if the law which creates and limits our jurisdiction does not afford him an opportunity to debate it again.

I agree that we must quash the appeal.

Appeal quashed with costs.

Solicitors for appellants: *Gormully & Sinclair.*

Solicitor for respondents: *A. Ferguson.*

1890
*May 13.
1891
*Feb. 24.
*Nov. 17.

JAMES BENNING, *et al.* (PLAINTIFFS)
AND
JAMES CRADOCK SIMPSON, *et al.*, *es-qual. par reprise d'instance*..... } APPELLANTS;

AND

THE HONOURABLE J. R. THIBAUDEAU *es-qual.*(DEFENDANT)..... } RESPONDENT.

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

Insolvency—Claim against insolvent—Notes held as collateral security—Pledge—Collocation—Joint and several liability.

Held, affirming the judgment of the court below, that a creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him for the purpose of effecting a pledge of the securities is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums of money he may have received from other parties liable upon such notes or which he may have realized upon the goods.

Fournier J. dissenting, on the ground that the notes having been endorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of the co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor.

Gwynne J. dissenting, on the ground that there being no insolvency law in force, the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed.

---

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

1890

BENNING v. THIBAUDEAU.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Court of Review (2).

The following special case was agreed upon for the decision of the appeal to the Supreme Court of Canada:

On the 13th February, 1882, Alphonse Marçotte of the city of Montreal, merchant, being insolvent, made an assigment of his estate, property and effects to the respondent, one of his creditors, for the benefit of the whole of his creditors.

On the 22nd of April, 1882, appellants, creditors of said Marcotte, filed their claim duly attested upon oath for an amount of $19,139.83 in the hands of the respondent, and the latter after having realized portion of Marcotte's property assigned as above prepared and advertised a dividend sheet at the rate of 12½ cents in the dollar, payable on the 13th July following.

Appellants were collocated on said dividend sheet for a sum of $2,392.49, but when they demanded payment of the same on the 13th of July, 1882, the payment thereof was refused. Hence the present action by appellants against respondent demanding payment of said sum of $2,392.49.

To this action respondent pleaded that appellants had no claim against Marcotte; that before his insolvency Marcotte had transferred to appellants promissory notes and merchandise for a large amount; and that, in crediting Marcotte with the sums paid out of the promissory notes and merchandise transferred as above and of the amounts realized therefrom, appellants claim was paid in full.

By their answer to this plea appellants admitted having realized subsequently to the filing of their claim, out of the promissory notes and merchandise to them transferred as collateral security by Marcotte,

(1) M. L. R. 5 Q. B. 425; 17 Rev. Lég. 173. (2) M. L. R. 2 S. C. 338.

1890

BENNING v. THIBAUDEAU.

certain sums of money very much inferior to the amount of their claim, but they claimed the right to rank for the original amount of their claim until paid in full.

Appellants made advances to Marcotte up to the amount of their claim on his promissory note for a like amount taking as further security a transfer from Marcotte of the notes and goods hereinafter mentioned or referred to.

The collateral securities, so transferred by Marcotte to appellants, consisted of promissory notes endorsed by Marcotte and of a certain quantity of merchandise, the amount of said promissory notes being $23,436.30 signed almost all of them by one Moodie, to the order of Marcotte and endorsed by him.

Moodie had also become an insolvent and appellants realized out of his estate, in virtue of said promissory notes, $9,676.24; of which $8,363.76 was received in May, 1882, subsequent to the filing of their claim but previous to the 13th July, 1882, when the dividend was made payable, $911.57 in May, June and July 1882; and $248.91 in April, 1883.

Appellants also realized out of the goods and merchandise transferred to them by Marcotte a further sum of $490.00, making with that of $9,676.24 a total sum of $10,166.24.

The parties are agreed to submit to this honourable court for its decision as they have done in the court below, the following question, to wit:

"Are appellants entitled to a dividend on the full amount of their claim as filed, to wit on $19,139.83, or only on the balance of said claim after deduction in whole or in part of the $10,166.24 by them realized out of said promissory notes and goods and merchandise."

In the Supreme Court of Canada the case was first argued on the 13th May, 1890, the Honourable Mr.

Justice Taschereau being absent, but by order of the court the case was set down for a rehearing before the full court at the February sessions 1891.

Beïque Q. C. for appellants, and *Geoffrion* Q. C. for respondent.

In addition to the points of argument and authorities cited by counsel in the courts below and which are fully given in the reports of the case in the courts below (1); *Beïque* Q.C. counsel for appellant, on the 1st point : Is the present case one of joint and several obligation ? cited Laurent (2); Marcadé (3); Demolombe (4); and Art. 1105 C.C.; on the 2nd point: If it is not a case of joint and several obligation proper, is it not at least, one of joint and several debtors? Marcadé (5), and Daniel on negotiable instruments (6); and on the 3rd point: Is the bearer of a joint and several obligation, or the creditor of joint and several debtors by way of suretyship or otherwise entitled to rank on the estate of each of the co-debtors for the full amount of his claim, until he has been paid in full without being obliged to deduct therefrom the amount received from one or the other, by way of dividend, after the filing of the claim? Laurent (7); *Benning* v. *Thibaudeau* (8.) Judgment of Mr. Justice Jetté and cases cited by him. Dalloz Vo. Distribution par contribution (9) and Arts. 1117, 1156, 1157 C.C.

Geoffrion Q.C. for respondent, cited and relied on Arts. 1573, 1578, 1969 and 2288 C.C. Arts. 605, 741 C.P.C., and Troplong, Gage (10); *Ontario Bank* v. *Chaplin* (11) and other cases there cited.

(1) M.L.R. 2 S.C. 338; M.L.R. 5 Q.B. 425; 17 Rev. Lég. 173.
(2) 17 vol. No. 294.
(3) 4 vol. No. 602.
(4) 26 vol. Nos. 210, 231.
(5) 4 vol. No. 601.
(6) P. 830.
(7) 17 vol. No. 294.
(8) M.L.R. 2 S.C. 338.
(9) No. 181.
(10) Nos. 415, 437, 441.
(11) 15 Rev. Lég. 435.

1891

BENNING v. THIBAUDEAU.

Strong J.

Sir W. J. RITCHIE C.J.—For the reasons given by the Court of Queen's Bench for Lower Canada (appeal side) (1), I am of opinion that the appeal should be dismissed with costs.

STRONG J.—I am of opinion that this appeal must be dismissed. In the joint statement of facts submitted by the parties it is admitted that "the appellants made advances to Marcotte up to the amount of "their claim on his promissory note for a like amount "taking as further security a transfer from Marcotte "of the notes and goods hereinafter mentioned. The "collateral securities so transferred by Marcotte to the "appellants consisted of promissory notes endorsed "by Marcotte and of a certain quantity of merchandise, the promissory notes being signed almost all of "them by one Moodie, to the order of Marcotte and "endorsed by him."

From this state of facts it appears that the promissory notes, out of which the appellants obtained the greater part of the partial payment of their debt which has given rise to this controversy, were held by them by way of pledge, and not absolutely. Therefore as the pledged notes exceeded in amount the original debt due from Marcotte to the appellants, the appellants, if they had collected the full amount of these notes would have been liable to account to Marcotte's estate for the balance remaining after the satisfaction of their own claim. Under these circumstances it is impossible to say that as between Marcotte and the appellants any new debt was created or liability incurred by Marcotte's endorsement of Moodie's notes. There was but one single debt due from Marcotte to the appellants represented by his promissory note in their favour and not a new joint and several debt for an

(1) M.L.R. 5 Q.B. 425.

1891

BENNING v. THIBAUDEAU.

Strong J.

amount never really due to them from Marcotte. It is always competent as between the immediate parties to securities, such as bills and notes transferred by endorsement, to show that the endorsement was made with the intention and for the sole purpose of effecting a pledge of the securities, which was the fact in the present case. Nouguier (1), Alauzet, Droit Commercial (2).

There was therefore no joint and several liability on the part of Marcotte, and the question principally argued and which does call for an adjudication in the case of the *Ontario Bank* v. *Chaplin* (3) does not arise at all in the present case.

The only question therefore, is whether the moneys realized by the appellants in respect of the pledged notes and property are to be treated as payments *pro tanto* of the appellants' debt. Of this there can be little doubt, at least as regards the proceeds of the notes which were placed by the debtor in the hands of his creditor for this very purpose. It is true that the amount arising from the notes was not received by the appellants, until after they had filed their claim, but this can make no difference since the only question can be, what was the amount due to the appellants at the time they were entitled to judgment? The rule of English bankruptcy procedure, which does not oblige a creditor, who has proved his debt, to give credit for payments received by him from another party after the date of the proof, is a purely arbitrary rule of procedure and can have no application to a case like the present. The administration and winding-up of the insolvent's estate was not under any statute, but under a voluntary creditors' deed, and no law says that any difference shall be made between payments re-

(1) Ed. 4, Vol. 1, p. 460. (2) Ed. 3, Vol. 3, p. 203.
(3) See p. 156.

1891

BENNING v. THIBAUDEAU.

Strong J.

ceived before, and those received after the filing of the claim. I repeat the only question can be, what was due at the time the action was taken or the judgment rendered, and the assignee is on ordinary principles entitled to credit for all payments made anterior to that date.

Further, I do not see any reason why any difference should be made between the credit to be given for the amount of the notes collected and the $490 produced by the sale of the goods. The sale of the goods is not in any way impeached, and must be assumed to have been authorised or acquiesced in by Marcotte; then the price ought, it would seem, to be credited just as is the money arising from the notes. The Court of Queen's Bench have, however, made a distinction founded upon the fact that the $490 was not received until after the preparation of the dividend sheet. With great deference, I am unable to see any ground for this distinction. The appellants were only entitled to judgment for the amount actually remaining due to them deducting all payments. I should, therefore, if it had been open to us to do so have been prepared to have affirmed Mr. Justice Mathieu's judgment in its integrity. There has, however, been no cross appeal, and the judgment of the Court of Queen's Bench must consequently be affirmed with costs, subject to the correction of an obvious error in calculation pointed out in the respondent's factum which requires that the sum of $1,550.50 for which judgment has been rendered should be reduced to $1,214.06.

FOURNIER J.—Les faits ci-dessus énoncés dans l'admission des parties (1) donnent lieu à la question suivante: les appelants ont-ils droit à un dividende sur le montant entier de leur réclamation telle que produite,

(1) *See* p. 111.

savoir, sur $19,139.83, ou seulement sur la balance de cette réclamation, après déduction en tout ou en partie de la somme de $10,166.24 qu'ils ont réalisés sur les billets promissoires et les marchandises qui leur avaient été transportés par Marcotte ?

Les appelants prétendent que les billets de Moodie qui leur avaient été transportés par endossement comme garantie de la dette de Marcotte étaient devenus autant de créances solidaires contre le failli et les signataires ou endosseurs de ces billets, et qu'en vertu des règles de la solidarité ils ont droit de réclamer la totalité de chaque créance de chacun des débiteurs solidaires jusqu'au parfait paiement. Qu'en conséquence de la faillite de Marcotte, ils ont droit pour arriver au paiement intégral de leur créance, de réclamer de l'intimé, son syndic, sur le chiffre nominal de leur créance, au moment de la faillite, sans déduction des sommes reçues subséquemment des autres débiteurs des créances transportées.

L'intimé prétend au contraire que les billets et marchandises transportés par Marcotte aux appelants n'étant en leur possession qu'à titre de gage, la réalisation de ce gage, à quelque moment qu'elle se produise, a pour résultat nécessaire l'extinction *pro tanto* de leur créance. En conséquence, l'intimé prétend que la question de solidarité ne se présente pas et qu'il n'y a pas lieu d'en appliquer les principes.

La cour de première instance a donné gain de cause à l'intimé en décidant que les règles de gage devaient s'appliquer dans le cas actuel, et que les appelants n'avaient le droit de concourir avec les autres créanciers du failli que sous la déduction des sommes reçues de la vente des marchandises et de la perception des billets transportés.

La cour de Revision pour le district de Montréal a modifié ce jugement en déclarant que le produit des

1891

BENNING v. THIBAUDEAU.

Fournier J.

marchandises devait être imputé comme un paiement sur la réclamation des appelants, mais que ceux-ci avaient le droit de concourir avec les autres créanciers sur le montant de leur réclamation, $19,139.83, sous la déduction seulement de la somme de $490.00 provenant de la vente des marchandises.

La cour du Banc de la Reine appelée plus tard à se prononcer sur ces questions, a confirmé le jugement de la cour de première instance et décidé que les appelants n'avaient le droit de concourir avec les autres créanciers que sous la déduction de tout ce qu'ils avaient reçu de Marcotte, tant des billets promissoires que des marchandises transportées.

Par l'appel à cette cour la même question nous est présentement soumise.

La position des appelants est-elle véritablement celle de créanciers solidaires du failli Marcotte et des signataires et endosseurs des billets par lui transportés aux dits appelants ?

C'est un principe incontestable que le faiseur d'un billet promissoire s'oblige directement envers toutes les parties qui peuvent ensuite en devenir porteurs et que ces derniers ne se représentent pas les uns les autres, mais sont tous créanciers du faiseur en vertu de leurs propres droits. Massé, Droit Commercial (1).

Les appelants sont devenus les créanciers directs de Moodie par le transport que Marcotte leur a fait des billets que Moodie avait souscrits en sa faveur. Ces billets transportés pour assurer le paiement de la dette de Marcotte et faits payables à son ordre ont par l'effet de l'endossement de Marcotte rendu le faiseur, Moodie, et l'endosseur Marcotte, débiteurs conjointement et solidairement des appelants.

Par l'admission de faits des parties on voit que les billets et les marchandises ont été transportés aux

(1) 3 vol. No. 1524.

appelants comme sûreté collatérale, *as further security*, pour assurer le paiement de leur réclamation. C'est sur ce caractère de sûreté collatérale donné au transport des billets et marchandises que l'intimé se fonde pour soutenir qu'il ne s'agit pas ici de solidarité, mais simplement de gage. Cette prétention est évidemment erronée quant aux billets, car ils ont été endossés et les appelants en sont devenus propriétaires sans conditions restrictives et ont acquis la qualité de créanciers solidaires contre Marcotte et tous les signataires ou endosseurs de ces billets. La solidarité étant établie par la loi, entre eux, il aurait fallu une condition spéciale dans le transport pour y déroger.

Le fait que ces billets ont été transportés comme garantie collatérale, même s'il avait l'effet de constituer un gage ne détruirait aucunement l'effet de la solidarité. Les solidaires de Marcotte n'en seraient pas moins responsables envers les porteurs. La signification que l'intimé donne aux mots "garantie collatérale" n'est pas celle qu'ils ont en loi ; elle n'a pas l'effet de diminuer les obligations légales découlant de la sûreté transportée, mais elle est au contraire une garantie additionnelle.

L'article 1103 du Code Civil déclare qu'il y a solidarité de la part des débiteurs, lorsqu'ils sont obligés à une même chose, de manière que chacun d'eux puisse être séparément contraint à l'exécution de l'obligation entière, et que l'exécution par l'une libère les autres envers le créancier.

Dans le cas actuel les appelants n'avaient qu'une réclamation et deux débiteurs dont chacun d'eux était obligé au paiement de toute la dette, et dont le paiement par l'un avait l'effet d'opérer la décharge des deux vis-à-vis des appelants.

Laurent dit (1) :—

(1) 17 vol. No. 249.

1891

BENNING v. THIBAUDEAU.

Fournier J.

Il y a deux éléments dans l'obligation solidaire, on ne peut les expliquer que par un double principe. D'une part, il y a plusieurs co-débiteurs, ce qui implique autant de liens qu'il y a de personnes obligées. D'autre part, la dette est unique, puisque tous les co-débiteurs doivent une seule et même chose et la doivent pour le tout. Il y a donc tout ensemble un lien multiple et unité de la dette.

Il y a un lien multiple parce qu'il y a plusieurs co-débiteurs, mais ce lien ne se divise pas entre eux : chaque co-débiteur est tenu de toute la dette comme s'il y était seul obligé.

Marcadé dit (1) :—

La solidarité pourrait exister entre deux personnes qui se sont obligées avec intervalle et par des actes séparés. Il suffirait pour cela que Pierre eût déclaré d'avance consentir à s'engager solidairement avec Paul, ou que le premier obligé vint, après que Paul s'est soumis à la solidarité, déclarer qu'il entend s'y soumettre avec lui. En un mot, il y aura obligation solidaire proprement dite toutes les fois que les volontés des divers obligés se sont réunies pour se soumettre à la solidarité d'un commun accord.

Demolombe dit (2) :—

L'obligation solidaire est une, à la vérité, par rapport à la chose qui en fait l'objet ; mais elle est composée d'autant de liens qu'il y a de personnes différentes qui l'ont contractée, et ces personnes étant différentes entre elles, les liens qui les obligent sont autant de liens différents, qui peuvent, par conséquent, avoir des qualités différentes.

Et plus loin (3) :—

Renoncer au bénéfice de division et de discussion, c'est en effet, de la part des débiteurs qui s'obligent conjointement, s'obliger solidairement.

Pas de division !

Donc, chacun d'eux pourra être contraint pour le tout.

Pas de discussion !

Donc, chacun d'eux pourra être poursuivi principalement, comme s'il en était seul débiteur envers le créancier.

La solidarité n'est pas autre chose.

Les auteurs sont d'accord que l'obligation solidaire implique un mandat donné et reçu par chacun des co-débiteurs de se représenter l'un l'autre (4).

Dans le cas actuel le mandat résulte de ce que la dette

(1) 4 vol., No. 606.
(2) 26 vol. No. 216.
(3) No. 231.
(4) 17 Laurent, No. 294.

1891

BENNING v. THIBAUDEAU.

Fournier J.

est créée par des billets négociables et que dans ce cas, le mandat de toutes les parties responsables du paiement de la dette est toujours présumé.

Code Civil, art. 1105 :—

La solidarité ne se présume pas ; il faut qu'elle soit expressément stipulée.

Cette règle cesse dans les cas où la solidarité a lieu de plein droit en vertu d'une disposition de la loi.

Elle ne s'applique pas non plus aux affaires de commerce dans lesquelles l'obligation est présumée solidaire, excepté dans les cas réglés différemment par des lois spéciales.

Cavanagh, Law of money security (1).

The literal meaning of collateral is "additional" or parallel ; it does not mean "ancillary" or "secondary" unless shown by other circumstances. Where securities are intended to rank in successive order, they should contain express clauses to that effect ; thus when two properties are mortgaged there should be a proviso that one shall be the primary, the other the secondary security if it be so intended.

Il y a sans doute une différence à faire entre le transport des marchandises et le transport des billets. Quant aux premiers, je crois qu'il y a lieu de leur faire application des règles qui concernent le gage. Quant aux seconds, je crois que ce sont les principes de la solidarité qui doivent régler les droits des parties.

Sous l'opération des lois de faillite de 1869 et 1875, cette question s'est présentée dans les causes de *Bessette* v. *La Banque du Peuple* (2), et *Rochette* v. *Louis* (3).

La loi de 1875 contenait cette disposition.

Art. 89. Le montant dû à un créancier sur chaque item séparé de sa réclamation, au temps de l'exécution d'un acte de cession ou de l'émission d'un bref de saisie-arrêt, selon le cas, et qui restera dû à l'époque où cette réclamation sera prouvée formera partie du montant pour lequel il prendra rang sur les biens du failli, jusqu'à ce que cet item de sa réclamation soit payé en entier.

Dans la cause de *Rochette* v. *Louis*, le juge en chef Meredith décida que les créanciers, MM. Louis et Cie.,

(1) P. 534.

(2) 15 L. C. Jur. 126.

(3) 3 Q. L. R. 97.

1891

BENNING v. THIBAUDEAU.

Fournier J.

n'étaient pas tenus de déduire de leur réclamation contre la faillite de Rochette le dividende qu'ils avaient reçu, depuis cette réclamation, de Samson leur obligé solidaire avec Rochette. Mais cette disposition a disparu avec la loi de faillite. De sorte qu'il faut rechercher quelle était avant la loi de faillite, la règle de notre droit sur la question soumise.

L'hon. juge en chef Meredith a fait cette étude dans la cause de *Rochette* v. *Louis* (1), en même temps qu'une revue de la loi française, anglaise et écossaise, sur cette question, que nous citons ci-après.

The rule according to the law of England appears to be that if at the time of proving the creditor has received a part of his claim, he can then only prove for so much as remains due, and when a dividend has been declared under another commission, under which the holder has already proved his bill, though the dividend has not been received, yet *the amount of it must be deducted* from the bill before it can be proved (2).

La loi écossaise, telle que nous la trouvons consignée dans Bell's Commentaries (3) est tout-à-fait différente.

He who holds several bound to him, is entitled to demand the whole from each, to the effect of being paid his debt and no more, or, if the co-obligants are bankrupts, a dividend from each *corresponding to the whole*, but so as not to derive more than payment of the debt from the amount of the several dividends, and that a payment from a part from any one will *pro tanto* extinguish the *claim* against that estate, only leaving the security *available to its full extent against the others.*

Après avoir ainsi exposé la loi d'Angleterre et celle d'Ecosse, l'hon. juge dit que depuis 1775, la jurisprudence en France était conforme à la loi écossaise, dont le principe fut adopté par l'art. 542 du code de commerce qui se lit comme suit :

Le créancier porteur d'instruments endossés, ou garantis solidairement par le failli et d'autres co-obligés qui sont en faillite, participera

(1) 3 Q. L. R. 97. (2) 3 Q. L. R. at p. 98.
(3) vol. 2, pp. 338 et 339.

aux distributions dans toutes les masses et y figurera pour la valeur nominale de son titre jusqu'à parfait paiement.

L'hon. juge fait suivre cet exposé de l'observation suivante :—

The doctrine of the French code and of the Scotch law is favourable to commercial credit, and it seems to me the most reasonable that can be adopted ; but it is not in accordance with our common law, and is not sanctioned by our statute law respecting insolvency. As to our common law, Pothier says : 'Si tous ceux qui sont débiteurs de la lettre de change, tant l'accepteur que le tireur et les endosseurs, avaient fait banqueroute, le propriétaire de la lettre qui est créancier de chacun d'eux du total, peut se faire colloquer dans la distribution des biens de chacun d'eux, comme créancier du total ; mais aussitôt que par la distribution qui aura été la première terminée, il aura été payé d'une partie de sa créance, *puta*, du quart, il ne pourra plus rester dans les distributions des autres débiteurs qui restent à faire, que pour le surplus de ce qui lui est dû (Contrat d'échange No. 160).' Renouard refers to the opinion of Pothier as being in accordance with that of Dupuy de la Serra, Bournier, Boutarie and Jousse (Renouard, vol. 2, p. 223), and speaks of the doctrine, for which they contended as an improvement upon that maintained by Savary, and as being not the same, but a step towards the modern law of France. It is thought by some persons whose opinions are well deserving of respect, that as to the matter under consideration, there is no difference between the old law and the modern law of France. But a comparison of the above extract from Pothier with the article 542 of the French code, is sufficient to show that opinion to be erroneous ; and Bédarride, Traité des Faillites, No. 853, expressly says : 'L'article 542 contient donc une dérogation au droit commun.'

L'honorable juge en chef Meredith est d'avis que le principe adopté par l'article 542 du code commercial français n'est pas notre droit. C'est aussi l'opinion de l'honorable juge Mondelet qui disait dans la cause de *Bessette* v. *La Banque du Peuple* (1) :

The new or present jurisprudence of France is of no application to the present case. The Scotch law, whatever its wisdom may be, cannot be our rule.

L'honorable juge Jetté tout en exprimant son respect pour l'opinion de ces savants magistrats déclare que ces opinions ne lui paraissent pas concluantes :

(1) 15 L. C. Jur. 126.

1891

BENNING v. THIBAUDEAU.

Fournier J.

En effet, dit-il, elles ne se posent que sur une appréciation comparative de certains textes de législation formelle des divers pays mentionnés, ce qui pouvait suffire, dans les circonstances, puisque nous avions alors une loi positive sur la matière. Mais aujourd'hui que cette loi est disparue de notre droit, la question doit être examinée à un autre point de vue, et c'est au développement de la science théorique du droit que nous devons en demander la solution.

Il résume ensuite les observations de Demolombe sur les conséquences de la solidarité entre débiteurs:

Trois systèmes se sont successivement produits en France, au sujet du secours accordé aux créanciers de plusieurs débiteurs en état de faillite.

D'après le premier système, le créancier avait le droit de se présenter à l'une des masses en liquidation de ses divers débiteurs, la plus avantageuse s'il le voulait, mais une fois son choix fait, il ne pouvait plus réclamer des autres masses qui se trouvaient absolument libérées à son égard. C'était le système de Savary, le principal rédacteur de l'ordonnance de 1673.

Inutile d'apprécier ce système si contraire aux principes qui prévalent aujourd'hui dans notre droit.

Le second système permettait au créancier de se présenter successivement aux faillites de ses divers débiteurs solidaires, mais à la condition de déduire, dans les dernières, ce qu'il avait reçu dans les premières.

C'était le système de Dupuy de la Serra, Boutaric, Jousse et Pothier, comme nous l'avons vu tout-à-l'heure par la citation des notes du juge en chef Meredith, et c'est celui que virtuellement le défendeur veut appliquer aux demandeurs dans l'espèce.

Le troisième système paraît avoir été le résultat de deux arrêts rendus en 1776, l'un par le parlement de Paris, l'autre par le parlement d'Aix.

Le parlement de Paris avait jugé, en principe que le créancier de divers débiteurs solidaires *peut se présenter* successivement dans toutes les faillites, pour la valeur nominale de son titre, *sans aucune déduction* des dividendes par lui déjà reçus.

Le parlement d'Aix avait jugé au contraire, mais sa décision fut cassée par arrêt du conseil, le 24 février 1778, qui fut lui-même confirmé par un second arrêt du 23 octobre 1781, portant rejet de la requête en opposition, dirigée contre le premier.

Depuis lors, la jurisprudence fut fixée et lorsque les rédacteurs du code de commerce eurent à exprimer la loi sur ce point, ils le firent dans le sens de cette jurisprudence par l'article 542 du code de com-

merce, dont j'ai cité plus haut la rédaction primitive et qui est aujourd'hui dans les termes suivants :

Le créancier porteur d'engagements souscrits, endossés ou garantis solidairement par le failli et d'autres co-obligés qui sont en faillite, participera aux distributions dans toutes les masses et y figurera pour la valeur nominale de son titre jusqu'à parfait paiement.

Telle est incontestablement la loi française actuelle. Mais dira-t-on, cette loi n'est pas la nôtre, et il est évident que cet article du code de commerce ne peut être invoqué ici. Il est vrai que la disposition formelle édictée par cet article 542, ne se trouve pas dans nos codes, mais la règle qu'il consacre est-elle étrangère à notre législation ?

Bédarride, cité par M. le juge Meredith, dit bien que cet article 542 est une dérogation au droit commun. Mais le sentiment de ces auteurs me paraît victorieusement combattu par ceux qui soutiennent au contraire que l'article 542 du code de commerce n'est que l'expression du droit commun et ne comporte que l'application du principe de la solidarité dont le but est d'assurer au créancier son paiement intégral.

C'est en effet la doctrine qui, après de longues controverses a finalement triomphé et a formé la jurisprudence en France sur cette question avant l'adoption de l'article 542 du code de commerce. L'honorable juge Meredith, fait erreur en disant que le principe de la loi écossaise a été adopté par l'article 542 du code de commerce. Cette question faisait depuis longtemps le sujet d'une division d'opinion parmi les jurisconsultes, comme on le verra par l'autorité citée ci-après de Dalloz, dans laquelle il fait l'historique de la question. Non seulement les jurisconsultes étaient divisés, mais les parlements l'étaient aussi, ceux d'Aix et de Paris décidant en sens inverse. La question fut réglée longtemps avant l'adoption du code de commerce par deux arrêts du Roi en conseil qui reconnaissent au créancier solidaire le droit de se porter réclamant pour la totalité de

1891

BENNING v. THIBAUDEAU.

Fournier J.

sa créance dans toutes les masses de ses co-débiteurs solidaires. Ces arrêts sont la base de la jurisprudence qui a existé jusqu'au code de commerce qui en a adopté le principe dans l'article qui fut d'abord l'article 534 et qui est maintenant l'article 542. Les auteurs qui soutiennent que cet article constitue une innovation sont évidemment dans l'erreur puisque le principe était déjà depuis longtemps reconnu par la plus haute autorité judiciaire de France, l'arrêt du Roi en son conseil, ainsi qu'on peut le voir par la citation suivante d'Emérigon, Traité des Assurances (1):

> La même question était alors agitée au parlement de Paris, au sujet de certaines lettres de change tirées par M et endossées par L. Ils avaient fait faillite et obtenu une remise de la part de leurs créanciers respectifs.
>
> Par un événement singulier, le parlement de Paris rendit le même jour, 18 juin 1776, un arrêt diamétralement opposé à celui du parlement d'Aix. Il fut déclaré que le porteur du billet avait droit de figurer dans chaque direction, pour la totalité du titre, jusqu'à extinction de créance.
>
> Bellon se pourvut au conseil, et obtint du roi un arrêt dont voici la teneur: "Ouï le rapport du sieur Moreau de Beaumont, conseiller ordinaire, et au Conseil royal de commerce, le roi étant en son conseil, ayant égard à la dite requête, a cassé et casse le dit arrêt du parlement d'Aix, du dit jour, 18 juin 1776, et tout ce qui s'en est ensuivi; ce faisant, a évoqué et évoque les demandes et contestations sur lesquelles le dit arrêt est intervenu, circonstances et dépendances; a ordonné et ordonne que les parties procéderont en son conseil sur leurs demandes et contestations, en la forme portée par le règlement, pour être statué ainsi qu'il appartiendra. Fait au Conseil d'état du roi tenu à Versailles, le 24 février 1778. Signé, Huguet de Montaran.
>
> Autre arrêt du Conseil, rendu le 23 octobre 1781, qui déboute Zacherie B. et consorts de la requête qu'ils avaient présentée en opposition.
>
> Voilà donc la question préjugée en faveur du porteur du papier. Les débiteurs corrés doivent chacun la même somme. Le titre est indivisible vis-à-vis de chacun d'eux: *Promittentes singuli in solidum tenentur; in utraque enim obligatione una res vertitur. Inst. de duobus reis.* La faillite des débiteurs corrés n'altère en rien l'individualité de la

(1) Ch. 10, p. 569.

créance, qui ne cesse d'être la même dans chaque direction, et qui conserve sa force jusqu'à ce qu'elle soit éteinte par un entier paiement.

CONFÉRENCE.

LIV. Le code de commerce a mis fin à ces longues controverses des auteurs, sur la question présentée. "Le créancier porteur d'engagements solidaires entre le failli et d'autres co-obligés qui sont en faillite, participera aux distributions dans toutes les masses, jusqu'à son parfait et entier paiement." (Art. 534).

Ces principes dérivent de celui de la solidarité, car il y a solidarité de la part des débiteurs, lorsqu'ils sont obligés de manière que chacun puisse être contraint pour la totalité. Le titre est indivisible à l'égard de chacun d'eux. (Voyez d'ailleurs les art. 1200, 1201, 1202 et 1204 du Code civil, et l'art. 140 du Code de commerce ; voyez notre Traité des faillites, tom. 2 chapitre I, section 13, No. 279.)

Ces arrêts, quoi qu'ils n'aient pas pour nous l'autorité législative, ni l'autorité judiciaire de nos tribunaux n'en ont pas moins réglé définitivement une question soulevée sur les effets du principe de la solidarité qui était exprimé dans la loi française alors, comme il l'était dans notre propre droit. Il en résulte nécessairement que les arrêts en conseil doivent valoir au moins pour nous comme raison écrite, et faire autorité dans nos cours au même titre que les décisions de la cour de Cassation, lorsqu'elles portent sur un texte qui est semblable dans le code français et dans le nôtre.

Ainsi comme le dit d'Emérigon, voilà donc la question préjugée en faveur du porteur du papier. Les débiteurs corrés doivent chacun la même somme Le titre est indivisible vis-à-vis de chacun d'eux.

Les autorités suivantes établissent toutes que les principes sur lesquels sont basés les arrêts sont dérivés de celui de la solidarité et ne forment pas une innovation dans le droit français.

Larombière sur l'article 1204 du Code, au No. 5 (1), parlant des articles 542 et 544 du Code de Commerce, dit :

(1) 2 vol. p. 617.

1891

BENNING v. THIBAUDEAU.

Fournier J.

Ces sages dispositions, expression du droit commun, doivent être appliquées en matière civile. Elles ne sont, en effet, que la conséquence de ce principe que chaque co-obligé solidaire est tenu de la totalité. Si le créancier ne figurait pas dans chaque distribution pour la valeur nominale de son titre, et si sa créance était diminuée successivement du montant de chaque dividende alloué, il en résulterait que le créancier perdrait dans tous les cas, une partie de sa créance, puisque dans la dernière distribution, si avantageuse qu'elle fût, il n'arriverait jamais à un paiement intégral et serait ainsi privé des garanties que lui donne la solidarité. Car si chaque débiteur est réputé seul et unique débiteur du total, ce n'est évidemment que pour mieux assurer l'intégralité de son paiement au moyen de cette responsabilité réciproque et mutuelle des insolvabilités de la part des co-débiteurs entre eux.

Massé—Droit Commercial (1), dit:

On s'est demandé si l'article 542 du Code de commerce ne fait que formuler une application des principes sur la solidarité et les effets du paiement par dividendes qui sont les mêmes en matière civile et en matière commerciale. Les conséquences de ces principes ne tiennent pas à l'organisation spéciale des faillites ; elles en sont indépendantes et par conséquent elles trouvent leur place dans la déconfiture qui n'est autre chose qu'une faillite civile, bien que sa liquidation ne soit soumise à aucune forme et à aucune organisation particulière.

Locré (2), dit:

Toutes ces dispositions puisées dans les principes élémentaires et immuables du droit civil, s'appliquent à toutes les matières et à tous les cas.

Au sujet de l'article 542, Code de Commerce, Dalloz, Rep. (3), dit:

On n'a jamais contesté aux créanciers qui avaient plusieurs débiteurs solidaires la faculté de s'adresser à chacun d'eux indistinctement, soit pour le montant total de la dette, soit pour parfaire le paiement qui n'avait été effectué qu'en partie. Mais on a débattu longtemps la question de savoir si, après que le créancier avait réclamé son paiement dans la faillite de l'un des co-débiteurs solidaires, il pouvait encore s'adresser aux autres co-débiteurs pour tout ce qu'il n'avait pas effectivement reçus? Comme l'ordonnance de 1673 ne contenait aucune disposition à cet égard, les anciens auteurs n'étaient pas d'accord sur la solution de la question. Ainsi Savary, soutenait, paragraphes 13 et

(1) 3 vol. No. 2023. (2) 19 vol. p. 693.
(3) No. 993, vo. Faillite.

1891

BENNING v. THIBAUDEAU.

Fournier J.

48, 5me question, que lorsque le créancier s'était présenté à la faillite de l'un des co-débiteurs, son opposition était faite et que l'acceptation d'un dividende éteignait la dette au regard de tous les obligés.

Dupuys de la Serra s'appuyant sur des avis des avocats Perrin, Pomercy et Chappé combattait cette opinion. Dans le chapitre 16 de son livre, sur l'article des lettres de change, il établissait ainsi le droit de solidarité :

En cas de faillite de tous les obligés à la lettre de change adoptée et protestée faute de paiement, comme le porteur a une action solidaire contre tous, il a droit d'entrer dans chaque direction et contribution sans pouvoir être obligé d'en choisir ou opter une et abandonner les autres..... Le porteur qui signe le contrat d'un des premiers obligés, sans avoir un consentement des derniers obligés, que c'est sans préjudice à son action, se rend non-recevable contre eux, faute de leur pouvoir céder l'action entière..... Le porteur qui est entré dans quelque contribution, ne peut entrer dans les suivantes que successivement pour ce qui lui est dû en reste. Un arrêt du parlement de Paris, du 18 mai 1706, consacre ce système que Boutarie, Jousse, en l'art. 33 de l'ordonnance, et Pothier, du Contrat de change, No. 179, approuvèrent également. Quoique plus favorable au créancier que l'opinion de Savary, la théorie de Dupuys de la Serra le soumettait cependant, en fin de compte, à une perte, puisqu'elle ne l'autorisait à venir dans la dernière faillite que sous la déduction des dividendes par lui reçus dans les autres, et que la dernière faillite ne payait qu'un dividende du reliquat. Un arrêt du parlement de Paris, du 18 juin 1776, accordant tous les effets de la solidarité, décida que le créancier avait droit de figurer dans chaque faillite pour la totalité du titre, jusqu'à ce qu'il eût reçu son entier paiement, et un arrêt du Conseil, rendu le 24 février 1778, cassa une décision que le parlement d'Aix avait rendu en sens contraire à celui du parlement de Paris, par arrêt du 18 juin 1766, sur la plaidoierie d'Emérigon (Contrats à la grosse, ch. 10, sec. 3.)

Sur l'opposition formée contre l'arrêt du conseil, un second arrêt, du 23 octobre 1781 maintint sa jurisprudence. Le code du commerce fut rédigé pendant que la jurisprudence était dans cette situation, et son art. 534 fut écrit dans le sens des arrêts rendus par le conseil en 1778 et 1781. Aussi malgré l'ambiguité de cet article, qui était ainsi conçu : Le créancier porteur d'engagements solidaires entre le failli et d'autres co-obligés solidaires qui sont en faillite, participe aux distributions dans toutes les masses jusqu'à parfait et entier paiement. MM. Vincens, T. 4, p. 521 ; Pardessus, No. 1211 ; Locré, T. 7, p. 33 et suivant ; Boulay-Paty, Nos. 381 et 382 ; et nous-mêmes, T. 8, p. 196, avions considéré le créancier comme ayant le droit de se présenter dans chaque masse pour le total de sa créance, quels que fussent les

1891

BENNING v. THIBAUDEAU.

Fournier J.

dividendes partiels qu'il eût précédemment obtenus, et cela jusqu'à parfait payement. Par application de cet article, il avait été jugé ainsi que le porteur d'effets de commerce, qui avait été payé, en partie, par l'un des débiteurs solidaires de ces effets, pouvait s'adresser à la faillite de l'autre pour la totalité de sa créance, mais de manière cependant qu'il ne pût recevoir au-delà de ce qui lui était dû ; que s'il avait été passé un concordat avec le failli, il pouvait également dans les mêmes cas et sous les mêmes conditions, réclamer le dividende convenu sur la totalité de sa créance.

La Cour, attendu que l'art. 534 C. Com. spécial pour la matière, autorise le créancier porteur de lettres de change qui a plusieurs débiteurs solidaires en état de faillite, à se remplir de l'intégralité de sa créance, en se présentant pour la totalité de ce qui lui est dû dans chaque masse de ses débiteurs faillis, jusqu'à ce qu'il ait obtenu son parfait et entier paiement, et que l'arrêt attaqué (de la Cour de Douai) n'a fait que se conformer à cet article qui justifie suffisamment sa décision ; rejette, (Réj. 28 janvier 1817. MM. Brisson, pr. ; Boyer, rap. Jourde, c. conf. affr. Leblond). Le nouvel article 542 a fait disparaître tout équivoque, en autorisant le créancier à venir dans chaque faillite pour la valeur nominale de son titre jusqu'à parfait paiement (1).

Ces autorités me paraissent suffisantes pour établir que le droit du créancier de se présenter dans toutes les faillites de ses co-débiteurs solidaires n'est qu'une conséquence logique du principe de la solidarité. Mais la cour d'appel ayant été unanime dans la répudiation de ce principe je ne crois pas devoir m'en tenir à ces autorités, je pourrais en ajouter beaucoup d'autres, mais je me contenterai des suivantes qui contiennent les opinions de plusieurs de nos plus savants commentateurs :

Massé, Droit Com. et Droit Civil (2), après avoir démontré que sous l'ordonnance de 1673 les opinions étaient partagées, ayant cité les opinions de Savary, Dupuys de la Serra, Boutarie, Jousse et Pothier, ajoute :

Aussi le commerce, préoccupé des nécessités du crédit et des dangers auxquels l'exposait un système qui limitait le recours du porteur contre ses débiteurs faillis, réclama-t-il vivement contre l'usage qui s'était introduit à la suite de la doctrine et de la jurisprudence. La

(1) Voir même auteur n° 994. (2) 3 vol., Nos. 2021, 2022 et 2023.

1891

BENNING v. THIBAUDEAU.

Fournier J.

question fut donc de nouveau vivement agitée entre des commerçants et des jurisconsultes ; et de cette discussion, dont on retrouve les traces dans le recueil de Nicodème, il résulta que la faillite des divers co-obligés ne pouvait paralyser les effets de la solidarité et que le porteur d'une lettre de change, dont les divers signataires étaient en état de faillite, avait le droit de figurer successivement dans toutes les masses, sans déduction des dividendes qu'il avait perçus, et jusqu'à parfait paiement.

Entraîné par ce revirement dans la pratique, le parlement de Paris revint sur son ancienne jurisprudence, et par arrêt du 18 juin 1776, il décida que le porteur d'engagements solidaires avait le droit de figurer dans toutes les faillites des co-obligés pour la valeur intégrale du titre jusqu'à parfait paiement.

Par une coïncidence singulière, le parlement d'Aix rendait le même jour, 18 juin 1776, sur la plaidoierie d'Emérigon, qui nous en a conservé le souvenir, un arrêt en sens contraire, jugeant que le porteur qui était entré dans le concordat de l'un des co-obligés, ne pouvait entrer dans les autres que successivement et pour ce qui lui restait dû. Mais, sur le pourvoi du porteur, cet arrêt fut cassé par un arrêt du conseil du 24 février 1778, qui fut lui-même confirmé par un second arrêt du 23 octobre 1781, portant rejet de la requête en opposition dirigée contre le premier.

C'est cette jurisprudence qui a été sagement maintenue par le Code de Commerce.

Plus loin (1):

C'est à cette conclusion que je crois devoir m'arrêter, parce que c'est la seule qui se trouve d'accord avec les principes sur la solidarité, qui veulent que les co-obligés soient toujours tenus, quand il reste dû quelque chose, et les effets du paiement sous forme de dividende, qui, si le dividende n'était calculé que sur ce qui reste dû après le paiement d'un premier dividende, ne pourrait jamais constituer un paiement intégral.

Et au No. 2023, il dit :

On s'est demandé si l'article 542 du Code de Commerce ne fait que formuler une application des principes sur la solidarité et les effets du payement par dividendes, qui sont les mêmes en matière civile et en matière commerciale. Les conséquences de ces principes ne tiennent pas à l'organisation spéciale des faillites ; elles en sont indépendantes et par conséquent elles trouvent leur place dans la déconfiture qui n'est autre chose qu'une faillite civile, bien que sa liquidation ne soit soumise à aucune forme et à aucune organisation particulière.

(1) No. 2022.

1891

BENNING v. THIBAUDEAU.

Fournier J.

Sirey, Recueil général (1).

L'article 542, Cod. Comm. ; aux termes duquel le créancier porteur d'engagements souscrits, endossés ou garantis solidairement par un failli et d'autres co-obligés également en faillite, participe aux distributions dans les masses, et y figure pour la valeur nominale de son titre jusqu'à parfait payement, est applicable alors même que tous les co-obligés solidaires ne sont pas en faillite. Il suffit qu'un ou plusieurs d'entre eux s'y trouvent.

Le créancier porteur d'engagements solidaires entre un failli et d'autres co-obligés qui ne sont pas en faillite, et qui, depuis la faillite, a reçu un à-compte des obligés, doit être compris dans les distributions pour la valeur nominale de son titre, sans qu'il y ait lieu de faire déduction de cet acompte ; ici ne s'applique pas la disposition de l'article 544, Cod. Comm ; relativement à la déduction des acomptes payés avant la faillite.

Et à la page 297.

Le créancier qui, depuis la faillite, a reçu de la caution, la portion de créance garantie par celle-ci, doit néanmoins, dans la répartition des dividendes fixés par le concordat, être compris pour la valeur de sa créance entière telle qu'elle a été admise au passif de la faillite.

Démolombe (2) :

Dès le moment où chacune des faillites est déclarée, le créancier acquiert le droit à la somme qu'elle pourra payer, après l'accomplissement des formalités de la liquidation, dès ce moment les droits de chacun sont irrévocablement fixés.

C'est un principe bien établi que la déclaration d'un dividende est l'équivalent d'un jugement. Dalloz (3) :

Jugé que le règlement définitif est une décision judiciaire, un véritable jugement contre lequel est ouverte la voie de l'appel dans les délais ordinaires. (Paris, 20 juillet 1844.)

Voir aussi Dalloz (4).

Les jugements ne sont que déclaratifs et nullement constitutifs des droits qu'ils reconnaissent. (Cass. 14 Dec. 1840). Par conséquent, ils ont un effet rétroactif au jour de la demande. Cass. 25 août 1868. Dalloz, 1868, 1, 397.

Ces auteurs font voir, contrairement à l'opinion de

(1) 62, 2, 121.
(2) 26 vol., pp. 380 et 381.
(3) Vo. Distribution par contribution, No. 181.
(4) Vo. Jugement, No. 316.

1891

BENNING v. THIBAUDEAU.

Fournier J.

l'honorable juge Meredith, qu'en dehors de toute loi de faillite, les demandeurs sont fondés à invoquer les lois de la solidarité et les conséquences nécessaires qui en découlent C'est par le droit commun que la solidarité est établie et qu'elle donne à chacun des créanciers le droit de poursuivre le débiteur pour le tout, comme elle impose à chacun des débiteurs l'obligation de satisfaire le créancier pour le tout. Puisque l'obligation solidaire a pour but d'assurer le paiement intégral de la créance, et que le créancier conserve la totalité de sa créance contre tous les co-obligés, il s'en suit inévitablement que si ceux-ci tombent ensuite en faillite, il a droit de se présenter dans leur faillite pour la valeur nominale de son titre jusqu'à parfait paiement. S'il en était autrement, si le créancier devait déduire le dividende reçu dans la faillite d'un co-obligé pour venir à contribution, il ne pourrait jamais arriver au parfait paiement. L'obligation solidaire manquerait alors son but qui est d'assurer le paiement intégral de l'obligation. Ce droit de venir à contribution dans toutes les masses en faillite de ses co-obligés a bien été reconnu par l'art. 542 du Code du Commerce, mais il existait de droit commun, avant cela, ainsi que l'a reconnu l'arrêt du parlement de Paris de 1776. L'art. 542 n'a fait qu'adopter cette jurisprudence comme n'étant qu'une des conséquences logiques découlant nécessairement du principe de la solidarité. Il n'est pas nécessaire pour nous de s'appuyer sur cet article, bien qu'il ne fasse que consacrer l'ancien droit français sur cette question, il nous suffit de se fonder sur les principes de la solidarité d'où découle ce droit du créancier de se présenter pour la totalité de sa créance dans chaque masse de ses co-débiteurs, jusqu'à ce qu'il ait reçu son paiement entier (1).

(1) On peut encore référer aux autorités suivantes : II Duranton, No. 228 ; 3 Pardessus, Droit Com. No. 1211 ; 2 Renouard, Faillites, p. 221. (2e partie, titre 1er, ch. 7); 5 Demangeat sur Bravard, p. 601 ; Sirey, 1862, pp. 121 et 397.

1891

BENNING v. THIBAUDEAU.

Fournier J.

J'adopte l'opinion si savamment développée par l'honorable juge Jetté dont j'ai cité une grande partie des notes sur cette cause.

L'honorable juge a encore cité un arrêt du 9 décembre 1880 *in re Bunyard* (1) où la Cour de Chancellerie a fait l'application des principes qu'il soutient dans une cause identique à celle-ci. Voici comment s'exprimait Lord Justice Cotton en rendant ce jugement:—

> Each of these appeals (il y avait trois causes réunies) raised the same question, namely, whether the holder of a bill of exchange taken from the drawer as security for a sum less than the amount of the bill is entitled as against the estate of the bankrupt, who had accepted it for the accommodation of the drawer, to prove only for the amount due to him, (the holder) or for the amount of the bill, with a restriction that he shall not receive dividends on his proof to an amount exceeding the sum due to him on his security. It was conceded that, if the bill had been accepted for value, the holder would have been entitled to prove for the larger amount. But it was urged on behalf of the respondent that the fact of the acceptance being for the accommodation of the drawer makes a difference. It was said, and truly, that a man who has taken a bill from the drawer as security only will hold for the drawer any sum recovered from the acceptor beyond the amount due on his security and that when the bill has been accepted for the accommodation of the drawer, he, the drawer, would be liable to repay to the acceptor any part of the sum recovered from him, which may be handed to the drawer by the holder of the bill. But the acceptor has put it in the power of the drawer to make the bill in the hands of a holder for value available against the acceptor for its full amount, and although the holder may have taken it as security for a sum less than the amount of the bill, we are of opinion that such a holder is entitled to make the bill available against the acceptor in the way which will best produce the sum due to him, and that in the event of bankruptcy he is entitled to prove against the acceptor's estate for the full amount of the bill.

D'après tout ce qui précède je conclus que les appelants créanciers solidaires de Marcotte et des signataires des billets qu'ils avaient reçus de lui en garantie collatérale ont droit d'être colloqués sur le chiffre nominal de leur créance, sans déduction des sommes reçues sur

(1) 16 Ch. D. 335.

les billets transportés, depuis la production de leur réclamation.

Il n'en est pas de même de la somme de $490, produite de la vente des marchandises données comme gage aux appelants. Cette somme devra être déduite du montant de leur réclamation, car cela constitue un paiement sur leur créance.

L'appel devrait être alloué.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed for the reasons given by the court of Queen's Bench for Lower Canada (appeal side).

GWYNNE J.—Some time prior to the month of February, 1882, the plaintiffs made advances to one Alphonse Marcotte, then a merchant trading in the city of Montreal, taking as security for the repayment of such advances Marcotte's own promissory note for the amount, and, by way of collateral security, divers promissory notes made by certain persons who were debtors of Marcotte, of whom one Moodie was one, for several amounts payable to Marcotte or order, and endorsed by Marcotte to the plaintiff; and, also, some goods and merchandise belonging to Marcotte and delivered by him to the plaintiffs. In the month of February, 1882, Marcotte, by a voluntary deed executed by him bearing date the 13th of that month, conveyed and transferred to the defendant Thibaudeau, one of his creditors, all his estate and effects upon trust for the benefit of the whole of his creditors. The plaintiffs as creditors of Marcotte claimed the benefit of this trust deed, and upon the 22nd April, 1882, brought in and filed with the trustee their claim for $19,139.83, which was accepted and recognized by the trustee as being, and which is admitted to have been, the amount then due to them by Marcotte, and for which they

1891

BENNING v. THIBAUDEAU.

Gwynne J.

were then entitled to rank as creditors entitled to the benefit of the said trust deed. The trustee having subsequently realized from the trust estate an amount which enabled him to pay to the plaintiffs and the other creditors of Marcotte the sum of 12½ cents in the dollar upon the amounts due to them respectively at the time of their claims having been presented to the trustee, prepared and advertised a dividend sheet upon which the plaintiffs were entered and declared to be entitled to receive the sum of $2,392.49, which sum the trustee promised to pay them upon the 13th day of July then next following such advertisement, that is to say, upon the 13th of July, 1882. Between the 22nd of April, 1882, and this 13th of July the plaintiffs received from Moodie in respect of the notes made by him to Marcotte and endorsed by the latter to the plaintiffs as such collateral security as aforesaid the sums, as is admitted in the case, of $8,363.76 and $911.57, making together the sum of $9,275.33; and in April, 1883, the further sum of $248.91. The plaintiffs also received subsequently to the 22nd April, 1882, but when in particular is not stated, the sum of $490 as proceeds of the merchandise left in their hands. There seems to me to be some confusion in the printed case which does not appear to have been noticed; what the case says is: "Moodie had, also, become an insolvent and appellants realized out of his estate in virtue of such promissory notes $9,676.24, viz., $8,363.76 in May, 1882, subsequently to the filing of their claim, but previous to the 13th July, 1882, when the dividend was made payable, $911.57 in May, June and July, 1882, and $248.71 in April, 1883. Appellants, also, realized out of the goods and merchandise transferred to them by Marcotte a further sum of $490, making with that of $9,076.24 a total sum of $10,166.24."

1891

BENNING v. THIBAUDEAU.

Gwynne J.

In the argument before us it was admitted that the above statement that "Moodie had also become insolvent" is erroneous and that in point of fact the amount realized from him was realized under an execution issued upon a judgment recovered against him in the province of Manitoba, so that the case before us is not that of a creditor having a claim against two insolvent estates for the main debt, but simply of a creditor holding collateral security for his debt claiming under a voluntary deed of assignment made by his debtor in trust for his creditors

Now as to the above sum of $490 it has been regarded by the Court of Queen's Bench at Montreal in appeal as having been received subsequently to the 13th July, 1882, and for that reason they have held that it cannot be deducted from the amount in respect of which the plaintiffs are entitled to receive a dividend of 12½ cents in the dollar under the trust deed: while in the Superior Court and in the Court of Review it seems to have been regarded as having been received prior to that date, although the learned judge who pronounced judgment in the Superior Court does not seem to have been of opinion that it made any difference whether it was received before or after the 13th July, 1882, for he has included the $248.91 admitted to have been received in April, 1883, in the same category as the sums received by the plaintiffs between the 22nd April and the 13th July, 1882. In an action brought by the plaintiffs against the trustee of the trust deed of February, 1882, to recover the sum of $2,392.49, declared by him to be in his hands and payable to the plaintiffs and which he promised to pay to them upon the 13th July, 1882, as their equal share or dividend upon the amount of the plaintiffs' claim as secured, and as recognized by him as being secured under the trust deed, the learned judge of the Superior Court

1891

BENNING v. THIBAUDEAU.

Gwynne J.

held that the plaintiffs had no right to recover from the trustee the said amount of $2,392.49 so declared to be in his hands and payable to them as aforesaid, and that they could recover only the sum of $1,121.69 for which sum he gave judgment in their favour. This sum of $1,121.69 was ascertained by calculating 12½ cents in the dollar upon the sum of $8,963.59, being the amount which he found to be due by Marcotte to the plaintiffs after deducting from the $19,139.83 due to them in April, 1882, the above sum of $10,166.24, and which sum of $8,963.59 the learned judge held to be the only sum for which the plaintiffs were entitled to rank as creditors under the said trust deed. The Court of Review set aside the judgment of the Superior Court holding that the plaintiffs were entitled to rank as creditors upon the trust estate for the sum of $18,649.83 being the amount of plaintiffs' claim as it stood in April, 1882, less the sum of $490 realized out of the merchandise, and they rendered judgment for the plaintiffs in the action for the sum of $2,331.23 with interest thereon from the 13th July, 1882.

The Court of Queen's Bench in appeal holding the $490 to have been received subsequently to the 13th July, 1882, adjudged that this sum could not be deducted from the amount upon which the plaintiffs were entitled to a dividend under the trust deed and that they were entitled to rank on the trust deed as creditors only for the sum of $9,712.50. This plainly ought to have been $9,716.50 for the judgment declares it to be arrived at by deducting from the $19,139.83 due in April, 1882, the sum of $9,423.33, which the court held to be the amount realized from the Moodie notes. How this latter sum was arrived at is not clear, for the only sums admitted to have been received by the plaintiffs from the Moodie notes appear to have been the three sums of $8,363.76, $911.57 and $248 91,

amounting together to $9,524.24, and as the $248.91 was not received until April, 1883, the Court of Queen's Bench must have excluded that sum for the same reason as they excluded the $490, namely, that money received after the 13th February, 1882, could not be deducted from the amount upon which the plaintiffs were entitled to a dividend; if then the $248.91 be deducted from the $9,524.24 there remained only $9,275.33 to be deducted instead of the $9,423.33.

The plaintiffs alone have appealed from this judgment and the learned counsel for the respondent admitted that not having presented a cross appeal the respondents cannot now object to the deduction of the $490, although he contended that in making that deduction the court erred, and he admitted, therefore, that the appeal before us is to be determined wholly upon the question as to the correctness of the judgment as to the deduction in respect of the amount received upon the Moodie notes prior to the 13th July, 1882. That is the sole question before us and in determining it we can, I think with great deference, arrive at a sound conclusion without inquiring whether Moodie, by reason of the plaintiffs having been the holders of his notes payable to Marcotte and endorsed by the latter to them as collateral security for Marcotte's debt, was bound *solidairement* with Marcotte for that debt; and without inquiring either what was the law of France prevailing in Canada at the time of its cession to the British Crown in relation to the distribution of the estate and effects of insolvent debtors.

The case in my judgment depends simply upon the true construction of the deed of the 13th of February, 1882, construing that deed by the light of the surrounding circumstances the plaintiffs being entitled to the benefit of its provisions to the fullest extent of its terms without prejudice to rights then already held by

1891

BENNING v. THIBAUDEAU.

Gwynne J.

him, which are not professed to be interfered with by the deed; and the defendant in like manner being bound to execute the trust in favour of the plaintiffs to the fullest extent of the terms of the deed without any diminution or variation whatever.

In 1864 the legislature of the late province of Canada passed an act respecting insolvency wherein provision was made for the distribution of the estate and effects of insolvent debtors whether under a voluntary deed of assignment executed by the debtor or under proceedings in compulsory liquidation. In that act provision was made for the case of a creditor holding collateral security, prescribing the manner in which, and the extent to which, such creditor should rank on the insolvent estate; that act was amended by the 29 Vic. ch. 18, and in the same session of the legislature the statute 29 Vic. ch. 41 was passed, which carried into effect the object of the statute 20 Vic. ch. 43 by codifying the laws in force in that part of the then province of Canada previously forming the province of Lower Canada in relation to civil matters into one code designated "The civil code of Lower Canada." This code contains no provision upon the subject of the distribution of the estates of insolvent debtors, for the reason, no doubt, that the legislature was of opinion that the Insolvent Act of 1864 as amended by 29 Vic. ch. 18 was sufficient for the purpose. This act of 1864 so amended constituted the sole law in force throughout the province of Canada, regulating the distribution of the estates of insolvent debtors at the time of the passing of the B. N. A. Act in March, 1867. In the new constitution given by that act to the Dominion of Canada and to the several provinces of which it was composed all matters relating to bankruptcy and insolvency, including, therefore, the distribution of the estate and effects of insolvent

debtors among their creditors, whether having, or not having, collateral securities for their respective claims, and the manner in which and the extent to which all such creditors respectively should rank on the insolvent estate, were placed under the exclusive jurisdiction and control of the Dominion Parliament for the purpose, no doubt, of insuring uniformity throughout the Dominion in the law upon these subjects. In the exercise of this jurisdiction the Dominion Parliament passed the act 32 & 33 Vic. ch. 16 making one uniform provision throughout the Dominion of Canada for the distribution of the estates of insolvent debtors, whether under voluntary deeds of assignment or in compulsory liquidation, and prescribing the manner in which, and the extent to which, creditors having collateral securities should rank on the insolvent estates. This act while repealing the act of 1864 which had abrogated, annulled and repealed the old French law relating to the distribution of the estates of insolvents in that part of the late province of Canada, which now constitutes the province of Quebec, where alone it had ever any force, enacted in substitution therefor another law relating to the matter, which continued to be the sole law in force upon the subject throughout the Dominion until 1875 when it was repealed and the Dominion statute 38 Vic. ch. 16 substituted therefor; this latter act as amended by the Dominion statutes 39 Vic. ch. 30 and 40 Vic. ch. 41 continued in force as the sole law upon the subject in the Dominion until 1880, when the statute 43 Vic. ch. 1 repealing the said three last mentioned statutes was passed.

Now on the 13th February, 1882, Marcotte executed to the defendant one of his creditors accepting, the trust deed, upon the construction of which alone, in my opinion, depends the solution of the question before us on this appeal.

1891

BENNING v. THIBAUDEAU.

Gwynne J.

By that deed, Marcotte, after reciting that he was indebted to several persons and firms his creditors, which indebtedness he was unable to pay in full, and that he had agreed with his creditors to transfer and assign to the defendant the whole of his property, movable and immovable estate and effects for the profit and benefit of his said creditors, assigned, transferred and made over to the defendant, accepting thereof as assignee for himself and assigns and for and on behalf and for the sole profit and benefit of said creditors "all and every," &c., &c, enumerating specific properties and concluding thus: "and all assets generally whatsoever without exception or reserve upon trust and to and for the uses, &c., hereinafter mentioned, that is to say :

"1st. To pay all costs attending the execution of the trust purposes of the deed: "

"2nd. All rent and privileged claims," and

"3rd. To divide from time to time and as said assignee shall deem proper the whole rest and residue of said estate *pro rata* among said creditors according to their several and respective claims as filed by them with the party of the second part" (The Trustee) "the amounts of which appear and are shown opposite the creditors' respective names set out in the annexed list approved and signed *ne varietur* by parties and notaries hereto."

Now, as it appears to me, Marcotte by this deed himself determined the precise time, *ne varietur* when each creditor should become entitled to receive a dividend upon his claim and the respective amounts of such claims, namely upon each creditor signifying his acceptance of the benefit of the deed as expressed therein by filing his claim with the trustee, such claim being that stated in the list annexed to the deed *ne varietur*. It is to be observed that there is no provision in the

1891

BENNING v. THIBAUDEAU.

Gwynne J.

deed to the effect that the claim of any creditor having collateral security shall be diminished or altered in any respect in case, after the filing of his claim and the acceptance thereof by the trustee, he should realize anything from the collaterals held by him; no provision that from time to time as anything should be realized from collaterals, the amount upon which such creditor would be entitled to be collocated for dividend, should be reduced by the amount realized from the collaterals. Every creditor, whether holding collateral security or not, was by the terms of the deed to receive out of the estate and effects which the grantor had power to appropriate for the benefit of all creditors alike an equal ratable dividend proportionate to the amount of his claim as it existed when filed with the trustee, those holding collateral securities until, with such dividends and any sums to be realized from collaterals, they should be paid in full, when what should remain of the collaterals held by them should first come under the operation of the trust deed and for the benefit of all the other creditors not paid in full.

This, as it appears to me, is the true construction of the trust deed. A contrary construction cannot, in my opinion, be given to it without the insertion of a wholly new clause never apparently contemplated by the grantor, and which could not be inserted without detracting in a most essential manner from the rights which had then already been vested by the grantor in such of his creditors as were then holders of collateral securities; without, in fact, completely altering the trust purposes of the deed.

Prior to the execution of the trust deed the above plaintiffs had the right to sue Marcotte and to recover judgment against him to the full amount of his debt, admitted to have been $19,139.83, and they had the right at the same time to

1891

BENNING v. THIBAUDEAU.

Gwynne J.

sue and recover judgment against Moodie to the full amount of his notes which the plaintiffs held as collateral security, and they had the right to enforce these judgments by executions levied both on the property of Marcotte and on that of Moodie from time to time, until the plaintiffs, by moneys realized either wholly from the property of one of them or partly from the property of one of them and partly from that of the other, should be paid in full Marcotte's debt to them. When, then, Marcotte executed the trust deed he had no power of disposition whatever over the Moodie notes, which had been transferred to the plaintiffs as collateral security, which he could exercise to the prejudice of the plaintiffs; and, indeed, he does not in the deed claim to have, or assume to exercise, any such power. So far as those notes were concerned Marcotte's interest in, and his power of disposition over, them was limited to so much of the amount thereof as should remain after the plaintiffs should be paid in full Marcotte's debt to them; and that was the sole interest in those notes which passed by the trust deed to the defendant. The trust deed had no operation whatever upon those notes, unless or until the plaintiffs should be paid in full Marcotte's debt, but upon the residue of the property of Marcotte the trust deed had immediate operation, and it is plain that out of the proceeds of that property the plaintiffs by the deed, which is recited as being executed in pursuance of an agreement between Marcotte and his creditors, are declared to be entitled to receive an equal dividend with all the other creditors of Marcotte, upon the full amount of Marcotte's debt to the plaintiffs which is admitted to have then been $19,139.83, without in any manner detracting from the plaintiffs' rights in the collaterals held by them until they should be paid in full, and the trust which the

defendant accepted and undertook to execute, in so far as the plaintiffs were concerned, was to pay to them upon the above amount as constituting their claim an equal share or dividend ratably with Marcotte's other creditors, out of the moneys to be realized by the trustee from the property so transferred to him in trust. It is a portion of this property which has been sold and the trustee, in accordance with the express provisions of the deed, the trusts of which he assumed and undertook to discharge, has collocated the plaintiffs as entitled to receive the sum of $2,392.49, being their equal share or dividend at the rate of 12½ cents in the dollar upon the above sum for which they were, as is admitted, entitled to rank when the trust deed was executed, and on the 22nd April, 1882, when they filed their claim with the trustee and thereby signified their acceptance of the benefits of the trust deed. For this sum of $2,392.49 the plaintiffs were, in my judgment, entitled to judgment in the Superior Court with interest thereon from the 13th February, 1882. The only law affecting the present case is, in my opinion, that prevailing in the Province of Quebec in relation to the construction of contracts, and to the obligation imposed upon a trustee to execute the trusts of a deed which he accepts and undertakes to execute. In the absence of an Insolvent Act passed by the Parliament of Canada qualifying the rights of creditors of an insolvent debtor as expressed in a voluntary deed executed by the debtor, and detracting from such rights in the case of a creditor holding collateral securities, there does not, in my opinion, exist in the Dominion any law which can have the effect of depriving the plaintiffs of the benefit of the provisions of the trust deed in his favour as above construed, or of relieving the defendant from the obligation of executing the trusts of the deed as

1891

BENNING v. THIBAUDEAU.

Gwynne J.

accepted by him according to the precise terms and provisions of the deed.

The case in my judgment is simply resolved into this :—The Insolvent Act passed in 1864 by the legislature of the late province of Canada abrogated, annulled and repealed, within that part of the province which formerly constituted Lower Canada, the old French law, whatever it was, in relation to insolvency and the distribution of the estates of insolvents. The act of 1864 assumed control over and provided the law relating to that subject. This act of 1864 was the sole law in force in Canada upon the subject at the time of the passing of the B.N.A. Act, which act withdrew the subject from provincial jurisdiction and placed it under the exclusive jurisdiction and control of the Dominion Parliament. That Parliament by the act of 1869, when repealing the act of 1864, enacted a law upon the subject having uniform force and effect throughout the whole Dominion. The act of 1875 which repealed the act of 1869 re-enacted another law upon the subject, having in like manner uniform force and effect throughout the Dominion. The act 43 Vic. ch. 1 repealed the act of 1875 and two other acts which had been passed in amendment of it. Now, what was the effect of this repeal? Not, in my opinion, as has been contended, to revive the old French law in relation to insolvency and the distribution of the estate of insolvents within the province of Quebec, so in effect leaving the province of Quebec with an insolvent law while all the other provinces of the Dominion were without one. The Dominion Interpretation Act enacts that the repeal of any act shall not revive any act or provision of law repealed by such act. As well might it be contended that 43 Vic. ch. 1 had the effect of reviving the repealed act of 1864 as of reviving the old provision of law which the act of 1864 abrogated, an-

1891

BENNING v. THIBAUDEAU.

Gwynne J.

nulled and repealed. The effect of 43 Vic. ch. 1, in my opinion, was simply to leave all the provinces of the Dominion alike in the same condition, that is to say, without any law relating to insolvency unless and until one should be enacted by the sole power having jurisdiction over the subject. As to this case now before us, all we have to do as it appears to me is to construe the agreement between the parties as expressed in the deed of February, 1882, the trusts of which the defendant assumed the duty of discharging, and in accordance with the provisions whereof he collocated, in my opinion correctly, the plaintiffs as entitled to receive as their dividend upon their claim as secured by the deed, the sum of $2,392.94 for which sum with interest from the 13th July, 1882, they are, in my opinion, entitled to judgment, and the appeal therefore should be allowed with costs and judgment be ordered to be entered accordingly in the Superior Court with costs.

PATTERSON J.—Marcotte being insolvent assigned his effects to the respondent, who is defendant in the action, for the benefit of the whole of his creditors, on the 13th of February, 1882. The appellants had made him advances on his promissory note, and he had given them collateral security, to an amount larger than his debt, by pledging some goods and by endorsing to them promissory notes made by one Moodie. It is not stated in the case agreed on by the parties that Marcotte made himself, or became, personally liable to the appellants as endorser of these notes. The notes may have been endorsed merely for the purpose of transferring them, the power to do which is explained in *Denton* v. *Peters* (1), or it may be that Marcotte was not notified of the dishonour of the notes so as to fix

(1) L. R. 5 Q. B. 475.

1891

BENNING v. THIBAUDEAU.

Patterson J.

him with liability for the payment of them. It was not a necessary part of the transaction that he should, in addition to his liability on his own note, become also liable on these Moodie notes. We are not even informed, nor is it necessary that we should know, whether the notes fell due before the assignment or not till afterwards. We have simply the facts that Marcotte was debtor to the appellants, and that, by way of security for the debt, they held a portion of the assets of their debtor, and had the right which is recognized by article 1969 of the Civil Code to be paid from those assets by privilege or preference before other creditors. The debt due by Marcotte to the appellants and the debt due by Moodie to Marcotte were entirely distinct debts. The nature of the latter was not changed by the accident of the endorsement over of the notes by Marcotte, which made Moodie directly liable to the appellants, not for the debt which they had proved against Marcotte's estate, but for the several promissory notes.

To constitute a joint and several liability as defined by article 1103 of the Civil Code three things must concur. The co-debtors must be obliged to the same thing: In such manner that each of them singly may be compelled to the performance of the whole obligation: And that the performance by one discharges the others towards the creditor. These tests are, in my apprehension, fatal to the recognition of a joint and several liability in the present instance. Moodie's obligation is to pay his notes; Marcotte is to pay his debt to the appellants, which is a different thing. To hold Marcotte compellable, as endorser of the notes, to perform the same obligation as Moodie would be, as we have seen, to assume facts that are not before us. Besides, that is not the obligation on which the claim before the assignee is founded. That claim is made

1891

BENNING v. THIBAUDEAU.

Patterson J.

under an obligation to which Moodie is no party. Performance by Marcotte of his obligation by the payment of his debt would not discharge Moodie. He would still have to pay his notes. And performance by Moodie discharges Marcotte only as a realization of so much of the security held by Marcotte's creditor.

In this particular I do not see my way to follow the learned and instructive judgment delivered by Mr. Justice Jetté in the Court of Review (1).

I do not think it necessary to discuss or to form a definite opinion as to the effect of Marcotte's being liable as endorser on Moodie's notes, if he had been shown or admitted to be so liable. Two questions would arise. The first, which might not be difficult to answer in the affirmative in view of articles 1103, 1104, 1105 and 2310, would be: Was there a joint and several obligation? And the second, which would involve more difficulty, would be the conclusion that a joint and several obligation would carry with it the right of the creditor to rank upon the estate of each co-debtor for the whole original amount of his claim until paid in full, without his being bound to reduce his claim on one estate by crediting payments received from the other estate. On this question there are strongly conflicting opinions, as is evident from contrasting the views of Mr. Justice Jetté in this case, which is reported as *Benning* v. *Thibaudeau* (1), with others commented on by him, particularly those of Chief Justice Meredith expressed in *Rochette* v. *St. Louis* (2), and with the later opinion of Mr. Justice Andrews in *Chinic* v. *Rattray* (3).

The debt for which, on the 22nd of April, 1892, the appellants filed their claim, was $19,139.83.

(1) M.L.R. 2 S.C. 338.
(2) 3 Q.L.R. 97.
(3) 14 Q L.R. 265.

1891

BENNING v. THIBAUDEAU.

Patterson J.

Moodie was unable to pay in full, and the amount realized from the collateral security was considerably less than this debt of $19,139.83.

The court of appeal sustained the respondent's contention that the sums so realized were payment *pro tanto* of the debt out of the property of Marcotte and that the appellants are entitled to share in the fund in the hands of the assignee in respect only of what remains unpaid.

In my opinion that conclusion should be affirmed on the grounds stated in the judgment of the court.

With regard to the amounts, I cannot make the details given in the case bring out the results there given, nor can I find in the case exactly the same figures on which the calculations in the judgment of the Queen's Bench are made.

In the court of first instance the computation is made on the gross amounts stated in the case, and, as far as I can perceive, that computation is correct. The figures thus used are as follows :—

Total debt proved	$	19,139 83
" amount realized from collaterals		10,166 24
Balance for which to rank	$	8,973 59
12½ cents per $ on $8,973.59	$	1,121 69

Part of the amount realized was received after the declaration of the dividend on 13th July, 1882. In the Queen's Bench it was held that that part was not to be deducted from the claim proved, and the amount deducted by the judgment of the Queen's Bench was therefore $9,427.33, or $678.91 less than the amount deducted at the trial, leaving $9,712.50 for which to rank. 12½ per cent on this amount would be $1,214.06, and not $1,550.50 as erroneously stated in the judg-

ment. This correction ought, at all events, to be made, as asked by the respondent at the end of his factum; but I do not understand why the whole amount received from the collaterals should not be deducted. I think the proper correction to be made would be to restore the judgment to the amount of $1,121.69, for which it was first rendered, and with this correction I would dismiss the appeal with costs.

1891

BENNING v. THIBAUDEAU.

Patterson J.

Appeal dismissed with costs.

Solicitors for appellants: *Beïque, Lafontaine & Turgeon.*

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

1890
*May 13.
1891
*Feby. 24,
*Nov. 17.

THE ONTARIO BANK (CLAIMANTS)..... APPELLANTS;

AND

EDWARD CHAPLIN (CONTESTANT).....RESPONDENT;

AND

THE EXCHANGE BANK OF CANADA ..... } IN LIQUIDATION.

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

Joint and several debtors—Insolvency—Distribution of assets—Privilege—R.S.C. ch. 129 sec. 62—Winding-up Act—Deposit with bank after suspension—Practice—Leave to appeal—Order nunc pro tunc.

Held Per Ritchie C.J., and Taschereau J., affirming the judgment of the court below, Strong and Fournier JJ. *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.

Per Gwynne and Patterson JJ. That a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. R. S. C. ch. 129 sec. 62. The Winding-up Act.

Held, also (affirming the judgment of the court below) that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

After the case was argued the appellant with the consent of the respondent obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the Registrar of

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

1890

THE ONTARIO BANK v. CHAPLIN.

the Supreme Court, sitting as a Judge in Chambers, giving him leave to appeal in accordance with section 76 of the Winding-up Act, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming a judgment of the Superior Court for Lower Canada, Montreal district (2), maintaining the contestation of the appellants' claim upon the Exchange Bank in liquidation.

The Ontario Bank creditors of the Exchange Bank, on the 5th June, 1886, filed an amended claim with the liquidators of the Exchange Bank of Canada, which had stopped payment on the 17th September, 1883, and had gone into liquidation under the Winding-up Act (1). The claim consisted of two items of $11,216.56, including a sum of $15,766.56, concerning which there was no contestation, and $6,450.00 in respect of certain promissory notes of Hyde, Turcot & Co., insolvents, which had been discounted for the Exchange Bank in 1883, and the payment of which at maturity had been guaranteed, and a further sum of $939.85, representing a deposit made by the Ontario Bank of several cheques drawn by customers of the Exchange Bank upon their accounts there, which cheques were handed in to the bank, after suspension of payment but before the Ontario Bank was aware of the suspension, and were passed to the credit of the Ontario Bank and charged against the several drawers of them, and which amount the Ontario Bank asked to be paid by preference.

In 1884, when the Ontario Bank first proved its claim under the Winding-up Act, it credited the Ex-

(1) M.L.R. 5 Q.B. 407. (2) 15 Rev. Lég. 435.
(1) R. S. C. Ch. 129.

1890

THE ONTARIO BANK v. CHAPLIN.

change Bank with the dividends it had received from the insolvent estate of Hyde, Turcot & Co., viz.: $2,454.29, but in the amended claim these dividends were not deducted.

The respondent Edward Chaplin, a creditor of the Exchange Bank in liquidation, contested the amended claim of the Ontario Bank on the ground that the Exchange Bank being liable as endorsers, were entitled to the credit of the dividends received by the Ontario Bank on Hyde, Turcot & Co.'s promissory notes, and that the cheques not having been presented until after the suspension of the bank, could not be paid by preference.

The written guarantee of the Exchange Bank when Hyde, Turcot & Co.'s notes were discounted reads as follows :—

"DR. IN ACCCOUNT WITH EXCHANGE BANK OF CANADA.

00843—D. Morrice & Co	Oct. 15	Beet Sugar Co	$	3,632 46
1—Gault Bros. & Co	Dec. 24	" " "		4,000 00
50—C. H. Nash	Dec. 24	A. W. Ogilvie		8,642 80
9—St. Lawrence S. Co.	Nov. 17	F. E. Gilman		5,000 00
60—W. Angus	Dec. 17	" "		5,000 00
798—Hyde, Turcot & Co.	Nov. 20	A. H. Plimsoll		2,150 00
9— " " "	Dec. 20	" "		2,150 00
800— " " "	Jan. 21	" "		2,150 00
71—Wm. Tarley	Dec. 4	M. H. Gault		1,279 20
55—C. Lamoureux & Cie.	Dec. 18	Brossard, Chaput & Co		2,000 00
				$36,004 46

"In consequence of the Ontario Bank having discounted the above list of notes for the Exchange Bank of Canada, the said Exchange Bank hereby guarantee the prompt payment of the same at maturity.

"T. CRAIG,

"*President, Exchange Bank of Canada.*

"Montreal, 21st August, 1883."

1890

THE ONTARIO BANK v. CHAPLIN.

The contestation of the amended claim of the Ontario Bank was maintained by the Superior Court and the Court of Queen's Bench.

Upon the appeal to the Supreme Court of Canada, the only questions argued were :—

1. As to the right of a creditor to rank, for the full amount of his claim, upon the separate estates of two insolvent debtors jointly and severally liable for the amount of the debt; or, in the present case, the right of the appellants to rank for the full amount of their claim, founded upon notes discounted for the Exchange Bank, without deducting from their claim the amount received from other parties jointly and severally liable with the bank upon the notes; and

2. As to the right of the appellants to be paid by privilege the amount of a deposit made with the Exchange Bank of Canada after its suspension, represented by cheques of third parties accepted by the Exchange Bank, and placed to the credit of the appellants.

After the case was set down for hearing the appellant, having failed to obtain leave to appeal to the Supreme Court in accordance with section 76 of the Winding-up Act, obtained from the judge of the court below an order extending the time for leave to appeal, and before the time expired the Registrar of the Supreme Court to whom a motion *nunc pro tunc* was referred granted leave to appeal, and his order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order grating leave to appeal.

The case which had been argued at the May sessions, 1890, was ordered to be reargued at the February sessions, 1891, in order that the case should be decided by the full court, Mr. Justice Taschereau being absent at the May sessions, 1890.

1891

THE ONTARIO BANK v. CHAPLIN.

Ritchie C.J.

Abbott Q.C. for appellants; and *Geoffrion* Q.C. and *J. H. Greenshields* Q. C. for respondent. The points of argument and cases cited are fully reviewed in the reports of the case (1), and in the judgments hereinafter given.

Sir W. J. RITCHIE C. J.—For the reasons given by the Court of Queen's Bench for Lower Canada (appeal side), I am of opinion that this appeal should be dismissed.

STRONG J.—I entirely agree with the Court of Queen's Bench that there is no foundation for the appellants' claim to preferential payment of the amount of the cheques deposited by the appellants in the Exchange Bank after its suspension.

I am, however, of opinion that the appellants are entitled in other respects to succeed in their appeal. The promissory notes for the full amount of which the appellants claim to be ranked as creditors without deducting payments received from other parties, were discounted by the appellants in the ordinary course of business, the Exchange Bank having first endorsed them. The latter bank thus became liable upon the paper jointly and severally with the prior parties to it.

The appellants had therefore, *primâ facie*, a legal right to get the benefit of this liability *in solido* by actions brought against all or any of the parties so liable. This being so it seems reasonable that the same right—to obtain payment in full—should be conserved to the creditor in the case of the bankruptcy or insolvency of the debtors—against the bankrupt or insolvent estates unless there is some positive law or enactment to the contrary. There being no such enactment, the solution of the question must depend entirely on the old law of France as it existed at the time of the

cession of the country, which law formed the common law of Lower Canada. Without entering upon a critical examination of the various authorities which have been cited, it is sufficient for me to say upon this point that I have come to the conclusion that the ancient law of France was that which was finally established by the jurisprudence. The state of this jurisprudence is shown by the arrêt of the Parliament of Paris of the 18th of June, 1776, and the arrêt of the Council of the 24th February, 1778, reversing the decision of the Parliament of Aix of the 18th June, 1776, which last arrêt is reported by Emerigon (1). The law as thus declared was embodied in Art. 542 of the Code of Commerce. I cannot, after a full consideration of all the authorities agree with the Court of Queen's Bench in holding that this was new law, introduced for the first time by the Code of Commerce, and applicable only to commercial matters; on the contrary, the best opinion I can form is that it was the reproduction of a principle which was established law, not only in commercial but also in civil matters. I am led to form this opinion, not only by what is said by authors of high authority, particularly Massé (2); Alauzet (3); Delvincourt (4); Rivière (5); Bravard-Veyrières, (6); and Larombière (7); but also by the consideration that in no other way can the creditor who has the joint and several obligation of several debtors obtain his right to a full payment save by treating each person obliged to him as the sole debtor. One of the authors before mentioned, Bravard-Veyrières, in the 7th edition of his work edited by Demangeat, has so clearly demonstrated this upon principle, as to con-

(1) Edition by Boulay-Paty, vol. 2, p. 565.
(2) Ed. 3, vol. 3, No. 2019.
(3) Ed. 3, vol. 8, pp. 2 et seq.
(4) Droit Commercial Ed. 2, vol. 2, p. 456, and note to p. 279.
(5) P. 754 et seq.
(6) Droit Commercial Ed. 7, par Demangeat, p. 600 et seq.
(7) 2 vol. p. 617.

1891

THE ONTARIO BANK v. CHAPLIN.

Strong J.

vince me that the creditor has a right to prove for the full amount of his debt against each estate without deducting payments received from the other, and that no other conclusion can be consistent with the contractual rights of a creditor to whom several debtors are bound *in solido*.

I am of opinion that the appeal should be allowed to the extent above indicated.

FOURNIER, J.—La question à décider en cette cause est absolument la même que celle soulevée dans la cause de *Benning et al.* v. *Simpson et al.* et *l'hon. R. Thibaudeau* (1), au sujet du droit d'un créancier de se présenter dans chaque masse en faillite de ses co-débiteurs solidaires pour la totalité de la somme qui lui est due. Il y a aussi la question de savoir si l'appelante a un privilège pour se faire payer de la somme de $939.80 qu'elle avait déposée à la banque d'Echange après la fermeture de ses portes, pour insolvabilité.

Dans la première cause il est indubitable qu'il y avait solidarité, parce que la créance des appelants était pour la plus grande partie fondée sur des billets promissoires, signés par diverses personnes et endossés par Marcotte en faveur des appelants Benning *et al.* Il y a également solidarité entre la banque d'Echange et les souscripteurs et endosseurs des billets promissoires mentionnés dans l'exhibit D. et en date du 21 août 1883, transportés à la banque d'Ontario pour escompte, par la dite banque d'Echange. La solidarité ne résulte pas dans ce cas comme dans l'autre, de billets promissoires signés par divers prometteurs en faveur de Marcotte et par lui régulièrement endossés en faveur de Benning *et al.* Elle résulte de la lettre de garantie donnée par la banque d'Echange à l'appelante et qui est conçue dans les termes suivants :—

(1) 20 Can. S. C. R. 110.

CLAIMANTS' EXHIBIT "D" AT ENQUETE.

(Please examine and report immediately.)

Dr. Cr.

IN ACCOUNT WITH EXCHANGE BANK OF CANADA.

00843—D. Morrice & Co	Oct. 15	Beet Sugar Co	$3,632	46
1—Gault Bros. & Co	Dec. 24	" "	4,000	00
50—C. H. Nash	Dec. 24	A. W. Ogilvie	8,642	80
9—St. Lawrence Steam'p Co.	Nov. 17	F. E. Gilman	5,000	00
60—W. Angus	Dec. 17	" "	5,000	00
798—Hyde, Turcot & Co	Nov. 20	A. H. Plimsoll	2,150	00
9— " "	Dec. 20	" "	2,150	00
800— " "	Jan. 21	" "	2,150	00
71—Wm. Tarley	Dec. 4	M. H. Gault	1,279	20
55—C. Lamoureux & Cie	Dec. 18	Brossard, Chaput Co.	2,000	00
			$36,004	46

In consequence of the Ontario Bank having discounted the above list of notes for the Exchange Bank of Canada, the said Exchange Bank hereby guarantee the prompt payment of the same at maturity.

T. CRAIG, *Pres.*,
Exchange Bank of Canada.

Montreal, 21st Aug., 1883.

Cette lettre constitue d'après notre loi l'espèce de cautionnement que l'on appelle un aval. Il ne faut pas le confondre avec le cautionnement ordinaire parce qu'il produit des effets plus étendus.

L'aval, de quelque manière qu'il ait été donné, produit de plein droit la solidarité, etc., etc.

Sur la nature et les effets de l'aval il n'y a aucune différence d'opinion dans le droit français. Celui qui a garanti un effet de commerce est toujours solidaire de celui qu'il garantit. Ce principe n'a nullement été mis en question dans cette cause. Les deux cours Supérieure et du Banc de la Reine l'ont également reconnu. Le jugement de la cour Supérieure s'exprime ainsi à ce sujet :

Attendu que la réclamante, dans sa réponse à la contestation du contestant, allègue : que, dans le mois d'août mil huit cent quatre-vingt-trois, la réclamante a prêté à la banque d'Echange du Canada, la somme

1891

THE ONTARIO BANK v. CHAPLIN.

Fournier J.

de trente-cinq mille deux cent quatre-vingt-dix-huit piastres et cinq centins, et lui a escompté, en faisant ce prêt, divers billets promissoires qu'elle avait alors, et pour le paiement desquels la dite banque d'Echange se rendit conjointement et solidairement responsable, avec les personnes obligées au paiement de ces billets, qu'au nombre de ces billets s'en trouvaient trois de la société Hyde, Turcot et Cie, au montant de deux mille cent cinquante piastres chacun.

La cour du Banc de la Reine a aussi admis la solidarité en confirmant purement et simplement le jugement de la cour Supérieure. Cela suffit pour régler la question de solidarité entre la banque d'Echange et les souscripteurs et endosseurs des billets garantis par la lettre ci-dessus citée.

Comme on le voit, la question dans cette cause se résume, comme dans celle de Benning *et al.*, à savoir si l'appelante a droit à un dividende sur le montant de sa demande, ou bien seulement sur la balance de sa réclamation, après déduction faite du dividende reçu dans la faillite de Hyde, Turcot et Cie.

Je ne crois pas devoir répéter ici l'argument que j'ai déjà fait sur cette question dans la cause de *Benning et al* (1), où j'en suis venu à la conclusion que le créancier solidaire peut se présenter pour le plein montant de sa créance dans les différentes masses en faillite de ses débiteurs solidaires jusqu'à entier paiement de sa créance.

Voir aussi Ruben de Cauder. Dict. de droit commercial (2).

1. L'aval est une espèce de cautionnement, mais il ne faut pas le confondre avec le cautionnement ordinaire parce qu'il produit des effets plus étendus.

7. Aucune forme particulière n'est prescrite pour l'aval.

24. L'aval de quelque manière qu'il ait été donné, produit de plein droit la solidarité et assujétit celui qui l'a souscrit à toutes les obligations de la personne pour laquelle il a été donné.

Les parties conservent la faculté d'en restreindre l'étendue par des stipulations particulières.

(1) 20 Can. S. C. R. 110. (2) 2 vol. vo. Aval.

25. Mais ces restrictions ne se supposent pas. A moins d'une convention expresse le donneur d'aval est soumis aux mêmes obligations que le débiteur principal.

1891

THE ONTARIO BANK v. CHAPLIN.

Fournier J.

Quant à la somme de $939.80 réclamée à titre de privilège, je concours dans les motifs donnés par l'honorable juge Mathieu pour justifier son refus de reconnaître l'existence d'un privilège pour le remboursement de cette somme.

D'après mon opinion le jugement de la cour du Banc de la Reine devrait être modifié de manière à reconnaître le droit à l'appelante d'être colloquée sur le plein montant de sa réclamation sans déduction du dividende de Hyde, Turcot et Cie.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed for the reasons given by the Court of Queen's Bench for Lower Canada (appeal side).

GWYNNE J.—There are two sums only as to which questions are raised upon this appeal, viz., $2,454.29 and $944.81; as to this latter sum the Ontario Bank claim a right to rank as privileged creditors on the Exchange Bank in liquidation. As to the $2,454.29, the question is whether the Ontario Bank should be allowed to amend a claim brought in and proved by them on oath against the Exchange Bank in liquidation, by erasing from the credit side of the said claim so proved the above sum, for which in their claim they had given credit as received out of certain promissory notes discounted by the Ontario Bank for and at the request of and guaranteed by the Exchange Bank. If the Exchange Bank had continued solvent they could not have been held liable in an action brought against them upon their contract of guarantee for any greater amount than remained due and unpaid upon the notes guaranteed at the time of the commencement of the

1891

THE ONTARIO BANK v. CHAPLIN.

Gwynne J.

action. So in like manner, upon the Ontario Bank bringing in and proving their claim against the Exchange Bank in liquidation under the Winding-up Act, they could not be received as claimants against the bank in liquidation for a larger amount than that bank would have been liable for in an action, if solvent, the Ontario Bank could not be recognized as creditors for a greater amount than was actually due by their debtor. When therefore the Ontario Bank in their claim made in December, 1884, which was proved upon the oath of their agent, gave credit for the above sum of $2,594.29 theretofore received by them upon the notes which were guaranteed by the Exchange Bank, they acted quite correctly in so doing and to the claim as then made, and which in truth was the only one existing, they must be held.

As to the $944.81 the claim is founded upon the fact that the Exchange Bank after they had stopped payment, but before the Ontario Bank were aware thereof, received from the Ontario Bank for deposit to their credit certain cheques made in their favour by certain customers of the Exchange Bank upon them, and which had been marked as good by the latter bank (and received or marked by the Ontario Bank before the Exchange Bank stopped payment) and entered the amounts of the cheques to the credit of the Ontario Bank's account in the books of the Exchange Bank. This entry was in fact but a completion of the undertaking involved in the marking the cheques as good a couple of days previously before the bank had stopped payment. But assuming this conduct of the Exchange Bank in entering those cheques to the credit of the Ontario Bank as above stated without informing the Ontario Bank of the stoppage of payment by the former, to have constituted an actionable wrong to the Ontario Bank, the nature of their bank's remedy

1891

THE ONTARIO BANK v. CHAPLIN.

Gwynne J.

was to compel a return of the cheques so as to enable the Ontario Bank to look to the persons who had given them the cheques and the latter to have proved against the Exchange Bank in liquidation. Not having pursued that remedy, but on the contrary made claim against the Exchange Bank as their debtors in respect of their deposit, and having proved the item in their claim presented in December, 1884, in the liquidation, they can only claim in respect of that deposit as ordinary creditors. To allow them to rank as privileged creditors in respect of that item, would operate to the prejudice of the general creditors of the bank in liquidation, and there is in my opinion no foundation whatever in law for the appellants' contention. The appeal must therefore be dismissed with costs.

PATTERSON J.—The Ontario Bank discounted for the Exchange Bank, on the 21st of August, 1883, a number of promissory notes, three of which were made by Hyde, Turcot & Co., the whole amounting to $36,004.46, and the Exchange Bank gave a written guarantee of the prompt payment of all the notes at maturity. The notes were all paid by the parties to them, except those of Hyde, Turcot & Co. who became insolvent.

The Exchange Bank stopped payment on the 17th of September, 1883, and went into liquidation under the Winding-up Act. If I correctly understand the documents before us, none of the notes fell due until after September, 1883, but they had all fallen due before the filing of the claim of the Ontario Bank on which the present contest arises.

That claim was proved on the 5th of June, 1886. It consists of two items. One is a special claim for $939.85 the consideration of which we may defer. It has no reference to the notes. The other item of

1891

THE ONTARIO BANK v. CHAPLIN.

Patterson J.

$11,216.56, includes $5,472.97 concerning which there is no question before us, and $5,743.59 in respect of the notes. This amount is produced by debiting, as of the 21st of August, 1883, $35,298.05 for cash advanced, being the proceeds of the $36,004.46 of notes discounted on that day, and crediting $29,554.46, the amount of all the notes except those of Hyde, Turcot & Co. Those three notes amounted to $6,450, and the Ontario Bank had received in March and June, 1884, before they proved any claim under the winding-up of the Exchange Bank, two dividends from the insolvent estate of Hyde, Turcot & Co., amounting together to $2,454.29.

The proof made on the 5th of June, 1886, was an amended claim. A claim had been proved on the 30th of December, 1884, in which credit had been given for these dividends, but that was withdrawn, and the contest, on this branch of the case, is whether the appellants are bound to deduct the dividends from their claim of $5,743.59, or have the right to rank for the whole amount.

It seems perfectly plain that the contention of the appellants cannot be maintained if the transaction is treated as they have treated it in their proof of claim. It is there represented as a loan to the Exchange Bank of $35,298 05 for which that corporation was primarily liable as borrower and the notes security for the loan. I am inclined to think that in putting the claim in this shape the appellants truly represented its real character, but if so they ought to have proved as for a secured claim under section 62 of the Winding-up Act (1), and cannot be allowed to rank without first accounting for the value of their security.

(1) R. S. C. ch. 129.

1891

THE ONTARIO BANK v. CHAPLIN.

Patterson J.

The argument for the appellants, however, ignores the form in which their claim was presented to the liquidator, and falling back upon the ostensible transaction of a discount of notes with a letter of guaranty, asserts a joint and several obligation, the co-debtors being, in the case of each note, the makers or endorsers of the notes and the bank as guarantor. This question of joint and several obligation is one which I do not find free from difficulty, and the authorities, which are fully cited and examined by Mr. Justice Jetté in *Benning* v. *Thibaudeau* (1), are by no means agreed upon it. My own opinion inclines to the recognition in this case of the joint and several obligation. I think that opinion is supported by articles 1103, 1104, 1105 and 2310 of the Civil Code, in connection with which I may refer to an English authority. In the case of *Liquidators of Overend, Gurney & Co.* v. *Liquidators of Oriental Financial Corporation* (2) there was a guaranty in these terms:

> I agree to indemnify you for all the loss that you may incur by discounting the bills, and in the event of the same not being paid at maturity, I engage to pay the amount of the bills on demand.

Lord Cairns speaking of that guaranty said:

> To all intents and purposes as regarded Overend and Gurney (who had discounted the bills) Mr. Henry (the guarantor) was exactly in the same position as to these bills as if his name had been found on the bills as a party to them. He had promised to pay them on demand when they reached maturity. Although he had given that promise not upon the face of the bills but upon a collateral writing, to all intents and purposes he was bound by the fate of the bills.

There appears to be an embarrassing conflict of opinion respecting the consequence of this joint and several liability. Does it entitle the creditor to rank on the estate of each of the co-debtors for the full amount of the debt, not crediting either estate with the amount realized from the other, until his debt is fully

(1) M. L. R. 2 S. C. 338. (2) L. R. 7 H. L. 348, 358.

1891

THE ONTARIO BANK v. CHAPLIN.

Patterson J.

paid? In *Benning* v. *Thibaudeau* (1), Mr. Justice Jetté answers the question in the affirmative, differing therein from the opinion of Chief Justice Meredith in *Rochette* v. *Louis* (2), and supporting his opinion by an able and learned argument, which however failed to convince Mr. Justice Andrews, who in *Chinic* v. *Rattray* (3) adhered to the view that the law of France at the time of the cession of Canada to Great Britain, which is conceded on all hands to afford the rule in the absence of legislation, was as it was declared to be by Chief Justice Meredith in Rochette's case. I do not feel that we are at present called upon to decide between these divergent opinions, because I think the question is concluded by section 62 of the Winding-up Act. The debt of the Exchange Bank to the appellants was a secured debt to the extent of the value of the notes they held. The appellants advance in their factum some arguments against this view. They urge that this being a commercial transaction, and therefore a joint and several obligation under article 1105, the bank is liable jointly and severally with the other parties on the paper. Granted; but so it is in any case of maker and endorser, and yet it cannot be doubted that, in view of section 62, the maker of a promissory note is security to the endorsee. It is further submitted that the section deals only with negotiable paper upon which the company is indirectly or secondarily liable, and that in any event it merely requires a valuation of the security when the paper is not due or exigible. It is urged by the appellants in another part of their factum, on the authority of Demolombe (4) and Sirey (5), that the account must be regarded as of the date of the insolvency and not as of the date of the proof. That proposition, if it were true in proceedings under the Winding-up Act, would dis-

(1) M. L. R. 2 S. C. 338.
(2) 3 Q. L. R. 97.
(3) 14 Q. L. R. 265.
(4) Vol. 26 p. 269.
(5) 62, 2, 121, 297.

1891

THE ONTARIO BANK v. CHAPLIN.

Patterson J.

place the point taken touching debts not due or exigible, because the notes in question were not due when the winding-up proceedings commenced. But, apart from that, the appellants do not read section 62 correctly. The section makes provision for the case of a creditor holding a claim based upon negotiable instruments on which the company is only indirectly or secondarily liable and which is not mature or exigible, enacting that such creditor shall be considered to hold security within the meaning of the section, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof, but that after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim. This is, in my judgment, a distinct affirmance, as applied to the present case, of the claim against the Exchange Bank being, in view of section 62, a secured claim, whether we regard the claim as of the commencement of the winding-up when the liability was not mature or exigible, or as of the date of the filing of the proof when the value of the security had been ascertained and realized. Whatever may be the true doctrine respecting the rights of a creditor who proves the same debt against the estates of two joint and several debtors, and however the general rule may be ultimately settled, it is clear to my apprehension that there are cases, of which the present is one, where an obligation which under articles 1103, 1104, 1105 and 2310 C.C. is joint and several, must be dealt with under the Winding-up Act as provable against the estate of one of two co-debtors as a debt secured by the liability of the other.

I am of opinion that the appellants have been correctly held to be bound to deduct the dividends and to be entitled to rank only for the balance of their claim.

I believe this opinion agrees with the jurisprudence which has obtained in the province of Quebec under

1891

THE ONTARIO BANK v. CHAPLIN.

Patterson J.

our Insolvent Acts of 1869 and 1875, which contained provisions similar to those of section 62 of the Winding-up Act. I refer to *In re Bessette* (1); to *Rochette* v. *Louis* (2), and to remarks by Mr. Justice Jetté in *Benning* v. *Thibaudeau* (3).

The appellants in executing the deed of composition and discharge of Hyde, Turcot & Co. noted that they did not waive their recourse against the bank. Nothing now turns on that reservation. The right of recourse against the bank has been accorded to the appellants without question notwithstanding their release of Hyde, Turcot & Co. The recourse stipulated for was, as I understand it, for the amount released not for the amount received.

The contest respecting the claim of the appellants to be paid by preference an item of $939.85 relates only to a part of that amount which represents a deposit, made by the appellants, of several cheques drawn by customers of the bank upon their accounts there, which cheques were handed in to the bank after the suspension of payment but before the appellants were aware of the suspension, and were passed to the credit of the appellants and charged against the several drawers of them.

I do not think it necessary to say more as to the claim to rank as preferred creditors for this amount than that, while the appellants apparently make out of the circumstances a case of some hardship, I have not been able to perceive any valid grounds for admitting their claim to be collocated as preferred creditors.

On both branches of the case I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for respondents: *Greenshields, Guerin & Greenshields.*

(1) 14 L. C. Jur. 21; 15 L.C. Jur. 126.

(2) 3 Q.L.R. 97.

(3) M.L.R. 2 S.C. 338.

CONTROVERTED ELECTIONS FOR THE ELECTORAL DISTRICTS OF

1891

*Nov. 2, 3.

SHELBURNE, N. S. (WHITE v. GREENWOOD); ANNAPOLIS, N. S. (MILLS v. RAY); LUNENBURG, N. S. (KAULBACH v. EISENHAUER); ANTIGONISH, N. S. (THOMPSON v. MCGILLIVRAY); PICTOU, N. S. (TUPPER v. MCCOLL); AND INVERNESS, N. S. (MCDONALD v. CAMERON).

Election petitions—Preliminary objections—Service of petition—Security—R. S. C. ch. 9 s. 10 and s. 9 (e) and (g).

In all these cases the appeals were from the decisions of the courts below dismissing preliminary objections to the election petitions presented against the appellants.

The questions raised on these appeals were also, 1st, Whether a personal service on the respondent at Ottawa without or with an order of the court at Halifax, or at his domicile, is a good service. 2nd, Whether the payment of the security required by sec. 9—(*e*) into the hands of a person who was discharging the duties of and acting for the prothonotary at Halifax, and a receipt signed by said person in the prothonotary's name—sec. 9 (*g*) were valid.

The court following the conclusion arrived at in the *King's County* (*N. S.*) (1) and *Queen's County* (*P.E.I.*) *Election Cases* (2), held the service and payment of security valid and a substantial compliance with the requirements of the statute.

Appeals dismissed with costs.

McCarthy Q.C. and *J. A. Ritchie* for appellants

E. T. Congdon for respondents.

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

(1) 19 Can. S. C. R. 526. (2) 20 Can. S. C. R. 26.

1891

*May 18, 19.

*Nov. 17.

THE GREAT NORTH-WESTERN TELEGRAPH CO. (PLAINTIFFS) } APPELLANTS;

AND

THE MONTREAL TELEGRAPH COMPANY (DEFENDANTS)..... } RESPONDENTS.

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

Lessor and lessee—Art. 1612, 1614, 1618 *C. C.—Disturbance of lessee's use —Claim for reduction of rent—Trespass—Trouble de droit.*

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court which dismissed appellant's action and incidental demand.

The action was instituted for reduction of rent and damages under the lessors and lessees articles of the Code of Civil Procedure and article 1612 and following of the Civil Code.

On the 17th of August, 1881, by deed or instrument executed under private signature an agreement was entered into between the appellants and the respondents in this cause, by which the appellants undertook for a period of ninety-seven years from the 1st of July, 1881, to work, manage and operate the system of telegraph lines then owned and operated by the respondents, including the telegraph lines erected along the South-eastern Railway line and other railways under certain agreements, and to pay the respondents quarterly during the continuance of the arrangement a sum equal to the dividend at 8 per centum upon the respondents' capital stock of $2,000,000, with the further

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

yearly sum of $5,000 to meet office expenses. In accordance with this agreement the appellants took possession of the respondents' system of telegraph lines and have since managed and operated the same. By their action the appellants averred that since the 17th of September they had been troubled in their enjoyment of the respondents' system of telegraph lines by the Canadian Pacific Railway Company, which now possesses and controls the South-eastern Railway and other railways and have constructed lines of telegraph along the same, by which in contravention to the agreements above mentioned, the company transmits for remuneration messages for the general public, thus causing a diminution of business and thereby great loss to the appellants, and concluded by their action and incidental demand by asking an annual reduction of $80,000 rent.

Upon the pleadings and evidence the Superior Court (1) whose judgment was affirmed by the Court of Queen's Bench for Lower Canada (appeal side) (2), dismissed the appellants' action and incidental demand on the ground that the alleged interference by the Canadian Pacific Railway with the rights and privileges acquired by the respondents under agreements with the South-eastern Railway Company and other companies referred to in the agreement of the 17th August, 1881, was a mere trespass which did not constitute a *trouble de droit*, and did not authorize an action for a reduction of rent under arts. 1616 and 1618 C.C.

On appeal to the Supreme Court of Canada.

Irvine Q.C., *Girouard* Q.C. and *H. Cameron* Q.C. appeared for the appellants.

Geoffrion Q.C., *Lacoste* Q.C. and *H. Abbott* Q.C. appeared on behalf of the respondents.

(1) M.L.R. 6 S.C. 74. (2) M.L.R. 6 Q.B. 257.

1891

THE GREAT NORTH-WESTERN TELEGRAPH COMPANY v. THE MONTREAL TELEGRAPH COMPANY.

The Supreme Court dismissed the appeal, agreeing with and adopting the reasons for judgment of Mr. Justice Wurtele of the Superior Court, which are reported in M. L. R. 6 S.C. 94.

Justices Strong, Fournier, Taschereau and Patterson were also of opinion that as by the agreement of the 17th of August, 1881, the appellants had assumed all risk of diminished income in the working of the telegraph lines transferred by respondent and had entered into this agreement after the Canadian Pacific Railway Company had obtained authority from Parliament to establish telegraph lines for the transmission of messages for the public, the action should be dismissed on the merits, adopting the view of the case taken by Sir A. A. Dorion in the Court of Queen's Bench for Lower Canada (appeal side), whose judgment is reported at length in M.L.R. 6 Q.B. p. 258.

Appeal dismissed with costs.

Solicitors for appellants: *Girouard & DeLorimier.*

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

CITY OF HAMILTON *v.* CORPORATION OF TOWNSHIP OF BARTON.

1891

*Mar. 17, 18.

*Nov. 17.

Municipal Corporation—Construction of sewer—Right to enter lands of adjoining municipality—Restrictions—R. S. O. (1887) *c.* 184 *s.* 479 *ss.* 15—51 *V. c.* 28 *s.* 20 *(O.).*

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the respondents.

The action in this case was brought to restrain the city of Hamilton from entering upon lands in the township of Barton for the purpose of extending a sewer constructed by the city into the territory of the township. The defendants relied upon the provisions of 50 V. c. 28 s. 20, amending the Municipal Act of Ontario, R. S. O. (1887) c. 184 s. 479 as giving them authority to enter the adjoining municipality without first obtaining the latter's assent, and also claimed that the private owners of the lands affected were the only persons who could complain. The courts below held, however, that the amending act did not take away the restrictions imposed by the Municipal Act, and that it is still necessary that the two municipalities should settle, by agreement, the terms and conditions of such entry, and if such agreement cannot be had the said terms and conditions must be settled by arbitration.

The Supreme Court affirmed the decision appealed from adopting the reasons given by the judges of the Court of Appeal for deciding against the contention of the city of Hamilton.

Appeal dismissed with costs.

MacKelcan Q.C. and *Moss* Q.C. for the appellants.

S. H. Blake Q.C. and *Bell* for the respondents.

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

(1) 17 Ont. App. R. 346. (2) 18 O.R. 199.

1891

SIMONDS *v.* CHESLEY.

*May 6.
*Nov. 17.

Trespass to land—Title—New trial—Misdirection—Misconduct of party at view of premises—Nominal damages.

APPEAL from a decision of the Supreme Court of New Brunswick refusing the plaintiff, Simonds, a new trial.

The action in this case was for trespass to plaintiff's land by placing ships' knees thereon whereby plaintiff was deprived of a use of a portion of said land and prevented from selling or leasing it. The defendants denied plaintiff's title. At the trial plaintiff gave no evidence of actual damage but claimed that an action was necessary to protect his title. Evidence was given to show that the alleged trespass was committed beyond the street line, and plaintiff claimed that the street had never been dedicated to the public and his ownership extended to the centre. Before the verdict was given the jury viewed the premises, one of the terms on which the view was granted being that "nothing said or done by any of the parties or their counsel should prejudice the verdict." The judge charged the jury strongly against the plaintiff and a verdict was given in favour of defendants. Plaintiff moved for a new trial on the grounds of misdirection and of improper conduct of one of the defendants at the view. The court below refused a new trial.

The Supreme Court held that plaintiff was precluded by the terms on which the view was granted from setting up misconduct thereat in support of the application; that there was no misdirection, and that as all plaintiff could obtain at a new trial would be nominal damages it was properly refused by the court below.

Appeal dismissed with costs.

Skinner Q.C. and *Simonds* for the appellant.

Currey for the respondents.

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

BOWKER *v.* LAUMEISTER.

1891

Trust—Not expressed in deed—Parol evidence of—Enforcement—Findings of fact.

*Nov. 19, 20.

APPEAL from a decision of the Supreme Court of British Columbia affirming the decree made at the trial.

The suit in this case was brought to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property reconveyed or sold according to the terms of the alleged agreement. The defendant claimed that he had given valuable consideration for the transfer to him of the property conveyed by the deed, and the plaintiff had accepted the same in full satisfaction and payment therefor.

At the trial parol evidence was given to establish the alleged trust and its existence was found as a fact by the trial judge who made a decree ordering the property to be sold and the proceeds applied as, according to the contention of the plaintiff and the evidence in proof thereof, had been agreed upon. The full court affirmed this decree.

The Supreme Court held that the fact of the existence of the trust having been found by the trial judge, and such finding having been affirmed by the full court, it should not be disturbed on this further appeal.

Appeal dismissed with costs.

S. H. Blake Q.C., for the appellant.

Robinson Q.C., for the respondent.

---

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

1892

ESSON *v.* McGREGOR.

*Feb. 22.

Promissory note—Failure of consideration—Delay in objecting—New trial.

APPEAL from a decision of the Supreme Court of New Brunswick refusing a new trial to the defendant (respondent).

The action was on a promissory note and the defence that the note was given in payment of a machine for polishing wood which machine did not do the work it was represented to do. The evidence at the trial showed that the machine had been used for some time in connection with building cars, and evidence for defendant went to prove that the work was under the control of a contractor with defendant; that before the machine could be used a fan had to be attached to keep off the dust; that it spoiled the boards on which it was used; and that the contractor did not inform the defendant as to the defects and he knew nothing of them until the case came on for trial. It appeared, however, that the general superintendent of defendant's business watched the progress of the work in which the machine was used and inspected all the cars before they were delivered. The jury found a verdict for the plaintiffs and a new trial was refused, the court holding that the defendant must be held to be affected with the contractor's knowledge or, at all events, that the superintendent was in a position to know if the machine did not work properly.

The Supreme Court held, after hearing counsel for the appellant and without calling upon respondent's counsel, that the new trial was properly refused.

Appeal dismissed with costs.

McLeod Q.C. for the appellant.

Alward Q.C. for the respondent.

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

JAMES BENNING *et al.*, *ès-qualité* (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ATLANTIC & NORTH-WEST RAILWAY CO. (DEFENDANTS)..... } RESPONDENTS.

1891

*May 21.

*Nov. 17.

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

Expropriation under Railway Act—R.S.C. ch. 109 sec. 8 subsecs. 20-21 —Discretion of arbitrators—Award—Inadequate compensation.

In a case of an award in expropriation proceeding under the Railway Act, R.S.C. ch. 109, it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed; and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice.

On appeal to the Supreme Court of Canada:

Held,—that the judgment should not be interfered with.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), at Montreal, confirming a judgment of the Hon. Mr. Justice Wurtele, rendered the 22nd of June, 1889, dismissing the plaintiffs' action to set aside an award of arbitrators under the Railway Act (2).

The plaintiffs are the executors of the late William Moody, of Côte St. Antoine. The railway company located their line across the property of his estate at Côte St. Antoine and gave the executors notice of expropriation in ordinary form in March, 1887, offering in compensation $3,701, and appointing Mr. Norman

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

(1) M.L.R. 6 Q.B. 385.

(2) M.L.R. 5 S.C. 136.

1891

BENNING v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

T. Rielle, advocate, to be their arbitrator, and the plaintiffs named as their arbitrator Joseph Barsalou of Montreal, auctioneer, and the two arbitrators chose as third arbitrator John M. M. Duff, Esq., of Montreal, accountant.

The arbitrators having proceeded to hold meetings and hear witnesses by a decision of a majority, awarded $5,000 to the appellants, their arbitrator dissenting. The action was brought to set aside the award on the ground *inter alia* of the gross inadequacy and unfairness of the award, amounting to a fraud on appellants' rights, and secondly, but mainly, on the ground that the arbitrators had taken into consideration, to determine the amount of their award, matters which they had no right to take into account. The evidence given at the trial is reviewed at length in the judgment of Mr. Justice Wurtele, reported in M. L. R. 5 S. C. 137.

Laflamme Q.C. and *Trenholme* Q.C. for appellants, contended on the evidence that the two arbitrators had awarded appellants less than they would have done but for the unwarrantable assumption of the existence of a depot in the vicinity affording access by rail to appellants' property.

The Duke of Buccleuch v. *The Metropolitan Board of Works* (1); *Brown* v. *Providence Railroad Co.* (2); *Re Credit Valley Railway Co. and Spragge* (3); *James* v. *Ontario & Quebec R. W. Co.* (4); were cited and on the evidence that the award was grossly unfair and inadequate. Dalloz Rep. Gén. (5); *Re Taylor & Ontario & Quebec Ry.* Co. (6).

Geoffrion Q.C. and *Abbott* Q.C. for respondents, cited and relied on arts. 1353, 1354 C.C. *La Compagnie*

(1) L. R. 5 H. L. 418.
(2) 5 Gray (Mass.) 35.
(3) 24 Gr. 231.
(4) 15 Ont. App. R. 1.
(5) Vo. Expropriation No. 588.
(6) 6 O. R. 338.

du chemin de fer de Montreal v. *Bourgoin* (1); R.S.C. ch. 109 secs. 20 and 21. *Re Taylor & Quebec & Ont. Ry. Co.* (2); *Benning* v. *Rielle* (3); *Charland* v. *The Queen* (4), and R.S.C. ch. 109 sec. 8 subsecs. 20-21.

The judgment of the court was delivered by

TASCHEREAU J.—The plaintiffs, appellants, seek to have an award made on the twenty-sixth of July, eighteen hundred and eighty-seven, establishing the compensation to be paid to them by the company defendant for the land to be taken from their property for its railway, declared illegal, fraudulent and void, and to get it set aside and annulled for various reasons, which on this appeal were reduced to three.

1st. Because the said award is so grossly and scandalously inadequate as to be a fraud on the plaintiffs, and the result of partiality on the part of the two arbitrators who made the same.

2nd. Because the said two arbitrators in making their award assumed as a fact that the company defendants were going to erect and maintain a station at or near the plaintiff's property, and that the company defendants would permit the plaintiffs to place pipes through the land to be expropriated for water and drainage; and

3rd. Because the said two arbitrators took into consideration the increased value alleged to be given to the remainder of the plaintiff's property by the construction of the railway, and set it off not only against the inconvenience, loss and damages to be suffered by the plaintiffs using the land to be expropriated, but also in deduction of the value of the land and buildings to be taken.

(1) 23 L. C. Jur. 96; 5 App. Cas. 381.
(2) 6 O. R. 338.
(3) M.L.R. 6 Q.B. 365.
(4) 1 Can. Ex. R. 291.

1891

BENNING v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

Taschereau J.

The action was dismised in the two courts below, and I am of opinion that these judgments cannot be impugned. No ground has been shown which would justify the maintaining of the plaintiffs' action. The arbitrators were the sovereign judges of the amount the plaintiffs were entitled to, and there is no foundation for the allegation that they ever took into consideration matters which they were not entitled to consider. They seem to have considered the whole matter with utmost fairness, taking the value of the property before the railway passed, then its value after the railway passed, and deducting the one from the other awarded the difference to the plaintiffs.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants : *Taylor & Buchan.*

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

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BELLECHASSE. 1892

*Feb. 16.

G. AMYOT (RESPONDENT).....APPELLANT;

AND

E. LABRECQUE, *et al.* (PETITIONERS)..RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA.

Election petition—Status of petitioner—Onus probandi.

The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th of May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. On appeal to the Supreme Court:

Held, reversing the judgment of the court below (Gwynne J. dissenting), that the onus was on the petitioners to prove their status as voters. *The Stanstead Case* (20 Can. S.C.R. 12) followed.

APPEAL from a judgment of the Superior Court for Lower Canada (Pelletier J.) dismissing the preliminary objections to the election petition filed against the appellant by the respondents.

The first preliminary objection was as to the status of the petitioners and read as follows:—

"Because the said petitioners and none of them are nor were at the time of the election in question in this cause electors qualified to vote at said election, and that their names were not inscribed on the electoral lists."

At the hearing of the preliminary objections no evidence was tendered as to the status of the petitioners.

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

1892

BELLE-CHASSE ELECTION CASE.

The appellant appeared in person and *Belleau* Q.C. appeared for respondent.

The appellant contended that this case ought to be governed by the judgment of the Supreme Court in the *Stanstead Case* (1).

Sir W. J. RITCHIE C.J.—The burden of proof was on the petitioner, and I am not prepared to reverse the judgment of this court in the *Stanstead Case* (1), and unless we do so this appeal should be allowed.

STRONG J.—Following the *Stanstead Case* (1), we are bound to hold that the objection taken on this appeal is good; that the onus was on the petitioner who was bound to prove his qualification; that not having done so the judge ought to have dismissed the petition and we must give the same judgment which he ought to have given. Therefore the appeal must be allowed and the petition dismissed with costs in all the courts.

TASCHEREAU J. concurred with Sir W. J. Ritchie C.J.

GWYNNE J.—I am not satisfied that this case comes within the *Stanstead Case* (1). Of course although I differed from the judgment of the court in the *Stanstead Case* (1), I am bound by it, but here as I understand the case the preliminary objection is that the petitioners were not entitled to vote and were not on the electoral list. This was not the form of the preliminary objection in the *Stanstead Case* (1), and I think the judgment in that case should be limited to cases identical. If the petitioners were not on the list, as the respondent alleged, that issue in my opinion was upon the person making the averment.

(1) 20 Can. S.C.R. 12.

1892

BELLECHASSE ELECTION CASE.

Patterson J.

PATTERSON J.—I think, irrespective of what was done or omitted to be done by the learned judge, that under the statute it is perfectly clear that the status of the petitioner can only be contested by a preliminary objection, and can never form an issue at the trial. Looking at the statute I think that appears very distinctly. The operation of the statute runs in this way. It provides by one section that the person complaining of an undue election may present a petition setting forth certain things, enumerating things which the petitioner may allege as grounds for avoiding the election. It goes on to state that notice of the petition must be served on the respondent within a prescribed time, and then there is the further provision that certain preliminary objections may be taken including, in express terms, the status of the petitioner.

Those are preliminary objections. Preliminary to what? That appears by the following section:

13. Within five days after the decision upon the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same if none are presented, the respondent may file a written answer to the petition; but whether such answer is or is not filed, the petition shall be held to be at issue after the expiration of the said five days.

Then, what are the issues? They are the matters of complaint mentioned in section 5: An undue return, or undue election of a member; or no return; or a double return; or any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, at any election.

The preliminary objections are objections which are preliminary to the necessity for putting in an answer; it is not until they are disposed of that the answer is to be put in.

1891

BELLE-CHASSE ELECTION CASE.

Patterson J.

I take it that where section 12 allows the respondent to file a preliminary objection "to the petitioner," it must mean that such objection is the subject of preliminary objection only, and is not one of the matters to be put in issue and heard on the trial of the petition.

Appeal allowed with costs and petition dismissed.

Solicitors for appellant: *Amyot & Pinault.*

Solicitors for respondents: *Belleau, Stafford & Belleau.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF LAPRAIRIE.

1892

*Feb. 16.

ARTHUR GIBEAULT (PETITIONER).....APPELLANT;

AND

L. C. PELLETIER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, DISTRICT OF MONTREAL.

Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months' limit—R.S.C. ch. 9 secs. 14 and 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and to attend to the case in which his presence was necessary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election petition" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.

Held, reversing the judgment of the court below, that the order was in effect an enlargement of the time for the commencement of

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

1892

LAPRAIRIE ELECTION CASE.

the trial until after the session of Parliament and therefore in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. R.S.C. ch. 9. sec. 32.

APPEAL from the judgment of the Superior Court for Lower Canada (Bourgeois and Mathieu JJ.) dismissing the election petition in this case on the ground that the trial had not been commenced within six months from the time when such petition had been presented.

The petition was presented on the 16th April, 1891, and the trial was fixed for the 10th December, 1891, by order of Mr. Justice De Lorimier.

On the 21st of April, 1891, the respondent appeared personally and filed an election of domicile at his office, 25, St. Gabriel Street, Montreal, and filed also a plea, in which he denied all the allegations of said petition.

On the 23rd of April, 1891, upon an application made by appellant, the Honourable Mr. Justice Wurtele granted an order to examine the respondent on the 27th of the same month under the authority of section 14 of the Controverted Elections Act.

On the 27th of April, 1891, the respondent presented to the Hon. Mr. Justice Wurtele the following motion:

" Whereas the session of Parliament is to be opened on Wednesday, the twenty-ninth of April instant at Ottawa, P.O.;

" Whereas he must leave to-morrow to go to Ottawa where he is called by his duties as a member of Parliament;

" Whereas he has not too much time to-day to prepare himself for his departure, and to attend to things which are absolutely necessary for such departure;

" Whereas it is impossible for him to appear before this honourable court, and to answer to the interrogatories which are to be put to him for the present without preventing the fulfilment of his duties as a member of the House of Commons ;

" Whereas it is impossible for him to get ready for said session of Parliament, and to fulfil its duties and to attend to the present case at the same time ;

" Whereas he is himself the defendant's attorney ;

" Whereas it is absolutely necessary for him to be constantly in court to attend to the present election petition ;

" Whereas it shall not be possible for him to appear in answer to the interrogatories, and to attend to the present case in which his presence is necessary before the closing of said session ;

" Whereas the notice of said interrogatories is irregular because it was served last Friday only, and that the hours of Sunday do not count when they serve to complete the delay ;

" That the defendant should not be forced to appear before the closing of said session of Parliament."

That motion was supported by the following affidavit :

" The said Louis Conrad Pelletier, the defendant in this case being duly sworn upon the Holy Evangelists depose and saith :

" That the session of Parliament is to be opened on Wednesday, the twenty-ninth of April instant at Ottawa, P.O.

" That he must leave to-morrow to go to Ottawa where he is called by his duties as a member of Parliament ;

" That he has not too much time to-day to prepare himself for his departure and to attend to things which are absolutely necessary for such departure ;

1892

LAPRAIRIE ELECTION CASE.

"That it is impossible for him to appear before this honourable court, and to answer to the interrogatories which are to be put to him for the present, without preventing the fulfilment of his duties as a member of the House of Commons;

"That it is impossible for him to get ready for said session of Parliament and to fulfil its duties, and to attend to the present case at the same time;

"That he is himself the defendant's attorney;

"That it is absolutely necessary for him to be constantly in court to attend to the present election petition;

"That it shall not be possible for him to appear, answer to the interrogatories, and to attend to the present case for which his presence is necessary before the closing of said session; and has signed."

When that motion was presented the Honourable Mr. Justice Wurtele granted it generally.

The order signed by the judge is as follows:—

"Having heard the parties by their counsel on the respondent's motion asking not to be forced to appear and answer to interrogatories until after the session which commences on the twenty-ninth of April instant, having examined the procedure and deliberated, I, the undersigned, order the said respondent not to appear until after the said session of Parliament. Costs reserved.

(Signed) "J. WURTELE,
"J. C. S."

On the 1st of October, 1891, an application was made to the court to fix a day for trial, and it was fixed for the 10th December. The session of Parliament opened on the 27th April, and was prorogued on the 30th September.

Mr *Choquette* for appellant. On the 10th December the trial commenced, but before the first witness was

examined the respondent filed an objection to the jurisdiction of the court and asked that the petition be dismissed because the trial had not commenced during the six months following the filing of the petition. The petition in this case was filed on the 16th April and was served on the same day.

This case comes within the exception contained in section 32 of the Dominion Controverted Election Act. The respondent appeared personally on the 21st April and filed an election of domicile at his office, 25, St. Gabriel Street, Montreal, and filed also a plea in which he denied all the allegations of the petition, and two days afterwards the appellant made an application to a judge in chambers for an order to examine the respondent under sec. 14 of the Dominion Controverted Elections Act. This was two days after the petition was at issue.

The application to examine the respondent on the 27th April was granted, and on the same day a motion was made by the respondent which reads as follows: (The counsel then read the motion, *ubi supra.*)

It is upon this motion and the judgment rendered on it that the present appeal depends. It is important to consider attentively the motion and the affidavit of respondent in support of the motion and which is as follows: (The counsel then read the affidavit—*ubi supra.*)

From the evidence and the record in this case I submit it was shown conclusively to the court within the meaning of section 32 that the presence of the respondent at the trial was necessary and therefore the time occupied by the session should not be computed.

(The Chief Justice.—We would like to hear the counsel for the respondent.)

Mr. Lajoie for respondent:

1892

LAPRAIRIE ELECTION CASE.

This case hinges upon the interpretation to be given to the judgment of Mr. Justice Wurtele. Unfortunately we have only a translation of it. In this case we rely upon the judgment of this court in the Glengarry case. There is no order of the court or evidence that the presence of the respondent was necessary at the trial. The application made by appellant was under sec. 14 for the preliminary examination of the respondent, a preliminary proceeding before the date of the trial, independent of the trial, and I submit that the appellant had notwithstanding this order a perfect right to commence the trial during the session; and if he had applied for an order to fix the date of the trial, then the respondent might have moved for an order of enlargement under sec. 33 or sec. 32. I admit that he was not bound to go on, but he should have obtained the order of the court postponing the trial under secs. 32 and 33, notwithstanding the order postponing the preliminary examination.

(Taschereau J.—The order in effect says that the examination preliminary to the trial shall not take place until after the session, and consequently that the trial shall be postponed until after the session.)

(The Chief Justice.—The moment the preliminary examination is postponed, *ex necessitate* the trial is postponed.)

There was no order saying the trial should not be commenced.

(Strong J.—Suppose the court, upon the application of the respondent, gave time to put in an answer, and it is put in as directed but not within the six months, could the respondent then turn round and say the court has no jurisdiction? The postponement here has been at the instance and for the benefit of the respondent, and he now asks us to help him to evade the trial?)

1892

LAPRAIRIE ELECTION CASE.

The appellant must come within the literal terms of the statute. See p. 459, 14 Can. S.C.R. Glengarry case. He should have obtained an enlargement.

(Strong J.—The party who obtained this order was estopped from raising such objection, for if the appellant had given notice of trial, he would have been met with this order.)

(Gwynne J.—There is nothing in the statute showing the necessity of an order being taken out under sec. 32?)

According to my reading of the decision of this court in the *Glengarry Case* (1), the appellant should have obtained a formal order of enlargement under section 33.

The court did not call upon the counsel for appellant to reply, but delivered judgment at once.

Sir W. J. RITCHIE C.J.—We have not the slightest doubt about this case. The respondent made an affidavit in support of his motion that "it was not possible for him to appear to answer to the interrogatories (which the appellant had the right under the statute to put to him prior to the trial) and to attend to the present case for which his presence was necessary before the closing of the session." Then there was an order of the judge postponing the preliminary examination of the respondent until after the session of Parliament. The judge in my opinion was quite right in making the order, but now the respondent wishes us to hold that having obtained an order preventing the petitioner from proceeding during the session on a preliminary examination,—preliminary to what? to the trial,—he, the petitioner, was still bound to go on with the trial during the session. The facts in the *Glengarry Case* (1) are quite different and the decision in

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

1892

LAPRAIRIE ELECTION CASE.

Ritchie C.J.

that case has no applicability to the present. There can, I think, be no doubt that this appeal should be allowed and the case sent back in order that the trial should be proceeded with.

STRONG J.—Under section 32 what is necessary to be shown is that it appears to the court or a judge that the respondent's presence at the trial is necessary, and that if the judge so considers then such trial shall not be commenced during any session of Parliament, and in the computation of any time or delay allowed for any step or proceeding in respect of the trial or for the commencement thereof, the time occupied by the session of Parliament shall not count. Then the respondent by his affidavit, shows that his presence was necessary at the trial because he distinctly swore that it was absolutely necessary for him to be constantly in court to attend to the present election petition, which would render it impossible for him to fulfil his duties as a member of the House of Commons, and he asked that he be not obliged to submit to examination, until after the session. Thereupon this preliminary examination was by an order of the court postponed until after the session. Now unless we can say that by that order the judge intended that the petitioner should be deprived of the statutory right of a preliminary examination of the respondent, it is a necessary inference that it appeared to him when he granted the order that the respondent's presence at the trial was necessary.

I think there can be no doubt that the decision of the court below was wrong and that this appeal should be allowed with costs.

TASCHEREAU J.—I am of the same opinion.

1892

LAPRAIRIE ELECTION CASE.

Gwynne J.

GWYNNE J.—I think the order made by the judge might have been more accurately drawn up, yet the order shows that, in the opinion of the judge, the presence of the respondent at the trial was necessary.

PATTERSON J.—The respondent is not in a position to complain even if no order was made. It seems that on the 23rd April, 1891, an order was made for the preliminary examination of the respondent, and upon the 27th April he made an affidavit in support of a motion to postpone his examination in which he stated that it was absolutely necessary for him to be constantly in court to attend to the present election petition, and that it would not be possible for him to appear to answer the interrogatories, and to attend to the present case in which his presence was necessary, before the closing of the session.

Now, looking at section 32, it enacts that if at any time it appears to the court or a judge that the respondent's presence at the trial is necessary such trial shall not be commenced during any session of Parliament. There is nothing said about an order. In this case, admitting that no order was made, the respondent swore that his presence was necessary. He cannot now say the trial should have been proceeded with. He comes literally within the operation of the section, having made it appear that his presence was necessary at the trial. I am of opinion that under the circumstances of this case the time occupied by the session of Parliament should not be included in the computation of the delay for the commencement of the trial, and therefore that this appeal should be allowed.

Appeal allowed with costs.

Solicitors for appellant: *Mercier, Beausoleil, Choquette & Martineau.*

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

1892
*Feb. 16

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF ARGENTEUIL.

THOMAS CHRISTIE (RESPONDENT).....APPELLANT;

AND

GEORGE MORRISON AND OTHERS (PETITIONERS) .....} RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT FOR LOWER CANADA.

Election petition—Preliminary objections—Deposit of security—R.S.C. ch. 9 sec. 9 (f).

The preliminary objection in the case was that the security and deposit receipt were illegal, null and void, the written receipt signed by the prothonotary of the court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of $1,000 in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of $1,000.

Held, affirming the judgment of the court below, that the deposit and receipt complied sufficiently with the section 9 (*f*) of the Dominion Controverted Elections Act.

APPEAL from a judgment of the Superior Court for Lower Canada (Taschereau J.) dismissing the preliminary objections filed by the appellant to the election petition contesting his return as member of the House of Commons for the electoral district of Argenteuil.

The preliminary objection relied on by appellant on the appeal to the Supreme Court was as follows:

"Because no proper or sufficient certificate or receipt of deposit of security was granted by the prothonotary and clerk of said court and no deposit of money such as required by law was made by petitioners or in this case for security and no such bank or bill as is described in the pretended deposit receipt filed in this case and in the copy thereof, served on respondent, existed or

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

exists, and the said pretended security and deposit receipt were and are wholly illegal, null and void."

The prothonotary's receipt was as follows:

"We moreover certify and acknowledge that the security required by law has been this fourth day of May (1891) instant given on behalf of the petitioners by a sum of $1,000 in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada), bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force."

Code, for appellant, contended that the prothonotary having described in his receipt the note deposited to be a bank note, the deposit was not according to the terms of the statute which requires the deposit to be made in gold coin or Dominion notes, being a legal tender under the statutes of Canada.

H. Abbott Q.C. for respondents was not called upon.

Sir W. J. RITCHIE C.J.—I am of opinion that there is nothing in the appellant's objection and that this appeal should be dismissed with costs. It is clear that a Dominion note was deposited and there was no necessity to take evidence to explain the character of the deposit. There is now in the hands of the prothonotary a Dominion note for $1,000, which is available for the purposes of this appeal.

STRONG J.—I am entirely of the same opinion. I will only add that I am surprised that an appeal should have been brought to this court upon such an utterly unfounded objection.

TASCHEREAU, GWYNNE and PATTERSON JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *R. P. de la Ronde.*

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

1892

*Feb. 16.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PRESCOTT.

ISIDORE PROULX (RESPONDENT).....APPELLANT;

AND

ALEXANDER RODERICK FRASER AND XAVIER MILLETTE (PETITIONERS)..... } RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF FALCONBRIDGE AND STREET JJ.

Election petition—Status of petitioner—When to be determined—R. S. C. ch. 9 ss. 12 and 13.

In this case the respondent by preliminary objection, objected to the status of the petitioner, and the case being at issue, copies of the voters' lists for said electoral district were filed, but no other evidence offered and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, and the objection was renewed, but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection. R. S. C. ch. 9 ss. 12 and 13.

APPEAL from the judgment rendered on the 15th day of December, 1891, by the Honourable Justices Falconbridge and Street, maintaining the election

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

petition filed against the return of the appellant and voiding the appellant's election as member for the House of Commons for the electoral district of Prescott.

The petition was filed in the Court of Appeal for Ontario on the 20th April, 1891.

On the 25th April a preliminary objection to the petition was delivered and filed on behalf of the respondent in the court below, in the words following:—

1. "The petitioners were not, nor was either of them, duly qualified to vote at the said election, whereby they are, and each of them is, incapable of being petitioners; wherefore the said respondent, as a preliminary objection to the said petition, and before he can be compelled to answer the same, objects and demurs to the same as aforesaid, and prays judgment on the said objection, and that the said petition may be quashed and dismissed and no further proceedings may be allowed to be taken on the same."

On the 26th May notice was given and served on the appellant, of a motion to be made before the Honourable Mr. Justice McLennan, a judge of the Court of Appeal for Ontario by the petitioners in the court below, to set aside or dispose of the preliminary objection.

In support of that application there were filed the affidavits of the petitioners and the copies of the voters' lists for the polling districts in which the petitioners were voters, duly certified by the revising officer for the electoral district of the county of Prescott.

No affidavit or other evidence was filed or offered for argument.

Mr. Justice McLennan after hearing the parties on the said motion on the 6th June last, made the order setting aside and ordering to be taken off the files the said objection with costs to the petitioners in any event as follows:

1892

PRESCOTT ELECTION CASE.

"Upon reading the petition herein, the said preliminary objections, the affidavits of the petitioners respectively and the exhibits therein referred to, and upon hearing counsel for all parties and counsel for the respondent admitting that the matters and charges contained in the said preliminary objections cannot properly be disposed of on a summary hearing of preliminary objections:

"It is ordered that the said preliminary objections and the presentation and filing thereof be and the same are hereby set aside and ordered to be taken off the files of this court without prejudice to the right of the said respondent if so advised to raise the matters and charges contained in the said preliminary objections at the trial of the petition herein.

"It is further ordered that the costs of the said preliminary objections and of this motion be costs in the cause to the petitioners to be paid to them by the respondent in any event of the petition."

Under the general order made pursuant to sec. 2 of the act of 1887, chap. 7, for distribution of election petition for trial, this petition was assigned to the Queen's Bench Division of the High Court of Justice for trial.

The appellant filed an answer to the petition, and the petition being at issue, an order was made on 26th September by the Honourable Justices Falconbridge and Street, judges of the Queen's Bench Division of the High Court of Justice, fixing the 15th of October for the trial of the petition.

At the trial the counsel for the respondent renewed his objection as to the status of the petitioners, and after hearing counsel the court ruled that as the preliminary objections had been taken off the files of the court by order of Mr. Justice McLennan, there was an end of the matter and that it was not the duty of the petitioner at the trial of an election to prove his status,

1892

PRESCOTT ELECTION CASE.

and after the trial the election was declared void by reason of corrupt acts by agents of the appellant.

The appellant thereupon appealed to the Supreme Court of Canada.

Belcourt for appellant cited and relied on R.S.C. ch. 9, sec. 35 and subs. 12 of sec. 2, Rule 37 General Election Rules for Ontario; Rule 531 Cons. Rules for Ontario; Bigelow on Estoppel (1). The *Stanstead Case* (2). The *L'Assomption Case* (3), and the *Quebec County Case* (4).

Ferguson Q.C. for respondent contended that the trial judges ruled properly in regard to this question of the status of the petitioners, that it was not open for trial before the trial judges and that it had been disposed of by the order dismissing the preliminary objections, and cited and relied on *The Charlevoix Case* (5), the judgments of the Honourable the Chief Justice, and of the Honourable Mr. Justice Strong (6).

The *Megantic Case* (7). The judgments of the Honourable the Chief Justice, Mr. Justice Taschereau and Mr. Justice Gwynne. The *Youghal Case* (8).

The *Glengarry Case* (9), judgment of the Hon. Mr. Justice Gwynne.

The *Stanstead Case* (2), judgments of the Hon. Mr. Justice Gwynne and Mr. Justice Patterson.

Sir W. J. RITCHIE C.J.—We do not desire to hear the respondent's counsel in this case. We have heard the argument of the learned counsel for the appellant who has said all that could be said in the matter, but really, I think, there was nothing for him to

(1) 5th ed. p. 719. R.S.C. ch. 9 sec. 50.
(2) 20 Can. S.C.R. 12.
(3) 14 Can. S.C.R. 428.
(4) 14 Can. S..C.R. 434.
(5) 2 Can. S.C.R. 319.
(6) P. 323.
(7) 8 Can. S.C.R. 169.
(8) 1 O'M. & H. 291.
(9) 14 Can. S.C.R. 461.

1892

PRESCOTT ELECTION CASE.

Ritchie C.J.

say. There has been a full adjudication upon this matter. The objection came at the proper time before Mr. Justice McLennan and the affidavits showed that the petitioner was on the list and duly qualified to vote. Whether that was so or not is not material. The judge read the affidavits and after hearing both sides he adjudged that the preliminary objections should be dismissed, and further that they should be taken off the files of the court. The counsel for the sitting member acquiesced in that decision and took no exception to the ruling. Then, because the learned judge has chosen to attach to his judgment a permission, or whatever it may be called, to the parties to bring the question up on the trial, though the statute says it must be dealt with as a preliminary objection, it is claimed that the trial judges have jurisdiction to deal with it and there is an appeal from their decision. That cannot be so. The statute is clear and there has ceased to exist in this case any preliminary objections as they have been dismissed and taken off the files of the court.

Under these circumstances, I think there is nothing for us to do but to dismiss this appeal with costs.

STRONG J.—The appellant insists that at the trial of this petition the learned judges in refusing to entertain his objection that the petitioner was not qualified to maintain the petition for the reason that he had not the status of an elector, ruled erroneously.

Such a point must be taken by way of preliminary objection. It was so taken in the present case, but the preliminary objection was ordered to be taken off the file by a judge having undoubted jurisdiction to make that order. Therefore the learned judges at the trial, having no preliminary objection before them,

could not do otherwise than they did in refusing to adjudicate upon the objection to the petitioner's status.

Further, Mr. Justice McLennan having dealt with the preliminary objection by ordering it to be taken off the file could not confer any larger jurisdiction than the statute itself conferred on the trial judges by delegating to them the decision of a question raised by the objections which had been set aside and ordered to be taken off the files.

I will not express any decided opinion as to the right generally of the judges at the trial of an election petition to decide preliminary objections. The words of section 12 are "the court or judge shall hear the parties" on such objections, and by section 2, subsection (*k*) "the judge" is interpreted as meaning the judge trying the election petition. It would, however, certainly seem from the expression "preliminary objection" that a question so raised was intended to be decided in some proceeding anterior to the trial. Moreover, unless this construction were adopted the object for which certain objections are required to be taken in this preliminary form would not be attained.

Although under the circumstances of this case it is not necessary to decide the point I incline to think that, notwithstanding the interpretation clause, the context indicates that by "judge" in section 12 is meant not the judge at the trial, but a judge who shall adjudicate previously to the trial, that is a judge of the court in which the petition is filed, sitting in Chambers. If this is the proper construction it follows that the judges at the trial have no jurisdiction to deal with preliminary objections at all. The *Youghal Case* (1) cited by Mr. *Ferguson*, though deciding nothing positively, favours this view.

The appeal must be dismissed with costs.

(1) O'M. & H. 291.

1892

PRESCOTT ELECTION CASE.

TASCHEREAU J.—I concur.

GWYNNE J.—I entertain not the slightest doubt that the course pursued by the learned judges at the trial of this cause was the only course that under the circumstances appearing, they could have legally pursued and that they would have erred if they had entertained as matter before them at the trial upon the merits, the matter which had been raised by preliminary objection to the status of the petitioner.

PATTERSON J.—I have nothing to add to what I have said to-day in the *Bellechasse Case* (1), and what I said in the *Stanstead Case* (2).

Appeal dismissed with costs.

Solicitor for appellant: *N. A. Belcourt.*

Solicitor for respondents: *A. Ferguson.*

---

(1) 20 Can. S. C. R. 181. (2) 20 Can. S. C. R. 12.

THE DOMINION SALVAGE AND WRECKING COMPANY (LIMITED) (PLAINTIFF)..... APPELLANT; 1892 *Mar. 9.

AND

ORMISTON BROWN *et al.*, *ès-qualité* (DEFENDANTS)..... RESPONDENTS.

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

Action for call of $1,000—*Future rights—Supreme and Exchequer Courts Act sec.* 29 *subsec.* (*b.*)

The company sued the defendant B. for $1,000, being a call of ten per cent on 100 shares of $100 each alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1,000 with costs. The defendant denied any liability and prayed for the dismissal of the action.

During the pendency of the suit, the company's business was ordered to be wound up under the Winding-up Act, 45 Vic. ch. 23 (D.), and the liquidator was authorized to continue the suit. The Superior Court condemned the defendant to pay the amount claimed, but on appeal to the Court of Queen's Bench (appeal side) the action of the plaintiff company was dismissed. On appeal to the Supreme Court of Canada:

Held, Gwynne J. dissenting, that the appeal would not lie, the amount in controversy being under $2,000 and there being no future rights as specified in subsec. (*b.*) of sec. 29 c. 135 R. S. C., which might be bound by the judgment. *Gilbert* v. *Gilman* (16 Can. S.C.R. 189), followed.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) reversing a judgment of the Superior Court and dismissing the plaintiff's action.

The suit was brought by the company plaintiff against defendant Alfred Brown to recover the sum of

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

1892

THE DOMINION SALVAGE AND WRECKING COMPANY v. BROWN.

one thousand dollars being a call of ten per cent on one hundred shares of one hundred dollars each which plaintiff alleged Brown subscribed in the capital stock of the company.

The declaration set out the undertaking which Brown signed and that one hundred shares were allotted to Alfred Brown, and that a call of ten per cent was made on the second of November, 1881, of which he was notified but which he failed and neglected to pay, and prayed for a condemnation to the extent of one thousand dollars against said defendant.

Defendant pleaded, denying any liability as a shareholder in the company plaintiff, &c.

During the pendency of the suit Alfred Brown died and the *instance* was taken up by the present respondents.

The judgment of the Superior Court condemned the respondents to pay the amount claimed by the suit, but this judgment was reversed by the Court of Queen's Bench and the action dismissed.

Goldstein for appellant—

By his pleas the respondent has denied his liability for any part of his subscription of $10,000 to the capital stock of the company, and therefore the amount in controversy between the parties is over $2,000; in any case the decision in this case would in effect be *res judicata* between the parties as to any future call, and therefore the case was appealable under sec. 29 (*b.*) of the Supreme and Exchequer Courts Act.

S. H. Blake Q.C. for respondent was not called upon, and the court proceeded to deliver judgment.

Sir W. J. RITCHIE C.J.—In this case I am obliged to follow the judgment I delivered in the case of *Gilbert* v. *Gilman* (1), where the same argument was urged be-

(1) 16 Can. S. C. R. 189.

1892

THE DOMINION SALVAGE AND WRECKING COMPANY v. BROWN.

Ritchie C.J.

fore us in support of the jurisdiction. In this case the only amount claimed is $1,000, a sum not sufficient to give this court jurisdiction. If hereafter a case should arise on other calls on this subscription, in which the amount in controversy is two thousand dollars, and the judgment is against the appellant, then as this court would have jurisdiction, he could come before this court, and we should not be bound by the decision of an inferior tribunal.

As in this case it does not appear that the objection to the jurisdiction was taken in the respondent's factum, or by motion, the appeal will be quashed but without costs.

STRONG J.—I agree that the appeal should be quashed. This case comes under the provision of the statute which requires that the amount in controversy on an appeal to this court should be $2,000. Here the amount in controversy is only $1,000 and this is ascertained by the conclusion of the declaration. The plaintiff does not claim and could not get judgment for more than $1,000, and all the defendant is defending himself against is this claim of $1,000. Then does this case involve the question of future rights, so as to give appellant a right of appeal? For the reasons stated in *Gilbert* v. *Gilman* (1) I am of opinion that it does not. The exceptions in the statute are of certain specified future rights mentioned in sub-sec. (*b.*) of sec. 29 of the Supreme and Exchequer Courts Act, and do not include such claims as are contended to be future rights in this case, as future liability for calls on shares. The appeal should be quashed without costs.

TASCHEREAU J.—I agree.

(1) 16 Can. S.C.R. 194.

1892

THE DOMINION SALVAGE AND WRECKING COMPANY v. BROWN.

Gwynne J.

GWYNNE J.—With great deference, this case is appealable. The amount in controversy although but one call of the $10,000 alleged to have been subscribed, is in my opinion nothing less than the whole amount of stock in respect of which the call sued for is made. The defence is, and the judgment has held, that no subscription for stock ever was made which imposed any liability whatever upon the person who subscribed his name for the stock, whom the defendant represents. That judgment in my opinion can be relied upon as *res judicata* to the effect that no liability in respect of the $10,000 ever accrued and would be a complete answer to any action for any future call. The case is in my opinion quite distinguishable from every case in which this court has held that no appeal lay.

PATTERSON J.—I do not dissent from the majority of the court. When there is a debt asserted for say $10,000 payable by instalments of $1,000 each—*debitum in presenti, solvendum in futuro*—and an action to recover one instalment is defended on grounds that involve the liability for the whole debt, the amount in controversy in the action, and on an appeal would be, in my opinion, the $10,000 and not merely the $1,000 instalment. The judgment in the action would be conclusive of the liability in any action for other instalments. On the same principle I should hold that in an action by a joint stock company for calls amounting to less than $2,000 upon stock subscribed exceeding that amount the full amount of the subscription, and not merely that of the particular calls, would be in controversy upon a defence going to the whole liability, such for example, as that the subscription had been procured by fraud. But the present claim is by the liquidator of a company which is being wound up, and it does not appear that as between him and the

1892

THE DOMINION SALVAGE AND WRECKING COMPANY v. BROWN.

Patterson J.

defendant there is any claim beyond the amount sought to be recovered in this action notwithstanding that the defendant might have been liable to the company, if it had maintained itself as a going concern, for the amount of $10,000 for which his name appears in the stock book. I am, therefore, not prepared to say that the matter in controversy in this appeal amounts to the sum or value of $2,000.

Appeal quashed without costs.

Solicitors for appellants: *Carter & Goldstein.*

Solicitors for respondent: *Lacoste, Bisaillon, Brosseau & Lajoie.*

1891
*Feb. 23.

THE GUARDIAN ASSURANCE CO. (DEFENDANTS)..... } APPELLANTS;

AND

ROBERT CONNELY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Description of premises—Reference to plan—Variance—Falsa demonstratio non nocet—Canvasser—Agency.

An insurance policy described the goods insured as stock, consisting of dry goods, &c., while contained in that one and a half story frame building occupied as a store house, said building shown on plan on back of application as "feed house" situate attached to wood-shed of assured's dwelling house. The plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked "feed house," did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation "feed house." The goods insured were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the said premises, as well as misdescription of the building containing the goods insured. In an action on the policy it appeared that a barrel of oil was in the building marked "feed house" at the time of the fire. The jury found a verdict for the plaintiff and a non-suit, moved for pursuant to leave reserved, was refused by the full court.

Held, that the non-suit was rightly refused; that it was evident that the building in which the goods were stored was that intended to be described in the policy; that the building marked "feed house" being detached from that in which the goods were was a suitable place for storing oil, which, therefore, was not a breach of the condition; that the case was a proper one for the application of the maxim *falsa demonstratio non nocet*, but if not the matter was one for the jury who had pronounced upon it.

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

1892

THE GUARDIA. INS. CO. v. CONNELY.

Held further, that the canvasser who secured the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to order a nonsuit moved for pursuant to leave reserved at the trial

The application for insurance was written by one Murray, a canvasser for several insurance companies including the defendant company, who had applied to the plaintiff and requested him to insure with the defendants. The application was written by Murray and signed by the plaintiff at Penobsquis, about fifteen miles from his residence, and was taken by Murray, who told the plaintiff that he had seen the buildings and knew their situation and would make a plan of them to accompany the application, to which the plaintiff assented, and Murray accordingly made a plan or diagram on the back of the application which he sent to the defendants, who issued the policy above referred to and sent it to the plaintiff.

The application asked for insurance on the plaintiff's goods contained in a building known as a storeroom and feed house. The plan represented the plaintiff's dwelling-house as facing the west, with an L attached to the rear or east side of it marked as a woodshed. On the north side of the woodshed and attached to it (the space between them was about four feet) was another building marked on the plan as feed house.

The plan was admitted to be incorrect. The building marked "feed house" had been built for a pig pen, and was not as high as the building marked "woodshed," which was a story and a half high with a chimney in it extending from the upper flat of the building through the roof for the reception of a stove-pipe. This building was fitted up as a store or shop with a counter and shelves for holding goods, and was used by the plain-

1892

THE GUARDIAN INS. CO. v. CONNELY.

tiff as his store or shop, the goods destroyed being in it at the time of the fire. There were no goods in the other building (the "feed house" as marked on the plan) except a barrel of oil. That building has never been used by the plaintiff as his shop or storehouse there being no floor in it nor any fitting as a store.

The company resisted payment, contending that there was no contract to insure the goods that were destroyed. In an action on the policy a verdict was entered for the plaintiff with leave reserved to defendants to move for a nonsuit on the ground that the misdescription avoided the policy. A nonsuit having been refused on such motion defendants appealed to this court.

Weldon Q.C. for the appellant, cited *Wyld* v. *The Liverpool, London & Globe Ins. Co.* (1); *Hastings Fire Ins. Co.* v. *Shannon* (2); *Gore Ins. Co.* v. *Samo* (3); *Lyle* v. *Richards* (4); *Hews* v. *Atlas Ins. Co.* (5).

McLeod Q.C. for the respondent.

Sir W. J. RITCHIE C. J.—I have no doubt whatever as to this case, and have had none since I first heard the statements made by the counsel. There was an application for insurance on a general stock consisting of dry goods, &c., and on the margin were these words: "Describe particularly how the property is built, where situated, how occupied, &c." To this there was annexed a plan made by a Mr. Murray, a canvasser of the respondents, in which it appeared that there was a building marked "feed house," and another marked "woodshed," attached to the kitchen of the dwelling-house. The application was accepted, and the goods of the applicant were insured for one year in consideration of the premium of thirty dollars.

(1) 33 U.C. Q.B. 284.
(2) 2 Can. S.C.R. 394.
(3) 2 Can. S.C.R. 411.
(4) L.R. 1 H.L. 222.
(5) 126 Mass. 389.

1892

THE GUARDIAN INS. CO. v. CONNELY.

Ritchie C.J.

Now let us see what the property was that was insured. It was $2,000 on a general stock consisting of dry goods, groceries, &c., while contained in that one-and-a half story building with shingled roof, occupied as a storehouse for storing horse feed and provisions for lumber camps, said building shown on plan on back of application for insurance as "feed house," situate attached to woodshed of assured's dwelling-house, &c. Now, it is contended that this building marked "feed house" on the plan, which is stated to have been originally, whatever it is now, a pig sty and which was without windows, and was not attached to any other building but stood alone, is the one intended to be described in this policy; but it cannot be contended, I think, that the assured so intended; there was a barrel of oil in this building and it would be a very suitable place for storing oil which they were not allowed to keep on the premises, but it would be a most unsuitable place to keep the stock which was insured in this case. Then again the building described in the policy had a shingled roof and was occupied as a storehouse for storing feed and provisions. This building was shown never to have been occupied for doing any of these things. It was also said to be a one-and-a-half story building attached to assured's dwelling-house, and this building was not attached but was a separate building, entirely distinct and apart from the dwelling-house. But the building in which the goods actually were was a one-and-a-half story building attached to the dwelling-house and occupied and known as a storehouse and entirely answers the description in the policy.

Now it appears to me, so far as my judgment in this matter goes, that if ever there was a case where the maxim *falsa demonstratio non nocet* would apply that this is peculiarly such a case; but suppose the maxim does

1892

THE GUARDIAN INS. CO. v. CONNELY.

Ritchie C.J.

not apply, it is quite clear that it is a question for the jury who have already determined that the building in which the goods were which were intended to be insured was the building occupied as a storehouse for storing feed and provisions. Under these circumstances I cannot entertain a doubt that the insured is entitled to recover his loss under the policy.

I cannot look upon a party who goes around for the purpose of obtaining insurance in any other way than as acting for the company, and I cannot see how the company is free from liability for his acts where, as in this case, he undertakes to put in with the application a plan of the building, and it was necessary that this plan should be inquired into. If all the other indicia are present, which is the case here, we have all the material necessary to determine the question put before us, and I do not think it possible to submit the case to any jury who would not find that the goods were kept in a proper building and not in a building erected for a pig-sty, and it having been left to the jury, and the court having determined that the evidence established the fact that the building really described in the policy was the one in which the goods were stored, the finding should not be interfered with. The appeal should be dismissed.

STRONG J.—I am of the same opinion. The principle upon which the Supreme Court of New Brunswick proceeded, as appears from the very full and able judgments of the learned judges who took part in the decision, was in my judgment perfectly sound. The case appears, as I said during the argument, to be one of latent ambiguity, one in which, though upon the face of the policy no difficulty or inconsistency appears, yet difficulty does arise in applying the description contained in the policy to the buildings as they actually

appear on the grounds. This being so parol evidence is admissible to remove such a latent ambiguity. The first thing we have to inquire is, whether the goods described in the policy are the same as, or are different from, those on the premises which were burnt. To do that we must be able to identify the stock of goods burnt with those mentioned in the policy. In the policy the goods are described as being in a one-and-a-half story frame building, with shingled roof, shown on the plan on the back of application for insurance, as "feed house." But when we come to look at the premises we find that the feed house is not a one-and-a-half story building with shingled roof; then the further description is that the goods are in a building occupied as a storehouse for storing horse feed, and the feed house was not at the time so occupied, but another building was. And then, we also find that the goods are said to be in a building attached to the woodshed of the dwelling-house. Now the feed house does not appear to have been so attached; therefore this examination of the premises and the evidence of the surrounding circumstances show that it was impossible to apply the description in the policy to the plan. That is the very case in which parol evidence is admissible.

Then the Supreme Court of New Brunswick has dealt with the case as a question of fact, and treating the question as one of fact, of course they have come to the only conclusion which is inevitable. If parol evidence is admissible any reasonable person, considering the evidence and all the circumstances and looking at the plan, must hold that the goods which were in the building marked "woodshed" on the plan, and which were destroyed, were the goods intended to be insured by the policy.

1892

THE GUARDIAN INS. CO. v. CONNELY.

Strong J.

As regards misrepresentation, I do not think that the plan and the application are to be looked upon as emanating from the insured, but must be regarded as emanating from the company. Murray was really an officer of the company, and what he did unless the contrary is clearly shown, was the act of the company. Therefore I do not think that there was any misrepresentation by the assured in the case.

The appeal must be dismissed with costs.

GWYNNE J.—I am of opinion that the correct construction of the policy is not that the goods insured are only insured in the small building on the place called "feed shed." The policy says distinctly that the goods insured are in a one-and-a-half story building, covered with shingles, occupied as a storehouse. What that building was was a matter of evidence, and the "feed shed" is not pretended to be such a building. The only error in truth is that of the person who drew up the policy and who made it say, rather ridiculously, and without any authority for so doing, that the building covered with shingles used as a storeroom for storing horse feed, &c., of the height of one-and-a-half stories, which the feed shed is not, is the feed shed. In my opinion the appeal must be dismissed with costs.

PATTERSON J.—I understand that in this case several wooden buildings attached to each other were destroyed by the same fire. The goods in question were deposited in one of those buildings. The premium of insurance in one would be just as much as in any of the others. The company say "these goods which were insured in one of these buildings were not in the one which we understood to have been described in

1892

THE GUARDIAN INS. CO. v. CONNELY.

Patterson J.

our policy." Now if the company can succeed in that defence it must be upon some principle of law or upon the contract between the parties. I know of no principle of law, and none has been indicated, which apart from the terms of the contract would lead to any such result as the company contend for. If there was any wilful misrepresentation the principle of fraud would come in, but that is not suggested.

Let us see what the contract was. We have the policy with a number of conditions set out in the declaration. Of these conditions the two which may apply to this case are nos. 1 and 2.

No. 1 deals with two things: first, the insurance on the building; secondly, on goods. Next it deals with the application:

> Every person desirous of effecting an insurance must state his name, place of abode, and occupation. He must describe the construction of the buildings to be insured, where situate, and in whose occupation, of what materials the same are respectively composed, and whether occupied as private dwelling houses or how otherwise.

Then with respect to the goods:

> Also the nature of the goods, or other property on which such insurance is proposed, and the construction of the building containing such property, &c.

That is what the condition says is to be stated with respect to the goods. "The construction of the building containing such property, &c." The form of application which is presented to the proposed insurer says the same thing:

> Describe particularly how the property is built, where situated, how occupied, and the nature of the goods deposited therein.

So we have in the first condition and on the margin of the application paper the same language, and we find both complied with in the application. The description is:

1892

THE GUARDIAN INS. CO. v. CONNELY.

Patterson J.

On general stock consisting of dry goods, &c., all contained in one-and-a-half story frame building with shingled roof, occupied and known as store-room and feed house for storing horse feed and provision for lumber camp; situated east side of Mechanic Settlement Highway.

Thus the condition is complied with and also the directions upon the form of application.

Then we look at the second condition, and that requires the good faith which is the essence of the contract of insurance perhaps to a greater extent than most other contracts. The terms of this condition do not avoid the policy for mere misdescription or misrepresentation, but

> If any misrepresentation is given so that the insurance be effected upon a lower premium than would have been charged had such risk been fairly stated.

There is no pretense here that the company insured at too low a premium.

The policy adds to the description these words: "Such building shown on plan on back of application for insurance as feed house." Who made the plan on the back of the application in that way? We know as a matter of evidence that it was not the applicant unless he can be said to have done it by the company's agent. There is as much reason for holding that when the policy says "said buildings shown by plan, &c.," it means shown by the company in that way as for saying it was shown by the applicant in that way. Murray was an agent for the company, and there is nothing in the case to show that he was an agent of the insured.

There is no ground of prejudice to the company or of construction of the contract for holding that the plaintiff cannot recover. I think the judgment appealed from was perfectly right. The facts seem to have scarcely required so much consideration of the

doctrine of *falsa demonstratio non nocet* as it received in the court below.

1892

THE GUARDIAN INS. CO. v. CONNELY.

Patterson J.

Appeal dismissed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitors for respondent: *E. & R. McLeod.*

1891
*May 22.
1892
*April 4.

THE HON. ALEX. LACOSTE *et al.*, *ès qual.* (PLAINTIFFS)..... } APPELLANTS;

AND

DAME ANNA MARIA WILSON *et al.* (DEFENDANTS)..... } RESPONDENTS.

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

Gift inter vivos — Subsequent deed — Giving in payment — Registration —Arts. 806, 1592 *C. C.*

The parties to a gift *inter vivos* of certain real estate with warranty by the donor did not register it, but by a subsequent deed which was registered changed its nature from an apparently gratuitous donation to a deed of giving in payment (*dation en paiement*).

In an action brought by the testamentary executors of the donor to set aside the donation for want of registration:

Held, affirming the judgment of the court below, that the forfeiture under art. 806 C. C. resulting from neglect to register applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*) with warranty, which under article 1592 is equivalent to sale, the testamentary excutors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court for Lower Canada, district of Montreal.

The appellants as executors and administrators of the estate of the Hon. Chas. Wilson brought an action against the respondents to have a certain deed of donation executed on the 7th of July, 1872, before Normandeau, N.P., by which the donor gave and made over to

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

(1) M. L. R. 6 Q. B. 316.

1891

LACOSTE v. WILSON.

the respondent Anna Maria Wilson the usufruct and enjoyment of certain immovable property in Montreal, with a clause of substitution in favour of the children of the donee, set aside and declared null and void for want of registration.

To this action the respondent pleaded that by a subsequent deed of renunciation on 26th June, 1875, executed before Normandeau, N.P., the respondent Anna Wilson gave the Hon. Chas. Wilson a final receipt and acquittance of $2,000 and interest which was due to her by the said Hon. Chas. Wilson by virtue of her marriage contract dated 4th July, 1859, declaring that the receipt was given in consideration of the donation above mentioned, and that this donation was thereby changed in its nature from a gratuitous donation into a contract of giving in payment (*dation en paiement*) which deed was registered; and also a plea of compensation by moneys due to her under the will. The parties agreed to submit the case on the merits, viz., whether on the documentary evidence filed in the case the plaintiffs were entitled to succeed.

Lajoie for appellant relied on the following points of argument:—

1st. Article 806 of the Civil Code applies to all donations and not only to those which are gratuitous or remuneratory. Pothier, Donations (1); Laurent (2); Dalloz, vo. Dispositions entre vif (3).

2nd. The donation of the seventh of June, 1872, was not converted into a contract of giving in payment. Championnière & Rigaud (4).

3rd. The registration of the deed of renunciation of the 26th of July, 1875, does not meet the requirements

(1) Art. 3, par. 1, p. 471.
(2) 12 vol. No. 334,340.
(3) No. 1291-1293.
(4) 3 vol. No. 2259.

1891

LACOSTE v. WILSON.

of the law concerning the registration of donations. Pothier, Donations (1); Merlin, Vo. Donation (2).

4th. Respondent has not the right to demand interest on the sum of $1,800 which she claims was due her for interest on the 26th of July, 1875.

5th. Respondent has not shown that she had any right to a larger sum than that which she admits was paid her by appellants for her under legacy the will of the Hon. Chs. Wilson; arts. 760, 1069 C.C.; Dalloz (3).

6th. Appellants have shown that they have a sufficient interest to bring the present action.

Geoffrion Q.C. relied on the following propositions in support of the judgment appealed from:—

1st. That the deed of the 7th June, 1872, was a donation under an onerous title and did not require enregistration to render it valid.

2nd. That the enregistration of the deed of the 26th July, 1875, covered the default of enregistration of the first deed of donation; and

3rd. That if this donation is not held to be a donation under onerous title then it becomes by the deed of the 26th July, 1875, a giving in payment, *dation en paiement*, a sale, and as between the parties it was made with warranty; even if not registered it was a valid transaction and could not be set aside by the testamentary executors of the person giving.

Sir W. J. RITCHIE C.J.—The judgment of the Court of Queen's Bench in this case seems to me entirely reasonable. I think the appeal should be dismissed.

STRONG J.—I am also of opinion that this appeal should be dismissed for the reasons to be given by my brother Taschereau.

(1) 8 Pothier Ed. by Bugnet No. 107.

(2) Par. 2.

(3) Vo. Obligation, No. 1099.

1892

LACOSTE v. WILSON.

Fournier J.

FOURNIER J.—Les appelants sont les exécuteurs testamentaires et administrateurs de la succession de feu l'hon. Chs. Wilson.

Leur action a pour but de faire déclarer nul un acte de donation en date du 7 juin 1872, passé par-devant Normandeau, N.P., consenti par le dit hon. Chs. Wilson, en faveur d'Anna Maria Wilson, épouse de Louis Masson, écr, pour défaut d'enregistrement. Par cet acte le dit hon. Chs. Wilson a donné à la dite intimée l'usufruit d'un certain immeuble y décrit comme partie du lot 1312 du quartier St-Antoine, de la cité de Montréal.

Cet acte contient une substitution de l'immeuble en question en faveur des enfants de l'intimée et à défaut d'enfants, l'intimée a droit de disposer du dit immeuble par testament en faveur d'un ou de plusieurs parents du donateur; dans le cas où l'intimée ne disposerait pas par testament de l'immeuble en question, le dit immeuble doit faire retour à la succession du donateur.

Ce contrat n'ayant pas été enregistré suivant la loi, les légataires du donataire prétendent qu'ils sont saisis de la propriété en question.

L'intimée en est demeurée en possession depuis le 4 mai 1877, date de la mort de l'hon. Chs. Wilson, et en a toujours retiré les revenus se montant à $600.00 par année.

Un des appelants, G. W. Mount, a été nommé curateur à la substitution créée par l'acte de donation ci-dessus cité.

Les appelants concluent à l'annulation de l'acte de donation du 7 juin 1872 du dit immeuble, à ce qu'ils en soient mis en possession et l'intimée condamnée à leur rendre compte des frais et revenus.

L'intimée a répondu à cette action qu'elle avait un autre titre à cet immeuble que l'acte de donation du 7 juin 1872. Que bien qu'il apparaisse par cet acte que la donation était gratuite, elle était au contraire faite à

1892

LACOSTE v. WILSON.

Fournier J.

titre onéreux et constituait de fait une dation en paiement, ainsi qu'il fut plus tard déclaré dans un acte entre l'intimée et feu l'hon. Chs. Wilson, en date du 26 juillet 1875, en la manière suivante:

That whereas by the marriage contract between the said Louis Masson and the said Anna Maria Wilson, bearing date and executed before J. Belle and colleague, notaries, the fourth of July, eighteen hundred and fifty-nine, the said honourable Charles Wilson agreed and bound himself to pay to the said Anna Maria Wilson the sum of five hundred pounds equal to two thousand dollars as more amply set forth in the said marriage contract.

That whereas by a deed of donation bearing date and executed before P. E. Normandeau, the undersigned notary, on the seventh of June, eighteen hundred and seventy-two, the said honourable Charles Wilson granted to the said Anna Maria Wilson a greater amount than the sum promised on the marriage contract *with the view and intention of compensating* the said Anna Maria Wilson *for her said claim* under the marriage contract; in consequence of which donation she has agreed to discharge the said Hon. Charles Wilson of the said marriage contract.

Wherefore the said Anna Maria Wilson authorized as aforesaid as well for herself, as for the children that may be born from her present marriage did and doth hereby renounce in favour of the said Hon. Chs. Wilson to the said claim of two thousand dollars under the said marriage contract and *to all interest accrued.*

On voit que par cet acte, l'intimée a donné quittance et décharge à l'honorable Charles Wilson, de la réclamation qu'elle avait contre lui en vertu de son contrat de mariage. Si cette déclaration n'a pas l'effet de faire considérer l'acte de donation comme ayant été fait à titre onéreux, l'intimée allègue que l'acte du 26 juillet 1875 doit être considéré à tout événement comme une dation en paiement, que cet acte ayant été enregistré le 15 novembre 1875, est valable et doit être considéré comme complétant l'acte du 7 juin 1872.

L'intimée a produit un plaidoyer subsidiaire, pour le cas où son premier plaidoyer ne serait pas maintenu, invoquant la compensation au montant de $7,274.14, a elle dû d'après un état produit.

1892

LACOSTE v. WILSON.

Fournier J.

Ce montant est plus que suffisant pour compenser la somme de $3,410, montant des profits et revenus de l'immeuble donné, après déduction faite des $3,000, ci-dessus mentionné pour la dette due à Madame Wilson (l'intimée,) avec intérêt jusqu'à la date du 26 juillet 1875, en vertu de son contrat de mariage, laquelle doit nécessairement revivre si la donation est annulée.

Cette somme de $7,274.64 est la balance due à l'intimée en vertu du testament de feu l'honorable Charles Wilson, savoir : $1,600 à dater de sa mort, jusqu'à celle de son époux, faisant un total de $2,000, sur lequel elle n'a reçu que $525.26, laissant en sa faveur une balance de $1,274.54. Plus la somme de $5,000 par année à compter de la mort de Madame Wilson le 7 février 1879, faisant un total de $37,500 sur lequel elle n'a reçu que $31,500, laissant une balance de $6,000 qui, ajoutée à la balance ci-dessus, forme la somme de $7,274.64.

L'intimée a aussi fait un plaidoyer réclamant les dépenses et améliorations faites sur l'immeuble donné, ce plaidoyer a été réservé du consentement des parties pour n'y être procédé ultérieurement que dans le cas où l'intimée serait condamnée à donner l'immeuble réclamé, pour être alors référée à des experts.

Les prétentions des appelants ont été admises par le jugement de la cour Supérieure qui a été infirmé par celui de la cour du Banc de la Reine dont il y a présentement appel à cette cour.

La question à décider est de savoir quel doit être l'effet de l'acte du 26 juillet 1875 sur la donation du 7 juin 1872. A-t-il pu remédier au défaut d'enregistrement de cette donation et ne comporte-t-il pas en lui-même une confirmation de la dite donation et n'est-il pas dans tous les cas une dation en paiement du même immeuble par le dit Chs. Wilson à l'intimée, à laquelle il devait la somme de $3,800, en vertu du contrat de mariage de cette dernière?

1892

LACOSTE v. WILSON.

Fournier J.

Il est vrai que la donation entre vifs devient nulle faute d'enregistrement du vivant du donateur. Mais pendant la vie de celui-ci, n'était-il pas libre aux parties de changer la nature de l'acte du 7 janvier 1872? En apparence c'était une donation gratuite, mais les parties qui étaient alors toutes en état de contracter librement, n'avaient-elles pas le droit d'annuler ou de modifier cette donation qui était encore dans toute sa force, quoique non enregistrée, et d'en faire un tout autre acte? C'est ce qu'elles ont fait par l'acte du 26 juillet 1875.

Comme on l'a vu plus haut par la citation d'un extrait du dit acte du 26 juillet 1875, le dit honorable Chs. Wilson se reconnaissait débiteur de l'intimée pour la somme de $2,000 qu'il avait promis lui payer par son contrat de mariage du 4 juillet 1879. La dite somme se montait alors avec l'intérêt à $3,800.

Les dites parties déclaraient et reconnaissaient en même temps par le dit acte et par la donation faite devant Normandeau, N. P., le 7 juin 1872, que le dit Chs. Wilson avait accordé à la dite intimée un montant beaucoup plus considérable que celui de la réclamation qu'elle avait contre lui en vertu de son contrat de mariage et qu'en conséquence de cette donation la dite intimée était convenue d'acquitter le dit Chs. Wilson de la somme qu'il lui devait par son contrat de mariage. En conséquence, avec l'autorisation de son mari, la dite intimée renonça, tant pour elle-même que pour ses enfants qui pourraient naître de son mariage, à la réclamation de $2,000 qu'elle avait contre le dit Chs. Wilson, par son contrat de mariage, ainsi qu'à l'intérêt échu.

Il résulte clairement de cette citation que l'intention du testateur, au temps de la donation, était d'obtenir une décharge de l'obligation de payer à l'intimée les $3,800, qu'il lui devait par son contrat de mariage.

Cette déclaration des parties est une preuve suffisante de leur intention de faire une donation onéreuse. Rien dans cette cause ne la contredit, et s'il en eût été besoin on aurait encore pu en faire la preuve par l'interrogatoire de l'intimée.

Lors de cette déclaration les choses étant encore entières entre les parties, et les tiers n'ayant non plus acquis aucun droit quelconque contre l'immeuble donné, il n'y avait aucun obstacle contre la validité de l'acte qui la contient.

La déchéance résultant du défaut d'enregistrement prononcée par l'art. 806 C.C. étant de droit étroit ne s'applique qu'aux donations gratuites et rémunératoires. L'acte de donation ayant été modifié quand il était encore loisible aux parties de le faire, et qu'au lieu d'une donation gratuite il est prouvé que les parties avaient l'intention et que de fait, elles en ont fait un acte de dation en paiement par l'acte du 26 juillet 1875, la question d'enregistrement ne peut plus affecter la transaction des parties que comme dation en paiement. D'après l'art. 1592 C.C., la dation d'une chose en paiement équivaut à vente et rend celui qui la donne ainsi sujet à la même garantie. La nécessité d'enregistrer un acte de vente ou dation en paiement n'existe que vis-à-vis des tiers acquéreurs et des créanciers; elle n'existe pas vis-à-vis du vendeur, de ses héritiers ou légataires qui sont garants de la vente et de la dation en paiement. La question d'enregistrement dans les circonstances de cette cause ne pouvant être soulevée que par les héritiers ou légataires de feu l'hon. Chs. Wilson qui, comme tels, sont les garants de la dation en paiement, il est clair qu'ils n'ont aucun droit de s'en prévaloir. Mais indépendamment de ce fait il est prouvé que l'acte du 26 juillet 1875 a été dûment enregistré du vivant des parties contractantes, ce qui met fin à toute difficulté à ce sujet. Sans entrer dans l'examen des

1892

LACOSTE v. WILSON.

Fournier J.

autres défenses de l'intimée, je suis d'avis que ces prétentions au sujet de l'acte 26 juillet 1875 sont bien fondées et l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—Par le contrat de mariage de l'intimée avec L. H. Masson, en date du 4 juillet 1859, son père Charles Wilson, partie à l'acte, lui fit donation de la somme de $2,000 qu'il promit lui payer sous un an avec intérêt.

Plus tard par acte de donation, en date du 7 juin 1872, le dit Charles Wilson fit donation à l'intimée de l'usufruit viager d'un certain immeuble.

Cet acte ne fut pas enregistré du vivant du donateur, et sur ce défaut d'enregistrement, les demandeurs en qualité d'héritiers fiduciaires et d'exécuteurs testamentaires du dit feu Charles Wilson, décédé le 4 mai 1877, en demandent la résiliation par leur présente action. Les parties sont convenues de traiter l'action comme si elle eût été prise en 1877, immédiatement après la mort du dit Charles Wilson.

La défenderesse intimée répond à cette action que bien qu'en apparence, l'acte de donation en question soit une donation gratuite, qui, faute d'enregistrement, serait peut-être nulle, cependant, en réalité, elle n'était qu'une dation en paiement, tel que ce fait fut plus tard constaté entre elle et le donateur, par acte du 26 juillet 1875, que ce dernier acte fut dûment enregistré le 15 novembre 1875, et que c'est en vertu d'icelui qu'elle a continué à jouir et jouit encore du dit immeuble.

Une simple référence à cet acte démontre que le plaidoyer de l'intimée est bien fondé, tel que l'a jugé la cour dont est appel.

Les parties y déclarent que la donation du 7 juin 1872, fut faite "with the view and intention of compensating the said Anna Maria Wilson for her claim under her marriage contract, that is to say, her claim

1892

LACOSTE v. WILSON.

Taschereau J.

" against her father to the sum of $2,000 with interest " from the 4th July, 1860," et en conséquence la dite intimée donna quittance pleine et entière à son père de la dite somme.

Je ne lis pas cet acte comme apportant, entre les parties, aucun changement à l'acte de donation de 1872, mais simplement comme déclarant entre elles, ce qu'elles avaient bien le droit de faire, quels avaient été dès son origine, son caractère, le but des parties et leurs motifs pour son exécution. Le fait qu'en 1875 comme en 1872, ils aient appelé cette cession une donation n'en change pas le caractère. C'est bien de fait une donation mais une donation en paiement. Ceci posé, comme fait, il en résulte comme conséquence légale que le titre de Charles Wilson à l'intimée équivaut à une vente, art. 1592 C. C., et que, par conséquent, une vente n'étant pas nulle entre les parties par défaut d'enregistrement, l'action des demandeurs doit être déboutée. Il m'est inutile d'ajouter qu'ils n'ont pas qualités pour attaquer l'intimée. Ils sont ses garants, aux lieu et place de Charles Wilson, son vendeur. L'article 806 C.C. qui donne aux représentants légaux d'un donateur le droit d'invoquer le défaut d'enregistrement ne s'applique qu'aux donations gratuites, et sans garantie de la part du donateur. Si leur auteur était garant, ils le sont eux-mêmes.

Les demandeurs ont dit :

Si cette donation est devenue par l'acte de 1875 une dation en paiement, ce ne peut être que pour une faible partie ; car la propriété cédée vaut de beaucoup plus que les $2,000 et intérêts que devait Charles Wilson à l'intimée ; or pour cet excédent, le titre de l'intimée ne repose donc que sur une donation gratuite ; or faute d'enregistrement, cette donation est nulle, et l'article 806 du code civil nous donne le droit d'invoquer cette nullité.

Cette objection m'a paru sérieuse. Mais après l'avoir bien pesée, j'en suis venu à la conclusion qu'elle ne peut prévaloir.

1892

LACOSTE v. WILSON.

Taschereau J.

D'abord, ces actes de 1872 et 1875 doivent être, entre les parties, pris comme un seul et même acte ; et c'est une dation en paiement équivalant à une vente, je l'ai dit, que constitue l'acte de 1872.

Je ne vois pas comment on peut le scinder de manière à y appliquer la règle de droit étroit sur l'enregistrement particulier aux donations, même si, pour partie, il n'est qu'une donation. Si cet acte au lieu de prendre la forme d'une donation, eut eu la forme de ce que les parties ont plus tard déclaré qu'il était, une dation en paiement, les appelants auraient-ils pu en demander la nullité faute d'enregistrement, la seule base de leur présente action ? Je ne le crois pas. Ce n'est pas là l'action qu'ils auraient eu, même dans le cas où ils en auraient eu une quelconque. Charles Wilson lui-même n'aurait pu se prévaloir de la simulation d'une partie de cet acte, et les appelants n'ont pas plus que lui, le droit de le faire, Bédarride Dol et fraude (1). Et puis, comme le remarque bien le jugement dont est appel, la différence de valeur entre l'immeuble donné et la dette qu'a payée Charles Wilson en le donnant n'est pas une cause suffisante pour le faire annuler. Elle ne l'aurait pas été non plus pour Charles Wilson lui-même ; elle ne peut donc non plus l'être pour les appelants qui le représentent. Ce n'est pas là d'ailleurs l'action des appelants ou la contestation liée entre eux et l'intimée.

J'ai déjà remarqué que l'acte du 26 juillet 1875 dont les demandeurs, il ne faut pas l'oublier, n'ont pas demandé l'annulation, a été dûment enregistré du vivant de Charles Wilson. Les vices qui peuvent se trouver dans cet enregistrement, en supposant l'enregistrement nécessaire, ne me paraissent pas pouvoir être invoqués par les parties mêmes à l'acte, quelles que soient les conséquences qui en résulteraient vis-à-vis de tiers intéressés. Or, je le répète, les appelants sont aux lieu

(1) 3 vol. Nos. 1260 et seq.

1892

LACOSTE v. WILSON.

Taschereau J.

et place de Charles Wilson, et l'article 806 C. C. ne peut être appliqué qu'aux donations sans garantie. Or, ceci n'est pas, je le répète, une donation pure et simple, mais une donation en paiement, équivalente à une vente.

Je suis d'avis que sur la contestation telle que liée dans l'instance entre les appelants et l'intimée, leur action doit être déboutée, en supposant même, ce qui me paraît très douteux, que, comme exécuteurs testamentaires, une action de cette nature leur compète.

Appel rejeté avec dépens.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Lacoste, Bisaillon, Brosseau & Lajoie.*

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

1891
*Nov. 3.
1892
*April 4.

THE BELL TELEPHONE COMPANY OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

THE CITY OF QUEBEC (DEFENDANT)...RESPONDENT.

THE QUEBEC GAS COMPANY (PLAINTIFF)..... } APPELLANT;

AND

THE CITY OF QUEBEC (DEFENDANT)...RESPONDENT.

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

Appeal—Action to set aside municipal by-law—Supreme and Exchequer Courts Act, sec. 24 (g).

In virtue of a by-law passed at a meeting of the council of the corporation of the city of Quebec in the absence of the mayor, but presided over by a councillor elected to the chair in the absence of the mayor, an annual tax of $800 was imposed on the Bell Telephone Company of Canada (appellant), and a tax of $1,000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the actions holding the tax valid.

On appeal to the Supreme Court of Canada—

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of sec. 24 (*g*) of the Supreme and Exchequer Courts Act providing for appeals in cases of municipal by-laws. *Varennes* v. *Verchères* (19 Can. S.C.R. 365); *Sherbrooke* v. *McManamy* (18 Can. S.C.R. 594) followed.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada reversing the judgments of

---

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

1891

THE BELL TELEPHONE COMPANY OF CANADA v. THE CITY OF QUEBEC.

THE QUEBEC GAS COMPANY v. THE CITY OF QUEBEC.

the Superior Court, which had set aside the by-law of the corporation of the city of Quebec. The question of the validity of the same by-law under which the appellants were taxed being raised in both appeals, they were argued together.

In March, 1889, in the absence of the mayor, and no pro-mayor having been elected, a by-law was passed at a meeting of the council presided over by a councillor, imposing a personal, fixed and annual tax of $800 on telephone companies operating in the city of Quebec, and a personal, fixed and annual tax of $1,000 on every gas light company operating in the city of Quebec.

The appellants in January, 1890, instituted actions in the Superior Court of Lower Canada, district of Quebec, praying that the by-law be declared null and void by judgment of the court. The Superior Court, following the decision rendered in the *Quebec Street Railway Co.* v. *The City of Quebec* (1) and not appealed from, declared that the mayor being an integral part of the council, and his presence, except in the cases provided for, being essential to the lawful exercise of the legislative powers of the council, by-laws passed in his absence, and in that of the pro-mayor if there be one, are invalid.

On appeal to the Court of Queen's Bench for Lower Canada the majority of the court held that the council was regularly constituted, a councillor having been elected to the chair in the absence of the mayor, and that the by-law was valid. Although the case was argued upon the merits the appeal was decided upon the question of jurisdiction which was raised during the argument by His Lordship Mr. Justice Taschereau.

Irvine Q.C. and *G. Stuart* Q.C. appeared for the appellants.

(1) 16 Q.L.R. 11.

1891

THE BELL TELEPHONE COMPANY OF CANADA v. THE CITY OF QUEBEC.

THE QUEBEC GAS COMPANY v. THE CITY OF QUEBEC.

P. Pelletier Q.C. for the respondent.

Sir W. J. RITCHIE C. J. stated that he had written an opinion on the merits affirming the decision of the court below, but in view of the decision of this court in the case of *Sherbrooke* v. *McManamy* (1) it was clear the appeal must be quashed.

TASCHEREAU J. delivered the judgment of the court:

These two appeals must be quashed, as we intimated at the argument. The appellants had to concede that they could not base their right to appeal on sec. 29 of the Supreme Court Act, *Gilman* v. *Gilbert* (2), as the matter in controversy, though perhaps affecting future rights, does not relate to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or "such like matters or things, where the rights in future might be bound," but they contended that their cases were appealable under sec. 24 of the act, subsec. *g*, which gives to this court jurisdiction in any case in which a by-law of a municipal corporation has been quashed by rule or order of court, or the rule or order to quash it has been refused after argument. This contention, however, cannot prevail. We have already disposed of a smilar question in the two cases of *Sherbrooke* v. *McManamy* (1) and *Verchères* v. *Varennes* (3) wherein we quashed the appeals. *Sherbrooke* v. *McManamy* (1) is particularly in point. The corporation of Sherbrooke had there sued the defendant for a tax of $100 as compounders of liquors. The defendant pleaded to that action that the said tax had been illegally imposed, because no power to impose it had been

(1) 18 Can. S. C. R. 394. (2) 16 Can. S.C.R. 189.
(3) 19 Can. S.C.R. 365.

1892

THE BELL TELEPHONE COMPANY OF CANADA v. THE CITY OF QUEBEC.

THE QUEBEC GAS COMPANY v. THE CITY OF QUEBEC.

Taschereau J.

conferred upon the said corporation by the legislature, and concluded that "the said by-law may be declared to have been and to be irregular, illegal, null and void, and to have been and to be *ultra vires* of the powers of the said municipal council, and that the same be set aside." The Court of Appeal granted the conclusions of the said plea. "Considering," said the court, "that the legislature hath not delegated by either of the said acts or otherwise to the corporation respondent, the power to impose the said tax of $100 upon appellants as compounders, and that in passing the said by-law in so far as relates to and concerns the said tax of $100, the respondent has acted *ultra vires*, and without right or authority so to do, and that the same is null and void in respect of and as regards the imposition of the tax of $100 upon appellants as compounders..... doth dismiss this action in so far as it claims the said tax of $100." From that judgment the corporation of Sherbrooke instituted an appeal to this court; but as I have said the appeal was quashed. Now here, the plaintiffs asked that "by the judgment of this honourable court the said by-law be adjudged and declared to be unjust, unreasonable and oppressive, that it be further declared that the said by-law was irregularly and illegally passed, and was and is null, void and of no effect, and that the said by-law be by the judgment of this honourable court annulled and set aside." And the judgment appealed from dismisses the action. We could clearly not entertain these appeals without overruling *Sherbrooke* v. *McManamy* (1). There is the greatest difference between an action like the present one, to have a by-law declared null and void, and the proceedings under the English system to have a by-law quashed by rule or order. On an action, as this one, the judgment declaring a by-law void is *res judi-*

(1) 18 Can. S.C.R. 394.

1892

THE BELL TELEPHONE COMPANY OF CANADA v. THE CITY OF QUEBEC.

THE QUEBEC GAS COMPANY v. THE CITY OF QUEBEC.

Taschereau J.

cata only between the parties, but under the English system, a by-law quashed by order of court is quashed to all intents and purposes whatever. The fact that there may be no such proceedings possible in the province of Quebec cannot have the effect to extend by interpretation the right of appeal to a case not clearly provided for by the act.

The case of *Les Ecclésiastiques* v. *The City of Montreal* (1), was a case of taxes on real property and was therefore held to have been appealable as coming within the words "any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound." I refer to the authorities cited in *Langevin* v. *Les Commissaires* (2), and *Verchères* v. *Varennes* (3).

Appeals quashed without costs.

Solicitors for appellants: *Caron, Pentland & Stuart.*

Solicitors for respondent: *Baillairgé & Pelletier.*

(1) 16 Can. S.C.R. 399. (2) 18 Can. S.C.R. 599.
(3) 19 Can. S.C.R. 365.

DAVID HOGGAN (PLAINTIFF).....APPELLANT; 1891

AND *June 16,17.

THE ESQUIMALT AND NANAIMO RAILWAY CO. (DEFENDANTS)..... } RESPONDENTS. 1892 *April 14.

SAMUEL WADDINGTON (PLAINTIFF)...APPELLANT;

AND

THE ESQUIMALT AND NANAIMO RAILWAY CO. (DEFENDANTS).... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Public lands—Right of pre-emption—Lands reserved—Agricultural settlers —47 Vic. c. 14 (B.C.)

By 47 Vic. c. 14 subsec. *f.* (B.C.) certain land conveyed to the E. & N. Ry. Co. was, for four years from the date of the act, thrown open to actual "settlers for agricultural purposes,"—coal and timber land excepted. H. and W. respectively claimed a right of pre-emption under this act.

Held, affirming the decision of the court below, that the act did not confer a right of pre-emption to lands not within the pre-emption laws of the province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement.

APPEALS from decisions of the Supreme Court of British Columbia affirming the judgment at the trial for the defendants in each case respectively.

In each of these cases the respective parties were represented by the same solicitors and counsel; the

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

1891

HOGGAN v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

WADDINGTON v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

cases were argued together and one judgment was given as deciding both. The following statement of facts from one of the cases will suffice to explain the position of them both before this court.

This is an action brought by the appellant for a declaration that he is entitled under the act chapter 14 of the Provincial Legislature of British Columbia passed on the 19th day of December, 1883, section 23 and sub-section *f*, therein mentioned, and under the act chapter 6 of the Parliament of the Dominion of Canada, passed on the 19th day of April, 1884, section 7, subsection 1, to acquire and purchase from the respondents a certain parcel or tract of land for the sum of $160, and that the respondents may be decreed to convey, &c., or for a declaration that the appellant is entitled under said section 23 of the said chapter 14 and section 7 subsection 2 of said act chapter 6, to acquire and purchase from the respondents the freehold of the surface rights of the said parcel of land on payment to the respondents of the sum of $160, and that the respondents may be decreed to convey.

47 Vic. ch. 14 subsec. *f*, one of the acts referred to, contains the following provision, the prior sections providing for a conveyance of certain lands from the crown to the defendant company in consideration of their having constructed a railway from Esquimalt to Nanaimo in the said province:

"(*f*.) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open from four years from the passing of this act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway and stations and workshops, shall

1892

HOGGAN v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

WADDINGTON v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

be reserved. In the meantime and until the railway from Esquimalt to Nanaimo shall have been completed the Government of British Columbia shall be the agents of the Government of Canada for administering for the purposes of settlement, the lands in this subsection mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers of the said lands."

The plaintiffs respectively claim the right to have a conveyance from the defendant company of a piece of land, for many years prior to said act known as the Newcastle town site reserve, lying within the land conveyed by said act. They first applied for them under the pre-emption laws of the province, but their applications were refused and no appeal from such refusal was taken to the Supreme Court of the province, as such laws allow. They then brought these actions.

The actions were dismissed by the trial judge on the grounds that the cases were *res adjudicata* by the refusal for pre-emption without appeal; that the lands in question were reserved lands, being reserved for a town site, and so not subject to pre-emption; and that plaintiffs never were "settlers for agricultural purposes" under clause *f* of 47 Vic ch. 14. The decision of the trial judge was affirmed by the full court. The plaintiff appealed.

S. H. Blake Q.C. for appellant.

Davie, Attorney-General of British Columbia, and *Moss* Q.C. for respondents.

Sir W. J. RITCHIE C.J.—I agree with the court below that the plaintiffs in this case and in that of Waddington against the same defendants have shown no claim whatever to the lands in question in this case, and that the decision of the trial judge and that

1892

HOGGAN v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

WADDINGTON v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

of the full court were correct and the actions were properly dismissed.

STRONG J.—I intimated at the conclusion of the argument of this case that the appeal should be dismissed, and on considering the case since I adhere to that opinion.

FOURNIER J. concurred in the appeal being dismissed.

GWYNNE J.—These appeals must, in my opinion, be dismissed. I cannot entertain a doubt that the Dominion Government, as trustees for the Esquimalt and Nanaimo Railway Company, took the lands vested in them by the provincial act, 47 Vic. ch. 14, in the character in which those lands then were, namely, as lands set apart for suburban park lots of from 3 to 5 acres each, and that such lands were not open for settlement as agricultural lands, nor did they become so by anything which took place subsequently. It is also, in my opinion, free from doubt that when the Dominion act, 47 Vic. ch. 6, placed the lands vested in the Dominion Government by the provincial act in the hands of the Provincial Government, as agents of the Dominion, for purposes of settlement, the effect and intent of the Dominion act was to place the lands for disposition under the laws of the province, and that no claim against the railway company could be maintained, except in right of a title, which would have been good against the Provincial Government, under the laws of the province, if the lands had not become the property of the railway company. The evidence clearly shows that the lands were never open for settlement by actual settlers as agricultural lands at all, and that the plaintiffs did not enter upon the

lands as actual settlers upon agricultural lands, believing themselves entitled to acquire 160 acres in virtue of the laws in force in the province, but on the contrary that they entered against express notice given to them, that the lands were not open for settlement as agricultural lands, or so as to enable the plaintiffs to acquire any claim by possession.

1892

HOGGAN v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

WADDINGTON v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

PATTERSON J. concurred.

Appeals dismissed with costs.

Solicitor for appellants : *S. Perry Mills.*

Solicitor for respondents : *C. E. Pooley.*

1891
*Nov. 4, 5.
1892
*April 4.

HER MAJESTY THE QUEEN (DEFENDANT)..... } APPELLANT;

AND

JOSEPH ADHEMAR MARTIN (SUPPLIANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence of servant—Crown—Liability of—50-51 *Vic. ch.* 16—*Prescription—Arts.* 2262, 2267, 2188, 2211 *C.C.*—44 *Vic. c.* 25—*R. S. C. c.* 38—50-51 *Vic. c.* 16 *s.* 18—*Retroactive operation.*

Held, reversing the judgment of the Exchequer Court, that even assuming 50-51 Vic. ch. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expresses no opinion), such act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the act.

Held also, that even assuming that under the common law of the province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of in this case having been received more than a year before the filing of the petition the right of action was prescribed under arts. 2262 and 2267 C.C.

Per Patterson J.—The Crown is made liable for damages caused by the negligence of its servants operating government railways by 44 Vic. c. 25 (R.S.C. ch. 38), but as the petition of right in this case was filed after the passing of 50-51 Vic. c. 16 (1887) the claimant became subject to the laws relating to prescription in the province of Quebec, and his action was prescribed.

APPEAL AND CROSS APPEAL from the judgment of the Exchequer Court of Canada (1).

This was a petition of right for injury to the suppliant's minor son received on the Intercolonial Railway.

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

(1) 2 Can. Ex. C. R. 328.

The facts and pleadings appear in the report of the case in 2 Can. Ex. C. R. p. 328 and in the judgments hereinafter given.

Robinson Q.C. and *Hogg* Q.C. for appellants.

The object and effect of subsection *c* of sec. 16, ch. 16 of 50-51 Vic. is to confer upon the Exchequer Court jurisdiction to hear and determine all cases of the classes indicated therein, in respect of which the Crown was liable before the passing of the act, and in cases where the Crown has been or may be rendered liable by legislation. It affects matters of procedure only, and not the legal rights of the Crown.

The heading of sections 15 and 16 of this act is "Jurisdiction" and in considering the proper construction to be placed on subsection *c* the heading should be looked to as not only explaining, but as affording a key to the construction of the said subsection.

The Eastern Counties v. *Marriage* (1). *Lang* v. *Kerr et al.* (2). Endlich on Interpretation of Statutes sec. 69. Wilberforce on Statute Law (3). *Wood* v. *Hurl* (4).

The question therefore is: Is the Crown liable in tort because a court is given jurisdiction to hear and determine such cases; and is the defence of the Crown that it cannot be sued in tort, no longer a defence because of this subsection *c*?

The Crown cannot be deprived of any prerogative right unless by express legislative enactment, subsec. 46 of sec. 7, Dominion Interpretation Act, and it is clear that there are no words in subsection *c* s. 16 of the Exchequer Court Act creating an express liability against the Crown in cases arising by or through the negligence of the Crown's officers or servants, and without

(1) 9 H. L. Cas. 32.
(2) 3 App. Cas. 529.
(3) P. 294-5.
(4) 28 Gr. 146.

1891

THE QUEEN v. MARTIN.

such express words in this subsection no extension of liability can be presumed.

See Endlich on Interpretation of Statutes (1), and Maxwell on Statutes (2).

The jurisdiction conferred on the Exchequer Court by this subsection *c* differs from any jurisdiction which the official arbitrators of the Dominion had under the statutes which governed that body. Under 33 Vic. cap. 23, 41 Vic. cap. 8, 44 Vic. cap. 25, only such claims arising out of death or injury on a public work as the head of a department was instructed by the Governor in Council to refer, could be referred to the arbitrators, and under the two latter statutes the reference was only for investigation and report, and cap. 40 Revised Statutes of Canada is the same, and the fact that the Crown referred such cases to the Official Arbitrators for adjustment and settlement, forms no argument that the Crown had prior to the passing of 50 & 51 Vic. cap. 16 admitted or created any legal liability for the class of claims mentioned in subsection *c*.

The learned counsel also cited and relied on *The Queen* v. *McLeod* (3); *The Queen* v. *MacFarlane* (4), and on the question of contributory negligence; Beach on Negligence (5); Clerk & Lindsell on Torts (6); *Radley* v. *The L. & N. W. Ry. Co.* (7); *Seymour* v. *Greenwood* (8); *Rounds* v. *Delaware Railroad Co.* (9).

Belcourt and *Taché* for respondent, cited and relied on *Farnell* v. *Bowman* (10); *Atty. Gen. of the Straits Settlement* v. *Wemyss* (11); 50 & 51 Vic. ch. 16 sec. 16; Government Railway Act R.S.C. ch. 38, sec. 50; arts

(1) At sec. 161.
(2) Pp. 112-265 of ed. of 1875.
(3) 8 Can. S.C.R. 1.
(4) 7 Can. S.C.R. 216.
(5) P. 60.
(6) 1 ed. 383-5.
(7) 1 App. Cas. 754.
(8) 7 H. & N. 355.
(9) 64 N.Y. 129.
(10) 12 App. Cas. 643.
(11) 13 App. Cas. 192.

1891

THE QUEEN v. MARTIN.

Ritchie C.J.

1053, 1054 C.C.; Toullier (1); Pothier, Obligations (2); and *The Central Vermont Ry. Co.* v. *Lareau* (3).

Sir W. J. RITCHIE C.J.—I express no opinion as to whether 50 & 51 Vic. cap. 16 gives a new jurisdiction to the Exchequer Court in respect of cases where no liability previously existed against the Crown. But assuming it does, how can this act have a retroactive operation, and make the crown liable for the acts of their officers or servants which happened prior to the passing of the act and for which the Crown was not liable at the time of the happening of the events complained of? Surely it can only apply if at all to acts of negligence committed after the passing of the act. The accident happened on the 18th July, 1884, the statute was not passed until the 25th June, 1887. Then again the petition of right was not filed till the 27th March, 1888. So that if the act had reference to the time when the act was committed the action was prescribed before the act was passed. For these reasons I think the appeal should be allowed. It is not necessary and would not be proper for me to discuss the merits of this case, which to my mind are by no means clear against the employees of the Intercolonial Railway.

FOURNIER J. concurred with Taschereau J.

TASCHEREAU J.—I am of opinion that this suppliant's claim must be dismissed. First, if as he contended at the argument, he had, in 1884, by the laws of the province of Quebec a right of action against the Crown for the damages he now claims, his action was prescribed, when he filed his petition, by one year under articles

(1) 2 vol. No. 284. (2) No. 121.
(3) Ramsay's App. Cas. 593.

1892

THE QUEEN v. MARTIN.

Taschereau J.

2262, 2267, 2188 and 2211. I do not wish, however, to be understood as conceding that he had such an action at common law.

Secondly—If he had a right of action under section 27 of the statute of 1881, the Government Railways Act, which I very much doubt (1), his action was also prescribed in 1887 by one year under the same articles. The contention that these were continuous damages is unfounded. The tort which he complains of was not a continuous act.

Thirdly—The statute of 1887, assuming, without deciding, that it now gives a petition of right against the Crown for damages such as those claimed here, arising out of any death or injury to the person happening since the passing of the said act, which may be doubtful does not revive claims against the Crown which had previously been extinguished either under the common law of the province or under section 8, ch. 40 of the Revised Statutes, or for any cause whatsoever. It may be that under this statute of 1887 no petition of right at all lies for such damages arising out of any death or personal injury antecedent to the said act, even if the claim was not previously extinguished by prescription, though a reference to the Exchequer Court upon such a claim might perhaps be made under section 58 of the act, a point, however, which it is unnecessary to decide here.

GWYNNE J.—It is unnecessary in the present case to determine whether or not the main point relied upon by the learned counsel for the appellant is well founded, namely, that the Dominion statute 50 & 51 Vic. ch. 16 gives no action against the Dominion Government for an injury to the person assuming such injury to have been caused in the manner charged in

(1) 3 Vic. ch. 27 sec. 19 ; *The Queen* v. *McLeod*, 8 Can. S.C.R. 1.

1892

THE QUEEN v. MARTIN.

Gwynne J.

the petition of right in this case. That act enacts that the Court of Exchequer shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment; and the contention is that this provision in the act operates merely as giving to the Court of Exchequer jurisdiction to try all cases wherein by law, independently of that statute, parties had a claim for compensation to be given to them by the Crown as representing the Dominion Government for injuries received from the negligence of the servants of that government, but not as giving any new cause of action or demand against the government, and that as, independently of the above statute, it had been held by this court that the Crown as representing the Dominion Government was not responsible for injuries to the person caused by the tort, default or neglect of the persons employed on the Intercolonial Railway, that therefore the petition of right in the present case could not be maintained.

Whatever may be the operation of the statute under consideration in respect of injuries occasioned to any person subsequently to the passing of the act it is sufficient for the determination of the present case to say that the act has no operation in respect of an injury sustained three years before the passing of the act, all right of action in respect of which injury, if any had existed independently of the above statute, as is contended there had by the law of the province of Quebec in which province the injury complained of was sustained, had been prescribed by the law of that province long previously to the passing of the statute 50 & 51 Vic. ch. 16. The evidence also, although in

1892
THE QUEEN v. MARTIN.
Gwynne J.

the view which I have taken it is not necessary to rest my judgment upon this point, fails to satisfy my mind that the brakesman Belanger, whose alleged negligence is relied upon as having caused the injury complained of, can be properly charged with any negligence whatever as causing the injury, which seems to have been wholly caused by the wrongful conduct of the boy who suffered the injury by falling from a train of cars on the Intercolonial Railway while in the act of committing in company with several other boys a wilful trespass thereon.

The appeal must, in my opinion, be allowed and the cross-appeal dismissed.

PATTERSON J.—On the 19th July, 1884, a son of the petitioner, 13 years old, was, with other boys, amusing himself by riding on a freight car of the Intercolonial Railway as it was moving along the track at the station of Rimouski. He fell off the step of the car and was injured. It is charged that his fall and the consequent injury were caused by the improper conduct of a brakesman upon the car, and that charge has been held to be established by the evidence. That conclusion of fact has been challenged and we have had a full discussion of the evidence bearing upon it. The conclusion depends upon the weight attached to parts of the evidence in which there is not perfect agreement among the witnesses, and is a matter of inference quite as much as of direct proof. Therefore, while there may be room for the conclusion that the boy's misfortune was either an accident for which no one was to blame, or was brought on him entirely by his own doings, I cannot say that the finding of the learned judge is not warranted or that it is so clearly wrong as to make it our duty to reverse it.

1892

THE QUEEN v. MARTIN.

Patterson J.

The important question upon the appeal is the liability of the Crown for the negligence or misconduct of the brakesman.

On the part of the Crown it is denied that any liability exists; and secondly, that if there is a liability, it can be enforced by petition of right.

The position is pleaded in these terms:

Her Majesty's Attorney General for a further defence says that the said petition of right does not disclose any claim which the suppliant can enforce by petition of right, nor does the said petition disclose any cause of action for which Her Majesty can be rendered liable, inasmuch as the claim and cause of action therein alleged and set out are founded upon the negligence and misconduct of the servants and employees of Her Majesty upon the said Intercolonial Railway; and it is submitted that the control and management of the said Intercolonial Railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because of any negligence or misconduct in the management thereof; and that even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence and misconduct of her servants, and no action will lie against Her Majesty for damages in consequence of such negligence and misconduct on the part of her servants; and Her Majesty's Attorney General claims the same benefit from this objection as if he had, on behalf of Her Majesty, formally demurred to the said petition of right.

The accident happened, as I have said, on the 19th of July, 1884. The cause of action, if any, accrued then and once for all, notwithstanding that the extent of the damages may not have been fully ascertained until some time afterwards.

The petition of right bears date in December, 1887.

The question is: What right of action or claim had the plaintiff in December, 1887?

The jurisdiction of the Exchequer Court, under the act of 1887 (1), extends to

Every claim against the Crown arising out of any death or injury to the person or property on any public work, resulting from the

(1) 50 & 51 V. c. 16 s. 16 (*c*),

1892

THE QUEEN v. MARTIN.

Patterson J.

negligence of any officer or servant of the Crown while acting within the scope of his duties or employment :

" The Crown " meaning the Crown in the right or interest of the Dominion of Canada; s. 1 (*c.*)

This is one of the heads of jurisdiction enumerated in section 16 of the act, and it is framed in language taken from the act respecting Official Arbitrations which is repealed by the act of 1887, the Exchequer Court being substituted as a tribunal in place of the arbitrators.

A petition of right presented under any of the statutes regulating that proceeding, *e.g.*, the Petition of Right Act, Canada, 1875 (1), or the Petition of Right Act, 1876 (2), or the Petition of Right Act as contained in the Revised Statutes (3), was a process by which a subject could obtain relief in respect of any claim against the Crown. In each of those statutes the word " relief " included every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right (4), or a return of lands or chattels or a payment of money or damages, or otherwise.

It was declared in the act of 1875 that nothing therein contained should prejudice or limit, otherwise than therein provided, the rights, privileges or prerogatives of Her Majesty or her successors, or apply to any claim, matter or thing which under the Public Works Act of 1867 (5), or under any acts amending or extending the same, might be referred by the Minister of Public Works to arbitration, and that no court should have jurisdiction under the Petition of Right Act in any such claim, matter or thing.

The subjects thus excluded were confined to claims for property or damage to property arising from the

(1) 38 V. c. 12.
(2) 39 V. c. 27.
(3) R.S.C. c. 136.
(4) 38 V. c. 12 s. 17 R. S. C. c. 136 s. 2 ; 39 V. c. 27 s. 21.
(5) 31 Vic. c. 12.

construction of public works, or claims under contracts for the construction of public works (1).

The act of 1875 was repealed by that of 1876. The latter act declared that nothing therein contained should—(1) prejudice or limit otherwise than therein provided, the rights, privileges or prerogatives of Her Majesty or her successors; or (2), prevent any suppliant from proceeding as before the passing of the act; or (3), give to the subject any remedy (*a*) in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the Imperial statute, 23 & 24 Vic. ch. 34; or (*b*), in any case in which either before or within two months after the presentation of the petition, the claim was, under the statutes in that behalf, referred to arbitration by the head of the proper department, who was thereby authorized with the approval of the Governor in Council to make such reference upon any petition of right.

The Revised Statute has the same restrictions as the act of 1876.

The Government Railways Act, 1881, was in force when the accident in question occurred. That act made some important changes, or at all events removed some questions that previously existed, with respect to the liability of the Crown for the acts or defaults of the persons employed in the actual working of the road.

The general railway law of the province of Canada was adopted, with some modifications, as the general law of the Dominion by the Railway Act, 1868. The first part of that act, including, amongst others, the heads of "working of the railway" and "actions for indemnity," were declared to apply to the Intercolonial Railway, the construction of which was then contem-

(1) 31 Vic. c. 12 s. 34.

1892

THE QUEEN v. MARTIN.

Patterson J.

plated, so far as applicable to that undertaking. That law was repeated, with some changes, in the Consolidated Railway Act, 1879. Under the general law a railway company was liable for damages caused by the negligence or other torts of its servants or officers operating the road. Did a similar liability attach to the Crown? That question was raised and was debated in this court in an action that arose out of an accident in 1880, upon the Prince Edward Island Railway, a Government railway to which the general act had been declared to apply, and it was decided by three judges against two that the principle of *respondeat superior* did not apply and that the Crown was not liable (1).

The Government Railways Act, 1881, 44 V. c. 25, if I correctly interpret it, placed the Crown on very much the same footing with regard to the liability in question as a railway company under the general act.

We may give a fair and liberal construction to the statute, understanding the legislature to mean what is said in plain terms or conveyed by reasonable implication, without fear of doing violence to any constitutional principle, or any doctrine touching the prerogative, or any such maxim as "the King can do no wrong."

The two recent decisions of the Judicial Committee of the Privy Council, viz.: *Farnell* v. *Bowman* (2) in 1887, and *Attorney General of the Straits Settlement* v. *Wemyss* (3), in 1888, leave no ground for hesitation or reluctance on that score.

It has been argued that an important distinction exists between a government railway and one constructed by a railway company in the fact that the former has a high political object, in view of the pub-

(1) *The Queen* v. *McLeod*, 8 Can. S.C.R. 1.

(2) 12 App. Cas. 643.

(3) 13 App. Cas. 192.

lic good, and is not a commercial enterprise undertaken with a view to profit. The distinction, so far as it is supposed to bear on the rights of persons who find one road conducted just like the other and have to deal with both in precisely the same way, is not at once apparent, but whatever force the suggestion may have had when the relation of the Crown to the undertaking, and to the public in respect of the undertaking, was to some extent a matter of argument and deduction, as it was before the passing of the Government Railways Act, it must, as I apprehend, be regarded as now beside the question.

The act is, by section 2, to apply to all railways which are vested in Her Majesty and which are under the control and management of the Minister of Railways and Canals.

I do not know that the rights of Her Majesty are affected by the act in the sense in which those words are to be understood in the Interpretation Act (1), but if they are affected then I hold that the effect of section 2 is to declare that Her Majesty is bound by the act in respect of all railways vested in her and under the control and management of the minister. But this is not the only declaration to that effect, as we shall find when we examine some of the provisions of the act.

By section 4, whenever the powers given to the minister are exercised by the chief superintendent or superintendent, or by any other person or officer, employee or servant of the department thereunto specially authorized by the minister, acting minister or his deputy, or an acting deputy, they shall be presumed to be exercised by the direction of the minister, unless the contrary be made to appear.

The words "the department" used in this section and in some other places in the act obviously signify

(1) R.S.C. c. 1, s. 7, ss. 46.

1892

THE QUEEN v. MARTIN.

Patterson J.

the Crown, just as if the words "Her Majesty" had been used. In fact we find the latter term substituted in the revised statute in some sections to which I shall refer which relate to liability for damages. In some other places the word "minister" is used in place of "department."

Various powers are conferred and duties imposed on the minister *eo nomine*. In many of these the public or individuals are interested, and the effect is to create rights which must be capable of being enforced. Proceedings for that purpose must be against the Crown and not in general, if in any case, against the minister who is merely the representative of the Crown.

Let us see how this is illustrated by some specific provisions of the statute. Take the heading "Fences." By section 55 the minister is to make certain fences when required by proprietors of lands adjoining the railway, and also cattle guards, and until they are made (s. 56) the department, or as in the revised statute, Her Majesty, not the minister, is to be liable for all damages which may be done by trains or engines to cattle, &c., on the railway which have gained access thereto for want of such fences or cattle guards. This liability is declared to be subject to the provisions of sections 60, 62 and 64. By section 62, the owner of cattle which are at large contrary to the mandate of section 60,

> shall not have any action or be entitled to any compensation in respect of the same unless the same are killed or injured through the negligence or wilfulness of some officer, employee or servant of the department.

The revised version has officer, employee or servant of the minister. Here is expressly the doctrine of *respondeat superior*. Who is the superior against whom the action will lie, or who is to make compensation? It is the action mentioned in section

56, not against the minister, nor against the impersonation called the department, but, as expressed in the revised statute, Her Majesty. So with section 57— all these being parts of the one enactment : 1892 THE QUEEN v. MARTIN.

After the fences or guards have been duly made and while they are duly maintained, no such liability shall accrue for any such damages unless negligently or wilfully done. Patterson J.

But if a liability does accrue by reason of negligence or failure to maintain the fences against whom does the action lie? Obviously against Her Majesty. It seems to me perfectly clear that section 56 does not, as has been in effect contended, impose a liability on the Crown in an arbitrary or capricious manner, but the whole series of sections form one enactment in which the liability of the Crown for the acts or defaults of its servants is expressly recognized. The object of section 56, and of the corresponding section of the general railway act, is not to create a liability, but, assuming the principle of the liability of the Crown, to define or limit the range of inquiry in the particular circumstances.

So under the head " working the railway " we have the same regulations as those contained in the general act. There are the same provisions for the safety of passengers and of the public in respect of moving trains ; as to servants of the department, (in revised statute, the minister) wearing badges ; as to running trains at regular hours and carrying passengers and goods on due payment of the toll, freight or fare legally authorized. Then by section 74, the department (in revised statute, Her Majesty) shall not be relieved from liability by any notice, condition or declaration, in case of damage arising from any negligence, omission or default of any officer, employee or servant of the department (in revised statute, of the Minister). Section 76 gives the department (revised statute, Her Majesty)

1892

THE QUEEN v. MARTIN.

Patterson J.

a lien on goods for freight and charges, and sec. 77 provides for the sale of unclaimed goods remaining in the possession of the department (revised statute, of Her Majesty). Sec. 78 requires that every locomotive shall have a bell and whistle, and sec. 79 makes the department (revised statute, Her Majesty) liable for all damages sustained by any person by reason of any neglect to ring the bell or sound the whistle at level crossings of highways, giving a remedy over for half the damages against the engineer who neglected to give the signal Sec. 80 allows a passenger to be put off the train in certain circumstances. If this power is improperly exercised there must be a right of action, and doubtless the action must be against Her Majesty.

Sec. 81 declares that any person injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided room inside of such passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time. There may, as is here admitted, be a claim by the man who stood on the platform, and of course by passengers seated in the cars, for injury caused, let us say, by the misplacing of a switch which wrecked the train, or by a collision with another train. The claim thus recognized is a claim against Her Majesty, not against the pointsman who failed to turn the switch, or the yardsman, who, as in a disastrous case which we recently read of, loitered on his way to signal danger to a following train.

The liability of the Crown thus distinctly appears from the whole scope of the statute.

It is recognized in an earlier section than those to which I have now been referring in terms that ex-

pressly cover claims like that before us. I allude to section 27 which relates to arbitrations, and I have now to consider whether under that branch of the statute a remedy is given which precludes the remedy by petition of right.

The first part of section 27 relates to claims for property taken or damaged arising from or connected with the construction, repair, maintenance or working of a government railway, or out of a contract for the construction or maintenance of any such railway, made and entered into with the minister, either in the name of Her Majesty or otherwise. The second part requires security to be given by the claimant before any claim under that or any other section of the act shall be arbitrated upon; and then the third part enacts that if any person or body corporate has any supposed claim upon the Government of Canada (an expression which, as we lately held in a case of *Grant* v. *The Government of the Province of Quebec*, means Her Majesty) for property taken, or alleged damage to property arising from the construction or connected with the maintenance or repair of any government railway, or connected with any contract for the construction, maintenance or repair of any government railway, or arising out of any death or injury to person or property on any such railway, such person or body corporate may give notice of such claim to the minister, stating the particulars thereof, and how the same has arisen; and in case the minister, from want of reliable information as to the facts relating to the claim, does not consider the case one in which a tender of satisfaction should be made, he may refer the claim to one or more of the official arbitrators for examination and report, both as to matters of fact involved and as to the amount of damages sustained. And thereupon the arbitrators

1892

THE QUEEN v. MARTIN.

Patterson J.

shall have all the powers in reference thereto as if the claim had been one coming within the purview of the first part of the section and had been referred after tender of satisfaction made; but the arbitrators' duty in such case shall be confined to reporting his or their findings upon the questions of fact, and upon the amount of damages, if any, sustained, and the principles upon which such amount has been computed.

Cases within the purview of the first part of the section, viz., those relating to property taken or damaged or to contracts, might, by section 28, be referred by the minister to arbitrators whose award was declared to be binding. Under the third part of the section a report only and not an award was to be made.

It may be noticed that the class of claims dealt with in this third part is the same which might have been referred to arbitration under the act 33 Vic. ch. 23 sec. 1, which formed section 6 of the revised act respecting official arbitrators (1), the provisions of the third part being found in section 11, and that that class is far from embracing all the claims that may arise under the Government Railways Act. As one example not reached by it, we may instance claims for damages suffered by reason of neglect to ring the bell or sound the whistle at a level crossing of a highway such as that which was the subject of *Grand Trunk Ry. Co.* v. *Rosenberger* (2), where the injury was not to person or property on the railway. Claims for damage by reason of detention of a train and others in great variety will be readily thought of.

The provision confers a certain permissive power in a limited class of cases, and cannot be construed to exclude the remedy by petition of right, while on the other hand the provisions of the Petition of Rights Acts which I have quoted give power to the minister with

(1) R.S.C. ch. 40. (2) 9 Can. S.C.R. 311.

1892

THE QUEEN v. MARTIN.

Patterson J.

the approval of the Governor in Council, to cause the matter to be referred either before or after the commencement of proceedings by petition.

In my view, therefore, the plaintiff might at once, after the happening of the accident in 1884, have taken proceedings by petition of right. He would have been of course subject to any limitation or prescription applicable to the case. There was the six months' limitation under section 108 of the act of 1881, and there may have been obstacles under the laws of the province. I have not considered to what extent, if at all, the provincial laws would have affected his action if it had been brought before the year 1887. By delaying his action until after the passing of the act of that year (1), he became subject under the express terms of section 18 to the laws relating to prescription in force in the province of Quebec; and by article 2262 of the Civil Code actions for bodily injuries are prescribed after one year. The defence of prescription is not pleaded, but it seems that it may be taken by the court of its own motion. Article 2188 declares that the court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied. This means, as I understand, denied by law, not denied on the record. The French version so expresses it: "*Sauf dans les cas où la loi dénie l'action.*" By article 2267 the right of action under article 2262 is absolutely extinguished after the delay for prescription has expired. I refer to *Leduc* v. *Desmarchais* (2) decided by Mr. Justice Johnson; *Pigeon* v. *Mayor, &c., of Montreal*, before the Queen's Bench in appeal (3); and *Breakey* v. *Carter* (4) in this court, as cases in which the duty of the courts to give effect to the defence of prescrip-

(1) 50-51 V. c. 16.
(2) 1 Legal News 618.
(3) 9 L. C. R. 334.
(4) Cassels's Dig. 256.

1892

THE QUEEN v. MARTIN.

Patterson J.

tion, though not pleaded, was acted on. Another case in this court was *Dorion* v. *Crowley* (1), which is also a precedent for the course which I think is the proper course in this case, viz., to give no costs of defence in any of the courts.

In my opinion the appeal should be allowed without costs, and judgment should be given for the Crown without costs.

Appeal allowed, no costs, cross-appeal dismissed without costs.

Solicitors for appellant: *O'Connor, Hogg & Balderson.*

Solicitor for respondent: *L. Taché.*

(1) Cassels's Dig. 420.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

F. C. SIBBALD (PLAINTIFF) ..... RESPONDENT.

1891
*June 3.
1892
*April 4

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

FRANK G. TREMAYNE AND ANOTHER, ADMINISTRATORS, &C., OF ANNE A. ANDERSON, DECEASED (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Negligence—Construction of road—Impairing usefulness of highway.

A railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road, and any other company operating it, is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it.

A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track though there was no contact between the engine and the carriage. *Grand Trunk Railway Co.* v. *Rosenberger* (9 Can. S.C.R. 311) followed :

The decisions of the Court of Appeal and the Divisional Court were affirmed.

---

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

1891

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the plaintiffs.

The actions in this case were brought for damages claimed in consequence of an accident caused, as was alleged, by the negligence of the servants of the defendant companies in not ringing the bell and sounding the whistle on approaching a crossing, and, also, for negligence in the construction of the railway at the place where the accident occurred. The one action was brought by the executors of a Mrs. Anderson who was killed, and the other by the plaintiff, Sibbald, who lost an arm, by such accident. The facts disclosed by the evidence of the plaintiffs' cause of action are as follows:—

The deceased Mrs. Anderson, on account of whose death the second above-mentioned action is brought, was on the morning of the 11th October, 1888, being driven with her younger son Allan by the plaintiff in the first mentioned action along the highway known as the Town Line, between the townships of Georgina and North Gwillimbury, in the county of York. The plaintiff, Dr. Sibbald, was driving two horses in a wagonette towards the south with his coachman, Lonergan, on his left, and Mrs. Anderson and her son Allan seated behind, with their backs to the driver. The defendants were propelling a locomotive engine with tender foremost along their line of railway towards the north.

The said line of railway in crossing the said highway for a distance of about 500 feet, entering upon it from the south at the distance of some 420 feet south of the point where the accident occurred, and continuing upon the highway for the distance of about 80 feet

(1) 18 Ont. App. R. 184. (2) 19 O. R. 164.

north of the point where the accident occurred, the accident occurring at a point within the limits of the road allowance. The distance between the north and south cattle guard at this crossing is some 592 feet. The plank crossing where vehicles pass over the defendants' track is distant about 195 feet south of the point of the accident. It will thus be seen that the railway is carried along the highway in crossing it for the said distance of 500 feet, and that an engine being propelled along the said railway and a person driving along the said highway are proceeding on almost parallel lines.

At the plank crossing the highway and the railway are practically on a level. To the south of the plank crossing the railway is above the level of the highway, but a few feet north of the plank crossing the land commences to rise, and in order to have the railway on a level the road allowance was cut into, and at the point of the accident the railway company has excavated a considerable portion of the highway for the purposes of the railway, leaving the railway at this point below the level of the highway two feet six inches. Dr. Sibbald, Mrs. Anderson, the doctor's boy, and Mrs. Anderson's little boy Allan were driving towards the south down this hill when they discovered a train coming from the south towards them, and, as soon as it was discovered, Dr. Sibbald told his man to get out and go and hold the horses by the head; then the engine came on slowly; the man was unable to hold the horses; the horses turned round and down the slope to the left, which was close to the railway track; the carriage or wagonette was upset, and two at least of the occupants of the carriage were thrown on to the track close to, if not under, the wheels of the engine which was coming along. The doctor's man was left safe in the road; Mrs. Anderson's little boy had got down

1891

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

out of the carriage, and was also safe: the doctor was thrown with his arm across the rail, and got that arm crushed so it had to be amputated, and Mrs. Anderson received such injuries there on the track at that time as resulted in her death the next morning.

The following are the questions put to the jury at the trial and the answers given thereto by them :—

First. Did the Lake Simcoe Junction Railway Company, at the place where the accident happened, excavate a portion of the highway, and carry its line of railway across the highway through the excavation? A. Yes.

Second. If so, how much lower is the line of the railway, in consequence of the excavation, than the highway at the point where the accident happened? A. Two feet six inches.

Third. Was the highway rendered less safe by reason of the difference in level, caused by the excavation between the highway and the railway, at the point where the accident happened? A. Yes, by reason of the fact that the legal allotment for the public highways in the said township is sixty-six feet, which has been reduced by said excavation.

Sixth. Was the whistle sounded or the bell rung at least eighty rods from the crossing? A. That the engineer did give the three sounds of the whistle somewhere about eighty rods south from the crossing.

Seventh. Was the bell rung, at short intervals, for a distance of about eighty rods from the crossing, until the engine reached the crossing? A. No; the bell did not ring; nor was it sounded by the fireman.

Eighth. Could the plaintiff, Dr. Sibbald, by the exercise of reasonable care, have avoided the accident, which happened to him? A. He could not have avoided the accident; he did exercise reasonable care in the course of it.

1891

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Ninth. Could Mrs. Anderson, by the exercise of reasonable care, have avoided the accident which happened to her? A. She could not have avoided the accident by any special care of her own.

Twelfth. In your opinion, was the accident caused by negligence on the part of the defendants? A. Yes.

Thirteenth. If so, what was the negligence of the defendants which caused the accident? A. Their negligence consisted in not constructing any fence or other protection on the portion of the road or highway, and that the non-ringing of the bell was contributory to it.

On these findings a verdict was entered for the plaintiffs in each action, which was affirmed by the Divisional Court and the Court of Appeal. The defendants appealed.

The accident occurred on the line of the Midland Railway Company, which, by agreement, was being operated by the Grand Trunk Railway Company.

McCarthy Q.C. for the appellants.

The duty to protect the public by fencing the road was on the municipality and not the company. *Wilson* v. *City of Watertown* (1).

The company cannot be held responsible under the circumstances. *Cracknell* v. *The Mayor, &c., of Thetford* (2); commented upon in *Geddes* v. *The Proprietors of Beauce Reservoir* (3); *Whitmarsh* v. *The Grand Trunk Railway Company* (4); *Hill* v. *The New River Company* (5); *Simkin* v. *The London & North-western Railway Company* (6).

The learned counsel referred also to *The Railway Act* (7), sec. 6 subsection 4 and section 12, and 51 Vic.

(1) 3 Hun. (N.Y.) 508.
(2) L.R. 4. C. P. 629.
(3) 3 App. Cas. 430, 448.
(4) 7 U.C.C.P. 373.
(5) 9 B. & S. 303.
(6) 21 Q.B.D. 453.
(7) R.S.C. c. 109.

1891

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

ch. 20 section 90 sub-section 8 and sections 91 and 184.

Burns for the respondent. The company was under an obligation to make the highway safe. *Fairbanks* v. *The Great Western Railway Company* (1). The engine should have been stopped when the driver saw the plaintiff's horses. *Tyson* v. *The Grand Trunk Railway Company* (2). See also *Lister* v. *Lobley* (3).

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Sir W. J. RITCHIE C.J.—I think these appeals must be dismissed for the reasons given by the majority of the Court of Appeal, namely, the Chief Justice and Osler and McLellan JJ.

STRONG J.—At the opening of the argument by the respondents' counsel, I intimated the opinion that these appeals were entirely unfounded and ought to be dismissed, and I adhere to that opinion.

TASCHEREAU J. concurred in the appeals being dismissed.

GWYNNE J.—I think these appeals must be dismissed upon the short ground that the railway company had no authority to interfere with the highway as they did, unless upon the express condition that they should restore it so as not to impair its usefulness. This the jury found that they did not do, and they have attributed the injuries received by the plaintiff to this default.

PATTERSON J.—I am of opinion that we should affirm this judgment for the reasons given by the Chief Justice of Ontario—and I shall add only a few observations.

(1) 35 U.C.Q.B. 523. (2) 20 U.C.Q.B. 256.
(3) 7 A. & E. 124.

1892

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Patterson J.

Two features of the case are somewhat unusual. One is that the accident and injury occurred without any collision between the locomotive engine and the vehicle in which the injured persons had been driving, and the other is that the negligence in respect of the alteration, which made the highway dangerous and led to the accident, was in the first place the fault of the company that constructed the railway and not that of the defendant company. These features do not, however, involve questions which are new to this court. The former existed in the case of *Grand Trunk Railway Co.* v. *Rosenberger* (1), and the latter in *Bate* v. *Canadian Pacific Railway Co.* (2). In both cases the defendant companies were held to be liable.

As to the first point, the case of *Victorian Railway Commissioners* v. *Coultas* (3) does not appear to me to aid the defendants. The Judicial Committee did not decide in that case that "impact" was necessary, holding merely that a nervous shock sustained by a lady whose carriage was safely driven across a railway in front of an approaching train, but who was frightened by the proximity of the train, was a cause of damage that was too remote to sustain an action The case of *The Notting Hill* (4) is referred to as containing a correct statement by the Master of the Rolls (Lord Esher) of the rule of English law as to the damages which are recoverable for negligence, viz., that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary state of things would flow from it.

The jury found in this case that the proper signals required by the railway law had not been given when the engine was approaching the crossing, and the

(1) 9 Can. S.C.R. 311.
(2) 18 Can. S.C.R. 697.
(3) 13 App. Cas. 222.
(4) 9 P.D. 105.

1892

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Patterson J.

judgment of the Divisional Court (1) appears to have been rested to a great extent upon that finding and on the authority of Rosenberger's case. I do not find fault with that judgment, but I think that the defendants are liable to these plaintiffs, even if the statutory signals were regularly given.

The signal would have enabled the driver to stop in good time. Grant that in this case the driver did stop his horses far enough from the crossing to have been, in ordinary circumstances, free from danger. Grant further that the railway engine was lawfully moving, after passing the planked crossing, along the road allowance almost parallel with the travelled track on which the horses were, very much as we sometimes find a railway running alongside a travelled road, or even along the road itself. The tendency in every such case is to frighten horses that are not trained to the phenomenon.

The railway company being in the exercise of a right conferred by law will, in the absence of negligence, be free from responsibility for any such casualty. But if a horse in such circumstances takes fright at a passing engine and, by reason of the defective state of the highway, damage is sustained, there must be a remedy against the party by whose act or neglect the highway was insecure. Such was the case of *Toms* v. *The Township of Whitby* (2), in which the law on this subject was much discussed in two of the Ontario courts, the Queen's Bench and the Court of Appeal. The horse of the plaintiff in that case was accidentally startled and backed the carriage over a declivity which the township ought to have protected by a fence. See also the later case of *Steinhoff* v. *Corporation of Kent* (3).

(1) 19 O.R. 164. (2) 35 U.C.Q.B. 195; 37 U.C.Q.B. 100.
(3) 14 Ont. App. R. 12.

1892

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Patterson J.

The accident in the case before us would not have happened if the railway had not encroached upon the highway or if the declivity formed by the railway cutting had been guarded by a fence or other protection. The jury so found, and the force of their finding is not weakened by the proof, to which our attention is called by the defendants in their factum, that a man coming to the place to make the experiment found that a carriage could be turned on the narrow road that was left, even if the forewheels did not turn under the carriage as they did in Dr. Sibbald's wagonette. Experiments of that kind seldom reproduce the situation. Important data are apt to be absent, as, in this case, the suddenness of the emergency and the fright of the animals. It is not surprising that the jury paid little attention to the experiments.

The unsafe condition of the road was caused by the railway company which is therefore liable for the individual injury even though it may have been caused by what is a public nuisance. The law was so laid down nearly four hundred years ago (1):

> If one make a ditch across the high road, and I come riding along the road at night, and I and my horse are thrown into the ditch so that I have thereby great damage and annoyance, I shall have my action against him who made the ditch, because I am more damaged than any other man.

The liability under this rule of law would probably not be confined to cases where the working of the railway was concerned in causing an accident, but would embrace other casualties incident to travel upon any road but which do no harm when the road itself is sufficient. In such cases there would be more room than in the present case for arguing that the liability was upon the company that made the cutting and not upon the defendant company. The damage here is

(1) Year Book 27 Hen. VIII. 27 pl. 10.

1892

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. SIBBALD.

caused by the passage of the engine along the road allowance while that portion left for the public remained in the unsafe condition produced by the construction of the railway, or conversely, by leaving the highway in that unsafe condition while the engine moved along the rails beside it.

The damages were—to adopt the definition already quoted—

> The natural and reasonable result of the defendants' act; such a consequence as in the ordinary state of things would flow from it.

In my opinion we should dismiss the appeals.

Appeals dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondents: *McCullough & Burns.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY v. TREMAYNE.

Patterson J.

C. F. BLACHFORD (PLAINTIFF).....APPELLANT; 1891

AND *May 22.

DAME JESSIE McBAIN *et vir*, (DEFENDANTS)..... } RESPONDENTS. 1892 *April 4.

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

Lessor and lessee—Amount claimed—Arts. 887 and 888 C.C.P.—Jurisdiction.

Held, affirming the judgment of the court below, Fournier J. dissenting, that where in an action brought by the lessor under arts. 887 and 888 C.C.P. to recover possession of premises, a demand of $46 is joined for their use and occupation since the expiration of the lease, such action must be brought in the Circuit Court, the amount claimed being under $100.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Court of Review.

There was a motion to quash in this case which was refused and the facts and pleadings are fully stated in the report of the motion in 19 Can. S.C.R. p. 42.

The only question which arose on this appeal was whether the Superior Court or Circuit Court had exclusive jurisdiction in this case, the action being taken under articles 887 *et seq.* of the Civil Code of Procedure.

Duclos for appellant cited and relied on *Cadieux* v. *Porlier* (2); art. 1652 C.C. and art. 1058 C.C.

Archibald Q.C. for respondent cited and relied on art. 1624 C.C.; arts. 887 and 888 C.C.P.; 18 Vic. cap. 108

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

(1) M.L.R. 6 Q. B. 273. (2) M.L.R. 3 S.C. 453.

1891 sec. 5; C.S.L.C. cap. 40 sec. 4; 25 Vic. cap. 12 sec. 1;
BLACHFORD *Beaudry* v. *Denis* (1); *Wood* v. *Varin* (2); *Fisher* v.
v. *Vachon* (3); *Barbier* v. *Verner* (4); *Guy* v. *Goudreault*
McBAIN. (5); *Voisard* v. *Saunders* (6); *Gauthier* v. *Desy* (7).

The Chief Justice concurred with Taschereau J.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons which I gave upon the motion to quash (8).

FOURNIER J.—Les faits de cette cause soulèvent une question concernant la juridiction de la cour Supérieure.

L'intimée avait pris par bail à loyer de l'appelant une maison située dans le village de Huntingdon pour un an du 1er mai 1888, à raison de $38.00 par année. Le bail expirait le 1er mai 1889.

Quelques jours après l'expiration du bail, l'intimée refusant de livrer la propriété louée, l'appelant fit émaner contre elle une action à la cour de Circuit du comté de Huntingdon alléguant l'expiration du bail et demandant la possession des prémisses louées. Cette action fut renvoyée sur une exception à la forme. L'appelant en prit de suite une autre à la cour Supérieure du district de Beauharnois.

La question de juridiction ne fut pas soulevée par les plaidoyers; elle ne le fut que par une objection *vivâ voce* alléguant que l'action n'étant que pour $46.00 la cour de Circuit seule avait juridiction. Cette objection fut maintenue par le jugement de l'honorable juge Bélanger qui déclara que la cour Supérieure n'avait pas juridiction. La cour de Revision siégeant à Mont-

(1) 20 L.C. Jur. 254.
(2) M.L.R. 3 S.C. 110.
(3) 6 L.C.Jur. 189.
(4) 6 L.C.Jur. 44.
(5) 14 L.C.R. 202.
(6) 1 Legal News 41.
(7) 9 Q.L.R. 13.
(8) 19 Can. S. C. R. 42.

réal, fut unanime à renverser le jugement de la cour Supérieure qui fut plus tard remis en force par celui de la cour du Banc de la Reine. C'est de ce dernier jugement qu'il y a maintenant appel à cette cour.

Toute cette difficulté au sujet de la juridiction de la cour Supérieure ou de la cour de Circuit, pour la décision de cette cause provient d'une méprise sur le caractère de l'action du demandeur. Son action avait double conclusion, 1° pour condamnation au paiement d'une somme de $46.00 pour arrérages de loyer; 2° pour condamnation à remettre au demandeur la possession de la propriété louée.

Les $46.00 de balance de loyer n'étant pas l'objet principal de la contestation, elles ont été immédiatement déposées et payées en cour. Il ne reste qu'à décider sur la possession de la propriété que l'intimée prétend avoir droit de retenir pour l'avoir achetée. Tel était le but principal de l'action. Le demandeur aurait pu limiter sa demande à la possession de la propriété et son action eût été évidemment de la juridiction de la cour Supérieure. Est-ce parce qu'il y a ajouté la demande de $46.00 que la cour Supérieure doit perdre sa juridiction sur l'objet principal de la demande? Il y aurait absurdité à le prétendre.

L'action est prise conformément à l'article 1624 C.C. qui donne au locataire le droit d'action suivant le cours ordinaire de la loi ou par procédure sommaire, tel que réglé par le code de procédure civile, pour les diverses causes y énoncées et pour entre autres—

Sous-article 2: rentrer en possession des lieux loués lorsque le locataire continue de les occuper contre le gré du locateur, plus de trois jours à l'expiration du bail.

Comme dans la présente action il ne s'agit ni du loyer dont la balance est payée, ni de dommages et intérêts à raison d'infraction aux obligations du bail, ni de résiliation du bail qui avait pris fin avant l'éma-

1892

BLACHFORD v. McBAIN.

Fournier J.

nation de l'action, mais uniquement de la possession de la propriété dont la valeur est suffisante pour donner juridiction à la cour Supérieure, il est évident que l'action y a été bien portée.

On a cité la cause de *Voisard* v. *Saunders* (1), pour prouver que la cour Supérieure n'avait pas juridiction. Ce précédent n'a aucune application à la présente cause. Il ne s'agissait là que d'une demande de $60, dont le défaut de paiement était allégué comme raison pour demander l'annulation du bail. Dans ce cas le montant demandé devait régler la juridiction.

Mais ici il n'y a pas demande d'annuler le bail, il avait pris fin,—il n'est question que d'une demande de la possession d'un immeuble d'une valeur suffisante pour rendre l'action de la compétence de la cour Supérieure.

Le défaut de paiement n'a rien à faire avec la présente demande. Il ne s'agit que d'une revendication d'immeuble.

Les opinions sont bien partagées sur cette question. La cour de Revision, composée des honorables juges Gill, Tait et Tellier, a été unanime à maintenir la juridiction de la cour Supérieure, la cour du Banc de la Reine a été divisée trois contre deux, les honorables juges Tessier et Baby en faveur de la juridiction. Dans les deux cours il avait une majorité en faveur du maintien de la juridiction. Il en est autrement dans celle-ci.

TASCHEREAU J.—Je suis d'avis de renvoyer cet appel. L'action de l'appelant est pour obtenir la possession d'un certain immeuble par lui loué à raison de $138.00 par an à l'intimée, qui en retient la possession illégalement, malgré que le bail soit expiré. Il y joint une demande pour $46.00, valeur d'après le bail même, de cette occupation illégale, et une saisie-gagerie. Par

(1) 1 Legal News p. 41.

1892

BLACHFORD v. MCBAIN.

Taschereau J.

l'article 1624 du code civil, l'appelant pouvait à son choix exercer son droit d'action soit en suivant le cours ordinaire de la loi soit par procédure sommaire suivant les dispositions concernant les locateurs et locataires contenues au code de procédure. Il a choisi ce dernier mode. Il est peut-être douteux, si maintenant, vû l'article 5977 des Statuts Revisés, cette option donnée par l'article 1624 du code civil existe en pareil cas. Mais, l'appelant ayant suivi les dispositions de cet amendement et pris une action sommaire, cette question ne se présente pas dans l'espèce. C'est donc tant sur l'inexécution de l'obligation qui incombait à l'intimée de lui remettre les prémisses à l'expiration du bail que sur sa créance de $46.00 que l'appelant a intenté cette action devant la cour Supérieure. Et la cour Supérieure avait-elle juridiction dans l'espèce, ou n'est-ce pas la cour de Circuit qui seule pouvait en connaître—est le seul point en litige ici entre les parties. Cinq des savants juges devant lesquels la cause est venue dans les cours de la province ont décidé que c'était la cour de Circuit, et quatre que c'était la cour Supérieure. La cour Supérieure elle-même, Belanger J., a été d'opinion que c'était la cour de Circuit, et, *ex proprio motu*, a débouté l'action à raison d'incompétence, *ratione materiæ*. La cour de Revision, Tait, Gill et Tellier JJ., a décidé le contraire ; et la cour d'Appel, Dorion, Bossé et Doherty JJ., a adopté l'opinion de la cour Supérieure et renversé le jugement de la cour de Revision, monsieur le juge Tessier et monsieur le juge Baby *dissentientibus*. C'est de ce jugement dont le demandeur se plaint.

La cause est d'abord venue devant nous sur une motion de l'intimé pour renvoi de l'appel, (*quash*) fondée sur ce que cette cour n'avait pas compétence. Nous avons rejeté son application sur le motif que, comme il avait par son plaidoyer mis en litige le titre

1892

BLACHFORD v. MCBAIN.

Taschereau J.

à la propriété en question, ce fait était suffisant, en vertu de la section 29 de l'acte qui régit cette Cour, pour nous donner juridiction (1).

Mais, maintenant, la question est toute autre, et il ne s'agit plus de l'acte de la cour Suprême, mais purement et simplement de l'interprétation à donner aux statuts de la province sur la question. Et ce n'est pas la matière mise en litige par le plaidoyer de l'intimée qui a pu donner à la cour Supérieure juridiction : mais c'est par l'action seule du demandeur qu'il nous faut décider, si, dès le début, il était *rectus in curiâ.*

La solution de la question ne m'a pas paru des plus facile. Elle est compliquée par la variance qui existe entre les deux versions de l'article 5977 des Statuts Refondus, comme elle existait dans les deux versions de l'article 887 du code originaire, dont il n'est que la reproduction. La version française du nouvel article 888 dit que l'action entre locateurs et locataires est intentée devant la cour de Circuit, ou la cour Supérieure suivant la valeur ou le montant du loyer réclamé, et la version anglaise, dit: "*according to the amount or the value of the rent*" "suivant la valeur ou le montant du loyer" omettant le mot "*claimed*" "réclamé." Suivant la version anglaise il est évident que l'action de l'appelant, qui allègue un loyer de $138.00 aurait été bien prise devant la cour Supérieure, vû que la cour de Circuit par l'article 5994 des Statuts Refondus n'a pas juridiction au chef-lieu d'un district au-dessus de $100. C'était là ce que disait clairement la section 4 du chapitre 40 des Statuts Refondus du Bas-Canada de 1860, en décrétant que "la valeur annuelle ou loyer de la propriété louée déterminera la juridiction de la cour quel que soit d'ailleurs le montant des dommages et du loyer réclamés." Sous cette loi, si un locateur réclamait $50.00 sur un loyer de $400.00, son action

(1) 19 Can. S.C.R. p. 42.

était du ressort de la cour Supérieure et s'il réclamait $400.00 sur un loyer de $50.00, son action tombait sous la juridiction de la cour de Circuit. Et la section 19 ordonnait que dans ce dernier cas, c'est-à-dire quand une action excédant $200.00 était intentée devant la cour de Circuit, les frais pouvaient être taxés conformément au tarif de la cour Supérieure. Mais cet acte fut amendé en 1862 par la 25 V., c. 12, qui décrète que, dans le but de diminuer les frais, toute action entre locateurs et locataires serait intentée devant la cour Supérieure ou la cour de Circuit pour le montant du loyer ou des dommages demandés, les frais à être taxés suivant le montant du jugement. Puis est venu l'article 887, du code de procédure, donné comme loi préexistante, maintenant 888, qui décrète comme la 25 V. c. 12 le faisait, mais en termes plus heureux, que les actions entre locateurs et locataires sont intentées soit devant la cour Supérieure, soit devant la cour de Circuit, suivant la valeur ou le montant du loyer réclamé. C'est donc la version française de l'article qui doit prévaloir : car la version anglaise laisserait la loi telle qu'elle était en 1860. Or, je l'ai dit, la 25 V., que le code a reproduit, a été passée spécialement pour l'amender. Quand, dans une action pour expulsion, aucun loyer n'est réclamé, cet article pris seul, peut laisser des doutes : mais quand, comme dans le cas actuel, il y a une conclusion pour $46.00, que ce soit pour le loyer convenu, ou pour usage et occupation suivant l'article 1608 du code civil ne fait aucune différence, il me semble impossible de dire que la cour Supérieure a juridiction. Ce serait rayer du code l'article entier.

1892

BLACHFORD v. McBAIN.

Taschereau J.

L'appelant, par un argument *reductio ad absurdum*, dit que s'il n'avait pas conclu à une condamnation pour $46.00, son action serait clairement du ressort de la cour Supérieure, puisque son bail est de $138.00, et qu'il est absurde pour l'intimée de prétendre que

1892

BLACHFORD v. McBAIN.

Taschereau J.

parce qu'il a ajouté une demande de $46.00 à une action du ressort de la cour Supérieure, cette action est par là devenue une action de la cour de Circuit. Cela peut bien être la conséquence, ou pour mieux dire l'inconséquence de la loi ; mais ne prouve pas que telle n'est pas la loi.

Une action, sous l'acte des locateurs et locataires en expulsion d'un immeuble de quelque valeur qu'il soit, et quel que soit le montant du bail, doit, lorsque le demandeur y joint des conclusions pour loyer ou dommages, être prise soit à la cour Supérieure soit à la cour de Circuit, suivant le montant du loyer ou des dommages demandés. L'article 888 s'applique à toutes les actions entre locateurs et locataires. S'il ne s'y trouve aucune telle conclusion, cas qui sera toujours bien rare, alors, la juridiction serait peut-être déterminée par la valeur ou le montant du loyer. Ce serait là, il me semble, la seule interprétation dont l'article du code soit susceptible, si l'on explique les deux versions l'une avec l'autre ou l'une par l'autre, et sans perdre de vue la législation préexistante et l'article 1105 du code de procédure.

Si, comme le soutient l'appelant, c'est le montant du loyer dans tous les cas, et non le montant demandé qui doit régler la juridiction, il s'en suivrait qu'une action de $300 pour dommages ou pour arrérages sur un loyer de $80, serait du ressort de la cour de Circuit. C'était là, je l'ai dit, la loi de 1860 ; mais c'est précisément le contraire qui est maintenant décrété.

Nous n'avons cependant pas à prononcer sur le cas où la demande ne comporte pas de conclusions à une condamnation pécuniaire.

Ici l'appelant a demandé $46 par son action et, je suis d'avis, avec la cour du Banc de la Reine, que la cour de Circuit seule avait juridiction, malgré que

le bail fut de $138 et qu'il eut aussi conclu à l'expulsion de l'intimée des prémisses.

Qu'il ait demandé l'un avant l'autre, on n'ait conclu que subsidiairement ou accessoirement à $46 ne me paraît faire aucune différence. L'article 1105 du code de procédure invoqué par l'appelant comme appuyant sa doctrine me semble tout au contraire militer fortement contre lui. Il peut se lire de deux manières. La première, et la plus grammaticale peut-être d'après la ponctuation, serait de ne pas connecter le mot "loyer" avec le mot "réclamés." Dans ce cas, l'article dirait que, dans tous les cas où le loyer n'excède pas $200, la cour de Circuit a juridiction, quelque élevé que soit le montant demandé pour arrérages. Mais l'article, ici aussi, est donné comme la loi existante lors de la mise en force du code. Or cette loi, je l'ai dit, était l'acte de 1862 qui décrétait précisément que c'était le montant demandé, et non le montant du loyer, qui déterminerait la juridiction, dans toute action, sans restrictions, entre locateurs et locataires. Et puisque le législateur a, non seulement par le code civil originaire, mais depuis par les Statuts Refondus de 1888, statué en termes qui ne prêtent à aucune ambiguité, que c'était le montant demandé qui devait contrôler, il faut donner à l'article 1105 une interprétation qui le concilie avec cette législation et y lire avec elle que, dans tous les cas où le loyer demandé n'excède pas $200.00, la cour de Circuit a juridiction et que, quel que soit le montant du loyer, c'est le montant demandé qui doit être le guide. C'est, de fait, pour les actions purement pour dette, rien autre chose que la règle générale sur la matière, que le législateur a été obligé de décréter spécialement, parce qu'en 1860 on l'avait modifiée.

J'ai considéré la question au point de vue de l'appelant, et, comme si, tel qu'il le soutient, l'article 5994

1892

BLACHFORD v. MCBAIN.

Taschereau J.

des Statuts Refondus s'applique, aux chefs-lieux, aux actions entre locateurs et locataires: en sorte que la cour Supérieure ait juridiction dans ces actions comme dans toutes autres pourvu qu'elles excèdent $100.00. Il peut y avoir des doutes là-dessus cependant; vû surtout l'article 1105 du code de procédure qui est resté intact. Mais la question n'a pas été soulevée à l'audience, et l'ayant prise comme résolue dans le sens favorable à l'appelant, il me serait oiseux de considérer si elle n'est pas susceptible d'une solution contraire.

L'appelant a émis la proposition, qu'indépendamment du montant de son loyer annuel, son action est du ressort de la cour Supérieure comme étant réelle, immobilière, par le seul fait qu'il conclut à la possession d'un immeuble d'une valeur d'au-dessus de $2,000. Cette proposition me paraît erronnée. C'est précisément pour donner juridiction à la cour de Circuit sur ce genre d'actions que l'article 1105 du code de procédure est décrété; autrement il n'a pas sa raison d'être. Quelle serait la conséquence directe de la doctrine de l'appelant? Evidemment, que toute action en expulsion ou en résiliation de bail, quelle que fût l'exiguité et du montant réclamé et du loyer, serait du ressort de la cour Supérieure. Ne serait-ce pas là ignorer la loi, et entraver l'action du législateur, qui, afin d'en diminuer les frais, et dans l'intérêt tant des propriétaires souvent en présence de locataires insolvables que des locataires eux-mêmes, a décrété ces dispositions spéciales sur leurs contestations devant les tribunaux, et, investi, par exception, la cour de Circuit d'une juridiction dont, suivant les règles générales, sur la matière, la cour Supérieure seule serait revêtue?

L'appelant a de plus dit que, son bail avec l'intimée étant expiré, les relations de locateur et locataire entre eux n'existaient plus. Mais l'art. 1624 du code civil dit expressément que l'action en expulsion après l'ex-

piration du bail peut être exercée par procédure sommaire. Et d'ailleurs, le demandeur a répondu d'avance lui-même à sa proposition, d'abord en prenant une saisie-gagerie ; en second lieu, en prenant des procédures sommaires sous les clauses concernant les locateurs et locataires et signifiant le douze septembre une action rapportable le seize ; et, en troisième lieu, en ne payant la taxe judiciaire et les honoraires des officiers de la cour que sur une action de la classe de $100.00 à $200.00, et non ceux d'une action de première classe.

Je suis d'avis qu'il y a bien jugé dans le jugement de la Cour du Banc de la Reine.

PATTERSON J. concurred with Taschereau J.

Appeal dismissed with costs.

Solicitors for appellant : *McCormick, Duclos & Murchison.*

Solicitors for respondents : *Archibald & Foster.*

1891
*Nov. 9.
1892
*April 4.

THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA (DEFENDANTS)..... } APPELLANTS;

AND

DAME ELIZABETH YOUNG (PLAINTIFF)..... } RESPONDENT.

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

Accident insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.

An accident policy issued by the appellants, was payable in case *inter alia*, "the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, &c., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under the policy.

On the 21st of March, 1886, the insured was accidently wounded in the leg by falling from a verandah and within four or five days the wound which appeared at first to be a slight one was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to

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

1891

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound but the court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court:

Held, reversing the judgment of the Court below, Fournier and Patterson JJ. dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.

Per Strong, Fournier and Patterson JJ., that the external injury was the proximate or sole cause of death within the meaning of the policy.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) rendered on the 21st March, 1891, confirming a judgment of the Superior Court (Mr. Justice Tellier) (1) of the 13th September, 1889, condemning the defendants to pay to the plaintiff the sum of $5,000 with interest and costs of suit.

The action was brought to recover from the defendants the sum of $5,000, under and by virtue of a certain policy of insurance issued by the said defendants insuring one William Wilson, against death by accident.

The material clauses of the policy and the facts and pleadings are sufficiently stated in the head note and in the judgments hereinafter given (2).

Geoffrion Q.C. and *Cross* for appellant, cited and relied on Porter's Laws of Insurance (3); *Cawley* v. *The National Employers' Accident, Etc., Association* (4);

(1) M.L.R. 6 S.C. 4.
(2) See also report of the case M.L.R. 6 S.C. 4.
(3) Pp. 443-444.
(4) 1 Cab. & El. 597.

1891

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Smith v. *The Accident Ins. Co.* (1); *Lawrence* v. *Accidental Ins. Co.* (2); *Insurance Co.* v. *Tweed* (3); *Insurance Co.* v. *Transportation Co.* (4); *Scheffer* v. *Railroad Company* (5); *Southard* v. *The Railway Passenger Ins. Co.* (6); *Accident Ins. Co.* v. *Crandal* (7); Dalloz Rep. (8); Journal des Assurances (9); *Gamble* v. *Accident Ins. Co.* (10); *Whyte* v. *Western Assurance Co.* (11).

Lafleur for respondent cited and relied on art. 2478 C.C.; May on Insurance (12); Bliss on Life Insurance (13); Angell on Life Insurance (14); *Herald Co.* v. *Northern Assurance Co.* (15); *Kelly* v. *Hochelaga Mut. Fire Insurance Co.* (16); *Garceau* v. *Niagara Mut. Insurance Co.* (17); *Ducharme* v. *Mut. Fire Insurance Co.* (18); *Agricultural Insurance Co. of Watertown* v. *Ansley* (19); *Ouimet* v. *Glasgow & London Insurance Co.* (20).

The case of *White* v. *Western Assurance Co.* (11), cited by the appellants, does not conflict with this doctrine.

Marble v. *City of Worcester* (21); Dumoulin (22); Sourdat, Responsabilité (23); Pothier, Obligations (24); Demolombe (25); Marcadé & Pont, Code Civil (26); *North American Life & Accident Ins. Co.* v. *Burroughs* (27); *McCarthy* v. *Travellers' Ins. Co.* (28); *Barry* v. *U. S. Mut. Accident Association* (29); *Peck* v. *Equitable Accident Association* (30); *Fitton* v. *Accidental Death Ins. Co.* (31).

(1) L.R. 5 Ex. 302.
(2) 7 Q.B.D. 216.
(3) 7 Wall. U.S. 44.
(4) 12 Wall. U.S. 194.
(5) 105 U.S. S.C. 249.
(6) 1 Big. L. & A. Ins. R. 70.
(7) 120 U.S. S.C. 527.
(8) Vo. Assurance Terrestre No. 197.
(9) 1886—p. 130, and 1887—p. 35.
(10) 4 Ir. R. C. L. 204.
(11) 22 L. C. Jur. 215.
(12) § 468.
(13) § 263.
(14) § 244.
(15) M.L.R., 4 S.C. 254.
(16) 3 Legal News, 63.
(17) 3 Q.L.R., 337.
(18) 2 Legal News, 115.
(19) 15 Q.L.R. 256.
(20) 19 Rev. Leg. 27.
(21) 4 Gray 412.
(22) No. 179.
(23) 1 Vol. § 693.
(24) No. 167.
(25) 24 vol., No. 599.
(26) Art. 1151 C. N.
(27) 8 Am. R. 212.
(28) 8 Bissell 362.
(29) 23 Fed. Reporter 712.
(30) 59 N.Y. 255.
(31) 34 L.J. (N.S.) C.P. 28.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C. J.

Sir W. J. RITCHIE C.J.—The appeal is from a judgment of the Court of Queen's Bench (appeal side) rendered on the 21st of March, 1891, unanimously confirming a judgment rendered by the Superior Court, in the district of Montreal, on the 13th September, 1889, which condemned the defendants (now appellants) to pay the plaintiff (now respondent) the sum of $5,000 claimed by her upon the death of her husband under the provisions of an accident policy issued by the defendants.

I am not by any means satisfied on the evidence that the deceased died solely in consequence of the external bodily injuries which he had sustained (*Smith* v. *Accident Ins. Co.* (1), but assuming that he did, as alleged in plaintiff's declaration, I think no immediate or due and sufficient notice was ever given as provided for by the policy.

The accident happened upon the 21st of March, 1886, the insured died on the 13th of April following; the notice of the accident and death was only sent to the company on the 29th of April one month and eight days after the accident, and sixteen days after the death, and notice was only received in Montreal on the 1st of May. I cannot think that this was any compliance with the express provision of the policy, which is as follows:

CONDITIONS.—1. In the event of any accident or injury for which claim may be made under this policy, or in case of death resulting therefrom, IMMEDIATE NOTICE must be given in writing, addressed to the manager of this company, at Montreal, stating the full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under this policy; and unless direct or affirmative proof of the same, and of the death or duration of total disability shall be furnished to the manager of the company within THREE MONTHS from the happening of such accident in the event of

(1) L. R. 5 Ex. 302.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C.J.

death, or SIX MONTHS in the case of non-fatal injury, then all claims accruing under this policy shall be absolutely invalid and of no effect.

It appears that the policy had been lost; this perhaps may account for the neglect to give the notice, but it does not dispense with the necessity of a compliance with the terms of the policy. Mr. May lays it down that inability by reason of the loss of the policy, is no excuse, and Mr. Crawley in his work on Life Insurance says (1):

> Where it is a condition precedent to the right to recover on an accident policy that notice giving particulars of the accident should be delivered to the head office of the company within nine days, the principle of *Taylor* v. *Caldwell* (2) does not apply, and the condition is not discharged by the fact that the accident resulting in instaneous death, and no other person knowing of the existence of the policy, notice could not be given. It is not a case of impossibility owing to the act of God; the insured might have provided for the contingency by informing others of the policy, *Gamble v. Accident Insurance Co., Limited* (3).

I do not think mere silence is enough to constitute a waiver; there was no admission or act done with the intention of influencing the conduct of the holder of the policy or by which he could be prejudiced.

Mr. May shows very clearly the distinction between a failure to give notice within the time required, and to give the notice in form. He says (4):

> A failure to give notice within the time required stands upon a different ground from the failure to give the notice in due form. The latter defect may be remedied by a new and more accurate form, but the former, if insisted upon by the insurers, is irremediable. It may, indeed, be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of a mere defect in form. The silence of the insurers upon a mere defect of form might be very injurious to the assured, since, if the defect were pointed out to him, he might at once supply the deficiency, and save himself from loss. A failure to give the notice in due time, on the contrary, leaves the insured entirely at the mercy of the insurers,

(1) Ch. 6, p. 145.
(2) 3 B. & S. 826.
(3) 4 Ir. R. C. L. 204.
(4) P. 702.

and to point out to him the fact will not in the least aid him to remedy the defect. The omission to point it out to him is therefore no wrong, or prejudice or want of good faith towards him, nor is the insurer under any legal obligation so to do. *Patrick* v. *Farmers' Ins. Co.* (1) ; *St. Louis Ins. Co.* v. *Kyle* (2) ; *Edwards* v. *Balt. Fire Ins. Co.* (3) ; Post par. 471. In *American Express Co.* v. *Triumph Ins. Co.* (4), it is said that the acceptance of proofs without objection had never been held a waiver of neglect in point of time, when the policy provided that the proofs should be presented as soon as possible. But see *contra Palmer* v. *St. Paul, &c., Ins. Co.* (5).

There are no facts in dispute. I am unable to understand how it can be said that a delay of one month and eight days after the accident, and sixteen days after the death was a compliance with the provision requiring immediate notice.

The plaintiff's declaration does not directly set forth the clause of the policy we are now considering. It is as follows :—

That both before and after the said accident, the said William Wilson had used all due diligence for his personal safety, protection and preservation, and had in every way complied with the clauses and conditions of the said policy of insurance, and his said accident and subsequent death were covered by the said policy ;

That within due time after the death of the said William Wilson, the plaintiff furnished the defendants with sufficient proof of said accident and death according to the conditions of said policy, and then and ever since conformed herself to and fulfilled all the requirements of said policy, and duly demanded payment of the sum of five thousand dollars which became due and payable to her in virtue of said policy upon the happening of the aforesaid events ;

That the defendants illegally and without just cause or reason, refused and still refuse to pay plaintiff the said sum or any part thereof, though they have frequently acknowledged their liability thereof.

Now, it is abundantly clear that no notice as required was given after the accident and before the death and none was furnished to defendants within due time

(1) 43 N. H. 621.
(2) 11 Mo. 278.
(3) 3 Gill (Md.) 176.
(4) 5 Ins. L.J. Dist. Ct. Hamilton Co., Ohio.
(5) 44 Wis. 201.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C. J.

after the death of Mr. Wilson according to the conditions of the said policy, nor did plaintiff conform herself to, nor fulfil all the requirements of the said conditions, nor is there any evidence that the defendants frequently as alleged, or at any time, acknowledged their liability; on the contrary, the proof is directly the opposite. Now it is clear, that having made these allegations the burden was on the assured or plaintiff, to show that she has complied with the requirements of the policy, which she has failed to do.

But it is alleged that defendants waived the fulfilment of the conditions of the policy; but this is not the case set up by the plaintiff in her declaration, or that which the defendants were by the pleadings called on to answer. It is true that the plaintiff, in answer to the defendant's pleas which are as follows:—

That in and by one of the conditions contained in the said policy of insurance declared on by the said plaintiff and forming part of the contract thereby entered into, it was specially stipulated and agreed as follows, and in the words following: "In the event of any accident or injury for which claim may be made under this policy, or in case of death resulting therefrom, immediate notice must be given in writing, addressed to the manager of this company, at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under this policy; and unless direct or affirmative proof of the same, and of the death or duration of total disability shall be furnished to the manager of the company within three months from the happening of such accident, in the event of death, or six months in the case of non-fatal injury, then all claims accruing under this policy shall be absolutely invalid and of on effect.

That the death of the said William Wilson occurred on the thirteenth day of April, one thousand eight hundred and eighty-six, as alleged in the plaintiff's declaration, but the said plaintiff wholly failed and neglected to notify the said defendants as required by the said above recited condition until long after the death and burial of the said William Wilson, to wit, on the twenty-ninth day of April, one thousand eight hundred and eighty-six, a period of sixteen days thereafter, and which notification was only received by the said defendants

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C.J.

at their head office in Montreal on the first day of May, one thousand eight hundred and eighty-six.

That the said plaintiff has wholly failed and neglected to comply with the terms and conditions of the said policy of insurance.

That by reason of the said above recited condition and of the premises, all claims under and by virtue of the said policy became invalidated and the same are invalid and of no effect and cannot be enforced against the said defendant.

Reaffirmed the performance of this condition, and at the same time set up a waiver. Assuming that there was no necessity for plaintiff to allege waiver in her declaration, and that it was sufficient for her to do it in the replication, I can discover nothing to justify me in saying that the company waived the performance of this condition of the policy. It appears to me to have been a case of all others requiring immediate notice, and the company appears to have had an agent at Wilmington, to whom no notice appears to have been given, even if that would have been sufficient, which I do not think it would under the terms of the policy. I am therefore of opinion that this appeal should be allowed with costs.

STRONG J.—I am clear to allow this appeal. No doubt that erysipelas immediately resulting from the accident was the proximate cause of death, and the plaintiff would have been entitled to recover if he had brought himself within the conditions. But he did not give the notice required by the condition unless as argued the word "immediate" has reference only to death, an interpretation which is, however, totally inadmissible. There is no ground whatever for saying there was any waiver. The loss of the policy could not prejudice the company or dispense with the conditions against them. I am of opinion that the appeal should be allowed and the action dismissed with costs.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Taschereau J.

FOURNIER J.—was of opinion that the appeal should be dismissed for the reasons given by the court below, and also for the reasons stated in the judgment of Patterson J.

TASCHEREAU J.—In my opinion this appeal should be allowed, and the respondent's action dismissed upon the company's plea of want of due notice.

It was specially stipulated and agreed in the contract between the parties that

> In the event of any accident or injury for which claim may be had under this policy, or in case of death resulting therefrom immediate notice must be given in writing, addressed to the manager of this company, at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury.

It is in the evidence that the accident from which the late William Wilson died, happened on the 21st of March, 1886, and that he died on the 13th day of April following; but that notice thereof was only sent to the company on the 29th of April, sixteen days after the death, which notice was only received by them in Montreal on the 1st day of May.

Now by the law which rules this case, there can be no doubt that the aforesaid condition of the said policy must be given its full force and effect.

Dalloz, Répertoire Vo. Assurance Terrestre (1):

> Il est bien entendu que, si le contrat porte que le sinistre sera dénoncé dans un délai fatal emportant déchéance l'assuré qui a laissé passer ce délai sans faire la dénonciation perd tout droit à l'indemnité, à moins qu'il ne prouve avoir été empêché par cas fortuit ou force majeure.

Revue de Droit Commercial 1883 (2):

> Tribunal de Nantes (Commerce) 13 mai 1882.
>
> En matière d'assurance contre les accidents, l'assuré est tenu, alors même que la police ne stipule aucune déchéance à ce sujet, d'avertir l'assurance des accidents survenus à la chose assurée et l'assureur est

(1) No. 197. (2) P. 271.

fondé à refuser toute indemnité s'il n'a été prévenu que très longtemps après l'accident dont on veut le rendre responsable et s'il se trouve par suite, dans l'impossibilité de faire les vérifications nécessaires à la défence de ses intérêts.

NOTE—La clause d'une police, par laquelle l'assuré est tenu de faire la déclaration de chaque accident dans le délai de deux jours, doit être rigoureusement appliquée.....Cp. Tribunal de la Seine, 10 mars 1869. *Lecomte* v. *La Prévoyance, etc.*

Journal des Assurances, 1886 (1) :

Cour d'Appel de Paris, 4 Chambre, 29 janvier 1886.

L'assuré qui n'observe pas les délais et les formalités prescrites pour la déclaration du sinistre, doit être déchu de toute indemnité.

Journal des Assurances, 1883 (2) :

Tribunal Civil de la Seine, 19 août 1882.

Lorsqu'il a été stipulé qu'en cas de maladie ou d'accident sur les bestiaux soumis à l'assurance, l'assuré est tenu d'en prévenir l'administration dans les vingt-quatre heures, à peine de déchéance, cette clause est valable et la déchéance doit être prononcée.

The respondent could hardly contend that the notice she gave in this case was given within the proper time, but relied chiefly, as Mr. Justice Cross did in the Court of Queen's Bench, on the ground that the said condition of the policy had been waived by the conduct of the company, who, in their correspondence with her or her solicitors had given as their reason for acknowledging liability the only ground that Wilson's death did not result from the accident which happened to him. The respondent certainly brought to our notice some cases which would appear to support her contention on this point. But however this may be, the law on the question is in my opinion entirely against her. Certainly such conditions can be waived. Article 2478 C. C. expressly recognizes it, but of such a waiver, there is in my opinion not a tittle of evidence in this case. The respondent cannot deny it, but she wants us to presume or infer waiver from the conduct of the com-

(1) P. 130.

(2) P. 35.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Taschereau J.

pany. But the company did nothing here to mislead her. When on the 29th day of April, she, for the first time, notified the company at their head-office in Montreal, her right of action was then gone and nothing that the company did afterwards can have revived it. It is a well-established proposition of law that a renunciation to a right is never to be presumed.

Comme personne n'est facilement présumé renoncer à son droit, les renonciations expresses ou tacites doivent être strictement resserrées dans leurs termes, jamais on ne doit les étendre d'un cas à un autre. Cela résulte de la nature même des choses ; tous les auteurs sont d'accord sur ce principe. Fav. de Langlade (1).

Mais puisque des faits emportent renonciation, il faut qu'il en résulte une volonté manifeste de renoncer, c'est-à-dire, que ces faits soient directement et à tous égards contraires au droit dont il s'agit ; Merlin (2), ou exclusifs de l'exercice de ce droit. Merlin (3).

Il faut que les circonstances soient telles que tout concoure à faire supposer la renonciation, sans qu'il y ait aucune conjecture vraisemblable qui tente à faire augurer le contraire. Solon, nullités (4).

See also *Lancashire Ins. Co.* v. *Chapman* (5), where the Privy Council, in a case, it is true, from Quebec, held that a notice had been waived but upon acts by the company which necessarily implied an acknowledgment of their liability.

For these reasons I am of opinion that this appeal should be allowed.

PATTERSON J.—I remain of the opinion which I was inclined to at the hearing of this appeal, that there is no sufficient reason for disturbing the judgment in which the courts below have concurred.

The more formidable of the two main grounds of appeal is that which relates to the somewhat tardy notice

(1) Répertoire, vo. Renonciation.
(2) Répertoire, vo. Renonciation.
(3) Questions de droit, vo. Hypothèque, par. 19.
(4) 2 vol. No. 452 ; See also *The Western Assurance Co.* v. *Atwell*, 2 L.C. Jur. 181 ; Reversing *Atwell* v. *The Western*, 1 L. C. Jur. 278.
(5) 7 Rev. Leg. 47.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

of the accident. The condition calls for immediate notice, but the word "immediate" cannot be taken in its strict etymological meaning. The absurdity of that is easily shown. It would require a man who gets hurt, say *e. g.* in a railway accident, to give notice before doing any intermediate act. He must get home first or to some place where a notice can be written, and when there he would to a certainty do some other intermediate thing, if it were only to get his hurts attended to. How, then, is the word to be understood in a contract like this, or in a statute which requires an immediate notice or something to be done immediately after something else? We shall find a sensible and practical answer to the question given by Lord Chief Justice Cockburn in *The Queen* v. *Justices of Berkshire* (1):

"The question" he said "is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

If the appellants had said, when they received the notice in this case, that it was not the notice they bargained for, because it did not enable them to make prompt inquiry into the facts while they were fresh or to take such steps as they might have taken to prevent serious consequences, it is not likely that any court would have said they put too strict a construction on the condition as applied to the circumstances The sufficiency of the notice as a compliance with the condition was a question of fact, and the company's view of the fact may not improperly be gathered from its conduct. What was done was precisely what would

(1) 4 Q.B.D. 469.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

have been done if an unobjectionable notice had been given—receiving proofs of the claim, investigating the particulars, and intimating the decision to resist on the ground that the accident or injury was not covered by the policy.

Now whether we regard the company as having conceded the sufficiency of the notice as a question of fact, and acting on that concession, hold the condition satisfied, which is the formal finding of the court below; or hold that the company waived the giving of the notice in the precise terms of the condition, which is the view intimated by Mr. Justice Cross; or that the company is estopped from insisting upon the condition, which might not be a strained conclusion; the result is the same. I see no good reason to find fault with the conclusion, nor do I think it important to examine the grounds of it more closely.

As to the other ground of appeal which has afforded room for some ingenious discussion, I cannot see my way to question, much less to reverse, the decision of the courts below.

There is ample evidence to sustain the finding of fact that the bruise or abrasion or wound on the leg of the deceased, caused by the accident of his falling off the verandah, led to his death.

The medical evidence cannot be taken to establish any facts inconsistent with the findings of the court below. Much stress has properly been laid upon the *post-mortem* examination. The facts ascertained upon that examination by the pathologist who made it and the local physician who assisted him are, of course, beyond the reach of dispute. But the deductions from those facts stand on a different footing and as to them the doctors differ. The autopsy revealed some pneumonic consolidation of one lung and traces of a disease of the kidneys. Three opinions, more or less divergent,

are given respecting these discoveries. One is that they may indicate some debilitating disease that may have predisposed the patient to erysipelas; another makes them account for the attack of erysipelas; and the third treats them as either of no significance in connection with the erysipelas, or as secondary to or resulting from it. It is plain that those differences are not for us to reconcile, and that for the purpose of this appeal the broader facts alone can be looked at. These are that in consequence of the injury to the leg of the deceased erysipelas set in, involving the whole of the limb from the foot upwards. The examination did not disclose any indications of pyæmic poisoning, but the presence of considerable quantities of pus in the leg, in conjunction with the evidence furnished by the absence of surgical incisions which would have promoted the discharge of the pus, led to the inference that the treatment of the patient had not been skilful.

The conclusion of fact that the erysipelas from which the insured died was due directly to the injury and not to any diseased condition of the system was, as I have said, fully warranted by the evidence, and must be accepted by us.

The conclusion of law, against which the appellants contend, is that under the circumstances it was not a case of death caused (within the words of the policy) "wholly or in part by bodily infirmities or disease existing prior to or subsequent to the date of this contract," but that the injury was "the proximate or sole cause of the death."

There is frequently some difficulty in satisfactorily interpreting the language of provisoes like that from which I quote these words. I cannot say that that is so in the present instance. As soon as we abandon the notion that other diseases, such as the dis-

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

eases of the lungs or kidneys of which traces were found, produced or aided in producing the erysipelas, the reference to "bodily infirmities or disease existing prior or subsequent to the date of this contract" becomes inapplicable to the case. It would be straining the language and giving a delusive character to the contract to understand a disease produced by an accident against which the company insures to be included in the reference.

It would be straining the language if we had nothing but the words of the proviso to guide us. But the contract itself helps to define the extent of these words. The insurance applies in cases of death whenever the fatal result follows within ninety days of the accident. During that interval it is obvious that the insured is contemplated as suffering from the effects of the accident, and it must be also contemplated that his sufferings may take the form of a disease that has a name of its own, it may be pyæmia, or tetanus, or erysipelas, or congestion of the brain, or something else, but still the direct consequence of his injury and the path by which the fatal result is approached. It would make the contract a delusion to hold that in any such case the liability of the company was gone by reason of the exception of death from bodily infirmity or disease existing subsequent to the date of the contract.

A force is claimed for the word "proximate," which again would reduce the contract to a delusive pretense of insurance. Leave erysipelas out of view for the moment. A disease more readily recognized, at least in popular estimation, as the result of an injury is tetanus, one development of which is lock-jaw. Can it be contended that a person whose hand or foot is injured and who in consequence dies of tetanus, did not die from the injury as, within the meaning of this policy, the proximate cause of his death?

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

It might as well be argued that in the case of a gun-shot wound that severs an artery and the man bleeds to death because no one happens to be present with the means or the skill to stop the flow of blood, the proximate cause of death was not the wound, but the exhaustion from loss of blood.

The construction of the proviso for which the appellants contend seems to treat the word "proximate" as referring only to the order of time. That is not its meaning here. The contract is to pay if the death happens within ninety days. During that interval secondary or resulting "causes of death," as that expression might be used in the report of a *post-mortem* examination, must often intervene, nearer in point of time to the death, but still not the proximate cause.

The proviso in the policy distinguishes between death from an injury, as a direct consequence, and death from bodily infirmities and disease not caused by the injury. The latter cause of death gives no claim under the policy, the former, which is designated the proximate cause, gives a claim. The word "proximate" I understand to be used in the sense of "direct," which seems to be the word employed in English policies. It is so in the policies which were in question in *Fitton* v. *Accidental Death Ins. Co.* (1), *Smith* v. *Accident Insurance Co.* (2), in *Winspear* v. *The Accident Ins. Co.* (3), and in *Lawrence* v. *The Accidental Ins. Co.* (4).

In this sense the word has a useful and sufficient signification. For example, a man suffering from some disease brought on by an accidental and violent injury, involving perhaps congestion, or suppuration, or inflammation like the peritonitis discussed in one of the American cases, *N. American Life and Accident Co.* v.

(1) 17 C. B. N. S. 122.
(2) L. R. 5 Ex. 302.
(3) 6 Q. B. D. 42.
(4) 7 Q. B. D. 216.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

Burroughs (1), and threatening a fatal termination, happens to die from heart disease with which the injury had nothing to do, although the condition of the patient may have made him more liable to an acute attack. The proviso would protect the company, while if the death had been from the peritonitis or other effect of the injury, the injury would have been the proximate cause of it within the meaning of the policy.

I do not think it necessary to go into a detailed discussion of the cases cited to us, though I have not failed to examine them. I may say generally that the principle on which the policies and facts in the various cases have, as a rule, been discussed is that which I have applied to the construction of the policy before us. I have already incidentally mentioned the principal English cases. Several of the American decisions are direct authorities for the construction contended for by the respondent.

In my opinion the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellants: *Selkirk Cross.*

Solicitor for respondent: *E. Lafleur.*

(1) 8 Am. R. 212.

ALEXANDER GRANT (PETITIONER).....APPELLANT; 1891

AND *Nov. 6.

HER MAJESTY THE QUEEN (DEFENDANT)..... } RESPONDENT. 1892

*April 4.

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

Petition of right (P. Q.)—R. S. Q., art. 5976. Sale of timber limits—Licenses—Plan—Description—Damages—Art. 992 C. C.—Practice—Title of cause.

Where the holder of a timber license does not verify the correctnesss of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits, but was subsequently ascertained by survey to from part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. Fournier J. dissenting.

Per Patterson J. The licensee's remedy would be by action to cancel the license under art. 992 C. C. with a claim for compensation for moneys expended.

In this case the action was instituted against the Government of the province of Quebec, but when the case came up for hearing on the appeal to the Supreme Court, the court ordered that the name of Her Majesty the Queen be substituted for that of the Government of the province of Quebec.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court, by which judgment the petition of the said appellant was dismissed with costs.

The petition of the appellant was made under section 5976 of the Revised Statutes of Quebec, and was

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

1891

GRANT v. THE QUEEN.

granted by the Lieutenant Governor of the province of Quebec in accordance with article 886*d*. C. C. P. amended.

The circumstances which gave rise to the litigation are briefly as follows :—

On the 15th August, 1880, the Commissioner of Crown Lands for the province of Quebec advertised in the public newspapers that he would sell at public auction on the 15th October following, 1880, certain timber limits in conformity with the Provincial Act, 36 Vic., ch. 9.

Among the limits mentioned in the said public notice was the following : " Rimouski Agency, Limit River St. Pierre, 26 square miles." The following also formed part of said public notice : " Plans exhibiting these timber limits will be open for inspection at the Department of Crown Lands in this city (Quebec) and at the agent's office for these localities from this day (14th August, 1880) to the day of sale." This notice was signed by Mr. E. E. Taché, Assistant Commissioner of Crown Lands. On the said 15th October, 1880, the said timber limits were adjudged to Messrs. King & Bros., they being the highest bidders.

A plan of these limits was exhibited at the Crown Lands Department offices, which previous to the sale was inspected and examined by the subsequent purchasers, Messrs. King & Bros. This plan showed that the River St. Pierre traversed the 3rd and 4th ranges of the township of Awantjish.

The following license was subsequently issued ;—

DESCRIPTION OF LIMIT NO. 56.

N. B.—To be dated and signed by the agent.

RIVER ST. PIERRE.

To commence from the rear line of the Seigniory of Lake Metapedia, to extend thence up the River St. Pierre a distance of six and a half miles measured on a due south-west course, and to include in breadth

the first, second, third and fourth ranges of the township of Awantjish. The said timber limit being bounded to the north-east by the line of Seigniory of Lake Metapedia, to the south-west by the township of Cabot, and to the south-east by the line between the fourth and fifth ranges of Awantjish Township, containing an area of twenty-six and half square miles, more or less.

Crown Timber Office,
Rimouski, 2nd December, 1880. GEO. SYLVAIN,
Cr. Tr. Agt.

On the 24th November following (1881) these limits were transferred by King & Brothers to the present petitioner, Mr. Grant. This transfer was duly accepted by the Crown Lands Department and a new license in similar terms was issued to Mr. Grant signed by the said Crown Timber Agent and dated 6th December, 1881.

In the year 1885, Messrs. Martin & Lebel acquired by public auction from the Government of the province of Quebec, the remainder of the said township of Awantjish, namely the fifth, sixth and seventh ranges of the said township. A survey was then caused to be made by Messrs. Martin & Lebel to ascertain the dividing line between the fourth and fifth ranges of the said township, that is the line dividing the limits of Mr. Grant from those of Messrs. Martin & Lebel. Mr. John Hill was the surveyor employed. From his survey it was ascertained that the principal branch of this river St. Pierre did not run through the third and fourth ranges of this township, but that it ran through and across the fifth range, namely, through the limits that had been subsequently purchased by Messrs. Martin & Lebel. In the interval the appellant, viz., for four years, from 1881 to 1885, carried on successful lumbering operations on this branch of the river, when Messrs. Martin & Lebel seized a large quantity of timber that Mr. Grant had cut near this river on the fifth range and appellant was obliged to pay $5,000 for its release.

1891

GRANT v. THE QUEEN.

Thereupon the appellant brought a petition of right claiming $10,000 damages.

The respondent pleaded: that the Rivière St. Pierre limit was described in the license according to the notice published in the *Official Gazette*, and according to the deposited plan; King Brothers never made any complaint about their license; in virtue of the rules of the department, the purchaser must verify the correctness of the official description before the issuing of the license; the bounds of the Rivière St. Pierre limit are visible and were so at the time of the sale; and the Crown has always been ready to refund any money unduly exacted by the agents of the Lands Department.

Issue being joined the evidence taken at the trial showed that the River St. Pierre has two branches, one running through the Grant limit with almost no current, and the other, wider and deeper, more suitable for lumbering operations, running through the Martin & Lebel limit.

The Superior Court whose judgment was affirmed by the Court of Queen's Bench for Lower Canada (appeal side) dismissed the petition, holding that the principal branch of the river flowed through the limit granted to the appellant, and that it had been correctly described.

When the case first came before the Supreme Court it was objected that the defendant being styled the Government of the province of Quebec, no judgment could be entered against the Government, and by consent it was agreed that Her Majesty the Queen be substituted as the respondent in the case.

Hutchinson appeared for the appellant and contended that the principal river which was purchased on the Crown's representation was the branch running through Martin & Lebel's limits, and therefore he

should recover the difference of value in the two limits and the expenses (1). Addison on Contracts (2).

Bedard for respondent contended there was no error and that the profits made on the Crown's domain during four years by the appellant more than compensated any damage suffered by reason of any error as to the location of the river.

SIR W. J. RITCHIE C.J.—Notwithstanding the forcible judgment of my brother Fournier which he has permitted me to read, and which I have very carefully considered, I have not been able to come to the conclusion at which he has arrived. I cannot think that the Government guaranteed in any way the position of the River St. Pierre on the limits.

The boundaries of the limits are clear and distinct, and their position admits of no doubt. If petitioner made improvements or works on any other lands than those confined within the boundaries of the limits granted to him he did it at his own risk and peril and can impute the loss only to himself.

I am not satisfied that if the Crown incurred any liability by reason of the position of the river as designated on the plan the petitioner would have any substantial cause of complaint, because the purchaser had delivered to him all the department sold, viz., the four first ranges, and he has not been disturbed in the enjoyment of the limits described in his license, and because it appears that the branch of the river containing the most water, and which the Crown's witness, Hill, says is wider and deeper, though perhaps not the most useful for driving logs by reason of the sluggishness of the current, is in the limits of the petitioner as described in the license

(1) Art. 992 C. C. and R. S. Q. Art. 1313.

(2) Addison on Contracts No. 520.

1892

GRANT v. THE QUEEN.

Ritchie C.J.

and in accordance with the notice published in the *Official Gazette* and according to the deposited plan, and because in accordance with the rules of the department the purchaser is required to verify the correctness of the official description before the issuing of the license. It seems to me that this is the very object of depositing the plan for two months in the department and with the local agent, viz., to enable the would-be purchaser to do this, and it is hardly to be supposed that any party would purchase limits without having taken the precaution of examining by himself or his agent the limits, or making such other inquiries as would make him acquainted with the exact position and capabilities of the limits for lumbering operations.

Under these circumstances I think the judgment of the court of first instance, confirmed by the unanimous judgment of the Court of Queen's Bench, should be affirmed and this appeal dismissed.

STRONG J.—I am of opinion that the conclusion at which the Chief Justice has arrived is the only proper one and would dimiss the appeal.

FOURNIER J.—Par sa pétition de droit, présentée à la cour Supérieure pour le district de Québec, l'appelant demandait à Sa Majesté le montant des dommages que lui avait causés une erreur commise par le département des terres publiques de la province de Québec, dans la description d'une limite à bois qu'il avait achetée du département, à une vente à l'enchère publique.

Le 14 août 1880, le commissaire des terres de la province de Québec avait annoncé qu'il vendrait à l'enchère publique, le 15 octobre suivant (1880), un certain nombre de limites à bois, conformément à l'acte 36 Vic. c. 9.

Parmi les limites mentionnées dans cet avis se trouvait la suivante :

Rimouski Agency, Limit River St. Pierre, 26 square miles.

Dans cette annonce se trouvait la déclaration suivante :

Plans exhibiting these timber limits will be open for inspection at the Department of Crown Lands in this city (Quebec) and at the Agent's Office for these localities from this day (14th August, 1880) to the day of sale.

Cet avis était signé E. E. Taché, assistant-commissaire des terres de la couronne.

Le 15 octobre 1880, la limite ci-dessus mentionnée fut adjugée à MM. King et Frères, qui étaient les plus hauts enchérisseurs. Une licence fut émise en leur faveur, en date du 2 décembre 1880.

Le 24 novembre 1881, cette limite fut transportée par MM. King et Frères à l'appelant. Le transport fut accepté par le département et une nouvelle licence signée par l'agent de la couronne, en date du 6 décembre 1881, fut accordée au nom de l'appelant.

En conformité de l'avis de la vente, un plan de la limite en question fut exposé pour l'information des acheteurs. Ce plan est intitulé :

Plan de 1881 de la rivière St-Pierre et ses limites à bois.

Et au bas se trouve la signature de E. E. Taché, assistant-commissaire.

La limite en question est indiquée sur le plan comme se trouvant entre les lignes rouges et comprenant les 1er, 2e, 3e et 4e rangs du township d'Awantjish. Sur ce plan la rivière St-Pierre est représentée comme passant à travers les 3e et 4e rangs de la limite en question.

Sur le dos de la licence accordée à l'appelant la limite est décrite comme suit :—

River St. Pierre. To commence from the rear line of the Seigniory of Lake Metapedia, to extend thence up the river St. Pierre a distance

1892

GRANT v. THE QUEEN.

Fournier J.

of six and a half miles, measured on a due south-west course and to include in breadth the first, second, third and fourth ranges of the township of Awantjish. The said timber limits being bounded to the north-east by the line of the Seigniory of lake Metapedia, to the south-west by the township of Cabot, and to the south-east by the line between the fourth and fifth ranges of Awantjish township. Containing an area of twenty-six and a half square miles more or less. Crown Timber Office, Rimouski, 2nd December, 1880, George Sylvain, Crown Timber Agent.

L'appelant prit possession de sa limite et l'exploita pendant quelques années. Des chantiers furent érigés pour loger les ouvriers, des chemins construits et la rivière nettoyée pour le transport du bois manufacturé. Ces divers travaux se montèrent à une somme de $1,328.68. L'appelant se croyait bien certain de les avoir faits sur sa limite.

MM. Martin et Lebel ayant, en 1885, acquis du gouvernement de Québec, le reste du township Awantjish, savoir, les 5e, 6e et 7e rangs, firent tirer la ligne de séparation entre le 4e et le 5e rang, c'est-à-dire la ligne qui devait séparer la limite de Grant de la leur. M. Hill, arpenteur, qui fut employé pour cette opération, constata pour la première fois que la rivière St-Pierre ne passait pas à travers les 3e et 4e rangs de ce township, tel que montré sur le plan exhibé au bureau du département des terres, à l'époque de la vente de la dite limite, mais qu'elle passe à travers le 5e rang, sur la limite subséquemment achetée par MM. Martin et Lebel. Ce fait est démontré par le plan de M. Hill produit comme exhibit n° 7 de l'appelant.

L'appelant qui faisait alors faire du bois sur le 5e rang, près de la rivière, apprit alors par le résultat de cette opération qu'il se trouvait en dehors de sa limite, et sur celle de MM. Martin et Lebel. Ceux-ci firent saisir son bois et l'appelant fut obligé de le racheter en payant $500.00 et perdit en outre tous ses frais d'ouverture de chemins et de nettoyage de la rivière. La

rivière ne passant pas sur le 4e rang, dans sa limite, la valeur de celle-ci en était par là réduite à peu de chose. Il estime ses dommages à $10,000.

L'existence d'une rivière flottable pour l'exploitation du bois est une des considérations qui donnent le plus de prix à une limite à bois. Sans cela il serait trop dispendieux de rendre le bois au marché par transport de voiture. La rivière est pour cela considérée comme l'un des éléments principaux de la valeur d'une limite.

Celle-ci fut décrite et vendue comme la limite " sur la rivière St-Pierre " s'étendant le long de la rivière (up the river) une distance de six milles et demi dans la direction du sud-ouest. L'appelant, en suivant la rivière indiquée sur le plan et la description donnée dans sa licence, ne pouvait faire autrement que de se croire dans sa limite.

L'intimée dans sa défense a admis l'achat de la limite en question par MM. King et Frère et l'émission de la licence en leur faveur, ainsi que la description, tel que ci-dessus mentionnée ; mais elle allègue que cette description est correcte et conforme à l'avis public donné par le département des terres, et que les limites, telles que décrites dans la dite licence, étaient faciles à vérifier

La question soulevée par cette contestation est de savoir si l'erreur commise dans la description de la dite limite et le plan indiquant la rivière St-Pierre comme traversant les 3e et 4e rangs, tandis que par la preuve il est constaté de la manière la plus évidente qu'elle n'y passe pas, mais qu'elle se trouve sur le 5e rang du même township, dans la limite accordée depuis à MM. Martin et Lebel; la question, dis-je, est de savoir si cette erreur portant sur une des considérations principales qui ont décidé l'appelant à faire l'acquisition de la dite limite n'est pas suffisante pour lui donner droit de demander l'annulation de la vente et

1892

GRANT v. THE QUEEN.

Fournier J.

des dommages lui résultant de cette erreur. 2° Est-il vrai, comme l'a plaidé l'intimée, qu'en vertu des règlements du dit département en force lors de la vente et adjudication de la dite limite et lors de l'émission de la dite licence, l'adjudicataire d'icelle devait vérifier l'exactitude de la description officielle de la dite limite et informer le dit département de toute erreur contenue en icelle, et ce avant l'émission de la dite licence.

Il est important de citer la preuve pour démontrer l'erreur de cette conclusion qui, quoique confirmée par la cour du Banc de la Reine, n'en est pas moins en flagrante contradiction avec la preuve.

L'appelant a fait la preuve la plus positive de l'erreur commise dans la description de sa limite, et dans le plan qui a servi de base pour la vente. L'arpenteur Hill qui a fait le plan, exhibit n° 7, lorsqu'il a fait le tracé de la ligne de séparation de la limite de l'appelant de celle de MM. Martin et Lebel, entre les 4e et 5e rangs du township, est le premier qui ait déterminé la véritable position de la rivière St-Pierre. Il a constaté qu'elle se divise en deux branches sur le quatrième rang. L'une passe sur le 5e rang et se trouve très avantageuse pour le flottage des bois, tandis que l'autre continue au sud-ouest sur le 4e rang où elle s'étend comme un lac dans lequel il n'y a pas de courant et n'offre aucun avantage pour le flottage des bois.

Cependant c'est cette dernière que le jugement de la cour Supérieure, tout en admettant qu'elle est moins avantageuse pour le flottage des bois, déclare être la branche principale, et elle en conclut que partant la description de la limite et du plan se trouve correcte, et qu'en conséquence l'appelant n'a aucun sujet de se plaindre.

Ce n'est, il est vrai, qu'une question de faits, mais c'est toute la cause. Un examen sérieux des faits est donc indispensable pour la décision de ce litige.

La vente a été faite conformément au plan, exhibit n° 2, indiquant que la rivière St-Pierre traverse les 3e et 4e rangs du township Awantjish. M. King, l'acquéreur originaire de cette limite, dit que lors de la vente il avait examiné le plan en question, n° 2, exhibé pour l'information des acheteurs, et que c'est le plan qui avait été déposé au département des Terres de la Couronne.

Dans la vente à King comme dans celle faite à l'appelant, le 6 décembre 1881, la limite est désignée principalement sous le nom de "rivière St-Pierre." Dans l'avis de vente du département (n° 54) elle est désignée uniquement sous le nom de *River St-Pierre*. Avis est aussi donné que les plans des limites offertes en vente seront exposés à l'inspection des acheteurs jusqu'au moment de la vente.

Les conditions de la vente mentionnent la mise à prix des limites qui doivent être vendues dans les différentes agences du département. Les autres conditions sont que les limites seront adjugées à ceux qui offriront le plus haut montant de bonus. Le bonus et la première année de rente foncière de $2.00 par mille carré devant être payés immédiatement après la vente.

Les dites limites à bois seront sujettes à tous les règlements concernant la vente des bois actuellement en force, ou qui pourront être adoptés ci-après.

Ces ventes sont faites périodiquement en vertu des règlements du département dont on trouve la refonte à la page 78, du dossier. Elles doivent être faites à l'enchère publique, après avis public contenant description des locations à vendre, leur situation et mise à prix, après qu'elles auront été explorées et évaluées approximativement avec un plan du territoire où se trouvent les dites limites et celles environnantes ; ce plan devra demeurer sujet à l'examen du public durant tout le temps compris entre la publication de l'avis et le jour fixé de la vente.

1892

GRANT v. THE QUEEN.

Fournier J.

Le plan exhibit n° 2 d'après lequel la vente a été faite se trouve confirmé par un autre plan exhibit n° 3 préparé par le département en 1884. Un autre plan, exhibit A de l'intimée daté de 1878 aussi préparé par le département, se rapproche beaucoup des deux autres plans.

Tous ces divers plans prouvent d'une manière certaine que lors de la vente de la limite en question, le département ne possédait aucune information contredisant l'exactitude du plan n° 2, d'après lequel la vente fut faite.

Ce n'est qu'après la vente faite à MM. Martin et Lebel en 1885, du reste du township Awantjish, des 5e, 6e, et 7e rangs qu'il fut découvert que le plan n° 2 était tout à fait erroné. Désirant faire tirer la ligne de séparation entre leur limite et celle de l'appelant, MM. Martin et Lebel employèrent M. Hill, arpenteur, qui constata que la rivière St-Pierre ne passe pas sur les 3e et 4e rangs de la limite de l'appelant, tel qu'indiqué sur le plan n° 2, mais qu'elle passe sur le 5e rang du township dans la limite acquise par Martin et Lebel. Le plan, exhibit n° 7, produit par le témoin Hill, fait en avril 1885, constatant que la rivière St-Pierre passe sur le 5e rang a été pour le département comme pour l'appelant la première information de l'erreur commise dans le plan n° 2 de la description de la limite.

Un autre plan, exhibit A de l'intimée émanant du département des Terres, daté 17 août 1888, diffère aussi du plan n° 2, il correspond presque exactement avec celui de M. Hill, exhibit n° 7. Ce plan évidemment calqué sur celui de Hill, n'a été fait qu'après coup et pour les besoins de la cause, puisque le gouvernement, avant l'opération de Hill, ne possédait aucune information au sujet de l'erreur du plan n° 2. La pétition de droit est datée le 29 juillet 1887, mais les

plaidoyers sont datés du 23 août 1888, six jours seulement après la date du plan fait pour le besoin de la cause.

Dans le plan n° 2, toute la rivière St-Pierre est représentée comme étant dans les limites de l'appelant, et comme n'ayant pas de branches, excepté deux petites fourches qui s'élèvent l'une vers la fin du 3e rang et l'autre vers l'extrémité du 4e rang, toutes deux très courtes et formant la rivière St-Pierre représentée sur le dit plan de la limite appartenant à l'appelant. Mais d'après le plan de M. Hill presque toute la rivière se trouve sur les 5e et 6e rangs, propriété de MM. Martin et Lebel, et elle ne passe que sur un coin du 4e rang dans la limite de l'appelant. Il y a, cependant, une certaine étendue d'eau dans le 4e rang, au-dessus du point où la principale branche de la rivière St-Pierre fait un détour et continue vers les 5e et 6e rangs.

Voyons maintenant par le témoignage de M. Hill laquelle des deux branches dont il parle peut être considérée comme la rivière St-Pierre. Il dit:

R. Quand je suis allé sur le terrain, j'ai découvert que la vraie rivière St-Pierre se divisait en deux branches, que la principale branche courait sur la limite en courant au sud, sur la limite de M. Martin au sud; l'autre branche, il y avait une autre branche qui se joignait à peu près à dix arpents en bas du fronteau, entre le quatrième et le cinquième rang; c'est une rivière qui ne coule pas beaucoup, ce n'est pas une rivière qu'on peut driver..... dire drivable.

R. J'ai trouvé que le camp de M. Grant était à trois arpents ou à peu près trois arpents de la ligne sur la branche principale, suivant moi.

Q. Courant dans le sud?—R. Oui, courant dans le sud. J'ai relevé cette rivière-là, j'ai relevé la rivière principale suivant moi, à environ treize arpents, j'ai rencontré une écluse qui, suivant moi, a dû coûter trois cents piastres ($300), suivant ce que je puis connaître dans ces affaires-là, a dû coûter à peu près trois cents piastres ($300) à celui qui l'avait bâtie; je ne sais pas si c'est M. Grant, je ne l'ai pas vu faire. Celui qui a bâti cette écluse ça dû lui coûter $300 pour en bâtir une pareille dans tous les cas. Ensuite j'ai rencontré du bois fait le long de la rivière jusqu'à une distance à peu près depuis la fourche des deux rivières, à peu près une distance de quatre milles et demi, par la rivière, par les croches de la rivière, c'était plus court que ça en passant en

1882.

GRANT v. THE QUEEN.

Fournier J.

ligne droite, mais en passant par la rivière, c'est à peu près quatre milles et demi. Il y avait là un camp, un grand camp, pour tenir vingt hommes, puis un camp pour les chevaux ; enfin il y avait des travaux là qui coûtaient une centaine de piastres pour bâtir. Il y avait un poêle là-dedans, ça prenait deux chevaux pour le monter là. Je dis ce que j'ai vu—un poêle qui était ça d'épais, cinq pieds de long. Ça devait avoir été fait ce camp-là—et le poêle..... Ç'avait été fait au moins cinq ou six ans avant. Nous avons couché là ce soir-là, tous mes hommes, on a couché là, à ce camp-là ; c'est tout ce que je sais.

Q. Vous connaissez très bien, vous avez fait l'exploration de la limite rivière St-Pierre, la limite de M. Grant ?—R. Je la connais autant qu'un homme peut la connaître.

Q. Voulez-vous dire ou établir approximativement la valeur de cette limite, rivière St-Pierre, la limite du pétitionnaire qu'elle est la valeur. —R. D'après ce que je connais depuis ce temps-là. J'ai pu connaître depuis ce temps-là, et dans ce temps-là si réellement la branche principale.....la branche qui court sur la limite de M. Grant.....c'est une rivière à eau morte ; je pense bien qu'il y a plus d'eau, mais elle ne coule pas, elle est plus large, et c'est une espèce de lac tout le temps.

J'ai exploré depuis ce temps-là la rivière St.-Pierre, presque depuis son embouchure avec l'autre branche de M. Grant jusqu'au lac Métapédiac c'est toujours un courant égal.

Suivant mon opinion, je pense que la principale branche de la rivière descend du sud, de la limite de MM. Martin et Lebel.

Q. Avez-vous remonté bien haut la branche qui court sur la limite de M. Grant ?—R. Je ne l'ai pas remontée elle-même, mais j'ai tiré le fronteau le long de la branche de M. Grant, M. Martin qui était avec moi.....

Par moi-même j'ai vu que ça coulait dans une cédrière et que la branche ne pouvait pas avoir de courant, il n'y avait pas moyen.

Voici le témoignage d'un homme compétent en ces matières, qui a fait l'exploration de la rivière en question et qui dit la connaître autant qu'un homme peut la connaître, qui prouve que la branche principale passe en courant sud sur la limite de Martin et Lebel. Celle qui passe sur la limite de l'appelant est une rivière à eau morte, dit-il, où il y a plus d'eau, mais elle ne coule pas, elle est plus large. C'est une espèce de lac. Son opinion est que la principale branche de la rivière St-Pierre descend du sud de la limite de MM. Martin et Lebel. L'autre, celle de Grant, coule dans une

cédrière où il n'y a pas de courant. Ces faits constatent à l'évidence que la rivière principale, celle qui passe sur la limite de Martin et Lebel, la seule qui soit utile pour l'exploitation du bois ne se trouve pas sur la limite de l'appelant.

L'autre témoin qui parle de la rivière est Edward Grant, fils de l'appelant, qui dit que son père s'était établi sur la principale branche de la rivière St-Pierre d'où il a été évincé par MM. Martin et Lebel qui depuis 1885 ont la possession de la branche sud, celle sur laquelle était établi son père, qui est la branche principale de la rivière St-Pierre. C'est, ajoute-t-il, ce qu'on considère la rivière St-Pierre proprement dite.

Voilà avec le témoignage de M. King toute la preuve au sujet du caractère de la rivière. Les autres témoins n'en font pas mention. La défense n'a rien prouvé au contraire.

Ainsi l'erreur sur laquelle l'appelant fonde sa pétition est démontrée à l'évidence. La rivière St-Pierre n'est pas sur la limite vendue à l'appelant, elle se trouve en dehors, sur la limite de Martin et Lebel. Le fait qu'il se trouve sur le 4e rang, dans la limite de l'appelant, une espèce de lac ou étendue d'eau morte, dans laquelle il n'y a aucun courant et qui ne peut nullement servir au transport des bois ne peut pas raisonnablement être considéré, ainsi que l'a fait la cour Supérieure, comme la rivière St-Pierre ou son équivalent. Bien que le jugement comporte la déclaration "que le témoin du pétitionnaire" (de l'appelant) dit que cette espèce de lac est plus large et contient plus d'eau que l'autre, et que pour ces raisons, il dit qu'elle est la branche principale—je dois dire qu'on ne trouve cependant rien de semblable dans les témoignages." J'ai vainement cherché cette déclaration. Elle n'existe pas dans la preuve. Aucun témoin n'a confondu la branche principale de la rivière avec l'autre et n'a cherché à

1892

GRANT v. THE QUEEN.

Fournier J.

établir une équipollence entre les deux. Ce *finding*, cette déclaration du jugement de première instance est tout à fait contraire à la preuve Il n'est pas surprenant qu'après cela, la cour ait adopté comme conclusion le considérant suivant "que d'après la preuve la branche de la dite rivière contenant le plus d'eau est sur la limite du pétitionnaire et que par là même la désignation de la limite dans les licences est fidèle et correcte."

Pour en arriver à une telle conclusion il faut absolument ne donner aucune attention à la preuve des témoins sur le caractère de la rivière St-Pierre ni à celle faite au sujet de l'importance qu'il y a, pour l'exploitation d'une limite, à posséder un cours d'eau pour le transport des bois. Il est inutile de revenir sur les avantages mentionnés par plusieurs témoins dont quelques-uns considèrent que c'est un des principaux éléments de la valeur d'une limite. M. King dit positivement qu'il n'aurait pas acheté cette limite s'il avait su que la rivière ne la traversait pas tel qu'indiqué sur le plan n° 2, qu'il avait particulièrement examiné. Cette erreur reposant sur une des considérations principales de la vente, doit la rendre nulle. (Voir art. 992, c. c.)

La prétention émise par l'intimée que d'après les règlements du département en force lors de l'adjudication et de l'émanation de la licence, l'adjudicataire d'icelle devait vérifier l'exactitude de la description officielle de la dite limite et informer le département de toute erreur avant l'émanation de la licence, est-elle réellement fondée en fait?

L'assistant-commissaire des terres dans son examen comme témoin a soutenu cette proposition. Il cite comme autorité à ce sujet la 4e clause de la refonte des règlements, mais cette clause ne dit absolument rien de semblable. Elle ne concerne que les rentes

foncières auxquelles les limites nouvellement acquises seront sujettes. Il n'est là aucunement question des ventes des limites ni de leurs conditions, excepté en ce qui concerne la rente foncière au sujet de laquelle elle fait cette restriction, " et après l'émission de la licence aucune réclamation ne sera admise pour le remboursement de rente foncière provenant de surcharge faite dans le calcul de superficie des limites." Ni dans les conditions de la licence, ni dans les articles concernant la vente des limites on ne trouve aucune condition soumettant l'adjudicataire à vérifier l'exactitude de la description officielle de la limite et d'informer le département de toute erreur en icelle. Il est évident que l'assistant-commissaire s'est trompé en voulant étendre à la vente des limites la restriction imposée au sujet de la rente foncière. Il n'y a pas d'autres conditions que celles ci-dessus énoncées, la vente publique à l'enchère, après avis de deux mois, avec dépôt du plan de la limite chez l'agent local pour l'information de l'acheteur. Telles sont les précautions prises pour la sûreté du département et pour celle de l'acheteur. Pour le reste la vente est réglée par les principes ordinaires du contrat de vente, qui sont parfaitement applicables au cas actuel.

S'il est certain que les commerçants de bois font souvent des démarches pour connaître la valeur des limites à vendre, c'est pour avoir des informations que le département n'est pas en état de leur donner sur la qualité et la quantité du bois, sur les dommages qui peuvent avoir été causés dans les limites par le feu ou par les voies de faits des voisins ou autres. Mais dans le cas actuel, le gouvernement a donné par l'avis public et par son plan de la limite toutes les informations que les règlements l'obligeaient à donner, et il est tenu à en garantir l'exactitude. Il ne devait faire cette vente qu'après *exploration* de la limite, et le plan qu'il en a donné

1892

GRANT v. THE QUEEN.

Fournier J.

lors de la vente n'a dû être fait que sur exploration et n'a été exhibé aux acheteurs que pour leur faire croire que la rivière St-Pierre passait à l'endroit indiqué sur le plan. A moins de croire que le plan n'avait été ainsi exhibé que pour tromper les acheteurs, quelle raison y avait-il pour M. King ou pour l'appelant de faire inutilement une opération coûteuse, lorsqu'ils ne pouvaient aucunement supposer qu'il se trouvait une erreur aussi grave dans le plan déposé. Il n'est pas possible, je crois, de faire aucun reproche à l'appelant de ne pas avoir agi comme s'il eût connu l'erreur. Il est trop positivement établi qu'il l'ignorait et qu'il ne l'a connu qu'après que M. Martin et Lebel eurent acquis la limite voisine. Le seul coupable de cette erreur est le département qui a fait faire le plan sans avoir fait d'exploration, et c'est à lui d'en porter la responsabilité. Dans tous les cas, le règlement lui défendait de vendre une limite *avant de l'avoir fait explorer.*

Les dommages résultants à l'appelant sont considérables. Il se trouve à perdre tous les travaux qu'il avait faits pour chantiers, chemins et nettoyage de la rivière. En outre une somme de $500, qu'il a été obligée de payer à Martin et Lebel pour le bois qu'il croyait avoir fait chez lui, tandis qu'il se trouvait dans la limite de ces derniers. Avant la découverte de cette erreur sa limite valait $8,000, depuis elle vaut à peine $1,500.

Malgré la justice évidente de cette réclamation, le département des terres, pour éviter la responsabilité de son erreur, a refusé de faire droit à la demande de l'appelant pour obtenir une rectification de l'erreur. On a bien vu dans les règlements des choses qui n'y existaient pas pour s'excuser de ne pas rendre justice et on a fermé les yeux sur une disposition formelle qui existe leur donnant tout le pouvoir de réparer leur erreur ; c'est celle-ci, à l'article 28 de la refonte des règlements :

et, dans le cas où il serait constaté que, soit par erreur ou par défaut dans sa description, aucune licence est évidemment incompatible avec l'intention ou avec les règlements en vertu desquels elle a été accordée, le commissaire des Terres de la Couronne pourra la faire annuler ou amender.

1892

GRANT v. THE QUEEN.

Fournier J.

Une application au département pour le redressement de cette erreur n'ayant obtenu aucun résultat, l'appelant a eu recours à la pétition de droit. Il est évident que le département dans ces circonstances avait droit de résilier ou annuler la licence de MM. Martin et Lebel. Ceux-ci n'avaient encore fait aucuns travaux,—ils étaient seulement en possession de ceux faits par l'appelant. L'indemnité qu'ils auraient pu obtenir ne pouvait être considérable. Un règlement équitable eût été facile alors, mais on a injustement et contrairement au règlement préféré imposer une perte considérable à l'appelant. J'espère que cette injustice sera réparée par cette cour qui accordera l'appel de ce jugement—et condamnera le département au paiement de la somme de $6,868, et les dépens,—mais je regrette de voir qu'il en doit être autrement par le jugement de la majorité.

TASCHEREAU J.—The appellant's claim against the Crown is utterly unfounded and was rightly dismissed by the two courts below. He complains that in the sale of a certain timber limit made to one King by the Quebec Government in 1880, which said King he now represents, he was deceived by a false description of the locality given by the plan of the Government, and bases his claim for damages upon the ground, that owing to such false description he located his lumbering operations not in the limits he had so bought but erroneously on another adjoining limit, then belonging to the Crown, upon which he carried his operations till 1885; he then alleges that in 1885, the Crown having conceded to a firm of

1892

GRANT v. THE QUEEN.

Taschereau J.

Martin & Lebel the limit upon which he had so worked up to this time, he was forced to give it up to the said Martin & Lebel and to pay them $500 for damages. Assuming it to be true that the appellant was led into error by the Crown's agents, as to what was really the situation in that wilderness of the limit he had bought, I fail to see upon the evidence of record that he has suffered any damages thereby. On the contrary that error seems to have been a very beneficial one to him, as he netted a clear profit during the four years of over $8,800. Now here is a man who, after having illegally and without any right whatever trespassed on the Crown's domain for four years, carried away from it the best timber he could find and made thereby a profit of over $2,000 a year, who claims from the Crown a sum of over $10,000, for damages resulting to him from the error into which he was led by the alleged false representations of the Crown's agents. It is to my mind a most extraordinary claim. The timber limit he actually bought was delivered to him or was there for him. The river St. Pierre crosses it as indicated on the government's plan. If the appellant thought that it was another branch of the said river that crossed it, the error was his; he should have taken some trouble to ascertain, on the ground, what were the facts relating to it. I do not see that the Government led him into error, but, however, as I said, if that were so it was for him an error from which he certainly has no reason to complain. As to the difference in value of the said limit, between what it actually is and what he thought it to be—between as it is actually located and where he thought it to be located—the evidence of record establishes clearly that it is more than covered by the profits he received from his illegal operations on the Crown's domain.

1892

GRANT v. THE QUEEN.

Patterson J.

PATTERSON J.—I have had an opportunity of reading my brother Fournier's full and careful discussion of the facts connected with the purchase of the limits by Messrs. King Bros. and of the regulations of the department touching such transactions, and I adopt his conclusions regarding those matters without attempting an independent examination of the evidence. I agree that the suppliant has sustained the allegation that the purchaser was misled by the plan exhibited by the Crown Lands Department, and purchased believing that the territorial description of the limits included land through which ran a river available for lumbering purposes. The river St. Pierre is a river available for lumbering purposes, but not that branch of it which alone runs through those limits. I think that, as my learned brother has pointed out, the judgment of the courts below proceeds, in this respect, on an assumption of fact that is not borne out by the evidence.

There was, in my opinion, such an error as, under article 992 of the Civil Code, was a cause of nullity of the contract.

The law is the same indicated in an English treatise cited by the appellant in his factum, on the authority of a case in which, an analogous error having occurred, the court refused to decree specific performance of the contract.

But my chief difficulty arises from the fact that the suppliant does not ask to have his contract declared null. He now wishes to adhere to his bargain, but to be compensated because it is not as good a bargain as if he had the more effective facilities which the main branch of the river would have afforded. I do not see my way to assess damages against the Government on that basis.

1892

GRANT v. THE QUEEN.

Patterson J.

If the relief indicated by article 992 had been what was asked for, namely, the declaring the contract null by reason of the error, there would doubtless have been added a claim for compensation for losses sustained by acting on the understanding derived from the erroneous representations before the error was discovered.

It has been shown that money was expended to the amount of over $1,300, besides $500 paid to the lawful owners of the limits where the timber was cut. I suppose the $500 was not more than the timber was worth, and the appellant got the timber. He had to give up the works on which he had spent the $1,300, but then he made a large profit by his lumbering operations during all the years he worked there. Deducting the $1,300 there would still be a large profit.

Therefore it seems that a claim for compensation merely would be without foundation in fact, and the demand comes to be for special and unliquidated damages for breach of a warranty that the river ran through the limits.

Thus, differing though I do from the court below in the grounds of the decision, I have to agree that the action fails, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Hutchinson & Oughtred.*

Solicitor for respondent: *J. B. Bédard.*

GEORGE BALL (DEFENDANT).....APPELLANT; 1891

AND *Nov. 9,10.

FRANCIS McCAFFREY (PLAINTIFF)...RESPONDENT; 1892

AND *April 4.

THE ATTORNEY-GENERAL (INTERVENANT) ..... } *Mis en cause.*

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

Appeal—Acquiescence in judgment—Jurisdiction—38 Vic. ch. 81, P.Q.—Charges for boomage—Agreements—Renunciation to rights—Estoppel by conduct—'Renunciation tacite.'

In an action in which the constitutionality of 36 Vic. ch. 81 (P.Q.) was raised by the defendant the Attorney-General of the province of Quebec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention the defendant appealed to the Court of Queen's Bench (appeal side) but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench on the principal action the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this court.

F. McC. brought an action against G. B. for $4,464 as due him for charges which he was authorized to collect under 36 Vic. ch. 81, P.Q., for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his *auteurs*, and the interpretation put upon them by F. McC. the repairs to the booms were to be and were, in fact, made by him, and

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

1891

BALL
v.
MCCAFFREY.

that in consideration thereof he was to be allowed to pass his logs free; and, also, pleaded compensation of a sum of $9,620 for use by F. McC. of other booms and repairs made by G. B. on F. McC.'s booms, and which by law he was bound to make.

Held, reversing the judgment of the court below, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to the piers, &c., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.

Held, further, that even if F. McC.'s right of action was authorized by the statute the amount claimed was fully compensated for by the amount expended in repairs for him by G. B.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, which affirmed the judgment of the Superior Court, sitting at Montreal, condemning the appellant to pay the respondent $4,186.55.

The action was for the recovery from the appellant of the sum of $4,464.70 for the use of certain booms and piers, lying on the river Nicolet, in the springs of 1887 and 1888.

The plaintiff (respondent) in his declaration, after referring to the act of the Quebec Legislature, 36 Vic. ch. 81, by which he, Antoine Mayrand and Charles McCaffrey were authorized to construct booms and other works on the river Nicolet, and to charge persons using them according to a tariff allowed by the act, alleged in substance that the works so authorized were constructed, that he stood in the rights of Antoine Mayrand and Charles McCaffrey as respects the collection of the charges authorized by the act, and that defendant (appellant) was indebted to him in the sum of $4,464.70 for the use he made of the booms during the years 1887 and 1888.

Plaintiff further set up that by deed of transfer from him to Mayrand, dated the 19th of April, 1873, he transferred to the latter, without warrant, all his

1891

BALL
v.
McCAFFREY.

rights and privileges, under titles, leases and permits to all the piers of the islands, including the booms, &c., constructed on the river above the ferry of the old Catholic Church, called the upper booms, upon condition that Mayrand should, at his own expense, perform the obligations, including the maintenance of the booms to which plaintiff was bound, and in consideration, among other things, that the said Mayrand should have no claims for any work he might so perform against whomsoever *sous titre de frais ou coût du boomage*, but that plaintiff alone should collect the charges authorized from the act from all persons using the booms free, the revenue derived therefrom to be his property, and further, that Mayrand, his heirs and assigns, should be entitled to use all the booms free. That said Charles McCaffrey, *mis en cause* although not a party to this deed, abandoned all his rights under the act to plaintiff.

The defendant filed four pleas which may be summarized as follow:

1. That the river Nicolet is navigable over that portion of it referred to in said act, and that such act was *ultra vires* of the Legislature of Quebec. That Mayrand by transfer dated 31st of July, 1876, transferred to J. G. Ross all that he acquired from plaintiff under the deed of 18th of April, 1873; that Ross, by transfer dated 23rd June, 1886, ratified by deed dated 4th January, 1889, transferred to defendant what he had acquired from Mayrand; that the defendant, during the years 1887 and 1888, was proprietor and in possession of the upper booms, which were the only essential ones, and that he did all the work necessary to be done in connection with them to the knowlege and with the acquiescence of plaintiff incurring expense to the extent of $4,626.24; that plaintiff cannot make defendant pay for using his own property,

1891
BALL
v.
McCAFFREY.

that plaintiff and others use the booms, and plaintiff derived all the benefit resulting from defendant's work, which was greater than any amount he can claim from defendant for the latter's use of said booms, and there ought to be at least compensation;

2. That plaintiff did not perform the work he was bound to do under the act, during the years 1887-88, although put in default, and that consequently he has lost the privileges to which he was entitled.

3. That defendant's, as standing in the rights of Ross, acquired the right to pass his timber free, and that the parties, by their conduct, put this interpretation upon the contracts; that from 1873 to 1875 both the Mayrand and Ross logs were passed free with the knowledge and acquiescence of plaintiff, and repairs were done with Ross's money; that by deed of 31st July, 1875, Mayrand gave Ross the right to pass logs free, and he did so, except during the years 1880 and 1881, when Hall & Co. were his transferees and passed their timber free; that by the transfer from Ross to defendant, the latter acquired all the rights Ross had.

4. That plaintiff's claim is compensated by the two sum of $5,000 and $4,620, the first as the value of the use and revenues of the upper booms to plaintiff for 1887 and 1888; the second as the cost of urgent and necessary repair made by the defendant, which plaintiff should have made.

By his answers plaintiff alleged in effect, that by the terms of plaintiff's transfer to Mayrand and Mayrand's to Ross, Mayrand was bound towards both of them to maintain and repair the upper booms, and that defendant as transferee of Ross could only look to Mayrand to do the work; that if any repairs were made, plaintiff was not put in default and they were not necessary, and in any case in making them, they merely carried out Mayrand's obligation; that Mayrand never

1891

BALL
v.
MCCAFFREY.

transferred to Ross, but expressly reserved his right to pass his logs free; that Ross never acquired such right and could not give it to defendant.

There was also an action in warranty taken by the plaintiff against Michael O'Shaugnessy but the court below dismissed the action in warranty and no appeal was taken.

The Attorney-General, having been notified of the conclusion taken by defendant to have the act of the Quebec Legislature, 38 Vic. c. 81, declared *ultra vires*, intervened, and by his intervention claimed that the act was not *ultra vires* of that legislature.

The following correspondence between the respondent and the appellant's predecessors in title, Messrs. W. G. Ross & Son, was put in evidence:

"NICOLET, 27th March, 1887.

"Messrs. W. G. Ross & Son,

"St. Nicholas.

"*Gentlemen*,

"As the season is fast approaching I consider it my duty to learn of you as soon as possible what you intend to do about the piers and booms on the Nicolet. It will soon be time for some one to take care of booms and piers. Please let me know what you intend to do about placing said booms, &c., or if you have given authority to some one to act for you in said affair.

"Respectfully yours,

"F. MCCAFFREY."

The following letter was sent in reply:

"Yours of 17th to hand, and should have been answered sooner. I am not using the river now and I don't intend to put up my booms this spring for the use of others—but in the meantime I am anxious of relieving the interested parties from their natural anxiety and act fairly. I think we ought to meet and take some

1891

BALL v. McCAFFREY.

steps to secure the putting up of the booms by Mr. Ball or some one else; you must understand that it is necessary for you to help me as your interest is much greater than mine as I have no logs in the river this spring."

Laflamme Q.C. and *Charbonneau* for appellant, contended that by his conduct the respondent was estopped from collecting dues on the lower booms from the party who spread the boom, and that in any case the appellant was entitled to succeed on his plea of compensation having done work which the respondent was bound to do under his charter, and on the question of the constitutionality of 36 Vic. ch. 81, cited *Queddy River Boom Co.* v. *Davidson* (1).

Geoffrion Q. C. and *Honan* for respondent, cited and relied on arts. 443, 447, 483, 1992, 1973, and 1977 C. C.

Brodeur for Attorney-General contended that the question of the constitutionality of the provincial statute was not a proper subject of appeal, as the appellant had not appealed from the judgment of the Superior Court on that point.

The judgment of the court was delivered by,—

TASCHEREAU J.—The first point which comes up for our determination in this case is as to the right of this appellant now to appeal from the judgment upon the intervention of the Attorney-General on the constitutionality of the act in question in the case. In the Superior Court this intervention was maintained. The case was then carried to the Court of Appeal on the final judgments both on the intervention and on the action. Subsequently, however, the appellant abandoned his appeal as to the intervention, and the Court of Appeal, consequently, gave judgment only upon the issue between plaintiff and defendant. Since the in-

(1) 10 Can. S.C.R. 222.

1892

BALL
v.
McCAFFREY.

Taschereau J.

scription of the present appeal from that judgment the appellant has given notice to the Attorney-General that he would claim before this court the right to have the judgment of the Superior Court on the intervention reviewed. Clearly, he has no such right. There was and there could have been no judgment by the Court of Appeal on that issue, and therefore there is no appeal to this court thereon. The Attorney-General's motion to have the appeal as to the intervention dismissed must be allowed with costs.

And neither can, on the principal appeal, the constitutionality of the said act be questioned before this court by the appellant, as he has acquiesced before the court below in the judgment of the Superior Court on that issue.

Now, as to the issues between the parties in the action. The plaintiff, present respondent, by his action instituted before the Superior Court, at Montreal, in November, 1888, claims from the defendant, present appellant, the sum of $4,464.60 for the use of certain booms on the Nicolet river during the years 1887 and 1888, under the authority of an act of the Quebec Legislature, 36 Vic. ch. 81, 1872, which authorized him and others, to erect and maintain booms and other works on said river, and to charge boomage for use thereof during twenty-one years according to a tariff allowed by said act, as an indemnity for the cost of said erecting and maintaining.

The Superior Court at Montreal gave judgment against the appellant for the sum of $4,186.55. The Court of Appeal affirmed that judgment, and he now appeals to this court.

By certain deeds with his co-grantees the respondent became vested, soon after the passing of the said act, with the exclusive right to the said charges for boomage authorized thereby. In 1873 he transferred all his rights of

1892

BALL v. McCAFFREY.

Taschereau J.

ownership in a part of the said booms called the upper booms to one Mayrand, upon condition that he, Mayrand, should, at his own expense, be bound to perform all the obligations to which he, the respondent, was bound for the maintenance and repairs of the said upper booms, in consideration of which obligation so assumed by him it was convenanted that the said Mayrand, his heirs and assigns, should be entitled to use all the booms, both upper and lower, free of boomage for his own lumbering operations, the said respondent, however, reserving to himself exclusively the boomage and the revenues thereof on both upper and lower booms from all other parties lumbering on the said river, the repairs and maintenance of the lower booms to be at his charge. By a deed dated the 31st July, 1875, Mayrand assigned to one Ross all the rights he had acquired from the respondent, the said Mayrand, reserving for himself, however, his heirs and assigns, the free use of the said booms conceded to him by respondent as aforesaid, and remaining charged with the obligation of maintaining and repairing the same imposed upon him by the respondent.

In 1886 Ross assigned his rights as collateral security to the present appellant, who, in 1887 and 1888, boomed a large quantity of logs for which the respondent now claims that he is liable. There appears to have been another deed of assignment executed on the 24th of January, 1889, between Ross and the appellant. I do not refer specially to it, however, as it was passed since he institution of this action; moreover, there is nothing in it that could affect this case. The appellant is undoubtedly, as the respondent contends, in Ross's position, entitled to all his rights and liable to all his obligations.

It appears by the evidence that in 1875 Mayrand became insolvent. In fact he was so since 1873, and

had since been making logs mainly for the account of Ross. In 1875, however, he had to give up business, and, of course, having no logs to pass, abandoned the care of the upper booms altogether. Ross, then, for eleven years, from 1875 to 1886, either by himself, or in 1880 and 1881 by Hall Bros., for him and in his name, assumed the obligation, to the knowledge of the respondent and of O'Shaughnessy, and with their tacit acquiescence, to maintain and repair the said upper booms, in consideration of which the respondent during the said eleven years never charged him boomage. In March, 1887, the respondent wrote to Ross as follows:

NICOLET, 17th March, 1887.

Messrs. W. G. Ross & Son,

St. Nicholas.

Gentlemen,—As the season is fast approaching, I consider it my duty to learn of you as soon as possible what you intend to do about the piers and booms on the Nicolet. It will soon be time for some one to take care of booms and piers. Please let me know what you intend to do about placing said booms, &c., or if you have given authority to some one to act for you in said affair.

Why did the respondent write this letter to Ross and not to O'Shaughnessy? And how can he now argue that he was not put *en demeure* to make these repairs after having himself so thrown the liability thereto on Ross, and put him, Ross, *en demeure* to make them?

That letter, it seems to me, is clear evidence that he, the respondent, looked to Ross, and to Ross alone, for the maintenance and repairs of the booms. For eleven years, by his course of conduct, he leads Ross to believe that the party who makes the repairs has the use of the booms free. Ball is thereby induced, as Ross has been, to make large repairs and disbursements, and now the respondent would make him pay boomage. I would think that, granting that he would have had the right in 1875, by assuming himself the cost of repairing and maintaining, to charge any such boomage to Ross, he

1892

BALL
v.
McCAFFREY.

Taschereau J.

is now estopped by his line of conduct from claiming any from the appellant. He has ratified the understanding that he who made the repairs was entitled to pass his logs free. In 1875 and afterwards Ross was not obliged to make these repairs; and Mayrand or his assignee, not making them, the respondent would have been obliged to make them himself, otherwise his rights would have been gone; and he could not have claimed to be reimbursed from Ross, but only from Mayrand or his assignee. Renunciation to a right is not to be presumed, argues the respondent. As a general proposition of law that is unquestionable. But first, what rights to boomage would the respondent have had at all against Ross if these booms had not been maintained and kept in repair? Then if a party entitled to certain rights acts, in his dealings with any one, inconsistently with such rights, and thereby, knowingly, induces that other one to alter his position, or to submit to obligations or liabilities from which he would otherwise have been free, or to do that from which he might otherwise have abstained, that is evidence of renunciation or abandonment of his rights.

Because Mayrand remained liable for the repairs by his agreement of 1875 with Ross that did not free the respondent from his obligations towards the public and Ross himself. Ross, when Mayrand gave up business, as I have already remarked, assumed Mayrand's obligations to the repairs in consideration of which he exercised Mayrand's rights to free boomage; and such is the interpretation given to these deeds, and acted upon, during thirteen years by the respondent himself and Mayrand and his representative. Respondent says that he has not charged boomage to O'Shaughnessy who represents Mayrand under an assignment of June 15th, 1877. I do not see how that can affect the appellant. That does not concern him. Neither he nor Ross were

1892

BALL
v.
McCAFFREY

Taschereau J.

made aware of that assignment, and this O'Shaughnessy himself not only never expended a cent on these booms, but, when repairs were necessary, himself called on Ross or Ball to make them. The respondent's action should on these grounds be dismissed. If Ross was not liable the appellant is not. But assuming that his claim could at all be entertained, he must fail on the appellant's plea of compensation.

If he collects boomage from the appellant he must reimburse him his expenses for repairing and maintaining these booms. He cannot claim the profits and at the same time free himself from his obligations.

His contention against the appellant's plea as to this, that he was not put *en demeure*, or that the appellant might have recovered against Ross or against Maynard or O'Shaughnessy, cannot prevail against the principle that *nemo alterius detrimento locupletari debet*. The deeds moreover between Mayrand and Ross, and Ross and the appellant, are, towards him, the respondent, *res inter alios acta*. He could not, as against the public, free himself from the obligation imposed on him by the legislature of maintaining and replacing these booms. That was the express condition upon which this privilege was conceded to him, a condition precedent to any claim for boomage against Ross or any one else. If neither the appellant, nor Ross nor Mayrand, had made these repairs, upon the necessity and urgency of which there is ample evidence, where would he, the respondent, have been with his privilege if he had not made these repairs himself? He clearly benefited from the appellant's disbursements, and, it seems to me but just, on the principle of the action *de in rem verso*, that he should be held liable therefor. Then Mayrand, it is true, was obliged towards him, to make these repairs, but, on the other hand, he had the use of

1892

BALL v. McCAFFREY.

Taschereau J.

the booms free; and the appellant must likewise have had the booms free or be reimbursed his expenses. Ross had previously made the necessary disbursements for the annual repairs, &c., &c., but the respondent, as I have already said, never charged him boomage. I do not doubt that, as found by the learned judge of the Superior Court, the appellant never, at the time, contemplated to charge these disbursements to the respondent, but it is, in my opinion, as evident that he then thought himself not liable for boomage at all. In fact, the respondent himself did not then think he could claim such boomage from the appellant as I have shown. And he could not have been very confident of his rights even when he determined to take proceedings against the appellant, as he previously took the precaution to assign his property to his brother.

He would leave the appellant to exercise his recourse against Mayrand or his estate. Now, Mayrand died long ago, an insolvent. Or against O'Shaughnessy? But there is no privity of contract between appellant and O'Shaughnessy.

It may be that part of the appellant's bill of particulars should not be charged to the respondent; however, it is unnecessary for me to enter into an examination of its details as I am of opinion that the action is unfounded.

We are of opinion that this appeal should be allowed with costs on this appeal and in Queen's Bench against respondent, and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *L. Charbonneau.*

Solicitor for respondent: *M. Honan.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF NORTH PERTH.

1892
*Feb. 16.
*April 4.

HUGH CAMPBELL (PETITIONER).....APPELLANT;

AND

JAMES GRIEVE (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF ROSE AND MACMAHON JJ.

Dominion Controverted Elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—49 Vic. ch. 8 secs. 88, 91 ; sec. 84 (a) (e)—Free Railway tickets.

G. a voter and supporter of the respondent holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away from home, asked for the loan of the money from W. a bar tender and a friend. W. not having the money at the time applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S. the agent, lent the money to W. who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bonâ fide* loan by S. to W. On appeal to the Supreme Court of Canada :

Held, reversing the judgment of the court below, that as the decision of the trial judges depended on the inferences drawn from the evidence, their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of sec. 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under sec. 91 of the said act.

Strong J. dissenting was of opinion that there was no evidence that the loan of $2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

---

*PRESENT : Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

1892

NORTH PERTH ELECTION CASE.

Patterson J. dissenting, on the ground that as the decision of the Court below depended on the credibility of the witnesses it ought not to be interfered with.

Per Strong and Patterson JJ. affirming the judgment of the court below, that, upon the evidence which is reviewed in the judgments, the Grand Trunk railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of sec. 88 of the Dominion Elections Act. *Berthier Election Case*, 9 Can. S.C.R. 102, followed.

APPEAL from the judgment of Rose and MacMahon JJ. dismissing the election petition of the appellant with costs.

The appeal was confined to the cases or group of cases dealt with by the learned judges in their judgments of the 19th December, 1891, viz.:

1. The Grand Trunk ticket case.
2. The Gowing cases, Nos. 195 *et al.*
3. The Lavelle cases, Nos. 115 and 120.

The Railway Ticket cases.

Railway tickets were furnished by the railway upon the requisition of W. T. R. Preston an agent of the respondent, the form of which is as follows:

TORONTO, March 4th, 1891.

To P. J. SLATTER, Esq.,
Grand Trunk Railway Ticket Agent,
Toronto.

Please issue to bearer one ticket from Toronto to Fergus and return, and charge to the account of
No. 626.

W. T. R. PRESTON.

These tickets were given to voters which were known to be friendly to the respondent's party, or whose views had been ascertained prior to the delivery of the tickets,

and in many of the cases the voters used the tickets in question in going to and returning from the polls.

The form of the ticket issued was as follows:

GRAND TRUNK RAILWAY.

Return Coupon—Excursion Ticket.

Good for one continuous trip from Stratford to Toronto.

Expires March 9, 1891. Series A.

First conductor must collect or exchange this coupon for

989 "z" check.

J. HICKSON,

Form Ex. I.—6. *General Manager.*

GRAND TRUNK RAILWAY.

Going Coupon—Excursion Ticket.

Good for one continuous trip from Toronto to Stratford.

Series A.

Not good if detached from contract bearing signature.

First conductor must collect or exchange this coupon for

989 "z" check.

J. HICKSON,

Form Ex. I.—6. *General Manager.*

The circumstances under which the company agreed to furnish these tickets are reviewed in the judgment of Mr. Justice Strong, hereinafter given.

2. The Gowing Case, Nos. 195, 295, 296, 303, 375, 408 and 472 in the particulars.

William Gowing was a voter who voted in Listowel, who, at the date of the election lived in Stratford. He received from Duncan Hay one of the Hanna-McPherson Grand Trunk tickets, and used it in going to and returning from the polling place at Listowel. In the different particulars it was charge that he received money for his vote or for expenses in travelling to and from the polling place, and the charge which the appellant argued had been proved is the one which

1892

NORTH PERTH ELECTION CASE.

alleged the corrupt act to have been committed by James Stock an agent of the respondent, by advancing to one Winters, a bar tender at Stratford, to whom Gowing had applied for a loan of two dollars to pay his expenses while away from home, the said two dollars, which were immediately handed over to Gowing. This charge was held by the court below to have been a *bonâ fide* loan by Stock to Winters.

The evidence relied on in support of this charge is also reviewed at length in the judgments hereinafter given.

3. The Lavelle Case, Nos. 115 and 120 in the particulars, were as follows:

John Duggan, being an agent of the respondent, corruptly gave or provided, or caused to be given or provided, to one Anthony Lavelle, on the polling day of the said election, drink and refreshment, for the purpose of corruptly influencing the said Anthony Lavelle to vote for the respondent, and to refrain from voting for the said S. R. Hesson, at the said election.

William Daly, an agent of the respondent, corruptly gave or provided, or caused to be given or provided, to one Anthony Lavelle on the polling day of the said election, drink and refreshment for the purpose of corruptly influencing the said Anthony Lavelle to vote for the respondent and to refrain from voting for the said S. R. Hesson, at the said election.

On the contradictory statements of the witnesses examined to support this charge, the trial judges dismissed the charge with costs.

Osler Q.C. and *Ferguson* Q.C. with him for appellant referred to sec. 9, ch. 110 of R.S.C.; secs. 86 and 88 of ch. 8, R.S.C., the *Bolton Case* (1); the *Lisgar Election Case* (2); the *Haldimand Election Case* (3); the *West*

(1) 2 O'M. & H. 148. (2) 4 Can. S.C.R. 494.
(3) 15 Can. S.C.R. 495.

Simcoe Case (1); the *Norwich Case* (2) and the *Cashel Case* (3).

Garrow Q.C. for respondent cited and relied; the *Montcalm Case* (4); the *Berthier Case* (5); the *Haldimand Case* (6); the *Blackburn Case* (7); the *Wigan Case* (8); the *Staleybridge Case* (9); the *Londonderry Case* (10); and Leigh and LeMarchant on Election Law (11).

Sir W. J. RITCHIE C. J.—The charge in this case was number 375, which is as follows:

James Stock, of the City of Stratford, in the County of Perth, dealer in liquors, being an agent of the respondent, wilfully, illegally and corruptly paid or caused to be paid the travelling and other expenses of Henry Gowing, of the City of Stratford, in the County of Perth, laborer, a voter who voted at said election, in going to and returning from the polling booth at polling district No. 5 to vote at the said election for the respondent.

The facts in reference to this charge can hardly be said to be in dispute, nor is there any conflict of testimony. The only witnesses examined were Gowing the voter, the witness Winters who, it is alleged lent the money to the voter, and Stock who advanced the money to enable the alleged loan to be made to the voter. The determination of the case therefore depends upon whether or not proper inferences have been drawn by the court below, and the case is therefore open to the reconsideration of the appellate court.

Baggallay J. A. in the *Glannibanta Case* (12) says:—

In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of the "Julia" (13) and the "Alice" (14) to the effect,

(1) 1 Elec. Cas. Ont. 149.
(2) 1 O'M. & H. 10.
(3) 1 O'M. & H. 286.
(4) 9 Can. S.C.R. 93.
(5) 9 Can. S.C.R. 102.
(6) 17 Can. S.C.R. 170.
(7) 1 O'M. & H. 188.
(8) 1 O'M. & H. 188.
(9) 20 L. T. N. S. 75.
(10) 21 L. T. N. S.
(11) P. 88.
(12) 1 Pro. Div. 387.
(13) 14 Moo. P. C. 210.
(14) L. R. 2 P. C. 245.

1892

NORTH PERTH ELECTION CASE.

Ritchie C.J.

that if in the Court of Admiralty there was conflicting evidence, and the judge of that court having had the opportunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision, except in cases of extreme and overwhelming pressure; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based.

Now, we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides.

Gowing admits he got a return ticket from one Duncan Hay to go to Listowel to vote, for which he does not pretend he paid or was expected to pay. Now as to the alleged borrowing of two dollars by Gowing I think the fair inference from Gowing's testimony is that he did not consider he was really borrowing the money when he asked for it.

Q. Did you get any money the day before the election? A. No.
Q. The day before that again? A. No.
Q. What? A. No.
Q. No money? A. Do you mean given to me?

Q. Yes, or lent? A. I had no money given to me.

* * *

Q. Any lent to you? A. I borrowed two dollars the day before the election.

Q. From whom? A. I borrowed it from a friend named Tim Winters, at least I got it from him; it was from him I got it.

Q. Where did the money come from; who did Tim get it from? A. I think he got it from Mr. Stock.

Is this the way he would have spoken of the transaction, if it had been a fair *bonâ fide* loan? When the money was applied for there was no secrecy as to what it was wanted for. Gowing is asked:

Q. How did you come to get Tim Winters to go to Stock to get you this money? A. I went to Tim as a friend—he was the only friend I knew in Stratford—and he said he was a little short, but he would get a couple for me, and I had to go up and vote.

Q. You told him you had to go up and vote? A. Yes, or I wanted to go, at least.

Q. And you went to see him to see if you could get the money to go up and vote? A. Yes, to see if he could let me have a couple of dollars.

It appears that at this time there was plenty of money in his house to enable him to go to Listowel; with reference to this he says:

Q. You had some money of your own, had you not? A. Well, no, I hadn't.

Q. Was there any money in your house? A. Yes.

Q. If you wanted to go up to Listowel to vote you had plenty of money in the house to do so, hadn't you? A. Yes.

Q. But you didn't want to pay your expenses? A. I didn't want to borrow the Missus' money to go on that business. I thought if I could get a couple of dollars it would be better.

The inference I draw from this, if he could get the money without any idea of returning it, it would be better, or in other words he did not want to spend his own or his wife's in the operation which he evidently thought should be paid for by some one more interested in the election, and this view is strongly confirmed by his reply to the next question.

1892

NORTH PERTH ELECTION CASE.

Ritchie C.J.

Q. Have you paid back Tim Winters or James Stock? A. No.

Q. You have not been asked for it? A. No.

But he does not give the slightest intimation that he ever expected or intended to pay it back. And again he admits he brought the biggest part home; he says:

Mr. Osler—The money and ticket got you to go? A. I didn't require very much.

Q. Still, you required a little? A. Yes, and I brought the biggest part of it home with me.

And yet not a word about returning the unexpended amount. And all this also shows that neither Stock nor Winters looked on it as a loan to be returned. And read in the light of Gowing's account of his obtaining the money which is as follows:

Q. That money was for your expenses going voting, was it not; it looked like it? A. Well, I don't know; to my knowledge it was not.

Q. You have not paid it back; you had money of your own; you wanted it for election purposes and you told it? A. This money of mine was not mine.

Q. You had earned it? A. No, it was money given to my Missus.

Q. Were you earning money at this time? A. No.

Q. But you told Tom Winters and Stock what you wanted to do was to go and vote? A. I didn't tell Stock anything about it.

Q. Did you see Stock in the matter? A. No, not until I got the money.

Q. Stock gave you the money? A. Yes. I am not sure whether Stock gave it to me or Winters handed it to me.

Q. You and Winters went to Stock's together? A. No, he came to us.

Q. Stock came to you where? A. At the bar in the Windsor Hotel.

Q. And you were talking about your vote? A. I was talking to my friend Winters.

* * *

Q. And talking about your vote? A. Yes.

Q. And you were saying how you had no money to go up and vote? A. No, I wasn't saying just that.

Q. What were you saying? A. Just in the act of asking my friend for a couple of dollars. He says, "I am a little short." And he says,

"Maybe I can borrow a couple of dollars for you," and just at that this gentleman came in.

Q. And then you told him what your trouble was about going up to vote? A. Yes.

Q. And Stock put his hand in his pocket and handed you the money? A. I am not sure whether he handed it to me or Winters.

Q. You got the money? A. I got the money.

Q. And it was the day before the election? A. Yes.

Q. And on that money you went up and spent that on your way up and down? A. No, I went up on my ticket.

Q. Had you got your ticket at this time? A. Yes.

Q. And you could not go on a dry ticket? A. I didn't like to.

Q. Were you going if you hadn't got the money? A. Yes.

Q. What did you tell Tim Winters about that, that you could not go without money? A. No, I did not. I merely said I would like to have a shilling in my pocket to go up with.

Q. This was after Stock came in? A. No.

Q. What did you say after Stock came in? A. I cannot say.

Q. Stock was a stranger to you? A. Yes.

Q. You didn't know him? A. No.

Remembering Stock was the agent of the candidate, I have been unable to raise a doubt in my mind that Stock and Winters both knew that Gowing required something in addition to the ticket to enable or induce him to go to vote, and that the object of giving these two dollars to Gowing was to secure his attendance to vote at Listowel.

Now let us see what Stock says:—

JAMES STOCK, called by respondent.

Q. Were you present on the occasion that he refers to when some money was got from some person? A. Tim Waters came to me at the Windsor Hotel, when I came in from the store, and he asked me if I would lend him two dollars to lend a man of the name I think of Gowing, to go to Listowel to vote, and I said certainly; I lent him two dollars; I lent Tim Winters two dollars.

Page 105.

Q. You pulled out the two dollars and handed it to Winters? A. I gave it to Winters.

Q. For the purpose of giving it to this man? A. No, not necessarily.

1892

NORTH PERTH ELECTION CASE.

Ritchie C.J.

Q. That is what he asked it for? A. He said, lend me two dollars, I wish to lend this man two dollars to go to Listowel to vote.

Q. Lend me two dollars that I may lend it to this man to go to Listowel to vote. Have you got the money back since? A. Yes.

There can be no clearer admission that here an agent of the candidate knew that this money was handed over to Gowing to enable or to induce him to go to Listowel to vote. And we have this equivocating testimony as to when he got the money back. He is asked:—

Q. Since you got your subpœna? Before I got my subpœna.

Q. When? A. I don't know when it was I got it back.

Q. When? A. I got it back, it is immaterial when. Two dollars is a very small item.

Q. It is nothing at election times. When did you get it back? A. I got it back some time last week or this week. Tim told me it was about time to pay it back.

Page 106.

Q. Was it not this week? A. I would not say it was this week or last week.

Q. Will you swear it was not this week? A. I would swear it was not this week or last; at least I would swear it was either this week or last week.

Q. What about yesterday? Will you swear you didn't get it yesterday? A. No.

Q. Will you swear you didn't get it this morning? A. I don't think I got it this morning.

Q. Will you swear you didn't? A. I would not swear I didn't get it this morning.

Q. I won't try you about to-morrow. Are you sure you have got it? A. Well, I got two dollars back from Tim Winters. It is immaterial when I got it. I could have got it at any time.

Q. You never asked him for it, did you? A. For the two dollars?

Q. Yes? A. It was immaterial with regard to asking him.

Q. You never asked him for it? A. I never asked him for the two dollars.

Q. Did you ask him for it? A. Yes, I did; I thought it was time to pay it back.

Q. When? A. Last week.

Q. You got it this morning or yesterday or last week, or something? A. Or this week.

I cannot read this without drawing the inference that this money would never have been returned but for the proceedings taken in this case, and that at the time it was advanced it never was intended to be repaid.

It would appear to have been a great object to secure this vote, for not only was the ticket given and two dollars advanced, but this Mr. Winters loaned Gowing his own coat and had to borrow another for himself to enable him to go to vote.

Mr. Winters is asked, "Have you been repaid the money?" He replies, "Not yet," and does not express the idea or expectation that it ever would be repaid, or that there was any intention that it should be repaid. This is the account he gives of the transaction :—

TIMOTHY WINTERS (formerly sworn). By *Mr. Garrow :*

Q. You are the bar tender at the Windsor Hotel in this place? A. Yes.

Q. And you were in the month of March last? A. Yes.

Q. Did you ever lend any money to a man called Gowing? A. I did.

Q. The witness who was in the box? A. Yes.

Q. How much was it? A. Two dollars.

Q. Just state the circumstances? A. I think it was the evening before the election he came in, and he said that he had been sick for sometime, and he asked me if I would lend him two dollars. I told him I hadn't it on me just at the time, but said I will borrow it for you, and borrowed it from Mr. Stock, who appears to have arrived very opportunely, just in the nick of time, and gave it to him. I also lent him my overcoat to go to Listowel.

Q. Was anything said between you and Stock, as to what the money was wanted for? A. I don't know whether there was or not. I would not be positive whether there was anything said or not.

Q. You borrowed the money? A. Yes. It would not have made any difference anyway. I would have lent him the money, for I have lent him money before, in Listowel.

Q. You both came together from Listowel? A. Yes.

Q. Have you been repaid the money? A. Not yet.

Q. Have you paid the money back? A. I have.

Q. To Mr. Stock? A. I did.

1892

NORTH PERTH ELECTION CASE.

Ritchie C.J.

Q. When did you pay it back? A. Not very long ago, either the latter part of last week or the beginning of this.

Cross-examination:

Q. Since you were subpœnaed in this case, you paid the money back? A. No, I was subpœnaed since I paid the money back.

Q. Since the last sitting of this court? A. Yes.

Q. And the voter has not paid you back? A. No.

Q. You knew he was going to Listowel to vote? A. I did.

Q. And he could not go without an overcoat, and without money? A. Well, I suppose he could have gone on without money, for he told me he had his ticket, but I knew that he had always voted Liberal, and his father had always voted Liberal.

Q. And you thought it would be a nice thing to hand him two dollars to pay his way up? A. I didn't give it to him for that at all.

Q. It was the same occasion that he got the overcoat? A. Yes.

Q. And the overcoat was got to go to vote? A. I guess it was.

As to the witness Winters loaning Gowing money, it seemed to resolve itself pretty much to this:

Q. When he was down at heel, you would give him a quarter? A. Yes.

Q. How long ago? A. At different times; I suppose 3 or 4 years ago, 5 years ago.

Q. You didn't have any money dealings with him for months and months? A. No.

Q. Might we say years? A. No, not years.

Q. Inside 2 years? A. Probably 2 years.

After giving the case every consideration of which I am capable, and examining the evidence with the greatest care, I am unable to escape the conclusion that this alleged loan was nothing more nor less than a mere colourable transaction; that the only fair inferences to draw from the evidence are that the admitted agent of the candidate knew the object of the supposed loan; that the money was not returned by Winters to Stock until after the commencement of these proceedings; that it was only then done in consequence of these proceedings and to disguise the transaction; that Stock advanced the money for the purpose for which it was applied for, namely, to secure Gowing's attendance at the polls; that there was no

loan to the voter; that the money never was returned by the voter, and it never was contemplated by Stock or Winters, that it should ever be returned or repaid. Under all these circumstances I think the inevitable inference is that Stock advanced the money knowing full well the purpose for which it was applied, namely, to secure the vote, and that the whole transaction was merely colourable and plainly intended to disguise the corrupt practice of which, in my opinion, the agent was guilty under section 88 of the Dominion Elections Act (37 Vic. ch. 9) which declares that, "The payment by any candidate or by any person on his behalf of the travelling or other expenses of any voter in going to or returning from any election, is an unlawful act"; and section 91 which declares that, "Any offence against any one of the seven sections of this Act next preceding are corrupt practices within the meaning of this Act."

On the whole, therefore, I do not think it can be reasonably doubted that these two dollars were given to Gowing by an agent of the candidate for the purpose of paying his travelling or other expenses in going and returning from the election at Listowel, and that such payment was, therefore, an unlawful act and consequently a corrupt practice, and having been committed by the acknowledged agent of the canditate, the election of such candidate, under section 94, is void, and should be so reported to the honourable the Speaker of the House of Commons.

STRONG J.—The first and most important case presented by this appeal is that of a charge of paying the travelling expenses of certain electors, by means of railway tickets, by Mr. Preston, the secretary of the Ontario Reform Association, who it is contended was an agent of the respondent. A similar charge was

1892

NORTH PERTH ELECTION CASE.

Strong J.

also made in respect of tickets furnished to voters by Mr. Macpherson, an admitted agent of the respondent at Stratford. It was decided by the learned judges who tried the petition that the tickets issued by the Grand Trunk Railway Company to Mr. Preston and Mr. Macpherson, and by them through their sub-agents given to electors were gratuitously issued by the Grand Trunk Railway Company, and that consequently the charges of paying travelling expenses by means of these tickets were not established.

In the view I take of this case it is not necessary to decide the question of Mr. Preston's agency, and I express no decided opinion as to it. I propose, however, to deal with the case upon the assumption that Mr. Preston was an agent, for whose acts the respondent is responsible.

The facts established by the evidence relating to the tickets issued to Mr. Preston may be summarily stated as follows:—

A few days before the polling day at the last general election in February and March, 1891, Mr. Ryan, a member of the Reform Club at Toronto, who is not proved to have been an agent of the respondent, had an interview with Mr. Arthur White, an officer of the Grand Trunk Railway Company stationed at Toronto, who describes his office as being that of "District General Freight Agent." At this interview Mr. Ryan stated to Mr. White (to use the words of the latter) that the Canada Pacific Railway Company were issuing free tickets to voters that had to be moved," to which Mr. White replied that he was quite confident that if the Canada Pacific Railway Company did so the Grand Trunk Company would do so likewise. Mr. White further says, in his examination as a witness at the trial, that although he could not make a bargain or agreement with Mr. Ryan, he

thinks he led Mr. Ryan to think that would be the policy of the Grand Trunk Railway Company, although he had no authority whatever for saying so. Then, in answer to the question, "Did the conversation go further than this, did it take any practical form?" The witness answers, "I think the practical form it took I suggested to him that he should give an order or get the party to give an order on our agent, and it would be honoured the same as any other large body of excursionists would have been honoured." Then, we find in Mr. White's deposition, further material evidence which I extract:

Q. What was to be done with the tickets afterwards? A. The question of settlement for tickets would be an after-consideration, and I thought the Grand Trunk would not charge for them.

Q. What did you tell him as to the settlement as to them? A. I said "the question of settlement will be an after-consideration, and I imagine the Grand Trunk will not charge you anything for them."

Q. And you told him to send in requisitions to ticket agents? A. Yes.

Q. That the question of settlement would be an after-consideration? A. Yes, but leading him at the same time to think that the Grand Trunk would not charge him.

Q. Did you tell him what authority you had for thinking so? A. I was traffic manager on the Midland division, and where I was then I had power to give free tickets, and I gave free tickets to a great many people.

Then on cross-examination the same witness states:

I did not say anything about payment. I thought the Grand Trunk would surely give them free if the Canada Pacific was doing the same thing.

Q. Then they were to have free transportation? A. That was the effect of it. I think that was the effect on Mr. Ryan's mind.

Q. That was the effect on Mr. Ryan's mind? A. I fancy Mr. Ryan had that impression.

Q. And Mr. Ryan tells us in the box he left you from these interviews with the understanding they were to have free transportation for voters? A. I think Mr. Ryan may very well have gone away with that impression. I am saying that all along.

Q. So far as that conversation at all events was concerned, there was not a word about payment in it? A. I said the question of settle-

1892

NORTH PERTH ELECTION CASE.

Strong J.

ment would be an after-consideration, and certainly I led Mr. Ryan to think there would be no after-settlement.

Then Mr. Ryan, in his evidence says Mr. White told him to forward these requisitions to Mr. Slatter, the Grand Trunk Railway's ticket agent at Toronto, which was done, Mr. Ryan writing out several of these requisitions himself. This witness also says referring to his interview with White:—

From what he said I had the impression we would get the privilege and requisitions were then made on Mr. Slatter for tickets and railway passes.

And on being asked—

Was there any bargain as to the price or payment, or anything of that kind? Mr. Ryan answers: "No, no bargain at all, no price, it was without money and without price."

And then the examination thus proceeds:

Q. Was anything said about that? A. Yes, I said the Reform committee was in no position to pay for anything, that they had no exchequer to draw upon. The Grand Trunk should extend to us the same privilege that the Canada Pacific were extending to the Conservative electors.

Q. What did you mean by that? A. I meant to say that we had no money to pay.

Q. The same privilege? A. Of forwarding electors to support the Conservative candidates all over the Dominion of Canada without price, free.

Q. That was the same privilege you wanted from the Grand Trunk? A. Yes.

The witness also swears that he has never been asked to pay for the tickets and never had any intention of doing so. And he adds that the understanding was "they should be conveyed for nothing, no charge whatever." Immediately after the interview with Mr. White, Mr. Ryan returned to the Reform Club, saw Mr. Preston and told him that he had made an arrangement to have the voters conveyed free of charge and that free tickets were to be procured from Mr. Slatter. Preston's own words are

Mr. Ryan, as soon as he came into the room, said we could get our free tickets. Mr. Ryan when he came back told me that Mr. White told him to tell me if I would send round to Mr. Slatter we could get tickets or transportation as we wanted.

Preston further says that he believed all the time he was using free tickets, and that he would not have used the order for a single one if he had thought they were not free. Moreover, independently of what was said to Mr. Ryan by Mr. White there was a direct communication by him to Mr. Preston which warranted the latter in believing that the tickets were to be issued gratuitously. Mr. Preston says:

When Mr. White came into my office, I think perhaps an hour or two after Ryan returned from his visit, and I said to him then, I think I commenced the conversation by saying I am very glad the Grand Trunk is giving us transportation, allowing us to get our voters out, or we would not be able. His reply was—Well, the Grand Trunk could not do less.

Acting upon what had been said by Mr. White to himself and to Mr. Ryan, Mr. Preston then saw Mr. Slatter, the ticket agent, whose account of what took place is as follows:

Q. Did you have any communication with Mr. Preston yourself? A. Yes, Mr. Preston saw me and told me he was going to draw orders on me for tickets, and I told him I would accept them.

Q. Then you did see Mr. Preston? A. Yes.

Q. Did you arrange about the price or anything? A. No.

Q. Nothing said about excursion prices? A. No.

Q. Had you any instructions from headquarters about this time about tickets? A. At the commencement I had not when Mr. Preston first drew on me, but after he had sent several orders I wired my general passenger agent and he instructed me to continue honouring the orders.

Acting upon the arrangement thus made with Mr. White and Mr. Slatter, Preston made requisitions on Slatter for, and there were issued to him, tickets amounting in the aggregate at a mileage rate of charge to $3,384.13.

1892

NORTH PERTH ELECTION CASE.

Strong J.

The requisition upon which these tickets were issued was addressed to Mr. Slatter and was in the following form:

Please issue to bearer ticket from to and return and charge to the account of

And were either signed by Preston or stamped with his name by his authority.

Apart altogether from the tickets issued to Mr. Preston under the arrangement with White and Slatter, Mr. Preston had other transactions with the Grand Trunk Railway Co. during the course of the election. These had nothing whatever to do with the election for North Perth. For certain special trains hired during the election, and for some fares from Chicago to Cayuga and from Chicago to Kingston an account was furnished to Mr. Preston by the Grand Trunk Railway Co. on the 21st March, 1891, the amount being $463.90. It was accompanied by a letter from Mr. J. F. Walker, traffic auditor, in which it was stated that a supplementary account might follow.

On the 25th March, 1891, a letter asking for payment of this account was sent to Mr. Preston by Mr. Wright, the treasurer of the Grand Trunk Company. On the 4th of May, 1891, a further account headed "Supplementary Account" amounting to $18.80 was sent to Mr. Preston by Mr. Walker for certain specified tickets furnished to Mr. Preston, none of which had any connection with this election. Both these accounts were paid by cheque in one sum. No account in respect of the tickets issued at Toronto by Slatter under the arrangement before mentioned was furnished until the 28th of August, 1891, when an account for $3,384.13 was sent by Mr. Walker to Mr. Preston. This account has never been paid and no notice of the demand for payment of it was taken by Mr. Preston. It is to be observed that Mr. White did not communicate to Mr.

Ryan or to Mr. Preston his want of authority to enter into an arrangement to have free tickets issued. And although nothing was said as to it by Mr. White, the question not having been asked by counsel on either side, I think from the circumstances that it is a reasonable inference that Mr. White saw Slatter the ticket agent and gave him instructions, or at least informed him of what had passed between himself and Mr. Ryan before any tickets were issued. Further, Mr. Ryan did not inform Mr. Preston that Mr. White had made any allusion to any subsequent settlement or that any question as to it would be considered; on the contrary he told him that the tickets would be absolutely free.

Upon this state of facts the learned judges who tried the petition came to the conclusion that the tickets were issued as free tickets, and that at all events Mr. Preston so believed and had reasonable grounds for that belief. In this conclusion I entirely agree. It is, in my opinion, the only just inference from the facts in evidence. It cannot be presumed that Mr. Ryan knew that Mr. White had no authority to make the arrangement he did, and when Slatter acted upon the arrangement, Mr. Preston, even if he had had the whole conversation communicated to him would have been justified in assuming that Mr. White either had power to issue passes or tickets free of charge, or that he had before communicating with Slatter, obtained authority to do so. Again, it is to be remembered that Mr. Ryan distinctly told White that there were no funds to pay for these tickets, and it is out of the question to suppose that White could have thought that either Mr. Preston or Mr. Ryan were undertaking a personal responsibility to pay for them. The conclusion is inevitable that Ryan must have supposed that the tickets were to be free, as White very candidly

1892

NORTH PERTH ELECTION CASE.

Strong J.

says he led him to think they would be. Under these circumstances there could have been no contract either with Ryan or Preston, for the tickets being referrable to the agreement with White, no court could hold Preston liable merely on the strength of the words "charge to the account of" contained in the printed form of requisition. All the circumstances are to be considered together, and when this is done, these words are immaterial. Moreover, as I shall point out, there are other reasons why these tickets could not legally be treated as issued otherwise than gratuitously, which would have alone, irrespective altogether of any specific agreement, debarred the Grand Trunk Railway Company from recovering the price of them from Preston.

As regards the tickets issued at Stratford to Mr. Macpherson, the chief agent of the respondent there, they were undoubtedly issued free of charge. With these Mr. Preston had nothing to do. Mr. Hanna, an officer attached to the department of Mr. Wainwright, the assistant general manager of the Grand Trunk Railway Company, who was sent up from Montreal, supplied with tickets in blank, saw Mr. Macpherson, asked him what tickets he wanted and gave him such as he required, no requisition being signed for them. The facts regarding the issue of these last tickets are not only conclusive to show that these particular tickets were intended to be free, but they also reflect light upon the intention of the Grand Trunk Company's authorities with regard to the tickets issued at Toronto. They show that the Grand Trunk Company were issuing free tickets and no reason is suggested why any difference should be made between the tickets issued at Stratford and those issued at Toronto to Preston. On the whole the conclusion is, in my opinion, irresistible that all the tickets were issued with the inten-

tion that they should be free of charge, and the learned judges were perfectly right in so holding.

Then to consider the application of the law to the facts so found. The judgment appealed against decides that the tickets having been virtually railway passes, no corrupt act avoiding the election was committed in furnishing them to voters in the way in which the evidence shows them to have been dealt with. In this I also agree.

In the *Berthier Election Appeal* (1) I had occasion to consider the state of the law applying to the case in which railway passes or free tickets are furnished to voters by a candidate, or his agent. I adhere in all respects to what I there said.

By the 88th section of the Dominion Elections Act, (37 Vic. chap. 9, sec. 96) the payment of travelling expenses of a voter in going to or returning from an election is declared to be an unlawful act without regard to any condition being either expressed or implied as to whom the voter is to cast his vote for. By the 91st section of the same act (37 Vic. chap. 9, sec. 98) any wilful offence against the provision of section 88 is declared to be a corrupt act which under section 93 of the same act (37 Vic. chap. 9, sec. 101), if committed by a candidate or his agent is to avoid the election of such candidate.

In the *Bolton Case* (2) it was held that furnishing free railway passes to voters did not amount to paying travelling expenses, and this having been approved and followed in the *Berthier Case* (1), has, I consider become the law of this court, and is not now open for reconsideration. Assuming therefore, the learned judges who tried this petition were right in their finding on the facts that the tickets in question furnished to Preston were issued without charge, a finding

(1) 9 Can. S.C.R. p. 102. (2) 2 O'M. & H. 147.

1892

NORTH PERTH ELECTION CASE.

Strong J.

which I entirely adopt, the law is plain, and no offence has been committed against the provision contained in section 88 of the statute.

Further, even if this view of the facts should be erroneous, and even granting that the Grand Trunk Railway Company should all along have intended to exact payment for the tickets, yet Mr. Preston having procured the tickets to be issued to him, believing, and having reasonable grounds for so believing, that no payment was to be exacted for them, it cannot be said that he wilfully committed an offence prohibited by the 88th section, and therefore the condition of a wilful breach of the prohibition of section 88, which is under section 91 indispensable to the act being corrupt, is not established, and the election could not therefore be avoided for it.

Further, whatever may be the proper conclusions from the evidence, and assuming that those I have already stated are erroneous, yet by the express provision of the law, the Grand Trunk Railway Company could not recover the price of these tickets, for by the 131st section of the statute (The Dominion Elections Act) it is enacted that

> Every executory contract or promise, or undertaking in any way referring to, or arising out of, or depending upon any election under this act, even for the payment of lawful expenses or the doing of some lawful act shall be void in law.

If there had been an agreement by Mr. Preston with the Grand Trunk Railway Company, explicit in all its terms to pay for the tickets in question, they having notice they were to be used as they were in fact used, I am of opinion that this section would have applied, and would have constituted a defence to the action. The consequence of this is that even if the tickets were not in fact issued, as I think they were, upon an understanding that they were to be free, there being

by the operation of this plain, clear and express provision of the law no liability to pay for them, the result must be the same as if they were issued as free tickets.

In the judgment I delivered in the *Berthier Case* (1), it is pointed out that even though railway tickets or passes are not paid for but are issued gratuitously, yet such a use may be made of them as to constitute an offence within section 84, subsec. (*a*) of the statute. And such a use is made of a ticket of this kind if it is given to a voter upon the understanding, express or implied, that he is to vote for a particular candidate. In that case the offence of bribery is committed. The analogy between the use of free railway passes and a candidate or agent taking a voter to the poll in his own carriage seems to be perfect. As regards this last case, the law is thus summarized in a Treatise on Election Law of approved authority, Leigh and Le Marchand (2). The authors say:

> There is still no objection to a candidate or his friends taking voters to the poll in their own carriages provided no money is paid on account of such conveyance. On the other hand an offer to convey a voter to the poll even in a private carriage on condition of his voting for a particular candidate (*e. g.* I will give you a ride to the poll if you will vote for A.B.) is clearly an offer of valuable consideration and as such amounts to bribery.

In the present case, however, there is not even a suggestion that any of the tickets which passed through Mr. Preston's hands were used in this way. They appear all to have been given to persons who were well known supporters of the respondent and prepared to vote for him and for him only if they voted at all.

THE LAVELLE CASE.

The second case which is made the subject of appeal is that of Anthony Lavelle, a voter who is charged to

(1) 9 Can. S.C.R. 102. (2) Ed. 4 p. 21.

1892

NORTH PERTH ELECTION CASE.

Strong J.

have been treated by John Duggan and William Daly, alleged agents of the respondent. The only evidence in support of the charge is that of Lavelle himself, whose testimony was, as the trial judges have found, and as appears from his deposition itself, unsatisfactory and contradictory, so much so that the learned judges entirely discredited him. Such being their decision it must be regarded as final and conclusive and the case may be dismissed without further comment.

THE GOWING CASE.

The charge in the particulars applicable to this case is that of the payment of the travelling expenses of a voter named William Gowing, by James Stock an agent of the respondent. The evidence, however, if it could be said to establish anything against the respondent, would not be a case of payment of travelling expenses but a case of bribery by lending. Strictly speaking the evidence might have been rejected, but as the learned judges admitted the evidence and the objection as to the inaccuracy of the particulars does not seem to have been taken, it will be better to consider it on the merits, more especially as there can be no pretense of any surprise, the three persons who alone could speak as to the facts having all been very fully examined.

The agency of Stock is, I think, established by the evidence of Mr. Climie, the secretary of the North Perth Reform Association, who proves it in this way. Stock was a delegate to, and in that capacity attended, the convention by which Mr. Grieve, the respondent, was nominated as a candidate. The witness says that Mr. Grieve on accepting the nomination addressed the meeting of delegates, and urged them to work for him, saying he wanted all their assistance; and this mandate was accepted by Mr. Stock as is shown by his

having, as he himself proves, canvassed for the respondent.

The voter, William Gowing, was a bricklayer living in Stratford and having a vote at Listowel. He was a pronounced supporter of the respondent, and a free ticket had been furnished to him enabling him to go to Listowel to vote. On the day before the polling he went to Timothy Winters, who was the bar-keeper at the Windsor Hotel in Stratford, who himself came from Listowel and was an old friend and associate of Gowing's, and asked him to lend him $2, as he had no money and did not like to ask his wife for any, and yet did not want to go to Listowel without anything in his pocket. He seems to have appealed to Winters, who was also a supporter of the respondent but not an agent, not in any way as a political friend of the respondent but as an old personal friend of his own. He also asked Winters to lend him an overcoat. Winters lent him the coat but said he had not the money; just at that time, Mr. Stock, who boarded at the hotel, passed the hotel office in which Gowing and Winters were talking, and Winters appealed to him to lend him (Winters) $2, that he might lend it to Gowing to go and vote. Stock at once complied and handed over the $2 to Winters who immediately gave it to Gowing. The learned judges seem to have considered that if it was established that the loan was in truth a loan to Winters and not by Stock to Gowing, but by Winters to the latter, that the case failed. And they do find with some hesitation that the loan was not to Gowing but to Winters. I cannot, however, see that this is conclusive.

By section 84 subsection (*a*) every person who lends any money to a voter to induce him to vote is guilty of bribery. And by subsection (*e*) of the same section any person who advances money to any other person

1892

NORTH PERTH ELECTION CASE.

Strong J.

with the intent that such money shall be expended in bribery or corrupt practices is guilty of bribery.

Therefore if Stock, an agent of the respondent, advanced $2 to Winters who was not an agent, with the intent that Winters should expend it in bribing the voter Gowing, Stock himself upon the plain words of the act would be guilty of a corrupt practice which, Stock being an agent, would avoid the election.

Therefore the real question is whether Winters in lending the $2 to Gowing, intended it as a bribe or was merely doing a kindly act to accommodate an old friend. Winters says he was in the habit of lending Gowing money, that they were old friends and that he would have lent him the money any way irrespective altogether of the election. His own words are:—

I would have given it to Mr. Gowing if there had been no election at all if he came and asked for it.

And again:—

Any way I would have lent him the money for I have lent him money before in Listowel.

It is true that the money was not paid back until just before the trial and probably not until the attention of Winters was called to it by the knowledge that it was made the subject of a charge to be investigated. But on the whole, considering the old friendly relationship between Winters and Gowing, the smallness of the sum, the fact that Gowing was already a declared supporter of the respondent's, and that as he had a free ticket to take him to Listowel and back the strong presumption is that he would have gone to vote whether he got the $2 or not, I think it would not be safe to say that the evidence establishes that the loan was made by Winters to Gowing in order to induce him to vote for the respondent or that the loan by Stock to Winters was made with any corrupt object in view. This last mentioned loan, that by Stock to

Winters, may reasonably be attributed to a willingness on the part of Stock to accommodate Winters whom he seems to have known well, and whom he was probably accustomed to see several times a day at the Windsor Hotel at which he boarded, and with whom he was evidently on familiar terms of acquaintanceship. If these are correct inferences then, the learned judges having found that there were in fact two distinct loans, there is nothing in this case warranting any interference with the judgment of the Election Court. And in coming to this conclusion I place much reliance on the *Youghal Case* (1) as a strong authority in point. In that case an agent of a candidate canvassed C. an elector, who said that he could not vote for the candidate as he was under an obligation to D. (an agent or friend of the other candidate) who had a judgment against him for rent. The agent upon this said he would pay it off and went to D.'s office and tendered it on behalf of C. the voter, but D. the creditor not being at home his clerk refused to take it. It appeared, however, that the agent of the candidate who offered to pay the debt was also agent to a brewer who supplied porter to the publicans of the town and amongst them to C. the voter canvassed, and that it was customary with him to assist the publicans who dealt with him when they were pressed, by advances of money to pay off claims. Both C. the voter and the agent swore that the loan contemplated had nothing to do with the vote. It was held under these circumstances that there was not sufficient evidence of a corrupt intention. It should be remarked of this case that it is only referred to in the head-note and not in the body of the report, but it appears to have been reported by Mr. Cunningham who was himself one of the counsel in the case, and it is referred to by the reporter in his

(1) 21 L. T. N. S. 306.

1892

NORTH PERTH ELECTION CASE.

Strong J.

own work on corrupt practices as an authority (1). I think therefore it is a safe authority to follow, more especially as it seems to be a decision supported by a reasonable view of the law.

Then applying the principle of the *Youghal Case* (2) to the facts in evidence in the present, I think there is much more reason here for attributing the trifling loan to Gowing to the relationship of old friendship existing between the parties, and not to any corrupt intent, than there could possibly have been in the *Youghal Case*, more especially as we have the fact, which did not exist in the *Youghal Case* (2), that the voter here was not canvassed, but was already a declared supporter of the respondent, who had the means of going to vote for him and would, there is every reason to presume, have so done even if he failed in getting the sum he wanted to borrow. I must therefore hold there is no evidence of corrupt intent, and that this charge also fails.

The appeal should, in my opinion, be dismissed with costs, and a certificate sent to the Speaker that Mr. Grieve was duly elected.

TASCHEREAU J.—On the Gowing charge 375, there is, it seems to me, only one fair inference to be drawn from the evidence as a whole, and that is that the payment of the $2 by Stock was to pay Gowing's travelling expenses and to aid in procuring the vote. All leads to this. Winters had never made to this man a loan of such an amount before, he had had no dealings with him for two years, he was not a man able or likely to return a loan. The money was never returned by Gowing, never was asked for. After the beginning of the trial, some seven months after, Winters paid Stock back, but evidently only to pro-

(1) See Cunningham, Corrupt Practices, 2nd ed. p. 123.

(2) 21 L.T. N.S. 306.

tect the respondent's case. If there had been no petition against him Winters would not have returned this $2 to Stock. Do we hear of any so-called loans except in election times? Would Gowing have thought of his old friend Winters if it had not been election day? I agree with the Chief Justice upon his reasoning that the appeal should be allowed. I need not restate the facts; it has been done twice just now, and probably will be repeated twice again. That ought to be sufficient.

GWYNNE J.—In all cases of mere matters of fact, the finding upon which depends upon the credibility of witnesses or upon the due balancing of contradictory evidence, the judgment of the learned judge who hears and sees the witnesses should never, in my opinion, be reversed by an appellate court, and the more especially is this the case with the judgments rendered upon these election petitions, the trial of which takes place before two judges whose concurrent opinion is necessary to the avoiding of the election; but where the question in issue depends upon the proper inference to be drawn from undisputed facts the appellate court equally as the trial court is bound to exercise its independent judgment.

Now, the question in the present case is not whether one or another state of facts existed, but what is the proper inference to draw as to the intention of the parties to the transaction in question as to the facts of which there is no dispute – namely, was the handing of the two dollars by Stock to Winters intended as a *bonâ fide* loan from Stock to Winters, and was the handing of that same two dollars directly by Winters to Gowing, if that was the form of the transaction which is not quite clear, intended to be a *bonâ fide* loan from Winters to Gowing with which Stock had

1892

NORTH PERTH ELECTION CASE.

Gwynne J.

no concern, or on the contrary was the advance by Stock an advance made for the purpose and with the intention of Stock, who was an agent of the respondent, thus contributing to the paying of Gowing's travelling and other expenses from Stratford to the poll to vote for the respondent? And I must say that I concur with the Chief Justice in thinking that the latter was the intention of the parties is the only reasonable conclusion which the acts of the parties in evidence warrant and the only one which, having due regard to the object and intent and letter of the statute, can with propriety be drawn from those acts and the evidence. I therefore concur in the opinion that the appeal must be allowed and the election avoided upon this case.

As the majority of the court concur in thinking the election must be voided upon this case I abstain from the expression of any opinion whether the Grand Trunk Railway tickets were issued gratuitously or not, and the more especially so because it was said in evidence in the case that the Grand Trunk Railway Co. intend suing for the amount of the tickets in which case will necessarily arise the question whether they were issued gratuitously or not.

PATTERSON J.—The most important questions on this appeal arise in the cases called the Grand Trunk ticket cases.

Upon these cases we have distinct findings of fact.

Mr. Preston, who is secretary of the Reform Association, an organization which appears to exist for the purpose of promoting the interests of the political party to which the respondent belongs, is held to be an agent of the respondent. He obtained from the Grand Trunk Railway Company a large number of passenger tickets upon requisitions addressed by him to the com-

pany, and several of these tickets were given to voters to enable them to travel free of cost to themselves to and from their polling places.

The principal question of fact concerning these tickets is whether they were to be paid for by Preston to the company, or whether they were not given gratuitously by the company, the passengers being really carried free.

Much of the discussion before us, as well as at the trial, turned upon the form of the requisitions signed by Mr. Preston, and certain correspondence with and accounts kept or rendered by the company's auditor, and upon the effect of these and some other things as evidence of a personal liability of Mr. Preston for the price of the tickets.

That gentleman had, no doubt, furnished evidence that was capable of being used to establish a *primâ facie* case against him if he were sued by the company; possibly a strong *primâ facie* case, but one which might be met by other evidence, some of which is found in the record before us. The result of such a suit must at present be a matter of speculation only. The learned judges did not assume to decide it, but they agreed that the tickets were obtained by Preston under the belief that they were not to be paid for but that the railway company was to carry the voters gratuitously.

Taking that to be the fact, what is the law?

It is found in the group of sections of the Dominion Elections Act (1) beginning with section 84 and headed "Prevention of Corrupt Practices and other Illegal Acts."

Section 84 declares that "the following persons shall be guilty of bribery and shall be punishable accordingly," going on to define various acts and to enact that

(1) R. S. C. ch. 8.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

"every person so offending is guilty of a misdemeanour and shall also forfeit the sum of $200," &c. Section 85 is similar in its structure, describing other persons who are to be held guilty of bribery and punished in the same way as under section 84.

Now it is to be noted that these sections do not deal with the effect of bribery, as there defined, upon the election or upon any vote thereat. They merely prescribe the penalty upon the offender. They follow the English enactment under which the case of *Cooper* v. *Slade* (1) was decided, and which is found in the second section of The Corrupt Practices Prevention Act, 1854, (2).

That was an action for penalties, not a contest as to the validity of any vote or of any election.

Section 86 deals with corrupt treating by a candidate, imposing on the candidate a penalty of $200 in addition to any other penalty to which he may be liable under any other provision of the act, and providing for striking off one vote for every person corruptly treated. The second part of the section is not confined to candidates. It declares that giving refreshments to a voter on nomination day or polling day on account of the voter having voted or being about to vote is an illegal act and entails a penalty of $10.

Section 87 defines the offence of undue influence, making it a misdemeanour and subjecting the offender to a penalty of $200.

Section 88, to which I shall by and by refer more particularly, deals with the conveyance of voters, characterising the acts it forbids as unlawful acts, subjecting offenders to a penalty of $100, and if the offender is a voter disqualifying him from voting at the particular election.

(1) 6 E. & B. 447 ; 6 H. L. Cas. 746. (2) 17 & 18 Vic. ch. 102.

Section 89 defines personation, and attaches to that offence a penalty of $200, with liability to imprisonment.

Section 90 deals with subornation of personation or inducing any one to take a false oath, making the offence a misdemeanour, and further subjecting the offender to a penalty of $200.

Then section 91 declares that bribery, treating, or undue influence as defined by that or any other act of the parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections next preceding are corrupt practices within the meaning of the act, and by section 93 a corrupt practice committed by a candidate or his agent avoids the election.

It will be noticed that while section 91 designates by name bribery, treating, undue influence, personation, and inducing to commit personation, five of the six classes of offences dealt with in the preceding seven sections, as corrupt practices, it does not specifically name any offence against section 88, but covers offences connected with the conveyance of voters only by the general reference to any wilful offence against any of the seven sections. It may perhaps be the proper construction of section 91 that the five enumerated classes of offences, so far as they depend on this act and are not offences under any other act, do not become corrupt practices unless committed wilfully, but it is clear that no contravention of section 88 is made a corrupt practice unless it is a wilful offence. An offender against that section may, like the defendant in *Cooper* v. *Slade* (1), be liable to the penalty, no matter how innocent he may be of any intention to disobey the law, but unless he offends wilfully his act is not corrupt practice.

(1) 6 E. & B. 447; 6 H. L. Cas. 746.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

Take Mr. Preston's case. He may possibly have become legally liable to pay for the tickets by reason of the form of the transaction, or for want of written evidence of the concurrence of the railway company in the understanding on which he acted, or because no one who could bind the company in fact agreed to carry the voters free of charge, and if that should be held to be so the logical result might be that he is liable to the pecuniary penalty under the terms of section 88. But becoming liable by reason of his want of care and his neglect to have his real understanding properly expressed, yet contrary to his intention as well as to his understanding of the transaction, he could not be held guilty of a corrupt practice without striking out of section 91 the important word "wilful."

The position is very different from that in question before this court in *Young* v. *Smith* (1). The person who in that case was held by a majority of the court to have committed a corrupt practice had hired a team to bring voters to the place where the poll was to be held. What he did was exactly what he intended to do, though he had assumed that the act was not illegal except when done on polling day, while he had sent for the voters a day or two earlier.

It is unnecessary to say anything about some of the tickets which did not reach the voters through Mr. Preston.

The charges, then, are reduced to this, that the railway company, being owner of vehicles, carried voters in them to the polls or to the neighbourhood thereof. Whether that should be permitted or not, as a matter of policy, is not for the consideration of this tribunal. The owner of a carriage may lawfully drive voters to the poll. So may the owner of many carriages, like a livery stable-keeper, our law differing in this respect

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

from the English Act of 1883 (2) which does not allow public stages or vehicles kept for hire to be used in that way. As a question of the interpretation of the statute, there is no sound reason for applying a different rule to a railway company which chooses to employ its carriages in the same way.

I believe the charges touching these railway tickets are all framed on the particulars under section 88, for paying the travelling and other expenses of voters, with the exception of the charges relating to two brothers named Ruhl. As to each of these men there is the further charge that an agent of the candidate gave or agreed or offered or promised to give money or valuable consideration to induce the voter to vote for this particular candidate, and to refrain from voting for the other. This is a charge of bribery under section 84, and the valuable consideration relied on (there being no pretense of bribery with money) is the same free ticket on which the charge under section 88 is based.

I have not been able to find a note of any remarks made by the learned judges concerning these charges, and I do not think we were referred to any such note. The charges are negatived by the dismissal of the petition, and we are now asked to characterize the handing of the railway tickets to these men as bribery on the evidence that the tickets were given to them under the circumstances thus spoken of by one of the brothers.

Q. What was the ticket given for ? A. It was given to me to come up here and vote.

Q. Who told you that ? A. The way it was, they sent a telephone down for me to come up to vote here, and I did not want to go, but then I said if they will drive me down free, down to Berlin and then if they give me a free ticket up and fetch me back here, Sebringville, and bring me back again, I go up and vote, but not no other way. I

(1) 46 & 47 V. c. 51, s. 14.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

would not have gone with my own money for I had no money to go with.

Q. They telephoned to George in the same way? A. They telephoned for both of us.

Q. What did George say about coming down? A. He did not say much at all; all he said, "if I will go, he will go too."

This appears to me the ordinary case of conveying a voter to the poll, and is not the less so by reason of the circumstance that the voter did not want to go, but would have stayed at home if he had not been carried free. That circumstance, if it has any significance, shows that the ticket was not, to a voter of this disposition, a valuable consideration in the sense of saving his money. It is a case that in my opinion has to be dealt with under section 88. To attempt by refining upon some turn of expression in the evidence, or on the meaning to which the term "valuable consideration" is capable of being extended, in order to make out an offence under the other section is to strain the language of the statute and not to give their fair effect to its purpose and intent. Bribery may, no doubt, be committed under colour of paying travelling expenses, and courts are expected to see through that or any other pretense resorted to for the purpose of disguising the real transaction; but when the real transaction is apparent we have no right to make something else of it, something unreal, by means of ingenious reasoning.

In connection with the charge now under discussion we have been referred to *Cooper* v. *Slade* (1), a case in which letters were written to electors, on behalf of a candidate, asking them to come and vote for that candidate and promising that their travelling expenses should be paid. The question, which came before the courts on a bill of exceptions, was whether there was any evidence for the jury that (within the words of

(1) 6 E. & B. 447; 6 H.L.Cas. 746.

the statute) the electors were promised money to induce them to vote. It was held in the Exchequer Chamber that there was no evidence for the jury, but that decision was reversed in the House of Lords. I may quote a few words from the opinion delivered by Lord Cranworth, partly by way of introduction to a remark which I have to make:

"Now surely," His Lordship said, "if I say to a person 'If you come to Cambridge and vote for me, I will give you money, being the amount of whatever expense you may pay for coming up to vote,' that is giving money to the voter for the purpose of inducing him to vote; it is giving money to him to indemnify him for something which, but for giving the money, he would have to pay out of his own pocket? It may be a matter for your Lordships and for the other house of Parliament, in your legislative capacity, to consider whether it would not be reasonable to alter this enactment and to say that money *bonâ fide* paid, which is no more than an equivalent for the expense of coming to vote, ought not to be considered as a bribe."

The enactment thus referred to has not been altered by any statute directly professing to do so. It is the same law which we have in section 84. But in England there was in 1883 the enactment with respect to parliamentary elections (1), and in 1884 with respect to municipal elections (2), that made any payment or contract for payment of any kind made on account of the conveyance of electors to or from the poll, whether for the hiring of horses or carriages or for railway fares or otherwise, for the purpose of promoting the election of any candidate, an illegal practice. The same acts made it illegal to let, lend, or employ, or hire, borrow or use, for the conveyance of electors, any public stage or hackney carriage or other vehicle kept for hire, though it left electors, singly or several at their joint cost, at liberty to hire carriages, &c., to convey themselves.

Some things which these statutes declare to be illegal practices might by a very literal reading of the

(1) 46 & 47 V. c. 51. (2) 47 & 48 V. c. 70.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

definition of bribery, as in our section 84, be construed to be an offence of that kind, as being payment or promise of money to some person in order to induce voters to vote, but it may be reasonably doubted whether, in the absence of actual intention to commit the graver offence, a prosecution for bribery by paying travelling expenses, the payment not being excessive, would now be sustained in any English court.

In Cunningham on Elections the author or editor (1), speaking, as I understand him, of the time before 1883, founds upon the case of *Cooper* v. *Slade* (2) the remark that the law on the subject of travelling expenses had been in a state of great uncertainty. He follows this remark by a reference to the acts of 1883 and 1884. There had been also other legislation on the subject after the cause of action in *Cooper* v. *Slade* (2) had arisen. That case was decided under the Corrupt Practices Prevention Act, 1854 (3). The election in question was very shortly after the passage of the act. It occurred in August, 1854. The trial took place in 1855, the decision of the Exchequer Chamber was given in 1856, and the appeal to the House of Lords was argued in July, 1857. In 1857 (4) it was declared to be lawful for the candidate or his agent by him appointed in writing to provide conveyance for any voter for the purpose of polling at an election and not otherwise, but not lawful to pay any money or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose; and the Representation of the People Act, 1867 (5), enacted that it should not be lawful for any candidate or any one on his behalf at any election for any borough, except five which were named, to pay any money on account of the conveyance of any voter to the poll, either to the voter him-

(1) 3rd Ed. by Giles, p. 145.
(2) 6 E. & B. 447; 6 H. L. Cas. 746.
(3) 17 & 18 V. c. 102.
(4) 20 & 21 V. c. 87.
(5) 30 & 31 V. c. 102.

self or to any other person, making such payment an illegal payment within the meaning of the Corrupt Practices Prevention Act, 1854.

Mr. Justice Williams, who dissented from the judgment of the Exchequer Chamber in *Cooper* v. *Slade* (1) holding the opinion that was afterwards affirmed by the House of Lords, said:

> I am quite aware that the statute, as I have construed it, will act harshly, and apply to cases which can hardly have been in the contemplation of the legislature. But the language of the act appears to me so plain and unambiguous that these considerations afford only an argument to prove that the statute was inconsiderately passed and ought to be amended.

This suggested amendment of the law seems to have been made in England by the effect of the acts of 1857, 1867 and 1883, which, providing specially for the class of cases, modified the application to that class of the bribery clauses of the act of 1854. It left those clauses to apply to actual bribery committed under cover of paying travelling expenses, but provided a way for dealing with those payments which were not meant for bribes though perhaps capable of being brought literally within the statutory definition of bribery.

In the Dominion Elections Act we have both sets of provisions.

Section 88 of the Revised Statute follows section 96 of the Dominion Elections Act of 1874. Familiar as the provision may be, we may as well look at the exact language of section 96:

> And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters be or be not according to law, it is declared and enacted that the hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle by any candidate or by any person on his behalf to convey any voter or voters

(1) 6 E. & B. 447, 461.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

to or from the poll, or to or from the neighbourhood thereof at any election, or the payment by any candidate or by any person on his behalf of the travelling and other expenses of the voter in going to or returning from any election are and shall be unlawful acts.

Having regard to this recital as well as to the enactment to which it is introductory, and bearing in mind that in section 91, as already noticed, the word "wilful" is applied to the bribery clauses as well as to those relating to other offences, and that whatever may be the proper force of the word in relation to bribery, &c., it must be held, on ordinary principles, to have some meaning, we have sufficient reason to be cautious before finding constructive bribery in transactions specially provided for by section 88, where no intentional bribery is shown.

The cases of the brothers Ruhl may perhaps hardly require a discussion of the matters to which I have been adverting, because those men, like the other free ticket voters, received their tickets, or were supposed by the agents of the candidate to have received them, in effect, though indirectly, from the railway company.

However this may be I see no ground for finding the charges established.

There are two other cases to dispose of. One is that of a man named Lavelle who was given a glass of whiskey by a woman named Mrs. Daly in her husband's house. The charge is that the whiskey was given by Daly the husband as a bribe. The question is purely one of fact, and it has been decided against the petitioner upon evidence quite sufficient to sustain that conclusion.

The other charge is that one Henry Gowing was paid his travelling and other expenses by one James Stock, an agent.

The charge is under section 88. Stock appears to have been an agent, and if by what he did he offended

against section 88 he certainly did so wilfully. The learned judges agreed in holding that the charge was not established although the circumstances were very suspicious. Gowing had a free ticket but he wanted some money, apparently for the purpose of having it to spend while away from home. He asked one Winters for money, and Winters got from Stock $2 which was handed to Gowing.

The answer to the charge is two-fold. It is asserted that the money was merely lent to Gowing, and not given to him under colour of lending it but really by way of paying his expenses; and further that Stock neither lent nor gave the money to Gowing but lent it to Winters.

If the finding had been against these allegations no one could say that it was not justified. The question, however, is one of fact. It has been tried by two experienced judges who have had the witnesses before them and who agree in their conclusion. All the considerations that have been urged before us have been weighed by them, including the probability of the account given and the credibility of the witnesses. Mr. Justice Rose is reported as having made these observations:

> The case is full of suspicion, and there is one fact, which is also very full of suspicion, that the money was not repaid till the day before election trial began, and possibly not paid until the morning of the day upon which investigation of this case was entered upon. The only question is whether the surrounding facts and circumstances are so strong as to lead us to disregard the statement of each of the parties to the transaction, and to require us to find that they are not telling what is true, and that the transaction was not a loan from Stock to Winters and from Winters to Gowing. I do not feel justified in saying more than that it is a case full of suspicion, saying, further, that I am unable to find that a corrupt practice has been proven by the evidence.

Mr. Justice MacMahon made observations to the same effect.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

The case is thus correctly put by the learned judges as depending on the weight of evidence and the credibility of witnesses. It has been suggested that that is not a proper way to regard it, but that the court is asked merely to draw inferences, not to pronounce on the credibility of the witnesses. I confess my inability to understand the distinction. Three men swear to a certain fact. If they swear truly it was the fact. But it is said they do not swear truly, though no one swears to the contrary. There are circumstances: one man asks another to lend him money; the second man, not having any, asks number three for it; and number three supplies the money which is handed to number one who wants it for spending money at the election. These facts are all consistent with what the three men swear to, viz., that the money was merely lent. So are the other facts which throw suspicion on the reality of the alleged loan. It may be that all the story of the loan is utterly untrue. In other words it may be that the three men swore falsely. It may be very unlikely, or may seem so, that it should be only a loan. You may infer from all the circumstances that it was not a loan. That is to say, you may infer that the men swore falsely. The suspicious aspect of the transaction and the difficulty of accepting the sworn testimony as outweighing the inferences one might be otherwise inclined to draw from the circumstances do not touch the principle which would be the same if the sworn testimony and the inferences were more nearly balanced. It is to my mind a case simply of weighing probabilities against the oaths of witnesses. Is it our duty under the circumstances to do that?

There is of course no question of our jurisdiction or of our duty to hear appeals on questions of fact as well as of law. So it was in all the cases in which it has been laid down in this court that a decision de-

pending on a conflict of evidence or on the credibility of witnesses ought not to be interfered with. The rule has been acted on in election cases tried before a single judge. It should *a fortiori* apply under the present law when the trial is before two judges.

An early case in this court in which the rule was enunciated and acted on was *The Picton* (1). In one of the judgments delivered in that case a passage is quoted from the judgment of Lord Chelmsford in *Gray* v. *Turnbull* (2). I may quote another passage in which the reason of the rule is neatly expressed:

> Different minds will of course draw different conclusions from the same facts; and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested.

In the head note to the case of *Grasett* v. *Carter* (3) in this court the doctrine is very clearly stated:

> When there is a direct conflict of testimony, the finding of the judg at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

The cases of *The Picton* (1) and *Gray* v. *Turnbull* (2) are relied on in one of the judgments in *Grasett* v. *Carter* (3) as supporting that doctrine, and they are direct authority for it as a general proposition and as a rule of convenience and expediency, which I understand it to be, not in the nature of a rule of law limiting the jurisdiction of the appellate court. But the case of *Grasett* v. *Carter* (3) is capable, as it strikes me, of being understood, or perhaps misunderstood, as carrying the rule farther than that. *The Picton* (1) was a direct appeal from the court of first instance, and *Gray* v. *Turnbull* (2) was an appeal from the unanimous judgments of two courts, while in *Grasett* v. *Carter* (3) the court of intermediate appeal had reversed the finding of the primary

(1) 4 Can. S.C.R. 648. (2) L.R. 2 Sc. App. 53.
(3) 10 Can. S.C.R. 105.

1892

NORTH PERTH ELECTION CASE.

Patterson J.

court, which finding was restored by this court; and the statement of the doctrine, being addressed to the duty of the intermediate court, seems to me to involve the proposition that if an intermediate court reverses the decision of the primary court on a question depending on conflicting evidence, its judgment is, for that reason alone, liable to be in its turn reversed. This savours of a rule of law affecting the jurisdiction of the court. I may be wrong in supposing such a rule to be in effect laid down, and I do not understand the judgment of the court to have turned upon it.

I have always thought that the proper principle on which appeals should be dealt with when the judgment directly appealed from has reversed a decision on a question of fact was stated by Lord O'Hagan in a case of *Symington* v. *Symington* (1) some five years later in date than *Gray* v. *Turnbull* (2), but found in the same volume of the reports.

> On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanour before himself, should not have his decision lightly set aside. And undoubtedly the value of *vivâ voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position and enabled us, so to speak, to see with his eyes when he states the impression produced upon him by the principal witness * * * Besides we are concerned, directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm unless we are satisfied of its error.

This is, however, somewhat aside from the immediate question of the disposal of the present appeal from a court of first instance.

For my own part I am not disposed to lay down or to acknowledge the authority or the value of rules or formulas for the decision of questions of fact. Evi-

(1) L. R. 2 Sc. App. 415, 424. (2) L. R. 2 Sc. App. 53.

dence, particularly *vivâ voce* evidence, will in general be best appreciated when looked at as an ordinary juror will look at it, with the mind free from theories and arbitrary rules, and by those who, like a jury, see and hear the witnesses. That principle is recognized by the rule under discussion, and in my opinion that rule ought to be adhered to in this case.

I think the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for appellant: *Meredith, Clarke, Bowes & Hilton.*

Solicitor for respondent: *G. G. McPherson.*

1892

*Feb. 8.

*April 4.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF WELLAND.

WILLIAM MANLY GERMAN (RESPONDENT) ..... } APPELLANT;

AND

JESSE CALHOUN ROTHERY (PETITIONER) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF ROSE AND MACMAHON JJ. AT TRIAL OF PETITION.

Election—Promise to procure employment by candidate—Corrupt practice—Finding of the trial judges—49 Vic. ch. 8, sec. 84 (b).

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved.

The promise was charged as having been made in the township of Thorold on the 28th February, 1891. At the trial it was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C.P.R. Co. until the trial took place, and W. swore that the promise had been made on the 17th February. G. the appellant, although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the elections G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the court below, that as the evidence of W. was in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial judges was not wrong, still

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

less so entirely erroneous as to justify the court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved.

APPEAL from the judgment of the Honourable Justices Rose and MacMahon who tried the election petition in this case and found the sitting member, the present appellant, guilty personally of a corrupt practice.

The election petition in this case charged the appellant with being guilty of corrupt practices by himself and by his agents and prayed that the appellant be unseated and disqualified.

The particulars of the charges furnished by the petitioner upon which the evidence with respect to the disqualification of the appellant was given at the trial were as follows:

"3. On or about the 28th day of February, 1891, at the township of Thorold, the said respondent gave to one Joseph B. Wood, of the Village of Niagara Falls, in the said electoral district, agent, the sum of $10, in order to induce the said Wood to vote for the said respondent at the said election.

"4. On or about the 28th day of February, 1891, at the said township of Thorold, the said respondent agreed to procure and offered and promised to procure or to endeavour to procure place or employment for the said Joseph B. Wood, in order to induce the said Wood to vote for the said respondent at the said election.

"5. Some time after the said election, at the City of Buffalo, in the State of New York, one of the United States of America, the said respondent corruptly promised to procure and to endeavour to procure a place or employment for the said Joseph B. Wood, on account of the said Wood having voted for the said respondent at the said election."

1892

WELLAND ELECTION CASE.

After hearing of the evidence, which is reviewed in the judgments hereafter given, the learned trial judges found the appellant W. M. German guilty of having agreed to procure, and having offered and promised to procure or to endeavour to procure, a place or employment for one Joseph B. Wood, a voter entitled to vote at the said election, in order to induce the said Wood to vote for the appellant at the said election.

The appellant limited the subject of this appeal to so much of the judgment as granted that portion of the prayer of the petition which related to the personal charges against the present appellant, and found and declared the present appellant (the respondent in the court below) guilty of a personal corrupt practice at the said election.

The judgment of Mr. Justice Rose on the personal charges was as follows:—

"ROSE J.—With reference to the personal charges against the respondent the facts appear, as far as may be necessary to consider them, somewhat as follows: The respondent accompanied the witness Wood to Buffalo for the purpose of obtaining a situation for him. This was possibly some two or three weeks after the election, within that time certainly. Now the respondent was in Buffalo very active in endeavouring to procure a situation for Wood. The evidence does not disclose what claim Wood had upon him, outside of the election, to demand or receive the assistance that he was then obtaining. True the respondent had acted as solicitor for Wood and his brother; but as far as the evidence discloses the witness Wood was not brought into close personal intercourse with the respondent, and there is no such personal claim shown in the evidence as would cause one to expect that the respondent would make much effort to obtain a situation for him. We then look for a cause for this

action. We find that the parties met at Thorold. Now the relations between them were such as provoked words of caution from the supporters or friends of the respondent, warning him not to have anything to do with Wood, that he would get him into trouble. Exactly what conduct caused this warning is, perhaps, not made very clear unless we adopt the statement of the witness Wood; but it is clear, I think, upon the evidence, that there was then and there discussed the question of obtaining a situation for the witness Wood. We have then during the election a conversation between the respondent and the witness Wood at which was discussed the obtaining of a situation, and we have after the election the endeavour to obtain that situation by the respondent. Whether at this meeting in Thorold, owing to circumstances which were detailed in evidence, the respondent was acting incautiously, and whether under the circumstances to which I am referring his memory is not very clear as to what then did take place, and whether he was led to do and say something then that was imprudent, is perhaps a matter of surmise; but we find that after the meeting in Thorold the respondent wrote a letter to Wood. In that letter some statement was made. Wood says that it was a request to see another voter and wound up by a reference to a previous promise, and a further promise to fulfil that previous promise. Subsequently another letter was written by the respondent to the witness Wood, and in that subsequent letter without doubt upon the evidence there was a request that the previous letter should be destroyed, and that the subsequent letters should be destroyed. Both these letters were destroyed by Wood. Now everything must be presumed against one who destroys written evidence. Why were these letters destroyed? The respondent says

1892

WELLAND ELECTION CASE.

because he had been warned against Wood. The letters therefore, and especially the first letter, must have contained something the disclosure of which would prejudice the respondent. How could a letter written under such circumstances prejudice the respondent? Only by affecting his election. How could it affect his election? Only by furnishing evidence of the commission of some corrupt practice. If the letter had reference to a corrupt practice what corrupt practice? The only practice, upon this evidence suggested, apart from other evidence to which I am not now referring, is the obtaining of employment or promising to endeavour to obtain employment for the witness Wood. I come to the conclusion as to that charge that the respondent did at Thorold for the purpose of influencing the vote of the witness Wood promise that if he would vote for him he would after the election endeavour to obtain a situation for him, and that, in pursuance of that promise given, he did endeavour to obtain a situation for the witness Wood. This evidence of a corrupt practice by the respondent compels us to grant the prayer of the petition and to find the respondent guilty of personally corrupt practice. It is therefore unnecessary for us to consider the other charges made, or the charge that is involved in this charge as to witness Wood. And we are glad to be relieved from further consideration of the evidence, and we have not so considered it as to come to a final and definite conclusion as to the credibility of the witnesses. If in the further history of this case we are called upon to examine that evidence and to express our opinion as to the credit to be attached to the various statements, we shall be of course compelled to enter upon an inquiry which will be unpleasant to ourselves, but we think we have sufficiently discharged our duty when we express the

opinion that we are expressing in regard to this corrupt practice, declaring that the respondent is guilty of a corrupt practice, namely, a promise to the witness Wood to endeavour to procure a situation for him if he would vote for him, the respondent, and that that promise was subsequently carried into effect as far as the respondent was able to perform it."

W. Cassels Q.C. appeared on behalf of the appellant, and

Blackstock Q.C. appeared on behalf of the respondent.

Sir W. J. RITCHIE C.J.—All we have to deal with in this case are the following charges, namely that:

4. On or about the 28th day of February, 1891, at the said township of Thorold, the said respondent agreed to procure, and offered and promised to procure or to endeavour to procure a place or employment for the said Joseph B. Wood, in order to induce the said Wood to vote for the said respondent at the said election.

5. Some time after the said election, at the city of Buffalo, in the state of New York, one of the United States of America, the said respondent corruptly promised to procure and to endeavour to procure a place or employment for the said Joseph B. Wood, on account of the said Wood having voted for the said respondent at the said election.

On these charges the learned judges who tried the case came to the conclusion as to that charge,

that the respondent did at Thorold for the purpose of influencing the vote of the witness Wood promise that if he would vote for him he would after the election endeavour to obtain a situation for him, and that, in pursuance of that promise then given, he did endeavour to obtain a situation for the witness Wood. This evidence of a corrupt practice by the respondent compels us to grant the prayer of the petition and to find the respondent guilty of a personally corrupt practice.

This finding we are now asked to reverse.

The evidence of the witness Wood, as to what the appellant promised him in regard to getting a situation, is as follows:

1892

WELLAND ELECTION CASE.

Ritchie C.J.

He had said he saw appellant in Thorold.

Q. When was that? What was going on there? A. He had a meeting in Thorold the night I saw him there.

Q. And where did you see him? A. At Hammond's hotel.

Q. And what took place between you? A. I told him there that I had considered the thing over again and if he would give me something to do I would much rather have it than the ten dollars. Why, he says, "I will do both."

Q. Then is that all that took place on that occasion? A. Yes.

Q. Then when did you next see him? A. At Port Robinson.

He then describes the circumstances under which he met appellant and is asked:

Q. What happened? A. Well, he came in; I asked him to sit down; he said he would not sit down, he was in a hurry to get back to the meeting. He gave me the ten dollars he promised me, and told me, he says "I give you the ten dollars now; you vote for me and after the election I will get you the situation."

Then he is asked:

Q. Did he write you a letter during the election? A. He did.

Q. Have you got that letter? A. No, I have not.

Q. Where is it? A. It is burned up.

Q. Why did you burn it up? A. He asked me to.

Q. What was in that letter? A. Well, I don't remember what there was in the first letter; I told him that day of a man named Watson that lived below there, and he wrote me the first time to see Watson and see if I could do anything with him; I could not do anything with Watson; I had no influence with any person in a political contest. He requested me to see Watson and do what I could for him, and he said he would do what he promised me.

Q. What else? A. That was about all there was in the letter.

Q. He said he would do as he promised you? A. Yes.

The appellant's testimony to a certain extent corroborates the witness Wood's, though he certainly denies that he said he would endeavour to get him a situation. This is the account which he gives of the matter:

Q. Then, when you saw him down at Thorold, did you have any conversation with him? A. Yes, shortly.

Q. Who were present on that occasion? A. There were several in the bar, but I do not think there was any person near enough to hear any conversation we had.

Q. What was the conversation? A. Well, I think that he spoke to me; I think it was on that occasion that he called me to one side, and he said, Don't you know some one in Buffalo that you can introduce me to, who will help to get me a situation over there; he says, I want to get out of this country; I am in debt, and they are bothering me, and I want to get away. I told him I thought I did, and that was all.

Q. You did say that you would endeavour to get him the situation? A. No, he asked me if I knew any people in Buffalo that could get him a situation. I told him I thought I did, and that was all that was said. He may have asked me when I would be going to Buffalo, and I told him I did not know, but not until after the elections anyway; that might have been said.

Q. Did he speak to you about getting a situation, and did you intimate that you would assist him in that respect? A. There was just that of it; he asked me if I knew any people in Buffalo that could assist him.

Q. Did you intend to represent that you did not intimate to him that you would assist him? A. There was the intimation of course.

Is not this directly confirmatory of Wood. How should this intimation be given to Wood without conveying to Wood that he relied on his assistance. Then as to the letters he is asked:

Q. Did you during the election write a letter to Wood? A. Don't know that I did during the election.

Q. Will you swear that you did not? A. No.

Q. Have you any recollection of whether you did or not? A. I have a recollection that Wood asked me here in Welland when I would be going to Buffalo, I think it was in Welland; if it was not on the Thorold occasion, and I don't think it was; I think it was in Welland he asked me when I would be going to Buffalo, he wanted to go with me. I said I didn't know, but I would let him know, and I might have dropped him a line telling him when I would be going to Buffalo; whether that was before election day or after I would not be positive.

The statement of Wood was certainly corroborated by the undoubted performance of the alleged promise in Buffalo; and then we have the statement by Wood that a letter was written by appellant to him, in

1892

WELLAND ELECTION CASE.

Ritchie C. J.

which he says: "He requested me to see Watson, and do what I could for him, and he would do what he promised me." This letter could not be produced because it had been destroyed, at appellant's request, as the following evidence clearly shows.

Wood swears:—

Q. You say that you destroyed that letter because Mr. German asked you to; how did he ask you? A. By another letter.

Q. When? A. Before the election.

Q. What did you do with that letter? A. I destroyed the both of them.

Q. What were the contents of the second letter? A. He asked me if I had seen Watson and what he was going to do.

Q. And what else? A. And if I had the first letter, why to destroy it, it wasn't necessary for any person to know anything about the first letter at all.

Q. Did you then destroy it? A. I did.

The appellant's testimony as to the letters is very unsatisfactory.

Q. Will you undertake to say that you did not write him a letter during the election? A. The only recollection I have is what I told you.

Q. Have you any recollection of writing him a letter telling him not to tell anyone the conversation that you had with him? A. No.

Q. Will you swear you did not? A. It is quite unlikely, there is no reason why I should.

Q. Will you swear you did not? A. If there is such a letter I wrote it, but—

Q. Will you swear that you did not? A. No, I won't swear positively; I don't believe I did, but still if there is such a letter produced, of course it is there.

Q. I did not ask that. Will you swear that you did not, yes or no? A. I will not swear absolutely that I did not.

Q. If you wrote him such a letter why did you write it? A. Well, if I wrote him such a letter it would be for this reason, that I was warned by some parties here in Welland to beware of Joe Wood. Mr. Sidey, Mr. Cowper and several others saw he was with me, and they warned me to be careful of Joe Wood, that he would get me into trouble, and if I wrote the letter at all, it was with a desire to influence him not to say anything about any conversation that there was so that there could be no trouble.

Q. Does that now come back to you? A. It does not.

Q. Have you any recollection upon that subject now? A. I have not any recollection of writing the letter, I don't believe I wrote it, but if a letter of that kind is produced, then I say that is the explanation that I give of writing it.

Q. Did you recollect writing him a letter after the election was over? A. I have no recollection as to any letter positively, excepting the one I have told you about, the day I would be going to Buffalo.

Q. You do recollect writing him that letter? A. I think very likely I did.

Q. And that must have been after the election? A. Well, I am inclined to think it was after the election.

Q. It must have been, because you did not make any appointment with him to go to Buffalo until after the election? A. I made no definite appointment at all to go to Buffalo with him, and this letter, if I wrote a letter, was a letter fixing the day.

Q. In that letter written after the election was over and making the appointment to go to Buffalo, did you add to the letter a request to Wood that he should destroy your former letter to him written to him during the election? A. I don't know.

Q. Will you swear that you did not? A. I don't believe—I don't know, I would not swear that I did not.

Q. Have you any recollection upon that subject? A. I have no recollection excepting the recollection as to going to Buffalo.

Q. Have you any recollection upon the subject upon which I am now asking you? A. I have not.

Q. If you wrote and was asking him to destroy your former letter, why did you do so? A. Well, I can only tell you what I have told you, that it was because I had been warned that Wood was a dangerous man, and that I had better be careful of him; that was all.

Q. When were you warned that Wood was a dangerous man? A. I was warned that night in Thorold.

Q. And you say you were warned by Mr. Sidey, Mr. Cowper, and who else? A. There were others, but I don't remember their names.

The appellant was re-called and examined by his own counsel two or three hours later, and after giving all his former evidence in such examination, deposed, in answer to the interrogatories of his own counsel, as follows:—

Q. In regard to the letters to Wood, have you any recollection about that?

1892

WELLAND ELECTION CASE.

Ritchie C. J.

Mr. Blackstock—He was asked all about that and he said he had no recollection.

Mr. Cassels—Since your examination have you thought it over? A. After Mr. Blackstock began to examine me about writing a letter it came to my mind that I remembered writing Joe Wood a letter to destroy some letter that I had written him previously, but without any reference to the election at all. I have been trying to remember what it was. It was something regarding some private business that I had quite forgotten, but I do remember writing Joe Wood to destroy some letter that I had previously written.

The letters unquestionably were destroyed at appellant's request and can any one doubt that the reason why appellant wished these letters destroyed was because they, or one of them, contained matter in connection with the election, compromising the appellant? And is not the observation of the learned judges with reference to the destruction of these letters most apposite?

They say everything must be presumed against one who destroys written evidence. Why were these letters destroyed? The respondent says because he had been warned against Wood. The letters therefore, and especially the first letter, must have contained something the disclosure of which would prejudice the respondent. How could a letter written under such circumstances prejudice the respondent? Only by affecting his election. How could it affect his election? Only by furnishing evidence of the commission of some corrupt practice. If the letter had reference to a corrupt practice, what corrupt practice? The only corrupt practice upon this evidence suggested, apart from other evidence to which I am not now referring, is the obtaining of employment for the witness Wood. I come to the conclusion as to that charge that the respondent did at Thorold for the purpose of influencing the vote of the witness Wood promise that if he would vote for him he would after the election endeavour to obtain a situation for him, and that in pursuance of that promise then given he did endeavour to obtain a situation for the witness Wood. This evidence of a corrupt practice by the respondent compels us to grant the prayer of the petition and to find the respondent guilty of a personal corrupt practice.

It cannot be denied as has been repeatedly held that in cases which turn on conflicting evidence the judge, who has the witnesses before

him hears the testimony and sees the manner in which they answer questions, and as my learned and lamented predecessor said in the *Jacques Cartier Case* (1), "sees whether they are prompt, natural and given without feeling or prejudice, with an honest desire to tell the truth, or whether they are studied, evasive and reckless, or intended to deceive, &c.," is much more competent to appreciate the evidence and determine on the credibility of the witnesses, and the weight due to the statements than those who merely read the statements of the witnesses as they have been taken down.

In the *Bellechasse Case* (2), after referring to my predecessor's remarks in the *Jacques Cartier Case* (1), I went on to say that "A case such as this is very different from a case at common law; there the witnesses are in general disinterested parties unconnected with the case, and so more or less impartial, while in election cases the witnesses are generally strong partisans, or more or less mixed up with the election. The opinion of the learned judge who has heard the case is entitled to great weight, and before his decision can be set aside we must be entirely satisfied that he is wrong. In affirmance with this view we have the repeated declaration of appellate courts, that on questions of fact such tribunals must be clearly satisfied that the conclusion at which the judge who tried the case arrived, was not only wrong, but entirely erroneous."

To this opinion I adhere. I am by no means prepared to say that the conclusion arrived at by the learned judges was wrong, still less, "entirely erroneous;" on the contrary I cannot see how they could have arrived at any other conclusion.

STRONG J.—The appellant has been unseated on a personal charge of bribery, and if the judgment against

(1) 2 Can. S.C.R. 227.

(2) 5 Can. S.C.R. 102.

1892

WELLAND ELECTION CASE.

Strong J.

him is maintained on this appeal he will, by the express provision of section 96 of the Dominion Elections Act, be incapable for the next seven years of being elected to and of sitting in the House of Commons and of voting at any election of a member of that House, and of holding any office in the nomination of the Crown or the Governor General in Canada.

These serious penal consequences call for the most careful examination and scrutiny of the evidence upon which such a judgment is founded.

The charge which the learned judges before whom the petition was tried have found to be established is, as stated in the particulars delivered by the respondent, that of having on or about the 28th day of February, 1891, at the township of Thorold, agreed to procure, and offered and promised to procure, or to endeavour to procure a place or employment for Joseph B. Wood, an elector, in order to induce the said Wood to vote for the appellant at the election.

There were two other personal charges relating to the same voter, one of bribery in having given the same Joseph B. Wood ten dollars to induce him to vote for the appellant, and the other a charge of having at the city of Buffalo promised to procure and to endeavour to procure employment for Joseph B. Wood, by reason of his having voted for the appellant. The learned judges have, however confined their judgments exclusively to the first mentioned charge. The judgment of the court, which was delivered by Mr. Justice Rose, concludes in these words:

> We think we have sufficiently discharged our duty when we express the opinion that we are expressing in regard to this corrupt practice, declaring that the respondent is guilty of a corrupt practice, namely, a promise to the witness Wood to endeavour to procure a situation for him if he would vote for him the respondent, and that that promise

was subsequently carried into effect as far as the respondent was able to perform it.

The learned judges have therefore refrained from expressing any opinion upon the evidence, as to the alleged bribery by payment of ten dollars, or upon the charge relating to a promise subsequent to the election.

The notice of appeal to this court purports to be limited pursuant to the statute to so much of the judgment as grants that portion of the prayer of the petition which relates to the personal charges against the appellant and finds and declares the appellant guilty of a personal corrupt practice at the election, and the appellant announces that he will upon the hearing of the appeal contend that the judgment, so far as it declares the appellant guilty of any corrupt practice personally, should be reversed and set aside.

The evidence relating to this charge of a promise to procure or endeavour to procure employment for Wood is, as I have said, confined to the testimony of the two parties to the transaction, Wood and Mr. German himself. The charge was opened by the examination of Mr. German who was called by the respondent's counsel. It will, however, be most convenient first to consider the evidence of Wood and ascertain as precisely as possible the material facts deposed to by him.

Wood speaks of at least four interviews with the appellant in the course of the canvass which preceded the election, the first being at Welland when nothing material is said to have occurred; the next meeting was at Port Robinson, where Wood lived; then a third interview took place at the City Hotel (Hammond's Hotel) at Thorold, where the promise to endeavour to procure a situation for Wood is said to have been made, and later on the parties again met at Port Robinson.

1892

WELLAND ELECTION CASE.

Strong J.

Wood's account of what took place at the first Port Robinson interview is as follows. He says he met Mr. German "on" the street and Mr. German asked him if he was going to vote for him, to which the witness says he answered he hadn't thought anything of it. Then the witness says (taking the exact words from his deposition):—

> He (German) pressed me to vote for him, and I finally told him that I had heard there was money in the county and I was poor and hard up, and nothing to do, and if there was any I might vote for him. He asked me how much I wanted and I told him ten dollars; he said he would see I got it. I told him that I would rather have it from him, it was something that I had never done before and I did not want it generally known that I had done that kind of business. He said all right, he would see I got it from himself; he said he would give it to me.

The witness says this ended the conversation on that occasion.

Then the next meeting of the parties was at Hammond's Hotel (the City Hotel) at Thorold, on an evening when a meeting of the appellant's supporters was being held at Thorold. To the question put to him by counsel as to what took place between Mr. German and himself on this last occasion, the witness answers:

> I told him that I had considered the thing over again and if he would give me something to do I would much rather have it than the ten dollars. Why, he says, "I will do both."

Wood says this was all that took place on that occasion. Then on cross-examination the witness speaks further of this Thorold interview. I extract from his deposition the following passage:

> Q. And when you saw Mr. German you told him you were hard up? A. I did.
>
> Q. And told him that you were anxious to get employment? A. I did.
>
> Q. And that you would like very much if he could help you to get employment? A. Yes.
>
> Q. You had known him before? A. Yes.

Q. And when you saw him, you being hard up and wanting employment, asked him if he could not help you to get employment, that is what you say? A. I asked him that at Thorold. I told him I would rather have employment than money.

Q. When did you first speak to him about employment? A. At Thorold.

Q. What date was it? A. I don't know that.

The third interview which, according to Wood, was had between the witness and the appellant, took place at Port Robinson subsequent to the meeting at Thorold. Wood says that Mr. German met him early in the evening in the street, that they separated, he (Wood) going directly home. That in a short time after he had got home, within three or four minutes, the appellant came to his house, that the witness himself opened the door for him. That there was no one in the house but the witness and his wife. Then I extract verbatim from the record what follows :—

Q. What happened? A. Well he came in, I asked him to sit down, he said he would not sit down, he was in a hurry to get back to the meeting. He gave me the ten dollars he promised me, and told me he says, "I'll give you the ten dollars now; you vote for me and after the election I will get you the situation."

Q. Is there any doubt that that took place? A. Not the slightest.

The personal history of Wood and his conduct in relation to this election as given by himself are not irrelevant in considering the weight to be given to his evidence, and so far as I am able to give an opinion as to the credibility of a witness I did not see examined and whose demeanour in the witness box I had no opportunity of observing, I should say the account he gives of himself, his admitted offer to sell his vote, and the way he has acted since the election with reference to his evidence, all tend to discredit him, and that for these reasons his testimony does not commend itself to favourable consideration except in so far as it is supported by other circumstances or by the admissions of

1892

WELLAND ELECTION CASE.

Strong J.

the appellant. Wood says that after having been in business as a butcher at Welland in partnership with his brother and having failed there he went to live at the International Bridge, which place he admits he left in order to avoid his creditors, and then went to Wisconsin, and after remaining there for some time he went to Buffalo, then returned to Welland and again moved to Port Robinson where he was living at the time of the election being engaged in selling fruit trees and being in poor circumstances. Then after the election, and after he had communicated the facts he swears to in his examination to Mr. Raymond, the solicitor of the present respondent, thus betraying Mr. German, the candidate he had, as he admits, taken a bribe to support, he obtained through Mr. Raymond a situation in the Canadian Pacific Railway Company's service at Montreal, which employment came to an end a short time before the trial of the petition. He further states that Mr. Raymond took from him a statutory declaration embodying the statements which he reiterated in his evidence. Having been the sort of person he describes himself to have been, and having given his evidence *in vinculis* as it were, his conscience bound by the statutory declaration most improperly taken from him by the petitioner's solicitor (1), and having been induced to remain in the country and rewarded for making the statutory declaration mentioned, by the situation obtained for him by or through the solicitor, coupled with his admitted readiness to be corrupted, implied in the statement that the proposal for the bribe which he swears he took, as well as for the offer about procuring employment came not from the appellant but from himself, I should not under all these circumstances, had there been no confirmatory evidence, have been inclined to

(1) See *Harvey* v. *Mount* 8 *Beav.* 439.

attach weight to his testimony if I were driven to express an opinion as to it.

It is usual for judges presiding at criminal trials to recommend jurors not to convict upon the evidence of an accomplice, unless confirmed in respect of some material fact; this is done not by way of a direction in law or as a ruling on evidence, but is a simple recommendation to the jury which the judge is not bound to give, it being intended merely as an indication of what the judge would consider it safe and proper to do, if he himself were dealing with the facts. No law or practice requires a court to adopt such a rule in weighing evidence on the trial of an election petition, but had I to deal with the evidence we have before us on this appeal without being able to find in the appellant's own deposition any admissions confirmatory of the statements of Wood, I should adopt and act on the usage I have referred to, not as a rule binding on me, but as a safe and convenient principle to guide me to a conclusion.

If the learned trial judges had stated in their judgment which of the conflicting statements of the opposing witnesses they gave credit to that would have been, as has frequently been held here, conclusive and we should then have had nothing to do with the credibility of witnesses. They have, however, expressly disclaimed doing this as appears from the following passage from the judgment. They say:

> We are glad to be relieved from further consideration of the evidence, and we have not so considered it as to come to a final and definite conclusion as to the credibility of the witnesses.

The learned judges reached the conclusion they arrived at upon another principle and upon evidence yet to be mentioned.

If, therefore, there had been a clear, direct and explicit denial by the appellant of the facts deposed to

1892

WELLAND ELECTION CASE.

Strong J.

by Wood and had there been no circumstances in the case confirmatory of his statement, no admissions by the appellant and nothing warranting presumptions against him, I should then in the absence of any finding by the trial judges as to the credibility of witnesses have found it impossible to decide adversely to the appellant.

Then I proceed to consider the appellant's own evidence. As regards what Wood swears to as having occurred at the two Port Robinson meetings, Mr. German does give a positive and explicit denial to Wood's statements which are in no way confirmed by admitted facts, or by presumptions therefrom, and the question so far as it depends on what passed on those occasions is, therefore, reduced entirely to one of the credit to be attached to one witness rather than the other. It was probably for this reason that the learned judges who, as I have pointed out, abstained from expressing any opinion as to the veracity of the witnesses did not pass upon the charge as to the bribe by paying the $10.

The case is reduced then to the consideration of the promise or offer to procure or to endeavour to procure employment, alleged by Wood to have been made at Thorold, and to which the decision of the trial court has been entirely restricted. It now becomes necessary to examine the evidence given by Mr. German himself as to this charge of having promised to endeavour to procure employment for Wood. What the appellant says on this head is contained in the following extracts from his evidence:

Q. Then, when you saw him down at Thorold, did you have any conversation with him? A. Yes, shortly.

Q. Who were present on that occasion? A. There were several in the bar, but I do not think there was any person near enough to hear any conversation we had.

Q. What was the conversation? A. Well, I think that he spoke to me; I think it was on that occasion that he called me to one side and he said, don't you know some one in Buffalo that you can introduce me to, who will help to get me a situation over there; he says, I want to get out of this country; I am in debt, and they are bothering me, and I want to get away. I told him I thought I did, and that was all.

Q. That was the whole of that conversation? A. Yes, practically all; I was in a hurry, and Mr. Cowper was waiting for me and some friends in the other room.

Mr. Blackstock—Q. On the occasion that you refer to? A. I believe that was the time that he spoke to me about this situation.

Q. That is all the conversation so far as you recollect? A. That is all; there might have been some further words said, but I don't think there was.

Q. On that occasion did he tell you he would rather have a situation than ten dollars you had promised him, or indeed one hundred dollars? A. No.

Q. Did he say that he would rather have a situation than one hundred dollars? A. No.

Q. Did you in reply to that say to him that you would do both for him, give him the ten dollars and get the situation? A. No.

Q. You did say that you would endeavour to get him the situation? A. No, he asked me if I knew any people in Buffalo that could get him a situation. I told him I thought I did, and that was all that was said. He may have asked me when I would be going to Buffalo, and I told him I did not know, but not until after the elections any way, that might have been said.

Q. Did he speak to you about getting a situation, and did you intimate that you would assist him in that respect? A. There was just that of it; he asked me if I knew any people in Buffalo that could assist him.

Q. Do you intend to represent that you did not intimate to him that you would assist him? A. There was the intimation of course.

Subsequently, Mr. German being examined by his own counsel having been recalled as a witness on his own behalf, gives this further evidence as to the Thorold conversation:—

Q. The fourth charge is, "on or about the 28th day of February, 1891, at the said township of Thorold, the said respondent agreed to procure and offered and promised to procure, or to endeavour to procure a place or employment for the said Joseph B. Wood, in order to induce the said Wood to vote for the said respondent at the said elec-

1892

WELLAND ELECTION CASE.

Strong J.

tion." Is that true? A. No, it is not. I told him I would introduce him to some people.

Now, upon the evidence obtained from the appellant himself, I regret to be obliged to say that I must hold the fourth charge proved.

The statutory provision applying to this charge is that contained in section 84, subsec. (*b*) of the Dominion Elections Act, which reads as follows:

> The following persons are guilty of bribery and are punishable accordingly: Every person who, directly or indirectly by himself or any other person on his behalf, gives or procures or agrees to give or procure or offers or promises any office, place, or employment, or promises to procure or to endeavour to procure any office, place, or employment to or for any voter, or to or for any other person in order to induce such voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting at any election.

The cardinal questions to be decided here, are then, (taking out the words of the clause which apply to the case before us): 1st. Whether Mr. German did offer or promise to procure employment for the voter Wood? 2nd. Whether such promise was made to induce Wood to vote?

Now, to turn again to Mr. German's evidence, we find him saying (to take his own words already quoted from the record) that Wood asked him if he knew any people at Buffalo that could assist him in getting a situation, and that he did in reply "intimate" to him that he would assist him, he says: "There was the intimation of course."

Then what does this mean but that Wood having asked Mr. German to assist him in getting a situation at Buffalo, Mr. German said to him that he would assist him in doing so. And saying that he would in the future assist him is nothing else than promising to assist. Of course the word "promise" need not be actually used. If a candidate says to a voter "I will do

my best in trying to get you a situation," that surely is a promise of an endeavour to procure employment, and what difference is there between a promise to try and get a situation and a promise to help or assist the voter in getting one? Both forms of expression mean that the party promising will endeavour to get the employment wanted and amount to nothing less than a promise not to get, but in the words of the statute, to endeavour to get employment.

It is not enough, however, that such a promise was made—it must have been made corruptly; that is to induce the person to whom it is made to vote. Now the corrupt intent, that is the intent to induce the voter to vote, will not be implied though such an offer or promise be made to an elector in the very heat of a canvass if it can be ascribed to any lawful motive. In the case, for instance, where relations of kinship, of business, or long or close friendship exist between the parties, which afford reasonable ground for supposing that the candidate would be willing to aid the voter in the way promised, irrespective altogether of the election, the offer or promise will not be readily ascribed to a corrupt motive. But in the present case it may be asked what possible suggestion can there be, upon the evidence before us, of any motive which could have induced the appellant to promise Wood that he would endeavour to get him employment at Buffalo save the election? It is impossible that any such motive can be suggested. The only connection which, so far as we can see from the proofs in the record, had ever existed between Mr. German and Wood was, that some time before the election, some years, I should think, Mr. German had acted professionally as solicitor for the firm of butchers at Welland to which Wood then belonged, about some chattel mortgages. Under these circumstances and in the absence of proof to the con-

1892

WELLAND ELECTION CASE.

Strong J.

trary, it is impossible to say that the object of Mr. German (who admits he had previously, at Port Robinson, canvassed Wood for his vote) in making the promise or intimation to Wood, was any other than one in connection with the election; and if so, it could only have been with the intent of inducing him to vote. Then as to the evidence of Mr. German when recalled by his own counsel and asked whether the 4th charge (which was read to him) was true—all that need be said is that it actually confirms his former evidence. Mr. German says: "I told him that I would introduce him to some people." What is that but saying over again that he promised to endeavour to get him employment. Of course the answer implies that he was to introduce Wood to people with a view to getting him a situation, as in fact the appellant afterwards did.

I have not overlooked the *Cheltenham Case* (1) in which Baron Martin is said to have held that a mere offer of employment not accepted or carried out would not amount to bribery. But I am of opinion that in view of the express words of the statute which I have already read such a decision cannot be followed. Moreover, in the *Waterford Case* (2) Hughes B. acted on the very opposite view of the law.

Further, in the present case, it does not rest on a mere offer or promise, for the appellant did carry out his promise by going to Buffalo with Wood and endeavouring through Beuhl to get him employment. And this it may also be said must be presumed to have been done in pursuance of the "intimation" which Mr. German says he gave to Wood that he would comply with his request to assist him, and shows not by words but by acts and conduct, that what was meant by that

(1) 19 L.T. (N.S.) p. 816-820. (2) 2 O'M. & H. 25.

assent was nothing less than a promise to endeavour to procure employment.

In Cunningham's Treatise on Corrupt Practices at Elections (3) the law will be found laid down as I have stated it, and the *Chettenham Case* is distinctly denied to be law.

Then there are additional reasons why presumptions are to be made against the appellant. He admits having written a letter to Wood and then having written another letter telling him to destroy both that and the first letter. This direction Wood says he acted upon and burnt both letters. Wood says these letters had reference to the election and to the promises Mr. German had made him. It is true he afterwards says he does not remember the contents of the letters, but by this he was evidently not understood by the learned judges as retracting his former evidence that the letters had reference to the election, but as merely intending to say he did not remember the exact terms of them. Mr. German when first examined by the petitioner's counsel says he does not recollect writing these or any letters to Wood, but if he did write, telling him to destroy letters—it was because he had been warned by friends not to put dependence on Wood. Later on when Mr. German is examined by his own counsel he says he did write Wood a letter and then a subsequent letter telling him to destroy both. But he does not say when this occurred, nor does he deny that it was during the canvass or after the election, and he says that these letters were "without any reference to the election at all," that he has been trying to remember what it was about; that it was something regarding some private business which he had quite forgotten.

I agree with the learned judges of the trial court that this is an unsatisfactory way of accounting for

(3) Ed. 2 p. 136.

1892

WELLAND ELECTION CASE.

Strong J.

these letters. Mr. German had, when he had not heard Wood's evidence that the letters had been destroyed, and when for all he knew the letters might be produced to contradict him, admitted that if he had written to Wood it was about the election I think the court below was right in not accepting this as a sufficient explanation regarding the contents of these letters to do away with that presumption which is always made against one who destroys relevant documents, viz., that their production would have been unfavourable to him.

I do not, however, as the learned judges have done, rest my judgment exclusively on the presumption arising from the destruction of these letters, though I agree in their view also. For the reasons stated I can come to no other conclusion than that this appeal must be dismissed with costs.

TASCHEREAU J.—I agree that this appeal should be dismissed. It is a frivolous appeal. There was nothing to justify it. *Audaces fortuna juvat* should not be relied upon in courts of justice.

GWYNNE J.—I concur that the appeal must be dismissed. I cannot find any ground which would justify the reversal of the learned judges who tried the election petition.

PATTERSON J.—We had the advantage of an earnest and able presentation by Mr. Cassels of the grounds on which it is contended that the judgment of the two learned judges who tried the petition should be reversed, and I have carefully examined the report of the evidence.

It would, as has frequently been remarked, require a very plain demonstration of error on the part of the

judges who saw and heard the witnesses to justify an appellate court in differing from them upon their findings of fact. I must say, however, that looking at the reported evidence without the leaning which is natural enough in an advocate, particularly when there seems to be some hardship in his client's case, my apprehension of it does not lead me to doubt the correctness of the findings.

The learned judges did not discredit Wood, the principal witness. It was strongly urged that they ought to have done so, and that we ought to treat his evidence as unworthy of credence because he had, some time before the trial, made a declaration at the instance of the solicitor for the petitioner, who had said that if he would do so he would get him employment to keep him in the country until the trial, employment being accordingly obtained in Montreal from the Canadian Pacific Railway Company, from which the witness was discharged a week or so before the trial. The practice of committing a witness to a certain statement of facts has occasionally been rebuked with severity and with justice, and there may be reasons found for regarding such evidence with caution and sometimes with suspicion. That is one of the things that are best dealt with by the tribunal of first instance. It is one of the complaints now made that the judges did not treat what was done with severity and, notwithstanding all that was done, believed the witness. They were the best judges in the matter. They knew, better than we can be expected to do, whether the witness ought to be regarded as a purchased witness, as we have been asked to regard him, merely because on his consenting to stay in the country till the trial employment was found for him by which he could support himself; or whether the circumstances of his having made the declaration of

1892

WELLAND ELECTION CASE.

Patterson J.

facts, which does not appear to have been put in the shape of an affidavit, or to have been anything beyond a statement in writing, affected the value of his sworn testimony.

The issue was whether the appellant had in order to influence Wood's vote offered or promised to endeavour to procure him employment, and whether after the election he had, corruptly and on account of Wood having voted, made the endeavour. The promise is charged in the particulars as having been made in the township of Thorold on or about the 28th of February.

There is ample and direct evidence of such a promise made in the town of Thorold, which is in the township of that name, and I am unable to say that the evidence of the appellant himself, as reported, is so directly opposed to that of Wood as to amount to anything like a satisfactory contradiction of it. The subsequent attempt to procure the employment is not in dispute. Both parties agree as to it, though its character depends of course on the previous promise.

The date of the promise seems, however, to have been the 17th and not the 28th of February. On the 28th something else, which was the subject of evidence, took place in Port Robinson which is also in the township of Thorold.

That other matter is charged in article 3 of the particulars, and the same date is assigned in article 4 to the promise which seems to have been referable to the 17th. I see no reason to suppose that the appellant was prejudiced or misled by the inaccuracy of the date, or that he could have given a fuller explanation of what took place on the 17th, if that date had been stated on the record. It is from the appellant that we learn that the date was the 17th. The witness Wood does not seem to have been able to fix any day in February, though in other particulars, such as the

hotel in Thorold where he saw the appellant, the two substantially agree.

I need not refer to the evidence in more detail. I make this general reference to it for the purpose of showing that it is capable of leading, and as I think leads directly enough, to the conclusion arrived at by the trial judges.

I do not think we can avoid dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Moss, Hoyles & Aylesworth.*

Solicitors for respondent: *Meredith, Clarke, Bowes & Hilton.*

1891
*June 15.
1892
*April 4.

FANNY MAY E. BARTON AND GEORGE BARTON (DEFENDANTS) } APPELLANTS;

AND

CATHERINE McMILLAN (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Specific performance—Deed of land—Undisclosed trust—Enforcement—Statute of Frauds.

The property of M. having been advertised for sale under power in a mortgage his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount B. agreed to lend it for a year taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property subject to re-payment of the loan from B. and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and in addition to denying said charge defendants pleaded the Statute of Frauds.

Held, affirming the decision of the Court of Appeal, Strong J. dissenting, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement she must be held to have taken the

---

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

property in trust as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff.

1891

BARTON v. MCMILLAN.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment at the trial in favour of the plaintiff.

The circumstances which gave rise to this action were found by the trial judge as follows :—

The plaintiff's husband, John McMillan, owned certain property which was mortgaged, and default having been made in payment the same was advertised for sale under a power of sale in the mortgage. Some months before the auction at which the lands were offered the husband, the mortgagor, had made an assignment for the benefit of his creditors. The plaintiff conceived the idea of buying the property for herself and attended the sale, but did not make a bid; the property was not sold. On the following day she went with her husband to the office of the vendor's solicitor, and after some conversation made an offer in writing to pay $3,325 for it, $325 to be paid in cash and the balance to be secured by a mortgage on the property. On the following day she authorized her husband to increase that offer by $25, making the offer $3,350. This offer was verbally accepted, the plaintiff agreeing also to pay all taxes due on the property. The intention of the plaintiff and her husband was to take a sum of money which was due on a contract entered into between her and one Wilson, and which contract was being performed by the husband as a builder, he not being able to make a contract in his own name by reason of his insolvency; but this money was not forthcoming, and caused some embarrassment as the wherewithal to pay the first instalment was not just then obtainable. The husband, however, in the course of a few days after that met George Barton, to whom he

1891

BARTON
v.
MCMILLAN.

told the strait the plaintiff was in; in fact he said his wife was not able to carry out the sale because of the disappointment in getting the Wilson money. The defendant, George Barton, at once volunteered and made the offer: "I will not see your wife stuck in that way. I will advance money for her myself, and give her a year to pay me back, at 7 per cent, if she will give me security." The husband said, "She will give you security on the Gordon Street lots (which she held as her own separate property) or you can hold the property purchased in trust for a year, and she will pay you 7 per cent and all expenses of the conveyance to her at the end of that time." This latter was agreed to, and the defendant George Barton then agreed to enter into an agreement to that effect with the plaintiff; and it was also agreed that defendant George Barton should accompany the plaintiff's husband on the day after to the vendor's solicitor and complete the purchase, after which the agreement with the plaintiff was to be executed. The husband reported this offer of George Barton to the plaintiff, and she acquiesced, and her husband then went alone, at her request, to the office of the vendor's solicitors and informed them that the defendant George Barton had agreed to buy the place for his wife on the terms agreed upon between the plaintiff and the said solicitors. They acquiesced, and the husband having left the office met the defendant George Barton and then took him to the office and introduced him to the solicitor as being the party who had agreed to purchase for the plaintiff. The conditions of sale were then read over and the question of the taxes due on the property was spoken of, and the vendor told him they must be paid by the purchaser, and the plaintiff's husband then agreed on behalf of the plaintiff that she should pay them, and the only money to be advanced by George Barton

1891

BARTON v. McMILLAN.

would be the $350. This being settled a contract was drawn up by the solicitors and signed by the defendant George Barton in presence of the husband. The defendant George Barton said he did not know whether he would take the deed in his own or his daughter's name, but he would advise him by telephone. On the following day a message came to draw the deed in the name of the other defendant, Fanny Barton, who is the defendant George Barton's daughter, and the deed was so drawn, and she gave back a mortgage to secure $3,200 and paid the $350 by cheque. The defendant Fanny Barton now claims that she purchased for herself and the plaintiff charges that the defendants George Barton and Fanny Barton entered into a fraudulent conspiracy to deprive the plaintiff of the bargain she had made for the purchase of the property and in violation of the verbal agreement entered into between her, the plaintiff, and the defendant George Barton.

The plaintiff accordingly brought an action to have the defendant Fanny Barton declared a trustee for her of the said property subject to payment of the amount due on the loan by said George Barton, and for specific performance of the alleged agreement between her and George Barton The defendants, in addition to denying the said agreement, pleaded that it was void under the Statute of Frauds for not being in writing, and that it was also void as being made in fraud of the creditors of the said John McMillan. The trial judge made the decree prayed for by the plaintiff and his decision was affirmed by the Court of Appeal. The defendants appealed to this court.

Moss Q.C. for the appellants cited *James* v. *Smith* (1); *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (2).

(1) [1891] 1 Ch. 384. (2) 17 Ch. D. 721.

1891

BARTON v. McMILLAN.

Bain Q.C. for the respondents referred to *Chattock* v. *Muller* (1); *Kitchen* v. *Dolan* (2); *Rose* v. *Hickey* (3).

Sir W. J. RITCHIE C.J.—My opinion is entirely in accord with the Chief Justice of the Court of Appeal and Mr. Justice Maclennan, and I therefore think the appeal should be dismissed.

STRONG J.—In my opinion the evidence did not warrant the conclusions of Mr. Justice Robertson and consequently the order of the Court of Appeal affirming his judgment ought to be reversed.

There never was any contract with the respondent or with Barton binding on Mr. Horsford, the mortgagee, to sell the property to either. The Statute of Frauds is pleaded and the defendant is entitled to avail herself of the defence afforded by it.

Mrs. McMillan's offer as signed by her was to purchase for $3,225, a price which was not accepted.

The offer signed by George Barton written at the foot of a copy of the printed conditions of sale was never signed by Mr. Horsford nor by any one duly authorized on his behalf; it never, therefore, ripened into a contract capable of being enforced against Horsford, although, no doubt, a mere parol acceptance by him would have made it a valid and binding contract within the Statute of Frauds as against Barton, and susceptible of being enforced against him. The law is clearly settled that where an offer to purchase, specifying all the terms required to make a contract of sale, is signed by the proposed purchaser a parol acceptance of that offer by the proposed vendor is sufficient to convert it into a contract binding on the party signing. *Warner* v. *Willington* (4). But on the

(1) 8 Ch. D. 177.
(2) 9 O. R. 432.
(3) 3 Ont. App. R. 309.
(4) 3 Drew. 523.

other hand such an offer thus accepted by parol does not become binding on the vendor, who may notwithstanding his acceptance repudiate it and set up the Statute of Frauds and the want of signing as a defence to an action brought to enforce the sale. It was long ago determined that the want of mutuality did not prevent a party to a contract of sale, who had not signed a memorandum such as the Statute of Frauds requires, from setting up the statute against the other party even though the latter had signed and would have been bound by the contract. Mr. Justice Maclennan suggests that inasmuch as the mortgagee's solicitor deposes that he referred by letter to his client, who lived at Port Hope, to inquire whether he would permit $3,200 instead of $3,000 to remain on mortgage, and inasmuch as Mr. Horsford authorized him to do this, the latter must be taken to have given a written assent to the contract. But there are several answers to this. In the first place the correspondence is not in evidence, and we cannot surmise that there was an assent to a proposal which, for all that appears, Mr. Horsford may never have had communicated to him. It is quite consistent with the evidence of Mr. Milligan, the solicitor, that the authority to take a mortgage for $3,200 may have been general and without reference to any particular offer or purchaser. Next, it could not apply to the contract signed by Mrs. McMillan for this was an offer to purchase for $3,325 only which was rejected by the solicitors, the price required by them being $3,550 which was never offered in writing by Mrs. McMillan. Then the assent of Mr. Horsford referred to by Mr. Justice Maclennan could not refer to the memorandum of offer signed by George Barton, for this was not signed until after Mr. Horsford's assent to take the mortgage for $3,200 had been communicated to his solicitors.

1892

BARTON v. McMILLAN.

Strong J.

It is therefore out of the question to say that on the 21st of November, 1888, the date of Miss Barton's purchase, Mr. Horsford the mortgagee was in any way bound to sell to Mrs. McMillan or to George Barton for her benefit; on the contrary, Mr. Horsford was, as Mr. Milligan quite correctly told Miss Barton, perfectly free to exercise his power of sale in favour of any one except himself or his solicitors. The reason for making these observations is this: If Horsford had become bound by reason of having, by a writing duly signed and so binding on him under the statute, accepted Mr. Barton's offer he would not have been free to sell to Miss Barton, and the latter, if she had taken the conveyance of the legal estate with notice of such a prior contract, would have been bound by it as much as Horsford himself. There is, however, no pretense for any such assumption. As far as Horsford was concerned he had a perfect right to sell to any one he chose, provided he complied with the terms of his power of sale.

The only question then is, whether Miss Barton was free to purchase as she did for her own benefit; and differing very widely indeed in the view I take of both the law and the facts from the learned trial judge, as well as from the learned Chief Justice and Mr. Justice Maclennan, I must answer this in the affirmative.

I do not regard *Bartlett* v. *Pickersgill* (1) as having been overruled by *Heard* v. *Pilley* (2) or any of the late cases which have been referred to. It had always, until it met with some judicial criticism from Selwyn and Giffard L.JJ. in *Heard* v. *Pilley* (2), been regarded as an authoritative decision, and what was said as to it in *Heard* v. *Pilley* (2) may well be regarded as *obiter dicta*, inasmuch as it was clear in that case that parol evidence was admissible upon a distinct ground. As has been pointed out by Kekewich J. in the late

(1) 1 Eden 515. (2) 4 Ch. App. 548.

case of *James* v. *Smith* (1), the case of *Heard* v. *Pilley* (2) was a suit for specific performance instituted by a party, who had authorized another to purchase as his agent, against the vendor and the agent (who had taken the contract in his own name) to compel the execution of the contract of sale. No conveyance had been executed and the contract still remaining executory what the plaintiff sought to prove was not a trust but agency, and there is nothing in the Statute of Frauds forbidding the admission of parol evidence to establish such a relationship. The actual decision in *Heard* v. *Pilley* (2) is therefore really not at variance with *Bartlett* v. *Pickersgill* (3), and as the latter case has always been recognized as good law by such distinguished text writers as Lord St. Leonards (4) and Mr. Dart (5), and has moreover, so recently as 1890, received the judicial approval of Mr. Justice Kekewich (6) who, had the statute been properly pleaded, would have acted on this view in the case cited, I cannot regard it as an overruled case. See also Lewin on Trusts (7). The cases of *Lees* v. *Nuttall* (8), *Cave* v. *Mackenzie* (9), and *Chattock* v. *Muller* (10), are all susceptible of the same explanation; they were all cases of agency. Then if *Bartlett* v. *Pickersgill* (3) is to be taken as good law parol evidence would not have been admissible even against George Barton himself, if he had purchased, paid his own money, and given a mortgage in this own name. And if this is so it follows that the defence of the Statute of Frauds must be equally available to Miss Barton, by whom it has been duly pleaded and in whose behalf the objection to the admissibility of parol

(1) [1891] 1 Ch. 384.
(2) 4 Ch. App. 548.
(3) 1 Eden 515.
(4) Vendors and Purchasers, 14th ed. p. 703.
(5) Vendors and Purchasers, 6th ed. p. 1056.
(6) *James* v. *Smith*, [1891] 1 Ch. 384.
(7) 1891, 9th ed. p. 176 and note.
(8) 1 Russ. & Mylne 53; 2 My. & Keen 819.
(9) 46 L. J. Ch. 564.
(10) 8 Ch. Div. 177.

1892

BARTON v. McMILLAN.

Strong J.

evidence was expressly taken *in limine* at the trial. Upon this ground alone I should be prepared to allow the appeal.

As regards the cases of *Haigh* v. *Kaye* (1), *Booth* v. *Turle* (2), *Davies* v. *Otty* (No. 2) (3), and *Lincoln* v. *Wright* (4), no one who has been familiar with these cases and their application in practice by courts of equity can fail to apprehend the distinction between them and such cases as *James* v. *Smith* (5) and that now under consideration (6). In all the cases just cited an absolute conveyance had been made by the party asserting the trust upon a parol trust which was established not merely upon the parol testimony of witnesses, but by reason of the additional circumstance that the grantor had retained possession of the property conveyed, which possession being inconsistent with the deed was not susceptible of being referred to any other title than the trust. Under these circumstances it was held, upon a principle analogous to that on which courts of equity act in decreeing relief, on the ground of part performance in the cases of contracts by parol, that it would be to sanction a fraud upon the grantor and to make the statute the instrument for effecting that fraud to permit the trustee to set up an absolute title in himself with which the possession and enjoyment of the grantor would be inconsistent. In such cases the trust is not established merely on parol testimony but on the surrounding facts of the case, which are not excluded by the statute and which courts of equity hold are sufficient to let in the parol evidence. This class of cases can, however, manifestly have no application when the sale is, as here, under the paramount title of a mortgagee who has never been in

(1) 7 Ch. App. 469.
(2) L.R. 16 Eq. 182.
(3) 35 Beav. 208.
(4) 4 DeG. & J. 16.
(5) [1891] 1 Ch. 384.
(6) See Lewin on Trusts, 9th ed. p. 53.

possession, the possession being all along retained by the mortgagor. There is here, therefore, nothing inconsistent with the deed raising the presumption of a trust.

If, then, parol evidence is admitted in such a case to show a trust it would be, as Lord St. Leonards says, "directly in the teeth of the Statute of Frauds" (1).

There is, however, the further defence upon the facts. The evidence entirely fails to establish that the purchase by Miss Barton was made collusively with her father, with his money, or in any way for his benefit. On the contrary it appears very conclusively that Mr. Barton having mentioned to his daughter the fact that the property was for sale, and that he had agreed to purchase it for Mrs. McMillan and applied to her to advance the cash to enable him to do so, she refused to make the loan and at once resolved and declared her intention to purchase it for herself, and very promptly went to the office of the mortgagee's solicitors and there made the arrangement, going again the next day and paying the cash portion of the price. No fact could be more clearly established in evidence than that the money was the appellant's own. She points out the sources from which it was derived and the production of her bank account corroborates her statements in this respect. That Miss Barton did not avail herself of any contract entered into by the mortgagor with her father or Mrs. McMillan is sufficiently apparent from what has before been pointed out, viz., that there was no such contract binding on the mortgagee, and so far from assuming to claim the benefit of the offer, a proposal short of contract, before made with the solicitors she expressly asked Mr. Milligan if the mortgagee was free to sell to her, and announced to him that she was buying for her own account. Had Miss

(1) Vendors and Purchasers, p. 703, 14 ed.

1892

BARTON v. McMILLAN.

Strong J.

Barton represented to the solicitors of the mortgagee or led them to believe that she was carrying out the proposal made by her father the case might have been different, though even then I should have thought there would have been legal difficulties in the plaintiff's way; so far from doing this, I repeat, she took pains to impress upon them that she was buying for herself. It is true that Mr. Milligan said in answer to a question put to him by the learned judge—a question I may say, which if it had been put by counsel and objected to, it would have been the learned judge's duty to have overruled—that he understood "they were carrying out the contract which George Barton had signed;" but this is not evidence but the mere conclusion of the witness, entirely unwarranted by anything which Miss Barton is proved to have either said or done.

Then what is there remaining to warrant the inferences of fraud and conspiracy which have been imputed to the appellants? Nothing but the relationship of father and daughter which exists between them. Had Mr. Barton told a person in no way related to him that he proposed to buy the property for the respondent surely that person would not have been incapacitated from making a purchase for his own benefit, nor, if he had done so, could it, in the absence of evidence, have been reasonably imputed to him that he was acting in collusion with Barton. Then upon what principle should any difference be made between the present case of a purchase by his daughter and that just supposed? The appellant, Miss Barton, is not a child nor an inexperienced girl, but a young woman of twenty-four years, who, as Mr. Justice Burton in his judgment has remarked, indicated by her evidence the possession of considerable ability, who, as she states, had had experience in dealings in real

estate previous to this purchase, and who was moreover possessed of means, satisfactorily proved to have been her own, amply sufficient to justify her in engaging in the purchase. Had the appellant been dependent on her father and without resources of her own, or had she been a young person of immature years, we might have gone far in making the presumption that she was interposed for the purpose of cloaking a purchase for her father's benefit, by whom in that case the money would presumably have been supplied; but as the case is presented to us on the evidence no such inference is admissible, and I am unable to find any reason why the case of Miss Barton should be distinguished from that of a mere stranger to whom her father had made the same communication of the facts and the same application for an advance of money which he had made to her. It is out of the question to say, as Mr. Justice Robertson does, that Miss Barton's father ought to have controlled her. We are dealing with legal rights and obligations, and with nothing else, and the plain answer to the learned judge's observation on this head is that she was in no way subject to the legal control or tutelage of her father; that she was as regards both legal age and actual capacity quite competent to act for herself; and so far from there being any proof that what she did was done under her father's influence, or with a view to his advantage, such presumptions are most effectually rebutted. Unless, therefore, it is to be held as a matter of legal presumption that a young woman of twenty-four, possessed of evident business ability and experience, could not act in a matter of this kind independently of her father merely because she was resident in his house, the respondent's case must fail. So to extend the disqualification of the

1892

BARTON v. McMILLAN.

Strong J.

father, to make the purchase for his own benefit, to the daughter, as a matter of legal disability, could have no sanction either in law or reason. Some stress was laid upon Miss Barton having said that she understood from her father that McMillan was to pay the taxes as indicating that she had adopted his proposal and was merely carrying it out on his behalf. She gives in her evidence an explanation of this which is reasonable and satisfactory. She says she expected McMillan to pay the taxes as he had been in possession. No doubt this was legally correct. McMillan must have been assessed for the taxes and was the person primarily liable to pay them, and the only person to whom any personal liability in respect of them attached, although, of course, the taxes were also a charge upon the property itself. I see nothing in this observation to indicate that the purchase was for the benefit of George Barton, or otherwise than as it was expressly declared to be, an independent purchase by Miss Barton with her own money and for her own exclusive benefit.

The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

GWYNNE J.—Notwithstanding some contradiction between the evidence of John McMillan, the plaintiff's husband, and the defendant George Barton it sufficiently appears, I think, from Barton's own evidence, that he signed the agreement which he did sign for the purchase of the property in question at the instance of John McMillan, but for and on behalf of the plaintiff, for the purpose of giving effect to an offer which had been made by her to, and accepted by, the vendor through his solicitor, and upon an agreement that he should hold the property only as security for

repayment by the plaintiff of the purchase money mentioned in the contract of purchase as being given in cash, together with interest thereon, to be repaid within a year, and that it was part of the arrangement made with him that although by the contract of purchase he was to buy subject to the back taxes these taxes should be paid by McMillan. When Barton signed the contract of purchase he gave to the vendor's solicitors his own name and that of his wife in case the papers should be made out in his own name and also the name of his daughter Fanny M. E. Barton saying that perhaps the papers should be made in his daughter's name, and that he would telephone from his house whether they should be made out in his own name or in that of his daughter; of the above facts there is, I think, no doubt. Now on the same afternoon a telephone message was delivered to the vendor's solicitors from a son of George Barton's from George Barton's house, saying that the property was to go in Miss Barton's name, and I am of opinion that although the defendant Fanny Barton seems to have entertained the design of acquiring the property absolutely to her own use in despite of her father's contract of purchase, of which she was quite aware, she in point of fact procured the deed to be executed upon the faith of her father's contract, and that it was executed to her with the intention upon the part of the vendor's solicitors of giving effect to the father's contract. She stated to the vendor's solicitor that she knew she was purchasing subject to the back taxes, but added that McMillan had agreed to pay them, thus showing that she was perfectly aware of the agreement between her father and McMillan in relation to these taxes and that she was taking the benefit of that agreement. It is apparent that the learned trial judge did not believe the evi-

1892

BARTON v. MCMILLAN.

Gwynne J.

dence of the defendant Fanny M. Barton when she represented herself as being a *bonâ fide* purchaser of the property wholly independently of her father's contract, of the terms of which she was quite aware, and was as I have observed taking advantage of as to the back taxes, and I cannot say that the conclusion so arrived at by the learned trial judge was incorrect. I am satisfied upon the evidence that notwithstanding the skill exhibited by the young lady in endeavouring to support the purchase as one made *bonâ fide* in her own interest as an independent purchase, the deed under which she claims was in truth and in fact executed to her for the sole purpose of giving effect to her father's contract of purchase, and that she must abide the consequences and hold the property as her father must have held it if the deed had been taken in his name, subject to the terms of redemption upon the faith of which he entered into the contract of purchase for and in behalf of the plaintiff. The appeal must therefore be dismissed with costs.

PATTERSON J.—In my opinion this judgment ought to be affirmed on the grounds fully stated and discussed by Mr. Justice Maclennan in the Court of Appeal.

The fact seems to me to be manifest, from the evidence taken as a whole, that the conveyance to Fanny Barton carried out, and was made by the vendor for the purpose of carrying out, the arrangement specified in the offer made in writing by George Barton on behalf of the plaintiff, but being really the arrangement made by the plaintiff herself with some intervention by her husband.

The objection so much relied on, that that agreement could not have been enforced against the vendor for want of a writing signed by him to satisfy the 4th section of the Statute of Frauds is beside the question,

1892

BARTON v. McMILLAN.

Patterson J.

as has been clearly demonstrated by Mr. Justice Maclennan, and I think that the principles enunciated by James L. J. in the case of *Haigh* v. *Kaye* (1), with respect to the operation of the 7th section of the statute, fully sustain the propriety of treating the appellant Fanny Barton as a trustee for the respondent, notwithstanding the absence of any written declaration of the trust, and without impediment from the suggestion that the transaction was put in the name of Mrs. McMillan, and not in that of her husband, in order to avoid interference by the creditors of the latter.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

Solicitors for respondent: *Greene & Greene.*

(1) 7 Ch. App. 469.

1891
*Nov. 5.
1892
*April 4.

J. H. R. BURROUGHS *et al.* (CLAIMANTS) APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Salaries of License Inspectors—Approval by Governor General in Council—Liquor License Act, 1883, *s.* 6.

On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by Order in Council under section 6 of the said Liquor License Act, 1883.

Held, affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor General in Council. The Liquor License Act, 1883, section 6.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the claimants' claim for $1,578.76.

The action was brought by the appellants to recover the sum of $1,578.76 which they alleged was due to them from the Government of Canada; the claim therefor arose under the following circumstances:—

Under the Liquor License Act, 1883, of Canada, the appellants were appointed the Board of Commissioners for the license district of the city of Quebec, and they continued in that office and capacity from the 19th day of February, 1884, until the 23rd day of December, 1885, at which time, the act having shortly before that

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

(1) 2 Ex. C. R. 293.

1891

BURROUGHS v. THE QUEEN.

date been declared *ultra vires* of the Parliament of Canada by the Judicial Committee of the Privy Council, the appellants ceased to act as commissioners.

By the 6th section of the act it is provided that "A chief inspector of licenses, and one or more inspectors, shall be appointed by the Board of License Commissioners from time to time for each district, as the board may see fit, and each license inspector shall, before entering upon his duties, give such security as the board may require for the due performance of his duties, and for the payment over of all sums of money received by him under the provisions of this act; and the salary of the inspectors shall be fixed by the board, subject to the approval of the Governor in Council." Under this section the appellants appointed a chief inspector at a salary of $1,200 and two assistant inspectors at $400 each, per annum, and those inspectors were paid at these rates up to the time when the commissioners ceased to hold office.

The said salaries which the appellants so fixed for the inspectors were not at the time they were determined upon approved of by the Governor in Council, nor did the appellants at any time submit the salaries to the Governor in Council for approval, but the appellants commenced and continued to pay the inspectors their salaries at the said rate until the month of September, 1885, when they were notified that an order in council had been passed on the 5th September fixing the rates at which inspectors were entitled to be paid, which was lower than the salaries which the appellants had been paying the said inspectors.

All the moneys which the appellants had received in the administration of the Liquor License Act during their tenure of office was paid into the license fund and amounted to the sum of $4,480, and it was out of this fund, under subsection 2 of section 56 of the act,

1892

BURROUGHS v. THE QUEEN.

that the salaries and expenses of the commissioners and inspectors and other expenses were to be paid, and it appears that the appellants had as a matter of fact paid to the inspectors for their salaries the sum of $3,431.42 which was the amount due them at the rates which the appellants had fixed for them.

The amount of license fund was not sufficient to cover all the claims on that fund for salaries and expenses under the requirements of the order in council.

When the operations under the act came to be wound up, the Government of Canada appropriated a sum of $726.23 to be added to the amount received by the appellants into the license fund, which made a total of $5,206.23, available for salaries and expenses; and the Department of Inland Revenue acting within the scope of the order in council of the 5th September, 1885, apportioned the said sum as follows: $2,521.33 for the appellants as commissioners, $1,852.66 for the inspectors and the sum of $832.24 for contingencies.

The sum which the appellants had already paid to the inspectors, namely, $3,431.42 was more than the Department of Inland Revenue was empowered under the said order in council to allow by the sum of $1,578.76, and the appellants found that out of the $5,206.23 there would only be $942.55 left to apply upon their own salaries, instead of the $2,521.33 which the department had appropriated for their payment.

The appellants then applied to the government for payment of this difference of $1,578.76, and upon payment being refused they applied for and obtained a reference of their claim to the Exchequer Court under 50 and 51 Vic. ch. 16, sec. 23, and on the 18th day of November, 1890, the case came on for trial at the city of Quebec before the judge of the Exchequer Court

and judgment was afterwards rendered whereby the appellants' action was dismissed.

L. Burroughs for appellants.

Hogg Q.C. for respondent.

Sir W. J. RITCHIE C.J. was of opinion that the appeal should be dismissed but without costs.

STRONG J. (Oral)—The act under which the appellant was appointed having been declared by this court and the Privy Council *ultra vires* of the Parliament of Canada, this petition of right is not maintainable and the appeal must be dismissed.

FOURNIER J.—Les appelants formant le bureau des commissaires pour l'octroi des licences pour la vente des liqueurs, en vertu de l'acte des licences du Canada, de 1883, réclament la somme de $1,578.76 comme leur étant due par Sa Majesté pour les causes suivantes:

Nommés commissaires des licences pour le district de licence de la cité de Québec, le 19 février 1884, les appelants en ont rempli toutes les fonctions et devoirs, jusqu'au 23 décembre 1885, époque à laquelle l'acte en question fut par jugement du Conseil privé, déclaré inconstitutionnel.

Les appelants avaient été nommés commissaires des licences en vertu de la sec. 6 de l'acte des licences, déclarant que:

A chief inspector of licenses, and one or more inspectors, shall be appointed by the board of license commissioners from time to time for each district, as the board may see fit, and each license inspector shall, before entering upon his duties, give such security as the board may require for the due performance of his duties, and for the payment over of all sums of money received by him under the provisions of this Act; and the salary of the inspectors shall be fixed by the board, subject to the approval of the Governor in Council.

1892

BURROUGHS v. THE QUEEN.

Fournier J.

En vertu de cette section les commissaires nommèrent un inspecteur en chef avec un salaire de $1,200 et deux assistants inspecteurs avec un salaire de $400 chacun, par année, et ces inspecteurs ont été payés à ces taux jusqu'au 10 septembre 1885, époque à laquelle les salaires fixés par les commissaires furent réduits par ordre en conseil.

Par lettre du 14 mars 1884, le ministre du revenu de l'intérieur avait été informé de ces nominations et du montant des salaires fixés qui seraient payés mensuellement pour l'inspecteur et toutes les semaines pour ses assistants, avec les fonds qui se trouveraient entre les mains des commissaires, à moins d'instructions contraires. Le département n'ayant donné aucune instruction à ce sujet, ces salaires furent payés aux taux fixés.

Le 6 août 1884, les commissaires furent informés par le département qu'il n'était pas probable que le Gouverneur en conseil s'occuperait de la considération des règlements adoptés en vertu de la 56e section de l'acte avant que sa validité n'eût été décidée par la cour Suprême.

Le 7 août 1885, après la décision de la cour Suprême, les commissaires informèrent le département, qu'ils continueraient leurs officiers en fonctions, ce qui fut approuvé par le département, par lettre en date du 14 août 1885. En conséquence, les commissaires continuèrent à payer les dépenses de leur bureau et les salaires de leurs officiers, aux taux fixés par eux, jusqu'au 10 septembre 1885, époque à laquelle ils furent notifiés par le département qu'un ordre en conseil fixant et réduisant les salaires des inspecteurs avait été adopté. Les inspecteurs furent ensuite payés suivant le montant fixé par cet ordre en conseil jusqu'au 23 décembre 1885, époque à laquelle tous procédés pour mettre à effet l'acte en question furent abandonnés en conséquence de la décision du Conseil privé.

En vertu de la sec. 61, les commissaires étaient tenus de faire rapport au ministre du revenu de l'intérieur de toutes leurs opérations pour la mise à exécution de l'acte des licences; et pendant tout le temps que le dit acte a été en force, les dits commissaires ont constamment tenu le département au fait de toutes leurs opérations.

Depuis le 16 février 1884 au 25 décembre 1885, le montant de leurs dépenses s'est élevé aux sommes suivantes:—

Salaires de l'inspecteur et de ses assistants	$3,431 62
Diverses dépenses	832 24
Salaires des commissaires	2,513 34
	$6,777 20

Les dépenses diverses furent accordées par l'ordre en conseil, mais le salaire de l'inspecteur en chef et de ses assistants fut réduit à $1,852.66 au lieu de $3,431.42 qui avait été fixé par les commissaires, ce qui fait une différence de $1,578.76 entre le montant réellement payé et déboursé par les commissaires et celui fixé par l'ordre en conseil du gouvernement.

Cette différence de $1,578.76 ayant été retranchée du montant accordé comme salaire aux commissaires, $2,521.33, il n'est resté à ceux-ci que $942.57 à compte de leur salaire.

Leur action a pour but d'être payés de la somme de $1,578.76 déboursée et payée par eux pour la mise à exécution de l'acte des licences; en outre de ce qu'ils ont reçu à-compte de leur salaire.

L'honorable juge de la cour de l'Echiquier a renvoyé la pétition de droit des appelants en se fondant sur la sec. 6 de l'acte des licences de 1883, citée plus haut, contenant la déclaration suivante: "And the salary of the

1892

BURROUGHS v. THE QUEEN.

Fournier J.

inspectors shall be fixed by the board subject to the approval of the Governor in council."

D'après l'exposé des faits ci-dessus, il est clair que les commissaires ont informé régulièrement le département de toutes leurs actions au sujet de la mise en force de l'acte, qu'ils lui ont donné information du montant fixé pour le salaire des inspecteurs et qu'ils ont aussi demandé l'approbation requise par la sec. 6 de l'acte, enfin que toute leur conduite a été marquée au coin de la prudence, du jugement et de la plus grande bonne foi dans tous leurs procédés.

Ne recevant pas de réponse au sujet du salaire de leurs officiers ils continuèrent de les payer aux taux fixés par eux, dont ils avaient informé le gouvernement en lui rendant compte de leurs dépenses. Non seulement les commissaires avaient raison de prendre le long silence du gouvernement à ce sujet comme une preuve d'approbation du taux fixé par eux, mais l'ayant informé après la décision de la cour Suprême qu'ils entendaient maintenir en office leurs officiers, ils reçurent une lettre en date du 14 août 1885, les informant que leur décision à cet égard était approuvée. N'était-ce pas là une approbation formelle et une ratification de la fixation du salaire? Si le gouvernement avait eu l'intention alors de ne pas confirmer les salaires n'était-il pas absolument de son devoir d'en informer les commissaires et de leur dire en même temps qu'il consentait au maintien des officiers, mais à un taux moins élevé. Les commissaires pas plus que les officiers ne pouvaient s'imaginer que le gouvernement avait l'intention de les conserver, mais à un taux réduit dont il ne fut nullement alors question. Ces officiers ont dû présumer que puisque le gouvernement retenait leurs services, c'était aux mêmes conditions que par le passé, c'est-à-dire au salaire fixé par les commissaires qui leur avait été payé jusqu'alors sans aucune difficulté. Malheureusement l'appro-

1892

BURROUGHS v. THE QUEEN.

Fournier J.

bation du Gouverneur en conseil requise par la section 6 de l'acte des licences de 1883, pour la détermination des salaires n'ayant pas été donnée, je me vois bien à regret forcé de déclarer que cette formalité était nécessaire pour légitimer la réclamation du salaire. Cependant les commissaires ayant fait toutes les démarches nécessaires pour l'obtenir ce n'est pas à eux d'en supporter la responsabilité, mais au ministre du revenu de l'intérieur qui a négligé de se conformer à la demande des commissaires. Il faut espérer que le département indemnisera les commissaires d'une perte qu'ils ne devraient pas subir.

TASCHEREAU J.—I am of opinion that this petition of right was rightly dismissed. I have come to that determination not without regret, as it is clearly in evidence that the petitioners were certainly led into error by the officers of the Crown, and paid these inspectors solely with the intention of effectually putting an act of Parliament into force, in performance of their duties. I think in law, however, that they have no right of action, though their claim should, in my opinion, receive a favourable consideration from the Crown. I agree with the judgment of the Exchequer Court.

The salaries of the inspectors could only become a charge upon the license fund after the sanction and approval of the Governor in Council of such salaries had been obtained therefor, and there is no evidence that the salaries as fixed by the appellants were ever approved of as required by the statute, so that any sums of money paid by the appellants without such approval were paid illegally, and the appellants must take the consequences of their illegal action.

The appellants were expressly warned shortly after their appointment by letter of the commissioner of

1892

BURROUGHS v. THE QUEEN.

Taschereau J.

Inland Revenue that in fixing the salaries of the inspectors, the salaries so fixed were subject to the approval of the Governor in Council, and that when the salaries should be submitted to the department, the Governor in Council would consider the matter; and more especially were the appellants notified by the letter of the commissioner of Inland Revenue of the 6th August, 1884, to the appellants, wherein amongst other things the commissioner says, "In districts where the revenue accrued upon applications for licenses and license fees is sufficient to meet all anticipated expenditure, the chairman of such boards will probably feel little hesitation in accepting the responsibility of authorizing disbursements on account of the expenses of the board and of the salaries and expenses of the inspectors, always bearing in mind that the inspector's salary is subject ultimately to the approval of the Governor in Council, and therefore that any advance on account of it must leave a reasonable margin for any possible divergence of view between the board and His Excellency in Council as to the value of the services rendered." The appellants cannot now be allowed to say that they never had any notification from the Department of Inland Revenue as to the fixing of the salaries even if such notification were necessary. And the fact that the appellants went on for nearly the whole time of their official tenure paying the salaries to the inspectors as fixed by themselves, with the knowledge of the Department of Inland Revenue, cannot, it seems to me clear, be construed into an approval of their conduct under the statute so as to bind the Crown.

The approval as required by the 6th section of the statute cannot be inferred from the mere inaction or silence of the Minister of Inland Revenue. That section requires actual approval by the Governor in Council. The minister, therefore, in fact had no authority

1892

BURROUGHS v. THE QUEEN.

Taschereau J.

under the statute to approve, and as the learned judge in the court below puts it, what he could not do directly he could not be held to have done indirectly. *Queen* v. *McGreevy* (1) and *Queen* v. *Smith* (2).

Neither can the delay which took place between the time when the appellants first notified the department that they had fixed the salaries and the time when the salaries were fixed and sanctioned by the Governor in Council, be taken to be an admission on the part of the Crown that the salaries fixed by the commissioners had the approval of the Crown.

PATTERSON J. concurred.

Appeal dismissed without costs.

Solicitors for appellants: *Belcourt, MacCraken & Henderson.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

---

(1) 18 Can. S. C. R. 371.

(2) 10 Can. S. C. R. 1.

1891
*May 19, 20.
1892
*April 4

JEAN BAPTISTE THÉOPHILE DORION (DEFENDANT).... ..... } APPELLANT;

AND

PIERRE ACHILLE ADÉLARD DORION (PLAINTIFF)..... } RESPONDENT.

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

Substitution—Curator to—Action to account—Indivisibility of—Will—Construction of—Transfer—Effect of—Sale of rights—Mandatory—Negotiorum gestor—Parties to suit for partition—Art. 920 *C.C.P.—Purchase by curator—Art.* 1484 *C. C.*

P.A.A.D., respondent, as representing the institutes and substitutes under the will of the late J. D., brought an action against J.B.T.D. (appellant) who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums, which the plaintiff alleged the defendant had received while he was curator.

Held, reversing the judgment of the court below, that an action did not lie against the appellant for these particular sums apart from and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S.D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £447. 7*s.* 6½*d.*, the defendant having in an action of reddition of account settled by notarial deed of settlement with the said S.D. for the sum of $4,000 which he agreed to pay and for which amount the plaintiff became surety.

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all renditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F.D. and E.D. two other institutes under the will, in virtue of two assignments made to him by them on the 21st January, 1869, and 15th November, 1869 respectively. In 1865, after the defendant had

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

1891

DORION v. DORION.

been sued in an action of reddition of account, by a deed of settlement the said F.D. and E. D. agreed to accept as their share in the estate the sum of $4,000 each, and gave the defendant a complete and full discharge of all further redditions of account.

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.

In 1871 C.Z.D., another of the institutes, died without issue, and by his will made the defendant his universal legatee. Plaintiff claimed his share in the estate under a deed of assignment made by defendant to plaintiff in 1862 of all right, title and interest in the estate.

Held, that the plaintiff did not acquire by the deed of 1862 the defendant's title or interest in any portion of C.Z.D.'s share under the will of 1871.

Held further, that under the will of the late J.D., C.Z.D.'s share reverted either to the surviving institutes or to the substitutes and that all defendant took under the will of C.Z.D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from the defendant was condemned to render an account of his own share in the estate which he transferred to plaintiff by notarial deed in 1862, and also an account of C.D.'s share, another institute who in 1882 transferred his rights to the plaintiff. The transfer made by the defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received the sixth of the sum for which he was sued to account.

Held, reversing the judgment of the court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in action to account as the mandatory or *negotiorum gestor* of the plaintiff.

2. That F. D. and E. D. having acquired an interest in C. Z. D.'s share after they had transferred their share to plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit. Art. 920 C.P.C.

Per Taschereau J.—*Quære:* Were not the transfers made by the institutes E.D., F.D. and C.D. to the plaintiff while he was curator to the substitution null and void under Art. 1484 C.C.?

APPEAL AND CROSS-APPEAL from a judgment of the Court of Queen's Bench for Lower Canada

1891

DORION v. DORION.

(appeal side) (1), which modified the judgment of the Superior Court for Lower Canada (2).

The respondent as representing the institutes, Sévère Dorion, Firmin Dorion, Charles Dorion, Eustache Dorion, Charles Zéphire Dorion and the appellant himself, under the will of the late Jacques Dorion who died in 1822, and also in his capacity of curator to the substitution, created by the said will, sued the appellant for the reddition of an account of the amount of three particular sums of money amounting to the sum of $15,646, which it is alleged the appellant received in his capacity of curator to the estate of the late Jacques Dorion.

In March, 1821, Jacques Dorion, by his last will, bequeathed his estate to his brother Charles with substitution in favour of the said Charles's children and the children of his children so long as there would be any of the name.

Jacques Dorion died in 1822, Charles then came into possession of the estate. On the 28th February, 1841, Charles died, and J. B. T. Dorion, the present appellant, was appointed curator to the substitution created by the will of Jacques Dorion, and he appears to have been in possession of the said estate in that quality from 20th August, 1841, to the 14th August, 1858.

In his declaration the plaintiff alleged that the defendant during his administration of said estate, received from Fred. T. Hall *et al.*, 1st, on the 16th May, 1845, $8,000.00; 2nd, on 13th May, 1854, $6,980.00, and 3rd, from one Eloi Marier, on the 18th July, 1855, $666.67; that these three capital sums belonged to the substitutes of the estate of Jacques Dorion; that the defendant had failed to invest said sums of money,

(1) 18 Rev. Lég. 647. (2) 18 Rev. Lég. 645.

making use of the same for his own benefit, receiving the interest thereon without accounting for the same.

The deeds of assignment from the institutes to the respondent and the pleadings are referred to at length in the judgments of the courts below (1) and in the judgment of the Honourable Mr. Taschereau, hereinafter given.

The respondent as representing the institutes had intervened in a previous action of reddition brought by one Moreau, who had become curator to the substitution and by a judgment of the Superior Court the appellant was condemned to pay the respondent the sum of $14,282.72, but on appeal it was reduced to the sum of $525.37, and on an appeal and cross-appeal to the Supreme Court, the action and intervention were dismissed (2).

Lacoste Q.C. and *Bonin* Q.C. for the appellant cited and relied on Dalloz, Rep. (3); Merlin, Rep. (4); Pardessus (5); Delamarre et Le Poitvin (6); Goujet et Merger (7); Encyclopédie de droit (8).

See also *Cummings* v. *Taylor* (9); *Dorion* v. *Dorion* (10).

Madore for the respondent, cited and relied on the Ordinance 1667 (11); Bornier (12); Carré et Chauveau (13); Rousseau et Laisney, Dic. de Proc. Civ. (14); Ricard, Donations (15); Denisart (16); Marcadé (17).

The judgment of the court was delivered by:

(1) 18 Rev. Lég. 645.
(2) 13 Can. S. C. R 193.
(3) Vo. Compte, No. 150.
(4) Vo. Société, sect. 6 par. 3, No. 2.
(5) No. 475.
(6) 2 vol. No. 467.
(7) No. 44.
(8) No. 53.
(9) 4 L.C. Jur. p. 304.
(10) 13 Can. S.C.R. 193.
(11) Art. 1 title 29.
(12) P. 251.
(13) 4 vol. p. 438.
(14) Vo. Reddition de compte, art. 932 C.C.
(15) Part 3, No. 523.
(16) 7 ed. Vo. Accroissement, Nos. 13 et seq.
(17) 14 vol. No. 200.

1892

DORION v. DORION.

Taschereau J.

TASCHEREAU J. :—Le 9 mars 1821, par son testament, Jacques Dorion, institue son frère, Charles Dorion, son légataire universel, avec substitution fidéicommissaire graduelle en faveur des enfants de son dit frère et successivement de ses petits-enfants et à l'infini, de chaque génération (1). Par l'art. 932 C. C., cette substitution est restreinte à deux degrés. *Robert* v. *Dorion* (2).

Jacques décède, 20 janvier 1822. Charles, son frère, recueille, comme grevé au premier degré, et jouit jusqu'à sa mort, en 1841, laissant six enfants, seconds grevés et premiers appelés, Jean-Baptiste T. le présent défendeur, Firmin, Sévère, Charles, Eustache et Charles Zéphire, dont les enfants recueilleront comme seconds appelés et propriétaires libres en vertu de l'art. susdit du Code. Merlin, Questions (3).

Le défendeur à la mort de Charles en 1841 est nommé curateur à la substitution, et, du consentement de ses co-légataires prend l'entière administration de la succession.

En 1851, Sévère meurt, laissant un fils, aussi nommé Sévère, qui devient pour un sixième appelé au second degré et propriétaire libre ; tel que déclaré, sur sa demande, en 1865 par un jugement dans une instance où tous les légataires étaient en cause, passé en force de chose jugée entre eux. Ce jugement fixe à $24,000 le montant des capitaux substitués, et conséquemment à $4,000 la part du dit Sévère, fils.

(1) Je donne à Charles Dorion la jouissance de tous les fonds que je possède, aussi bien que l'intérêt de tous les argents, ainsi qu'aux enfants qu'il a de sa dernière femme, et tous les enfants qu'il aura avec elle ; aussitôt que mon frère sera mort, ils retireront tous les profits et les intérêts ; ça n'ira tout qu'à ceux qui porteront le nom de Dorion ; aussitôt que les filles seront mariées ce sera fini, ses garçons de sa femme retireront tous les revenus. J'entends pour le repos de mon âme qu'aucuns de mes fonds ne soient vendus, aussi que l'argent restera où il est tout, les revenus iront toujours de père en fils.

(2) 3 L. C. Jur. 12.

(3) Vo. Substit. 78, 79.

1892

DORION v. DORION.

Taschereau J.

En 1858, 14 août, Moreau avait été nommé curateur, aux lieu et place du défendeur et, en 1866, 7 juillet, P. A. A. Dorion, le présent demandeur, le remplace comme tel.

Le dit demandeur, avocat suivant le bref de sommation, négociant en droits litigieux suivant la déclaration, allègue qu'il a acquis tous les droits dans la dite succession, par les actes suivants, savoir :

De J. B. T. le défendeur, par acte du 20 décembre 1862.

De Sévère, fils, par acte du 25 avril 1866.

De Firmin, par acte du 21 janvier 1869.

D'Eustache, par acte du 15 décembre 1869.

De Charles, par acte du 23 juin 1882.

Et que Charles Zéphire décédé en 1871 ayant constitué le défendeur son légataire universel, lui, le demandeur, est ainsi le seul représentant et ayant cause de tous les dits grevés de substitution. Puis il allègue que le défendeur lorsqu'il était curateur, et depuis, a toujours géré toute la succession, et n'en a pas rendu compte, et plus particulièrement, qu'il a reçu en 1845, 1854 et 1855 trois des capitaux appartenant à la dite succession, se montant en tout à $15,646, dont il n'a jamais rendu compte. Et il conclut : 1° à une reddition de compte, par le défendeur, de cette somme de $15,646, sinon à ce qu'il soit condamné à la lui payer moins une somme de $2,353 que, lui-même, le demandeur doit au défendeur en vertu d'un jugement du 19 novembre 1883 ; 2° à ce que le défendeur soit condamné, s'il ne rend pas compte, à lui payer une somme de $21,380 pour la part du capital de Sévère, fils, auquel il est subrogé, allègue-t-il, par l'acte du 25 avril 1866, à lui consenti par le dit Sévère, fils.

Je dispose de suite de cette part de Sévère, fils. Je suis d'avis, avec la cour d'Appel, que cet acte du 25 avril 1866, par lequel il appert que le demandeur a

1892

DORION v. DORION.

Taschereau J.

payé au dit Sévère, fils, une somme de £443.9.6 à l'acquit du présent défendeur, pour lequel il était caution, ne le subroge contre le défendeur que pour cette somme, et ne lui confère pas le droit de demander un compte au défendeur pour la part du dit Sévère, fils, dans les trois sommes sur lesquelles il base son action, droit que, d'ailleurs le dit Sévère n'aurait pas lui-même en vertu d'un acte entre lui et le défendeur du 12 janvier 1866 identique à ceux entre le défendeur et Firmin et Eustache dont je parlerai dans un instant. Le demandeur lui-même, d'ailleurs, dans sa déclaration, n'allègue qu'une subrogation en sa faveur à cette somme de £443.9.6.

Maintenant tant qu'aux parts de Firmin et Eustache, le demandeur doit aussi être débouté de sa demande pour les motifs sur lesquels la cour d'Appel s'est appuyée en renvoyant cette partie de l'action. Par actes du 5 novembre 1864 et du 29 mai 1865, entre eux et le défendeur, ces deux co-légataires consentirent au dit défendeur une décharge complète et finale de son administration jusqu'à ces dates, avec stipulation que leurs sixièmes se montaient à $4,000 chacun, faisant $24,000 pour le tout, dans laquelle somme, il est clair, les trois sommes sur lesquelles le demandeur base son action se trouvent comprises, s'engageant, les dits Firmin et Eustache de ne jamais exiger du défendeur ou de la dite succession des intérêts sur une plus forte somme que celle de $4,000, et admettant que leurs parts ne se sont jamais élevées à une plus forte somme ; le défendeur de son côté reconnaissant qu'elle s'élève à cette somme. L'acte par Eustache dit ; (et l'autre est dans le même sens.)

Le dit Eustache Dorion acquitte et décharge complètement et finalement de ce jour et à toujours le dit Jean B. T. Dorion, son frère, de toute reddition de compte de curatelle et d'administration de la dite succession Jacques Dorion, et de toute sa part des biens meubles et

immeubles et choses généralement quelconques de la dite succession comme aussi de toute balance de compte qu'il a ou pourrait avoir à exercer et à demander à l'encontre du dit Jean-Baptiste T. Dorion.

Il me paraît incontestable que cet acte contient un règlement final du moins tant qu'aux trois sommes spécifiques maintenant réclamées par le demandeur que le défendeur avait alors et depuis longtemps reçues tel que l'allègue le demandeur lui-même.

Le demandeur a émis la proposition que comme le défendeur n'a jamais payé ce reliquat de compte de $4,000 établi entre lui, le défendeur et Firmin et Eustache, il est demeuré comptable, et l'appuie sur l'ordonnance de 1667, art. 29, par. 1, qui décrète que tous ceux qui ont administré sont toujours comptables, encore que le compte soit clos et arrêté, jusqu'à ce qu'ils aient payé le reliquat. En loi sa proposition est correcte, mais il en fait une fausse application. D'abord, ce n'est pas une reddition de compte de son administration de ces $4,000 qu'il demande ici au défendeur. Et puis cet article de l'ordonnance ne veut pas dire que quand un reliquat a été établi, mais non payé, l'ayant compte aura droit tous les mois, tous les ans, ou chaque fois qu'il lui plaira, à une nouvelle action en reddition de compte. *Stephens* v. *Gillespie* (1); *Blais* v. *Vallières* (2); *Méthot* v. *Dufort* (3). L'action en revision de compte est même prohibée par l'ordonnance. Il n'existe alors que l'action en redressement ou en réformation, (4), s'il y a eu erreurs ou omissions. Et sur le reliquat même, quand il a été établi à l'amiable, c'est l'action de dette qui est donnée. *Michaud* v. *Vezina* (5); Demolombe (6); *Marcoux* v. *Morris* en appel (7); Demolombe référant à cet article de l'ordonnance dit (8):

(1) 14 Can. S.C.R. 709; M.L.R. 3 Q. B. 167.
(2) 10 Q.L.R 382.
(3) 3 Dorion's Rep. 262.
(4) Bioche, Proc. Vo. Compte.
(5) 6 Q.L.R. 353.
(6) 8 vol. 138.
(7) Art. 1898 C. C. by DeBellefeuille.
(8) Vol. 8 No. 130.

1892

DORION v. DORION.

Taschereau J.

Bien que le rendant compte fut réputé comptable jusqu'au paiement du reliquat, c'était seulement en ce sens que les règles relatives aux comptables, et particulièrement la voie d'exécution par la contrainte par corps, lui demeuraient applicables.

Firmin, Sévère fils, et Eustache n'auraient donc pas d'action comme la présente contre le défendeur. Et le demandeur, leur cessionnaire, n'a pas plus de droits qu'eux. Le contre-appel qu'il a pris du jugement de la cour du Banc de la Reine, qui a débouté cette partie de sa demande, doit donc être renvoyé avec dépens

Je passe maintenant à la part de Charles Zéphire, décédé en 1871, laissant un testament.

Ce testament n'est pas produit, mais il est admis qu'il a constitué le défendeur, J. B. Théophile, légataire universel. Par ce legs, les arrérages d'intérêts échus du vivant du testateur sont passés au défendeur ; mais pour sa part du capital du legs de Jacques Dorion, l'instituant, Charles Zéphire, n'a pu la léguer au défendeur, pas plus qu'il n'aurait pu le faire à un étranger. Tous ses droits se sont éteints avec lui, soit que sa part soit accrue en propriété avec charge de rendre à ses cinq frères survivants, soit qu'elle soit de suite passée, dégrevée, à leurs enfants, Art. 868, 873, 933 C.C. ; Ricard (1) ; Denisart, Accroissement (2) ; Marcadé (3) ; Troplong (4) ; Guyot (5) ; Salviat, usufruit (6) ; Pothier, Substitutions (7) ; et Donat. test. (8) ; Sirey (9) ; *Joseph* v. *Castonguay* (10) ; *Jones* v. *Cuthbert* (11). Il n'y a pas lieu à décider dans l'instance entre ces deux théories, soulevées à l'audience.

Sous l'une ou sous l'autre, le défendeur n'a pu acquérir des droits à la part de Charles Zéphire comme son légataire universel.

(1) Part. 3, No. 523, page 548.
(2) No. 13 et seq.
(3) 4 vol. page 142, Nos. 199, 200.
(4) 4 vol. No. 2184.
(5) Vo. Accroissement.
(6) 1 vol. p. 374.
(7) Sec. 7 par. 2.
(8) Ch. 3, par. 3.
(9) 36, 2, 360.
(10) 1 Rev. Lég. 200.
(11) M.L.R. 2 Q.B. 44.

1892

DORION v. DORION.

Taschereau J.

Jacques Dorion a institué les six enfants de Charles, après leur père, légataires conjoints, avec substitution graduelle, Bourjon (1); et le sixième de Charles Zéphire revient ou à ses frères survivants ou à leurs enfants, non pas *jure adcrescendi*, mais *jure non decrescendi*, arts. 868, 933 C.C., Laurent (2); Demolombe (3). C'est la propriété elle-même, pour un sixième, avec la jouissance, à charge de conserver et rendre, que l'instituant a légué à Charles Zéphire, et cette propriété Charles Zéphire n'a pu en disposer ni la morceler. La proposition que, par le fait qu'il n'a pas laissé d'enfants, la substitution, pour son sixième, est devenue caduque n'est pas fondée. La substitution fidéicommissaire comprend la vulgaire, art. 926 C. C. L'intention évidente de l'instituant était de conserver ses biens dans la famille. C'est d'ailleurs toujours là l'intention que l'on doit présumer dans les substitutions; c'est là le motif que la loi elle-même attribue aux instituants. Dans ce but, il a ordonné, et c'est sa volonté qui fait la loi, que, tant qu'il existerait des descendants de Charles, en ligne directe, ils viendraient successivement aux biens légués dans l'ordre prescrit par la loi, avec charge à chaque génération de conserver et rendre, et avec les modifications que cette charge peut comporter en loi, sans qu'aucun d'eux puisse jamais y déroger, ni interrompre l'ordre régulier de succession en ligne directe; et afin de ne pas laisser de doute sur ses intentions, il ajoute à la substitution une prohibition d'aliéner les capitaux. Or léguer par testament, c'est aliéner. Pothier, Subtitutions (4), Proudhon, Usufruit (5).

Si la mort de Charles Zéphire sans enfants avait entraîné la caducité de la substitution pour son sixième, il s'en suivrait qu'il aurait pu le vendre de son vivant, et que cette vente, résoluble d'abord, serait devenue

(1) 2 vol. pp. 169, 182.
(2) 14 vol. No. 318.
(3) 5 vol. No. 383.
(4) No. 520 art. 968, 973 et seq C.C.
(5) No. 636.

1892

DORION v. DORION.

Taschereau J.

inattaquable à sa mort. Ne serait-ce pas là un résultat absolument contraire aux intentions du testateur? S'il avait vendu ses droits purement et simplement, est-ce que son acheteur aurait eu des droits après la mort de son vendeur?

Thévénot-Dessaules Dict. du Digeste (1) dit:

Les parts léguées à ceux des légataires conjoints, dont la future existence quoique présumée n'a pas eu lieu, accroissent aux autres parts.

En matière de substitution *co-hæredes inter se gaudent jure accrescendi* et *jus accrescendi ac substitutio reciproca.* Idem *re Testament* (2).

Et l'annotateur ajoute:

C'est aussi ce qui sans doute aurait lieu dans notre droit tant pour les legs particuliers que pour les legs universels, laissés conjointement à plusieurs.

Je réfère aussi à Aubry et Rau (3), et Demolombe, donations (4).

Je dis donc, que si Eustache, Firmin et le défendeur lui-même (et peut-être Sévère, fils, si représentation a lieu) ont chacun hérité, avec Charles, en 1871, d'une part de celle de Charles Zéphire, cette part, ils l'ont encore. Les transports qu'ils ont faits au demandeur de leurs droits dans la succession en 1862, 1866 et 1869, en supposant même qu'ils s'étendraient aux trois sommes en question, ne couvrent que les droits qu'ils avaient alors dans ces sommes comme légataires de leur propre chef de Jacques Dorion, et ne peuvent s'étendre à ce qu'ils n'avaient pas alors et à ce qu'ils n'ont hérité que subséquemment de Charles Zéphire (5); et le demandeur n'en étant pas le cessionnaire n'en peut demander compte au défendeur.

Le demandeur lui-même n'a-t-il pas reconnu en 1882 que toute la part de Charles Zéphire n'appartient pas au défendeur, lorsqu'il a acquis de Charles sa part dans

(1) Vo. Accroissement Nos. 6, 19.
(2) Par. 1773, No. 3, et par. 1775 No. 8.
(3) 7 vol. par. 726, note 38.
(4) 5 vol. Donation Nos. 329, 393.
(5) Aubry & Rau 4 vol. No. 359 *ter.*

la dite succession, consistant, est-il dit dans l'acte, non dans un sixième mais dans un cinquième ? Si Charles avait un cinquième c'est que les cinq frères survivants, à la mort de Charles Zéphire, ont chacun hérité d'une part de son sixième.

Si, au contraire, cette part de Charles Zéphire est passée en propriété libre et entière aux enfants des cinq frères survivants, comme il a été suggéré alternativement à l'audience, la conséquence est la même vis-à-vis du demandeur. Il n'en est pas plus le cessionnaire. Le substitué du substitué est substitué de l'institué. Et si même, tel que les parties semblent admettre par la déclaration et par les plaidoyers, bien qu'erronément suivant moi, cette part était passée toute entière au défendeur par le testament de Charles Zéphire, le demandeur n'en est pas plus le cessionnaire pour la même raison que la cession que lui a faite le défendeur en 1862, n'est que de son propre sixième, et ne s'étend pas au sixième de Charles Zéphire qui n'est advenu à lui, le dit défendeur, qu'en 1871.

Il me serait en conséquence inutile de rechercher si Charles Zéphire a pu léguer à son frère, quoiqu'il n'eut pu le faire à un étranger. La question d'ailleurs n'a pas été soulevée par les parties.

J'ai dû me prononcer sur son testament, parce que le jugement dont est appel, prenant les admissions des parties peut-être plutôt que donnant l'opinion des savants juges, lui a donné un effet que je ne puis y voir, et que la question a été savamment débattue à l'audience. Mais, je le répète, le défendeur, eût-il hérité de toute la part de Charles Zéphire, le demandeur doit succomber tout de même, car lui, le défendeur, ne la lui a jamais cédée depuis qu'il en a hérité.

Son contre-appel, tant qu'à cette part, doit donc aussi être débouté. Ceci dispose des quatre parts en question sur le contre-appel du demandeur.

1892

DORION v. DORION.

Taschereau J.

J'en viens maintenant à l'appel du défendeur, qui se dit lésé par le jugement de la cour du Banc de la Reine en ce qu'il le condamne à rendre compte de son propre sixième et du sixième de Charles dans les trois sommes susdites.

D'abord tant qu'au sixième du défendeur lui-même. Le demandeur ici base sa demande sur une cession ou transport par le défendeur à lui en date du 20 décembre 1862, de ses droits dans la dite succession. C'est, il est évident, comme un des co-légataires seulement que le défendeur a consenti cet acte ; il n'a pu y être question de lui comme curateur ou procureur. Or, le demandeur demande exclusivement compte de trois sommes spécifiques toutes perçues par le défendeur avant cette cession. Cette cession comprend-elle ces trois sommes ? Le défendeur lui a cédé ses droits et actions. Avait-il des droits ou une action contre lui-même ? Une cession de droits, il semble, n'est et ne peut être qu'une cession de droits contre des tiers. Il est stipulé dans cet acte que :

> Le dit cessionnaire touchera et recevra sur ses simples reçus du curateur Moreau ou de tous autres qu'il appartiendra tous les capitaux afférant au dit cédant dans la dite succession comme légataires pour l'effet de quoi, le cédant le met et subroge dans tous ses droits et actions, privilèges et hypothèques.

Or depuis longtemps auparavant ce transport, comme je l'ai déjà remarqué, le défendeur avait reçu son sixième dans les trois sommes sur lesquelles l'action est basée. Car en recevant le total, il avait bien reçu son propre sixième, dont il était devenu créancier, avant tout partage, à la mort de Charles. Art. 1122 C.C.

Ce transport donc n'est pas et n'a pu être de ce sixième, ou d'aucune somme reçue antérieurement par le défendeur, mais uniquement de ce qui lui était alors encore dû. Quand le demandeur est autorisé à recevoir du curateur Moreau, ou de tous autres qu'il appar-

tiendra, tous les capitaux afférant au défendeur, ceci ne peut s'étendre aux capitaux que le défendeur avait déjà reçus et qui, par conséquent, ne lui étaient pas afférants.

Le demandeur n'est donc pas le cessionnaire de la part du défendeur dans les trois sommes en question. Mais même, en supposant qu'il le serait, et qu'il serait fondé à prétendre que le défendeur lui a cédé par cet acte son sixième de ces $15,646 que lui, le défendeur, avait alors entre ses mains, ceci ne lui donnerait pas contre le défendeur, une action en reddition de compte, car lui, le défendeur, n'est pas par là devenu son mandataire. Pour son propre sixième, il n'a pas agi comme procureur en recevant cette somme mais simplement pour lui-même comme co-légataire. De même pour les intérêts de ces sommes. Maintenant, en supposant toujours, que cet acte du 20 décembre 1862 puisse être considéré comme une cession du sixième de cette somme au demandeur, le défendeur est-il par là plus devenu le mandataire du demandeur, parce qu'il a continué à garder ce sixième, entre ses mains? Un emprunteur qui ne rembourse pas au temps convenu jouit bien du capital de son prêteur, mais peut-on dire qu'il en est le mandataire? Un cédant ou vendeur ne délivre pas ce qu'il a cédé ou vendu à son cessionnaire, devient-il le mandataire de son cessionnaire?

En loi donc, je croirais que le défendeur n'est pas par cet acte devenu, du moins pour son propre sixième dans ces trois sommes, le mandataire, ou *negotiorum gestor* du demandeur, même si cet acte les couvrait. Je conclus que le demandeur doit faillir sur ce chef de sa demande, et que l'appel du défendeur doit être en conséquence maintenu.

Ceci dispose de la cinquième part. Il reste celle de Charles.

1892

DORION v. DORION.

Taschereau J.

Le transport au demandeur par Charles d'un cinquième dans cette succession en date du 23 juin 1882, le demandeur l'allègue lui-même, n'est qu'une cession de droits contre le défendeur. Or il ne paraît pas avoir été signifié au défendeur. L'objection, cependant, n'a pas été prise. Il n'est pas non plus question dans la cause de retrait successoral, art. 710 C.C.; *Leclerc* v. *Beaudry* (1), si le demandeur n'est pas successible, ce qui n'appert pas au dossier. Cependant sur cette part de Charles, le demandeur doit, dans mon opinion, succomber comme sur toutes les autres pour un motif qui entraîne le rejet de l'action dans son entier, indépendamment des raisons particulièrement applicables aux cinq autres parts que j'ai données.

Il allègue que le défendeur a administré toute la succession et en a retiré les capitaux et revenus, mais il ne demande pas une reddition de compte de toute son administration, mais uniquement de trois sommes spécifiques reçues par lui.

Je ne crois pas qu'il ait ainsi droit de diviser une administration pour n'en demander compte que par parties. C'est une indivisibilité, et il ne peut être permis au demandeur de prendre dix, vingt, trente actions si dix, vingt, trente sommes différentes ont été reçues par le défendeur. Le gérant d'une hérédité pourrait-il prendre une action pour forcer les héritiers à recevoir un compte de lui et lui donner une décharge pour partie seulement de sa gérance? Le défendeur ici, aurait-il eu une telle action seulement pour ces trois sommes reçues par lui?

On ne peut diviser une dette échue pour en demander le recouvrement par plusieurs actions, dit l'art. 15 du C.P.C., *Légaré* v. *The Queen Insurance Co.* (2). Sans doute, si un créancier, sur une action de dette demande $100, et prouve que $200 lui sont dues, son action ne

(1) 10 L.C. Jur. 20. (2) 18 L. C. Jur. 134.

sera pas pour cela renvoyée. Mais une action en reddition de compte est par sa nature même indivisible, comme la gérance elle-même, et l'obligation de rendre compte le sont. Le défendeur peut, sur les autres parties de son administration qui a duré un demi-siècle, avoir contre le demandeur une réclamation plus élevée que les trois sommes spécifiques demandées par l'action. D'ailleurs, il ne doit pas être exposé à une multiplicité de poursuites pour ce qui ne forme chez lui qu'un seul et même acte, l'administration dans son ensemble. La cause de *Joseph* v. *Phillips*, (1) citée par le demandeur, n'est pas *in point*. Là, le défendeur n'avait retiré qu'une seule somme pour le demandeur, dont il était procureur, non général, mais seulement pour retirer cette somme spéciale, et la cour décida que, sous les circonstances, le demandeur pouvait prendre contre lui une action de dette pour recouvrer cette somme sans être obligé de recourir à une demande en reddition de compte. Il est évident que si le défendeur eût eu l'administration générale des affaires du demandeur, comme ici, d'après les allégations de la déclaration le défendeur a eu, la cour dans cette cause aurait dit au demandeur qu'il ne lui était pas permis de choisir une somme spécifique d'entre toutes celles reçues par le défendeur, pour la réclamer par action directe, et qu'il lui fallait recourir à l'action en reddition de compte, mais en reddition de compte, non d'une somme spécifique, mais de toute l'administration.

Un légataire qui a l'administration entière d'une succession léguée universellement à plusieurs est vis-à-vis de ses co-légataires dans la position d'un associé, gérant des affaires de la société, vis-à-vis de ses co-associés. Et il ne me paraît pas possible de prétendre, qu'un de ceux-ci pourrait réclamer de son associé gérant un compte partiel, ou d'une partie divi-

(1) 19 L. C. Jur. 162.

1892

DORION v. DORION.

Taschereau J.

sée de sa gérance. Et l'action du demandeur ici est non seulement en reddition de compte contre le défendeur comme gérant et administrateur, mais elle participe encore du caractère d'une action en partage contre lui comme son co-légataire. Et ce partage ne peut être demandé que de toute la succession, non d'une partie seulement. L'action *familiæ erciscundæ* ou *communi dividendo* n'est donnée que pour toute l'hérédité ; et une succession indivise ne doit être l'objet que d'une seule liquidation et d'un partage unique. Demolombe (1).

L'un des associés, dit la cour de Bordeaux, *re Dumecq*, ne peut contraindre ses co-associés à partager un objet particulier avant qu'il n'ait été procédé à la liquidation de la société et au règlement des comptes des associés entre eux. (2) ; *Bouthillier* v. *Turcotte* (3) ; *Dupuis* v. *Dupuis* (4).

De plus sur une action en partage, tous les co-propriétaires doivent être en cause. Or ici, Firmin, Sévère et Eustache ne le sont pas. Le demandeur ne les représente pas pour leur part dans la part de Charles Zéphire comme je l'ai déjà remarqué. Il n'est pas leur cessionnaire de cette part.

Sans doute le demandeur n'a pas demandé un partage par son action. Il ne le pouvait, vu qu'il allègue avoir droit à toute la succession, mais comme il n'a pas prouvé avoir droit aux parts de Sévère, Firmin, et Eustache, ni à celle du défendeur, dans la succession de Charles Zéphire, ni à celle du défendeur lui-même dans les trois sommes dont il demande compte, son action prend, je l'ai dit, tout le caractère d'une action en partage.

Le demandeur a cru pouvoir rencontrer cette objection en disant que le défendeur pouvait bien, s'il avait voulu, rendre un compte du tout. C'est possible, mais ce n'est pas là la question. L'action telle que portée,

(1) 15 vol. 481, 488, 494 ; art. 920 C.P.C.

(2) S. V. 31, 2, 314.

(3) 1 L. C. Jur. 170.

(4) 6 L. C. R. 475.

1892

DORION v. DORION.

Taschereau J.

d'après ses propres allégués, est-elle fondée en droit ou non ? Si elle ne l'est pas, le défendeur n'était pas tenu d'y suppléer, ou de la refaire. Et d'ailleurs, l'eût-il fait le défaut d'absence des parties intéressées au partage ne serait pas couvert.

Je verrais dans la cause une autre question. Ces cessions au demandeur à lui consenties pendant qu'il était curateur par Eustache, Firmin et Charles, sont-elles légales ?

Comme curateur il représente les appelés dans bien des cas, art. 942, 945 C.C. *Rattray* v. *Larue* (1) ; *Re Verneuil* (2) ; Demolombe (3). Si le grevé dissipe les biens, le curateur doit, en certaines circonstances, protection aux appelés. Or, il est de principe que

No one is allowed to put his interest in conflict with his duty, (*et que*) no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements or assume functions in which he has or can have a personal interest conflicting or which may possibly conflict with the interests of those he is bound to protect. *Bank of Upper Canada* v. *Bradshaw* (4).

Si le demandeur ici, comme grevé ou représentant les grevés, dissipe les biens, c'est lui-même, comme curateur, qui sera tenu d'y mettre empêchement. L'on verrait, dans ce cas, P. A. A. Dorion, comme curateur, en litige avec P. A. A. Dorion, le grevé, ou cessionnaire des grevés, l'inverse de ce que l'on a vu dans la première cause entre les mêmes parties devant cette cour, *Dorion* v. *Dorion* (5), où P. A. A. Dorion, le cessionnaire, venait généreusement, quoiqu'inutilement, à la rescousse de P. A. A. Dorion, le curateur.

Dans la présente cause elle-même, pourquoi le demandeur agit-il tant en son nom que comme curateur ? C'est, dit-il, lui-même, dans le bref, pour que le cura-

(1) 15 Can. S. C. R. 102.
(2) S. V. 47, 2, 82.
(3) 22 vol. Nos. 509 ; 515, art. 959 C.P.C.
(4) L. R. 1, P. C. 479 ; *Davis* v. *Kerr* 17 Can. S. C. R. p. 235.
(5) 13 Can. S. C. R. 193.

1892

DORION v. DORION.

Taschereau J.

teur voie au placement des capitaux substitués. C'est-à-dire, pour que P. A. A. Dorion, le curateur, oblige P. A. A. Dorion le cessionnaire des grevés, à placer les capitaux substitués! Dans une cause de *Danso v. Thibault* (1), il est jugé sur un principe applicable ici, il me semble, qu'un appelé ne peut être tuteur à la substitution. L'art. 1484 C. C., d'ailleurs décrète, en termes non équivoques, que les tuteurs et curateurs ne peuvent se rendre acquéreurs des biens de ceux dont ils ont la tutelle ou la curatelle. *Benoit* v. *Benoit* (2); *Rawley* v. *Monarque* (3). Le mot curateur, je constate, ne se trouve pas dans l'article correspondant du Code Napoléon. Cependant cette question n'a pas été soulevée par les parties, et je ne fais que la mentionner, vu que l'action du demandeur doit être renvoyée sur les motifs que j'ai déjà donnés. Il nous serait aussi parfaitement inutile de décider sur le mérite du plaidoyer du défendeur, par lequel il oppose à la demande une reddition de compte sur une instance antérieure.

Je suis d'avis d'accorder l'appel et de renvoyer le contre-appel avec dépens, dans les trois cours personnellement contre l'intimé.

Appeal allowed and cross-appeal dismissed with costs.

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

Solicitors for respondent: *Laflamme, Madore & Cross.*

---

(1) S. V. 26, 2, 94.

(2) 8 Rev. Lég. 425.

(3) 3 Legal News, 114.

LA SOCIÉTÉ CANADIENNE-FRANCAISE DE CONSTRUCTION DE MONTREAL (DEFENDANTS)..... } APPELLANTS;

AND

GEORGE DAVELUY ET AL., ÈS-QUALITÉ (PLAINTIFFS)..... } RESPONDENTS.

1891
*May 22.
1892
*April 4.

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

Acquiescence in judgment—Attorney ad litem—Right of appeal—Building society—C.S.L.C. ch. 69—By-laws—Transfer of shares—Pledge—Art. 1970 C.C.—Insolvent—Creditor's right of action—Art. 1981 C.C.

By a judgment of the Court of Queen's Bench the defendant society was ordered to delivered up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for the defendant delivered the shares to the plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:

Held, that the appeal would lie.

Per Taschereau J.—That an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

A by-law of a building society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P. a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society

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

1891

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. Fournier and Taschereau JJ. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing a judgment of the Superior Court.

The respondents (plaintiffs), in their capacity of joint curators to the insolvent estate of Charles Trefflé Picard, by their action prayed to have twenty shares of the appellant's (defendant's) stock valued at $200 per share, declared their property, and for an order to the appellant society to so enter these shares upon its books, or in default of so doing, to be condemned to pay to the respondents (plaintiffs) $4,000, and at the same time deposited $1,664.43 as due by Picard to the Banque Ville Marie and for which sum Picard had transferred these shares as collateral security. The appellants (defendants) by their pleas declared their willingness to so register the stock, but only on payment to them of the said sum of $1,664.43 paid by them to the Banque Ville Marie, and of a further sum of $3,744 with interest from the 25th of February, 1885.

The facts which gave rise to the litigation are the following: The appellants are a building society

(1) M.L.R. 7 Q. B. 417.

1891

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

organized under ch. 69 of the Consolidated Statutes of Lower Canada, and Picard, the insolvent, was a shareholder in the society and held as such thirty shares of $200 each. As collateral security for loans made to him by the Ville Marie Bank and aggregating $1,550, Picard in 1882 transferred to the bank twenty of these shares. Picard, at the time he made this transfer to the bank, was accountant and a director of the society, and he also owed the society in the neighbourhood of $1,000, and by the 24th of February, 1885, renewals and new loans had brought the amount to $3,744, represented by a demand note which specially covenanted that his stock was transferred to and held by the society as collateral security to be by it, in case of his default, taken in payment and sold without any *mise en demeure* being necessary. The transfers were made in fraud of appellants to the Ville Marie Bank and were entered in the transfer book, signed by the transferrer and transferee and countersigned by the secretary-treasurer, but of the fact that these transfers existed the society only became aware in February, 1886, and it then immediately paid off the claim of the Bank Ville Marie and took a subrogation dated the 11th March, 1887, of all its rights. In November, 1885, Picard became insolvent, and the respondents who had been appointed joint curators to his insolvent estate on the 27th of May, 1887, were authorized by the court to take an action in their name for the benefit of Picard's creditors against the appellant society for the recovery of these twenty shares, and it is the money paid by the society to the Ville Marie Bank which the respondents tendered with their demand for the delivery of the shares.

The following by-laws of the society were filed at the trial of the action:

1891

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Art. X.—No shareholder shall be entitled to demand from the Society the reimbursement of the amounts paid on his shares, the only way for him to dispose of his shares shall be by selling or transferring the same.

Art. XI.—To this effect, the Society shall keep a transfer book and all transfers to be valid shall be signed by the transferor and the transferee, and counter signed by the Secretary-Treasurer.

No transfer shall be made by the transferor until he has met all his obligations to the Society, and the Society shall not be obliged to acknowledge such transfer unless it be made in the form and on the conditions prescribed in the present article.

Art. XII.—The shares and moneys generally of any members in arrears towards the Society for any reason whatsoever, are specially and by privilege, affected to the payment of the Society's claims against him.

In the Supreme Court a motion to quash the appeal on the ground of acquiescence by appellant in the judgment appealed from was made by respondent and judgment was reserved and the case heard on the merits.

Laflamme Q.C. and *Charpentier* with him for appellants, contended that the transfer to the bank was made in fraud of the society's rights, and that no privilege could be removed or cancelled by fraud, and Picard's creditors could not invoke the fraud of their debtor to deprive the society of their lien and privilege on these shares, and referred to art. 1972 C. C. (P.Q.)

Bëique Q.C. for respondent contended that the property and assets of the debtor being the common pledge of his creditors (art. 1981 C. C.) and the proceeds thereof having to be distributed by contribution or dividend, appellants could not be permitted to appropriate to themselves the shares in question unless they justify of the right of pledge which they have

1891

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

alleged, and they had not done so—and referred to art. 1970 C.C., and contended also that the transfers to the bank were regular and binding on the society, and were known to the directors of the company, and they could not after Picard's assignment dispute their regularity.

Sir W. J. RITCHIE C.J.—(After reading the above statement of the case proceeded as follows :) The fraud in the transfer of the shares in question in this case seems to be established beyond all question, and I do not understand it to be disputed. I think the appellants cannot by fraud be deprived of their unquestionable right and privilege in these shares secured to them by law, and as the curators stand in the place of Picard, neither they nor the creditors of Picard whom they represent, can, in my opinion, invoke the fraud of Picard their debtor to deprive the appellant of the lien and privilege on these shares which the law has so conferred on them. When the defendants by paying the claim of the bank were reinstated in the position of which Picard's fraud had deprived them, they were simply placed in the same position in which they would have been if no fraud had been perpetrated. To allow Picard's creditors to avail themselves of Picard's fraud to obtain the possession and the benefit of the stock which, but for such fraud, would have stood on the books of the society subject to the advances made to Picard, they can only do this by claiming through Picard's fraud, and so making themselves participators in that fraud, which seems to me contrary to every principle of law and justice. I think the appeal should be allowed and the judgment of Mr. Justice Davidson should be restored.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Strong J.

STRONG J.—The appellants are a non-permanent building society incorporated under the provisions of chap. 69 of the Consolidated Statutes of Lower Canada. By section 1, subsection 3, of this act, societies organized under it, are empowered to make rules and regulations for the governance and guidance of the same, but such rules are not to be repugnant to the express provisions of the act or to the laws in force in Lower Canada.

By the Provincial Statute 42 and 43 Vic. chap. 32, sec. 4, building societies are authorized to lend money on the security of their own shares.

The society made by-laws and regulations of which articles 11 and 12 have an application to the present case.

Art. XI. enacts that no transfer of shares shall be made by the transferrer until he has met all his obligations to the society, and the society shall not be obliged to acknowledge such transfer unless it be made in the form and on the conditions prescribed in the present article. Art. XII. provides that the shares and moneys generally of any members in arrears towards the society, for any reason whatsoever, are specially and by privilege, affected to the payment of the society's claims against him.

There can be no doubt, in my opinion, that these by-laws are not in any way repugnant to the general law of Lower Canada as it existed when the Consolidated Statutes were passed, nor to the law as it now exists as embodied in the Code.

The law, of course, was and is that property such as these building society shares were, is to be considered movable property by determination of law And it is also the law that such property cannot be so hypothecated as to constitute a security available against the hypothecating debtor's creditors. And also that, as expressed in art. 1970 of the Code, it is essential to the

validity of a pledge that the pledged property shall remain in the possession of the creditor or of a third person agreed upon between the parties. Had the by-laws in question attempted to authorize the creation of a security in any way repugnant to these provisions of the law they would undoubtedly have been absolutely null. They have not, however, attempted to do so. The shares in the building society are shares in the capital stock of the society, and this capital stock necessarily remains in the possession of the society and the right to deal with the shares in it, is, by a provision quite usual and certainly *intra vires* made subject to the control of the society acting, of course, through its board of directors.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL *v.* DAVELUY.

Strong J.

Therefore, when the by-laws provided that the society should have a privilege on a member's shares for whatever he might owe to the society, and that no transfer should be made until the transferrer had met all his obligations to the society, they provided for a security which was legal and within the competence of the society to create. The shares as shares in the capital stock of the society, were in a sense in the possession of the society and no transfer of them could be made so long as any debt was due by the holder to the society without the assent of the latter. Then the transfers to the Bank Ville Marie, being in the very teeth of the by-laws, and made fraudulently and entered in the transfer book only by the fraudulent complicity of the secretary-treasurer, they were absolutely *null* and *void* as regards the society. The delivery of the share-books to the bank made no difference. These books were not the shares, they were merely evidence of the shares and the delivery of them by an original shareholder to a creditor without the registration of a proper transfer in the books was wholly inoperative and could not affect the privilege of the society, either for past or

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Strong J.

future debts. Until a proper legal transfer was registered, it was the right of the society to treat the original holder as absolute owner of the unincumbered property in the shares.

The consequence must be that apart from any special agreement to that effect, and by the mere force of the by-laws, the moneys lent and advanced to Picard became privileged debts charged on the shares so soon as such moneys were advanced to him, just as much so as if the statute had itself embodied the terms of the by-law.

For these reasons I am of opinion that the judgment of Mr. Justice Davidson was correct and ought to be restored, the appeal being allowed with costs.

FOURNIER J.—L'appelante est incorporée comme société de construction en vertu du ch. 69 des statuts consolidés du Bas-Canada. Son capital est divisé par action de $200 chacune, en série de livrets de dix actions chacune, portant des numéros consécutifs.

Le nommé C. T. Picard était actionnaire dans cette société et possédait trois livrets de dix actions chacune, numérotés 22, 59 et 274.

Le 17 mai 1882, Picard fit dans les livres de la société les deux transports suivants :—

No. 665—Montréal, 17 mai 1882.

Pour valeur reçue, je transporte à Ubalde Garand, écuier, caissier, en fidéicommis, ce acceptant, vingt actions par moi souscrites, dans la dite société portant les numéros 59 (cinquante-neuf) et 274 (deux cent soixante et quatorze.)

C. T. PICARD, cédant,
U. GARAND, caissier en fid.,
Cessionnaire.
T. LAPALME, secrétaire-trésorier.

No. 705—Montréal, 22 Décembre 1882.

Je, C. T. Picard, soussigné, pour valeur reçue, transporte à Ubalde Garand, caissier, résidant à Montréal, en fidéicommis, à ce présent et

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Fournier J.

acceptant, dix actions que je possède dans le fonds capital de la Société Canadienne-Française de Construction de Montréal, connues sous le livret numéro 22.

C. T. PICARD, cédant,
U. GARAND, caissier en fid.,
Cessionnaire.

Montant payé
$587.50.

T. LAPALME, secrétaire-trésorier.

Ces deux transports furent signés à leur date respective par le secrétaire-trésorier de la société.

Ubalde Garand agissait à ces transports comme caissier de la banque Ville-Marie. Les transports furent faits comme sûreté collatérale pour des avances faites par la banque à Picard et en conformité des règlements de la société. Les règlements à ce sujet sont comme suit :—

Art. X. Aucun actionnaire ne pourra exiger de la société la remise du montant payé sur ces actions, la seule manière de disposer de ces actions sera de les vendre et transporter.

Art. XI. A cette fin, la société tiendra un livre de transfert, et tout transport, pour être valable devra être signé par le cédant et le cessionnaire, et contresigné par le secrétaire-trésorier.

Aucun transport ne pourra être fait avant que le cédant ait satisfait à toutes ses obligations envers la société, et la société ne sera tenue de reconnaître tel transport que lorsqu'il aura été fait dans la forme et aux conditions prescrites par le présent article.

Art. XII. Les actions et deniers généralement d'aucun membre arrérage envers la société, pour quelque cause que ce soit, sont spécialement, et par privilège, affectés au paiement des réclamations de la société contre lui.

A l'époque de ces transports les actions en question n'étaient qu'en partie payées, mais la balance le fut plus tard en 1882 et 1883.

Picard étant après cela devenu insolvable produisit au bureau du protonotaire de la cour Supérieure, à Montréal, une cession de ses biens pour le bénéfice de ses créanciers, conformément aux articles 763 et suivants du code de procédure ; et les intimés furent nommés curateurs à ses biens.

1892

LA SOCIÉTÉ CANADIEN-NE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Fournier J.

L'appelante, le 11 mars 1887, dans la vue de donner effet à un transport qu'elle avait de Picard, comme sûreté collatérale des avances qu'elle lui avait faites, paya à la banque Ville-Marie le montant que lui devait Picard et prit de la dite banque un transport avec subrogation des billets de Picard, ainsi qu'un transport des actions (livrets 22 et 274) qu'elle détenait comme appartenant à Picard.

Le 7 mai suivant, les intimés offrirent à l'appelante les montants qu'elle avait payés à la banque Ville-Marie avec l'intérêt échu et demandèrent que les billets et les livrets de Picard leur fussent délivrés par l'appelante qui s'y refusa.

De là, la présente action contre l'appelante, alléguant les faits ci-dessus et demandant à ce que l'offre et la consignation des deniers fussent déclarés valables et eux-mêmes déclarés les propriétaires des parts en question, et ordre donné à l'effet d'inscrire les intimés dans les livres de la société, comme propriétaires des dites parts et de leur livrer les billets et livrets en question et à défaut de le faire, la dite appelante condamnée à payer aux intimés la somme de $4,000, valeur des dites actions.

L'appelante a plaidé que le transport des dites actions a été fait hors de la connaissance du bureau de direction de la dite société, qui n'en a été informé que le 15 juin 1886.

Qu'à l'époque des transferts du 17 mai et 22 décembre 1882, Picard devait à la dite société, la somme de $956 pour avances faites sur la garantie des livrets 22 et 274.

Qu'en vertu des règlements de la dite société, les membres n'ont pas le droit de transporter leurs parts à moins d'avoir acquitté toutes leurs obligations envers la société et que leurs parts sont affectées au paiement de ce qu'ils doivent et qu'en conséquence les dits transports sont nuls.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Fournier J.

Que ces transports ont été faits en fraude de la société appelante.

Que le 25 février 1885, Picard étant endetté envers l'appelante en la somme de $3,744 pour argent prêté, donna son billet pour ce montant et transporta en même temps ses actions à la dite appelante de la manière suivante :

No. 395.

A demande de cette date, pour valeur reçue, je promets payer à l'ordre de la dite Société, à son Bureau à Montréal, trois mille sept cent quarante-quatre dollars, et je lui transporte en garantie, les actions que je possède dans son fonds capital, étant les livrets Nos. 22, 274, 427, et je l'autorise, dans le cas de défaut de paiement de la dite somme à son échéance, de garder les dites actions en paiement, sans qu'il soit besoin d'aucune mise en demeure, et d'en faire le transport à toute autre personne, aux termes et conditions qui lui conviendront avec intérêt de six par cent jusqu'au paiement.

..... } (Signé),
..... } Témoins.
C. T. PICARD.

$3,744.00. Accepté pour et au nom de la Société,
(Signé), JH. EDMOND, Prest.

Que ce billet était en renouvellement de billets antérieurs pour argent prêté sur la garantie des dites parts.

Que Picard est encore endetté en la somme de $3,744 envers l'appelante qui a droit de retenir les dites parts jusqu'à ce qu'elle ait été payée de ce montant, ainsi que du montant offert par l'action des intimés.

Les intimés ont répondu que l'appelante avait perdu tous les droits qu'elle aurait pu avoir sur les dites parts en laissant faire le transport à la banque Ville-Marie,—et que le billet mentionné dans son plaidoyer ne pouvait être considéré comme un transport des dites parts, vu que le transport résultant de ce billet n'était pas conforme aux règlements de la société et parce qu'au temps de ce billet, la banque Ville-Marie était en possession des dites parts.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Fournier J.

Les intimés ont fait la preuve de toutes leurs allégations. Les actions en question étaient entrées dans les livres de la société au nom de Picard comme étant en sa possession et y étant restées jusqu'au 7 mai et 22 décembre 1882, dates de leurs transports par Picard à la dite banque Ville-Marie. Ces transports, à leurs dates respectives, furent entrés dans les livres de la société comme appartenant à la banque Ville-Marie. Ils étaient signés par Picard comme cédant et par Ubalde Garand agissant et acceptant pour la banque, et régulièrement contresignés par le secrétaire-trésorier de l'appelante.

Lorsque Picard a fait le transport de ses actions à la banque Ville-Marie, il devait alors près de $1,000 à la société appelante, et au 25 mai 1885, des renouvellements et de nouveaux prêts avaient porté sa dette à la somme de $3,744. Cette somme était représentée par son billet à demande avec déclaration, comme dans les règlements antérieurs, que son stock était transporté à la société et détenu par elle comme sûreté collatérale de ce qu'il lui devait.

Il est en preuve qu'à cette époque le bureau de directeurs de la dite société était encore dans l'ignorance du fait que Picard avait transporté ses actions à la banque Ville-Marie depuis 1882—Picard était un des directeurs de la société et son teneur de livres. Ses rapports intimes avec le secrétaire-trésorier lui avait fait acquérir sur celui-ci une influence dont il a profité pour l'induire à tromper la société et à manquer à son devoir en entrant et contresignant dans les livres de la société le transport de ses actions à la banque Ville-Marie, sans la connaissance du bureau de direction et pendant que Picard était endetté envers la société. Picard promettait au secrétaire-trésorier de rembourser promptement la banque et de dégager ses actions pour remettre la société dans la même position.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Fournier J.

Ce sont ces transports dont les intimés veulent prendre avantage au détriment de la société qui a perdu ses droits sur les actions de Picard.

Sans doute, Picard et le secrétaire-trésorier ont commis en se concertant pour exécuter ces transports à l'insu du bureau de direction, et pendant que Picard était endetté, une fraude à l'égard de la société. Mais comme il n'y a absolument aucune preuve que la banque Ville-Marie ait connu cette fraude ou y ait participé en aucune manière, la transaction est inattaquable, et l'appelante l'a reconnu dans une réclamation qu'elle a faite dans la masse en faillite de Picard, et en remboursant à la banque Ville-Marie les deniers qu'elle avait avancés à Picard sur le transport de ces actions.

Malheureusement pour l'appelante, Picard étant devenu insolvable fit, le 14 novembre 1885, pour le bénéfice de ses créanciers, cession de ses biens qui sont devenus par l'effet de l'art. 1987 C.C. le gage commun de tous ses créanciers et le produit en doit être distribué par contribution.

L'appelante ne peut s'approprier les parts en question, qui par la faillite de Picard sont devenues la propriété de ses créanciers, à moins qu'elle ne puisse établir qu'elle a légalement un droit de gage sur ces mêmes parts.

Le privilège que donne le droit de gage ne subsistant, qu'autant (art. 1970 C.C.) que le gage reste en la possession du créancier, ne peut pas exister dans le cas actuel en faveur de l'appelante qui n'a jamais eu la possession des dites actions depuis la date des transports faits par Picard à la banque Ville-Marie en 1882. Ce n'est qu'après avoir remboursé cette dernière en 1886 que l'appelante en a obtenu la possession, mais après que l'insolvabilité de Picard en eut fait passer la propriété à ses créanciers. Ni la banque Ville-Marie,

1892

LA SOCIÉTÉ CANADIEN-NE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Taschereau J.

ni Picard par son transport n'ont pu faire acquérir à l'appelante un privilège sur ces parts que la faillite rendait la propriété du créancier.

L'appel doit être renvoyé.

TASCHEREAU J.—Cette cause nous est d'abord présentée par une motion des intimés pour rejeter l'appel, parce que l'appelante aurait acquiescé au jugement en l'exécutant pour partie. Cette motion doit être rejetée. L'exécution par la remise des livrets, fût-elle suffisante, a été faite par le procureur de l'appelante. Or, il n'était pas dans les limites de son mandat, comme procureur *ad litem*, lorsqu'il a agi dans cette circonstance. Et de plus, son mandat avait pris fin par le jugement final dans la cause.

Maintenant, tant qu'au mérite. En 1881, un nommé Picard, étant propriétaire de vingt actions nominatives, acquittées depuis, dans le fonds social de la Société de Construction, présente appelante, emprunta de la société elle-même une somme de $744, sur la garantie de ces actions qu'il lui transporta par un écrit sous seing privé. Mais il garda ses livrets, et aucun transfert régulier n'en fut fait dans les livres de la société tenus pour l'enregistrement de tels transferts. Il a même peut-être continué à toucher les dividendes. Du moins je n'en vois aucune preuve au contraire. En 1882, Picard transporta les mêmes actions à la banque Ville-Marie comme sûreté collatérale d'avances que lui fit la banque. Il remit ses livrets à la banque et ce transfert fut dûment enregistré au livre des transferts de la société.

Les directeurs, n'ayant pas eu connaissance de ce transfert, quoiqu'il fut régulièrement fait, la société continua à faire des avances à Picard, qui, par un règlement final, le 25 février, 1885, reconnut lui devoir $3,744.00, et, comme sûreté collatérale, lui

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Taschereau J.

transporta de nouveau ses vingt actions, mais encore seulement par un écrit sous seing privé, et sans transfert régulier sur les livres de la société. Il était depuis longtemps un des directeurs de la compagnie, et continua à l'être. Le 14 novembre, 1885, Picard fut déclaré en faillite. En 1887, la société remboursa à la banque Ville-Marie le montant que lui devait Picard, sur quoi la banque remit à la dite société les vingt parts en question par acte authentique et par un transfert régulier sur les livres de la société. Les intimés prétendent que ces vingt parts sont devenues le gage commun des créanciers de Picard. L'appelante soutient qu'elle a un privilège sur icelles parce qu'elle en est en possession comme créancière gagiste.

La cour Supérieure a donné gain de cause à la société appelante, mais la cour d'Appel a été favorable aux intimés. La société nous demande de déclarer avec la cour Supérieure, qu'elle est créancière privilégiée. Je suis d'avis qu'elle ne peut réussir.

Elle n'a jamais eu la possession de ces parts avant la faillite de Picard. Ces transports sous seing privé, valables entre Picard et elle n'ont aucune valeur vis-à-vis des tiers. Et ne l'a-t-elle pas elle-même reconnu en payant la banque Ville-Marie ? Elle a non seulement laissé à Picard ses livrets, mais n'a même pas exigé de lui le transfert régulier sur ses livres exigé par la loi et ses propres règlements surtout dans l'intérêt des tiers. Quand Picard a failli, ces parts étaient en la possession de la banque, comme son gage, et la banque une fois payée, elles sont devenues le gage commun des créanciers de Picard. La rétrocession qu'en a depuis faite en 1887 la banque à la société ne peut préjudicier aux créanciers. Pas plus qu'une mise en possession par Picard lui-même, en 1887, n'aurait pu donner un privilège à la société vis-à-vis des tiers intéressés. C'est comme si Picard avait en 1881 promis donner ses

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Taschereau J.

parts en gage, mais ne l'avait fait et n'en avait mis la société en possession réelle qu'en 1887, après sa faillite. Toute la question se résume à celle-ci. La société avait-elle ces parts en gage vis-à-vis des tiers, toujours, en 1885. Non, bien certainement. Elle ne les a jamais eues ni en 1881, ni en 1885 vis-à-vis des tiers, parce que le transfert régulier sur ses livres, nécessaire, vis-à-vis eux, pour la mettre en possession n'a jamais été fait avant la faillite. La cause serait la même, en écartant la transaction avec la banque, et supposant que Picard eût failli en 1882. La société aurait-elle pu alors réclamer un privilège sur ces parts à l'encontre des créanciers de Picard. Non, parce qu'elle n'en avait pas la possession, la détention nécessaire pour constituer le gage, vis-à-vis des tiers. Chaque actionnaire de la société est propriétaire et en possession de ses actions. Elles peuvent être saisies et vendues en justice, et il peut à son gré les vendre, mettre en gage et céder à quelque titre que ce soit. Pardessus, Droit Commercial (1). Et, je le répète, la société l'a admis elle-même en payant la banque, quoique, quand Picard lui avait transféré ses parts, la société eût un écrit sous seing privé les lui transportant à elle-même. Est-ce que si, au lieu de transporter ces parts seulement comme sûreté collatérale, Picard les eût vendues purement et simplement à qui que ce soit, et qu'un transfert régulier sur les livres de la société eût été fait à l'acquéreur de bonne foi, la société pourrait contester le titre de cet acquéreur, ou réclamer contre lui le privilège de gagiste? Non: la vente serait parfaitement valable, comme le transport à la banque l'était. Et pourquoi? parce que Picard, malgré l'écrit sous seing privé entre lui et la banque est, vis-à-vis des tiers, resté en possession et maître absolu de ces parts. La société n'en a jamais eu la possession avant sa banqueroute, conséquemment

(1) No. 973, 992, 993.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Taschereau J.

elle ne les a pas eues en gage. Et après la banqueroute, elle n'a pu acquérir un privilège au préjudice des autres créanciers.

Le statut lui donne un privilège, mais vis-à-vis des tiers, il lui fallait pour l'exercice de ce privilège, se faire mettre légalement en possession de son gage. Ce statut doit s'interpréter conjointement avec le droit commun. D'ailleurs c'est comme créancière gagiste que la société réclame ici.

La proposition que les créanciers de Picard, étant ses ayants-cause, ne peuvent avoir plus de droits que lui, et que, conséquemment, comme Picard n'aurait pu contester à la société son droit de créancière gagiste, eux, non plus, ne peuvent le faire, est basée sur une erreur évidente. Elle pêche par ses prémisses. Les créanciers, sous ces circonstances, n'agissent pas comme ayants-cause de leur débiteur, mais comme tiers. La jurisprudence et la doctrine sont unanimes sur la question. Dans quatre causes rapportées dans Sirey, (1) la cour de Cassation a décidé que:

> Les créanciers d'un failli ou leurs syndics, bien qu'ils soient les ayants-cause du failli comme substitués à ses droits, n'en sont pas moins des tiers comme représentant la masse de la faillite, en tant qu'elle a des droits à défendre contre les actes du failli, et notamment à conserver dans son actif les valeurs qu'il en aurait fait sortir.

Dans une autre cause, *re Clauzel* (2), la même cour décida que "les créanciers sont recevables à demander la nullité d'un nantissement consenti par leur débiteur sans l'observation des formalités légales." Dans *re Védic* (3), et *re Langer* (4), la même jurisprudence est suivie.

Cette dernière décision surtout est particulièrement applicable à la présente cause.

> Les créanciers, dit la cour, doivent être considérés non comme les ayants-cause du failli, mais comme des tiers vis-à-vis de ceux d'entre

(1) 47, 1, 161 *et seq.*
(2) S. V. 48.1.609.
(3) S. V. 59.1.209.
(4) S. V. 77.1.369.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Taschereau J.

eux qui réclament un droit privilégié. Dès lors, le syndic, représentant la masse des créanciers a qualité pour contester le nantissement réclamé par l'un d'eux pour défaut des conditions requises pour l'exercice de ce privilège.

Et l'annotateur ajoute :

Le failli consent un gage avant la faillite, mais le créancier n'est mis en possession qu'après la faillite. Ce gage est-il nul vis-à-vis des créanciers ? Oui. Le gage est un contrat réel, et tant que le débiteur a conservé la chose en sa possession, il peut y avoir stipulation de gage, il n'y a pas de gage réel. C'est la mise en possession qui donne naissance au droit du créancier. Le créancier qui n'a pour lui qu'une simple convention, sans possession, n'est pas saisi, et s'il n'est pas saisi au moment de la faillite, il ne peut être saisi *ex post facto*. Aucun droit ne peut prendre naissance contre la masse après la faillite déclarée.

Tant qu'aux auteurs, ils sont unanimes à adopter cette solution. Je réfère plus particulièrement à Duranton 16 (1); Duvergier, Vente 2 (2); Troplong, Vente 2 (3); Laurent 16 (4); Laurent 19 (5); Demolombe, des Contrats 6 (6); Troplong, Nantissement (7); Pardessus, Dr. comm. (8). Cet auteur, *loc. cit.* dit :

La masse peut encore, même sans dénier ni la réalité ni la qualité de la dette, en contester la qualité privilégiée. Cette masse est composée de créanciers divers qui sont tous des tiers à l'égard du créancier prétendu nanti et du failli qui a consenti le nantissement. Ce n'est point le cas de dire que la masse n'a pas plus de droit que le failli.

Les intimés, je remarque, ont ici été dûment nommés curateurs à la faillite de Picard sous les arts. 763*a* et seq. du Code de procédure, et ont été autorisés par la cour à instituer la présente action. Leur *locus standi* est d'ailleurs reconnu par les plaidoyers.

PATTERSON J.—C. T. Picard being insolvent, made an abandonment of his property for the benefit of his creditors on the 14th of November, 1885, under the

(1) No. 502.
(2) No. 215.
(3) No. 911.
(4) No. 12.
(5) No. 330.
(6) Nos. 552 *et séq.*
(7) No. 276.
(8) Nos. 488, 489 et 1203.

provisions of the Code of Civil Procedure, articles 763, &c.

The respondents, plaintiffs in the action, are the curators appointed under art. 768.

Picard was a shareholder and a director of the building society, defendants in the action and the present appellants.

In 1882 Picard transferred to the Banque Ville Marie twenty shares of the stock of the society to secure loans from the bank amounting to $1,550.

He owed money to the society at that time, amounting to about $1,000.

A by-law of the society required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares.

The transfer to the bank was in violation of this by-law, but it was made in due form, Picard inducing the secretary-treasurer to countersign it.

Picard incurred further debts to the society, bringing up the amount he owed at the end of February, 1885, to $3,744. That amount was covered by his promissory note dated the 25th of February, 1885, payable on demand, and purporting to transfer to the society in security his shares in the capital stock, with power in case of default in payment of the note, to retain the shares or to transfer them to any person on terms and conditions agreed on with such person.

There had been similar notes given on the occasion of the several advances of money, which, together, made up the sum of $3,744. This note was in fact a renewal of all the others. The terms of these notes may possibly have given, or have been intended to give to the society power to deal with the shares in case of default more extensive than the society would have had under its by-laws, but it is important to bear in mind that, the shares existing only under the by-

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Patterson J.

laws, they had always, by virtue of the by-laws, been charged, as between Picard and the society, with Picard's obligations to the society.

It was not until some time after Picard's abandonment or assignment for the benefit of his creditors was made that the directors of the society, other than Picard himself, knew of the transfer of the stock to the bank.

The transfer being in due form, and the bank having no knowledge of Picard's debt to the society or of his fraud upon the society in transferring the shares without first satisfying his obligations to the society, it was of course entitled to hold the security. Therefore, on the 11th of March, 1887, the society paid to the bank the $1,550 with interest and took a formal assignment of the shares and of Picard's debt.

The claim of the society now is to hold the shares as security for that debt—which claim is conceded by the respondents—and also to hold them for Picard's other debt of $3,744. This latter claim is disputed by the respondents and is the subject of the present appeal.

It was sustained in the Superior Court by Mr. Justice Davidson, but his judgment was reversed on appeal to the Court of Queen's Bench, Mr. Justice Bossé dissenting.

The judgment of the Court of Appeal is put on the ground that the twenty shares were:—

> Transferred to the bank by transfers duly registered in the transfer book of the said society, whereby the possession of the said shares passed from the said Picard to the said Bank Ville Marie, with the sanction of the said society manifested by the act and signature of their secretary-treasurer, keeper of said transfer book, whereby the possession of said shares passed to the said Bank Ville Marie, subject to be restored to said Picard on payment of said advances, and could not, for want of possession, constitute a pledge in favour of said society by reason of any provision in their by-laws otherwise for any debt theretofore or thereafter created by said Picard towards the said society;

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Patterson J.

Considering that the right to recover the said shares from the said bank on payment of its advances thereon, was vested in said Picard and passed to his creditors upon his insolvency ;

Considering that long before the eleventh of March eighteen hundred and eighty-seven, the said Picard had become insolvent having on the fourteenth day of November, one thousand eight hundred and eighty-five, as such insolvent, made an assignment of his estate and effects for the benefit of his creditors, and after such an insolvency, it was not competent for the said society to acquire any privilege or pledge over the said shares to the prejudice of the creditors of the said Picard, by paying the claim of the said Bank Ville Marie for the advances made by it to the said Picard, on the security of the said shares, and getting subrogated in the rights of the said bank, by transfer from the said bank to the said society, made on the said eleventh March one thousand eight hundred and eighty-seven, other than to be reimbursed the amount thus paid, to wit, the sum of fifteen hundred and fifty dollars and interest thereon.

No account seems to be taken of the circumstance that the transfer of the shares to the bank was, as between Picard and the society, a fraud upon the society, but the effect of the transfer taken by the society from the bank, whether or not it is in other respects correctly apprehended, is treated as if the society was previously a stranger to the shares and had no title to them but that acquired from the bank. The bank was innocent of the fraud, but if it had been otherwise, if there had been a collusive scheme to defeat the lien which the society had upon the shares by virtue of the by-laws, the fraudulent transaction could have been set aside and the bank postponed to the society. The possession of the shares would, if necessary, have been decreed to the society. I say if necessary, because I do not understand that the possession was ever out of the society. The statement in the judgment is that the bank acquired possession by means of the transfer in the books of the society. No doubt that was sufficient possession, but it was possession of the character mentioned in the last words of article 1970 of the Civil Code, the thing pledged being in the hands of the per-

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Patterson J.

son appointed by the parties to hold it, viz., the society, and not in the hands of the creditor, or the bank. As said by Laurent (1):

> La société étant dépositaire du registre formant le titre du débiteur, elle était devenue, du consentement des deux parties, détentrice de ce titre pour les créanciers gagistes.

The bank being an innocent holder of the shares, the society could recover them only by assuming Picard's debt and paying off the bank. In that way it in effect annulled the transfer to the bank. The effect, as far as Picard was concerned, was the same as if the transfer had been annulled by the decree of a court, or as if it had never been made, but the $1,550 had been advanced by the society itself. In the deed of transfer and subrogation from the bank it is, as a matter of precaution, declared that the transfer is made without novation of, or derogation from, the rights of the society in respect of the shares by virtue of Picard's note of the 25th of February, 1885.

Those are the rights which the society is now asserting, not rights acquired after Picard's insolvency.

I see no reason to doubt the power of the society to make the by-laws under which the shares of every member are charged with the payment of the claims of the society against him, and no share is transferable until the shareholder has satisfied all his obligations to the society. Those by-laws are part of the contract between the society and the shareholder. The shares were never held except under those terms, and the respondents have only the same rights in respect of them as Picard himself had when he made the assignment.

For these reasons and those more fully expressed by Mr. Justice Davidson in the Superior Court, and without discussing whether, as between the debtor and his

(1) 28 vol. No. 483.

creditor—in this case between Picard and the society —the transfer of possession is essential, or whether it is not required only as respects third parties and as a notice to them of the existence of the pledge, I am of opinion that we should allow the appeal and restore the judgment of the Superior Court.

1892

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL v. DAVELUY.

Patterson J.

Appeal allowed with costs.

Solicitor for appellants: *M. E. Charpentier.*

Solicitors for respondents: *Beïque, Lafontaine & Turgeon.*

1892

*Feb. 23, 24.

*May 2.

E. CHURCHILL & SONS (DEFENDANTS)..... APPELLANTS;

AND

DANIEL McKAY AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

IN RE THE SHIP *QUEBEC.*

ON APPEAL FROM THE LOCAL JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT FOR NOVA SCOTIA.

Power of attorney—Construction of—Authority to settle and adjust claim—Right to receive payment under.

A crew of sailors claiming salvage from the owners of a vessel picked up at sea gave a power of attorney to P. authorizing him to bring suit or otherwise settle and adjust any claim which they might have for salvage services, &c.

Held, affirming the decision of the local judge in admiralty, that P. was not authorized to receive payment of the sum awarded for salvage or to apportion the respective shares of the sailors therein.

Taschereau J. took no part in judgment entertaining doubts as to the jurisdiction of the court to hear the appeal.

APPEAL from a decision of the local judge in admiralty for the district of Nova Scotia in favour of the plaintiffs.

The facts of the case are thus stated by the Admiralty Judge in giving judgment:—

This is an action for salvage by the plaintiffs, the crew of the schooner *Iolanthe* of Gloucester in the United States of America, against the British ship *Quebec*, her cargo and freight. The *Quebec* was abandoned at sea on the LaHave Banks off the coast of Nova Scotia on the 8th September last, and on the same day was boarded by the salvors or some of them.

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

On boarding the vessel they found the vessel making water rapidly through two augur holes which had been bored in her side. These they plugged and stopped the leak. They then started to tow the ship to Halifax where they arrived with her on the 12th September. It is admitted that the ship was derelict and that ship and cargo were saved by the exertions of the plaintiffs. The schooner *Iolanthe* was owned by one Joseph O. Proctor, junior, of Gloucester, who by deed dated 14th September, 1891, authorized and empowered his father Joseph O. Proctor, senior, as his attorney "to bring suit or otherwise settle and adjust any claim which I may have for salvage services rendered to the barque *Quebec*, recently brought into the port of Halifax, Nova Scotia, by my said schooner *Iolanthe*," and on the 16th of the same month the master and crew of the schooner executed a power of attorney to the same Joseph O. Proctor "for us and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority in and concerning the premises as fully and effectually as we might do if personally present." Acting under this power of attorney Joseph O. Proctor agreed with the owner of the *Quebec* to accept the sum of $1,680 in full of salvage for the ship, and that amount was paid to him by the agents of the owner on the 19th September. The salvage on the cargo was reserved for negotiation with the owners of cargo The only evidence as to the arrangement for salvage on cargo is that given in the testimony of George S Campbell of the firm of Corbett & Co., agents for the owners of the cargo. He says, "I had several con

1892

CHURCHILL & SONS v. MCKAY.

In re THE SHIP "QUEBEC."

versations with Joseph O. Proctor, senior. He brought me the powers of attorney to him at the first interview I had with him. On the authority of these papers I treated with him as to salvage of the cargo. We made a settlement on 22nd September in the forenoon; we were to pay the parties represented by Proctor $1,300 in full. This settlement was based on the supposition that the cargo was in perfect order. Proctor offered to take $1,300. We accepted *subject to approval of our principals.* Before that approval was obtained the power of attorney to Proctor was cancelled. The notice of cancellation to us was after the arrangement with Proctor." A release (Proctor, senior), was put in evidence dated the 19th September which acknowledges receipt of $650 in settlement of the claim of the owner of the schooner on the salvage of the cargo, and $46.43 for the claim of the master of the schooner on the same fund, which I assume was paid to him by Corbett & Co. The plaintiffs did not receive their money and became dissatisfied with the conduct of Proctor, and on the 22nd September they revoked and cancelled their power to Proctor, of which due notice was given to Proctor, the owner of the ship and his agents and to the agents for the owners of the cargo. Negotiations for a settlement of the plaintiffs' claims were continued but without success, and on the 8th October the ship was arrested under process from this court, an appearance was entered for the owners of the ship and cargo on the 9th October and on the 22nd October the owners of cargo paid $603.57 into court. The defendants contend that the payment to Proctor and his release and receipt for the money received by him is an answer to the plaintiffs' claim, while the plaintiffs contend: 1st. That their signatures to the power of attorney were

1892

CHURCHILL & SONS v. MCKAY.

In re THE SHIP "QUEBEC."

fraudulently obtained, that they did not know the nature of the paper they were signing and that it was not read over or explained to them; and 2nd. That assuming the paper to be duly executed, it only authorized Proctor to settle and adjust the amount to be paid by the defendants, but did not authorize him to receive or them to pay to him the money payable to the plaintiffs, nor did it authorize him to adjust and settle the proportion of the salvage to be paid respectively to the owner of the schooner and the plaintiffs, and that the payment to him did not release their lien on the ship and cargo.

The decision of the judge was that the power of attorney did not authorize the owners of the *Quebec* to pay to Proctor, or Proctor to receive from them, the amount of salvage awarded and that Proctor's release of the plaintiff's claim did not prevent plaintiffs from maintaining this action. The defendants appealed.

W. B. Ritchie for the appellants cited the following cases on the authority of Proctor under the power of attorney to receive payment: *Hatch* v. *Hale* (1); *Hawkins* v. *Avery* (2); *New York Railway Co.* v. *Bates* (3); *Rex* v. *Martin* (4).

MacCoy Q.C. and *Morrison* for the respondents referred to *The Sylph* (5); *The Sarah Jane* (6); *Coondoo* v. *Watson* (7).

Sir W. J. RITCHIE C.J.—I think the evidence very clearly shows that this man Proctor was dealing with those unfortunate seamen in a most improper and objectionable manner. They were in Halifax waiting for the salvage, without means and unable to get any reasonable information from either Proctor or the

(1) 15 Q. B. 10.
(2) 32 Barb. 551.
(3) 2 Am. Dig. 1104.
(4) 7 C. & P. 549.
(5) L. R. 2 Ad. & Ecc. 24.
(6) 2 W. Rob. 110.
(7) 9 App. Cas. 561.

1892

CHURCHILL & SONS v. MCKAY.

In re THE SHIP "QUEBEC."

Ritchie C.J.

agents of the ship-owner, and Proctor having got the money, rightly or wrongly, went off with it; and I do not think the conduct of the agents of the ship is to be commended and it seems very much as if they were acting in concert with Proctor, rather than with a desire to aid the men in preventing the money reaching the hands of Proctor as they desired, though, it is true, it may be that they were influenced by the belief that Proctor was authorized to receive the money and therefore were unwilling to assist the men in any attempt to enforce the payment from the ship-owners notwithstanding the payment to Proctor.

Be this as it may, I am not disposed to question the accuracy of the finding of the learned Chief Justice "that the men signing the power of attorney understood what they were doing and clearly comprehended the fact that they were, by executing the instrument, delegating power to Proctor to act for them to the extent of the power as expressed by the words of the instrument," but I do not think they authorized or intended to authorize Proctor to settle and adjust their proportion of the salvage as between the owners of the schooner and themselves, or receive their shares and release their lien until they actually received their respective shares. Whether such was their intention or not must depend on the reasonable and fair construction of the written instrument itself. The words of this power of attorney are:

> We, the undersigned, being all the crew of the schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney with power of substitution for us in our names and behalf as crew of the said schooner to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto

our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint from time to time as occasion may require one or more agents under him or to substitute an attorney for us in his place and the authority of all such agents or attorneys at pleasure to revoke.

It is for the judge to decide as a question of law on the construction of this power of attorney given by the crew to Proctor, inasmuch as the construction of written instruments is in all cases matter of law for the court. *Berwick* v. *Horsfall* (1); *Neilson* v. *Harford* (2). In my opinion this power of attorney must be strictly construed.

In *Attwood* v. *Munnings* (3) Bayley J. says:—

The plaintiff in this case relies on the authority given by two powers of attorney which are instruments to be construed strictly.

And again:—

The words must be confined to that which is their obvious meaning.

And the same case shows that the general words are not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which the power of attorney was given.

If the power conferred must be pursued strictly and so construed in ordinary cases, how much more so in a case such as this where seamen, whose interests it is the policy of the courts of admiralty to protect, are concerned.

Now what does the power of attorney authorize Proctor to do?

For us and in our name to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec*, granting to our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present.

But not a word about the distribution of the money or receiving it or releasing or discharging the ship.

(1) 4 C. B. N. S. 460. (2) 8 M. & W. 806.
(3) 7 B. & C. 283.

1892

CHURCHILL & SONS v. MCKAY.

In re THE SHIP "QUEBEC."

Ritchie C.J.

It authorizes a suit to be brought which was not done, and in the event of a suit not being brought to settle and adjust any claim, &c.; that, as I read the instrument, authorized him to fix and determine the amount to be paid by the owners of ship and cargo on account of the salvage services, but having settled and adjusted the amount I can find no language in the power of attorney to authorize Proctor to receive the amount of such adjustment, and to release and discharge the lien which the law gave the seamen on the vessel and cargo until their salvage claims were paid to them. Under this power Proctor would take all necessary means of executing it with effect, that is to say, all necessary means to settle and adjust the amount as between the owners of ship and cargo and the sailors. But receiving the money and fixing the amount to be received respectively by ship-owner, captain and seamen, as between themselves, were matters entirely independent of settling and adjusting the amount between owners of cargo and sailors. If such was the intention of this instrument, prepared at the instance of Proctor, surely they should not have been asked to sign until this was clearly pointed out to them, and as their interests were in conflict with that of the ship-owner I think they should have had legal assistance. But I think the notary who drew the power of attorney clearly shows that it was intended only to apply to a settlement of the amount of the salvage claim. He says on his examination at the trial:—

I am a notary public and shipping broker at Halifax. The first thing I had to do with the *Quebec* was at the request of Joseph O. Proctor to prepare a power of attorney. This was on 16th September last about 10 a.m. I prepared the power of attorney. The captain and some of the crew of the *Iolanthe* came to my office with Proctor. Proctor brought the paper with him. The seal on the face of the

paper now was then on the paper. Proctor and the captain of the schooner then brought the crew to sign this paper. Proctor explained to the crew what the nature of the instrument was. He told them it gave him the exclusive power to make all arrangements with regard to the salvage of the ship and cargo, and he would do all in his power to make the best settlement possible. I read the power of attorney over to the crew myself, and explained it to them several times. They did not all sign at the same time, but in batches. I read the paper and explained it to each batch. Every man who signed the paper in my presence had the paper read and explained to him. The men were sober as far as I could see. They were intelligent and asked questions about the paper. I read it to Seibe. He asked for an explanation. He wanted to know what the document was and what powers it gave. I explained to him that it gave full powers. He seemed to me to be sober. I told him and all of them that Proctor had full powers. There was no force or undue persuasion used in my presence.

Don't know where the power of attorney was prepared. The paper was signed by all the men during the morning. The master of the schooner and Proctor brought them to my office. John J. Collins was the master. There was no hesitation to sign on the part of the men. I told them they were giving Proctor absolute power to settle the salvage on ship and cargo. Joseph O. Proctor was not the owner of the *Iolanthe*. He told the men that he had a power of attorney from the owner of the schooner. He told the men he was the agent for the owner of the schooner. He did not say he was the owner.

What are the full powers the notary referred to but to settle the amount of salvage on ship and cargo and to make the best settlement possible? No doubt payment to the attorney of plaintiff is payment to himself: this may well be, for in such a case he is employed to collect the debt and the right to receive it is necessarily incident to the duty to collect, and then again he is an officer of the court and under its control. But an agent under a power of attorney stands in a very different position; he can only do what he is expressly authorized to do. His authority is confined to the very terms of the power. Thus payment of a debt to an agent employed to sue the defendant is not payment to the plaintiff.

1892

CHURCHILL & SONS v. MCKAY.

In re THE SHIP "QUEBEC."

Strong J.

In *Yates* v. *Freckleton* (1) "the court were clear that an agent employed to sue is not therefore authorized to receive payment. They said it had been formerly doubted whether payment to the attorney was payment to the party, though it was now settled to be so."

STRONG J.—This appeal cannot be sustained. The words of the power of attorney "to bring suit or otherwise settle and adjust any claim which I may have for salvage services rendered to the barque *Quebec*" were wholly insufficient to authorize payment to the attorney. Neither the word "settle" nor the word "adjust" implies any such authority, but they refer merely to the ascertainment of the amount due to the constituent. This is so plain that no reasoning or authority is required to demonstrate its correctness. "Adjust" plainly means to ascertain and in addition to the word "settle" being by itself insufficient to warrant payment, the principle of *noscitur a sociis* applies to restrict its meaning.

The appeal must be dismissed with costs.

TASCHEREAU J.—I am not satisfied that we have jurisdiction to entertain this appeal, and I take no part in the judgment. I refer to the Imperial Colonial Courts of Admiralty Act of 1890, 53-54 V. c. 27.

GWYNNE and PATTERSON JJ.—concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitor for appellants: *W. B. Almon Ritchie.*

Solicitor for respondents: *C. Hudson Smith.*

---

(1) 2 Doug. 623.

EDMUND H. DUGGAN (PLAINTIFF).....APPELLANT; 1891

AND *Dec. 1, 2, 3, 4.

THE LONDON & CANADIAN LOAN AND AGENCY COMPANY AND JAMES TURNBULL (DEFENDANTS) } RESPONDENTS. 1892 *May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Transfer of stock—Shares held in trust—Duty of transferee to make inquiry

D. transferred to brokers as security for a loan certain shares in a joint stock company, the transfer expressing on its face that it was in trust. The brokers pledged these shares with other stock to a bank as security for advances, and from time to time transferred them to other financial companies, each transfer on its face purporting to be "in trust." Eventually, the Federal Bank being the holders assigned D.'s shares, and others pledged by the brokers, by a transfer signed "B. manager in trust," to T. the manager of the respondent company, who accepted the transfer "in trust." D. brought an action to redeem them on payment of the amount of the loan to him from the brokers.

Held, reversing the decision of the Court of Appeal, Taschereau and Patterson JJ. dissenting, that the form of the transfer to the loan company was sufficient to put them on inquiry as to the nature of the trust indicated, and they were only entitled to hold the shares of D. subject to payment of the amount he had borrowed on them. *Sweeny* v. *The Bank of Montreal* (12 Can. S.C.R. 661; 12 App. Cas. 617) followed.

Held, per Taschereau and Patterson JJ., that "manager in trust" on the transfer to the loan company only meant that the manager held the stock in trust for his bank, and that the transferree had a right so to regard it and was not put on the inquiry, even if such inquiry would have been possible in view of the shares not being numbered or identified in any way by which they could be traced.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Street at the trial (2) in favour of the plaintiff.

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

(1) 18 Ont. App. R. 305. (2) 19 O.R. 272.

1891

DUGGAN v. LONDON & CANADIAN LOAN CO.

The plaintiff Duggan, in October, 1881, assigned to Scarth & Cochran, a firm of brokers in Toronto, 80 shares of the Toronto House Building Association as security for a loan of $1,500, and in February, 1882, he transferred to said brokers 80 other shares of the same stock as "margins" in stock speculation they were carrying on for him. Both transfers were expressed on their face to be "in trust."

A few days after the second transfer Scarth & Cochran obtained advances from the Standard Bank and transferred 80 shares, which were not numbered or otherwise identified, to "John L. Brodie, in trust, cashier," and in July, 1882, they transferred the remaining 80 shares in the same way. They afterwards shifted the loan from time to time from one bank or company to another, each transfer being made in the same way "in trust," until in 1887 the shares were transferred by the Federal Bank, the then holders, to the defendants the London and Canadian Loan and Agency Company, with which the brokers had negotiated a loan of some $14,000. The transfer by the bank in this case was also signed "J. O. Buchanan, manager, in trust," and was made to "James Turnbull, in trust," Turnbull being the manager of the defendant company. Prior to this transfer the name of the Toronto House Building Association had been changed to that of the Land Security Company and a new allotment of shares had been made which had been taken up by the Federal Bank at the request of the brokers, and the transfer to the defendant company consisted of 160 shares of old and 638 shares of new stock.

After this transfer Duggan demanded from the defendant company a re-transfer of his stock and tendered an amount sufficient to cover what he owed the brokers Scarth & Cochran. The company refused to recognize him in the matter and claimed to hold the stock for

their advances to the brokers and they finally sold the stock. Duggan thereupon brought an action against the company and Turnbull their manager for a declaration that they could only hold the stock for the amount due by him to the brokers and asking for an account of the full value of the shares and of the defendants' dealings with them.

The action was tried before Mr. Justice Street who gave judgment in favour of the plaintiff, holding that the form of the transfer was such as to put defendants on inquiry and that they could not hold the stock for more than plaintiff owed the brokers. This decision was reversed by the Court of Appeal and the plaintiff then appealed to the Supreme Court of Canada.

McCarthy Q.C. and *Kerr* Q.C. for the appellant. Shares may be pledged as any other personal property. *Donald* v. *Suckling* (1).

The owner's title cannot be affected by the mode in which the shares are transferred any more than some informality in registration can affect the validity of a deed. See *Cole* v. *The North-western Bank* (2); *Williams* v. *The Colonial Bank* (3).

As to what a pledgee may do see *Donald* v. *Suckling* (1); Story on Bailments (4); Campbell on Sales (5).

If the respondents claim to be transferees without notice they must establish the fact. The evidence brings them within the decision in *Earl of Sheffield* v. *London Joint Stock Bank* (6); *Simmons* v. *London Joint Stock Bank* (7). See also *Williams* v. *The Colonial Bank* (3).

(1) L.R. 1 Q.B. 585.
(2) L. R. 10 C. P. 354.
(3) 36 Ch. D. 659; 38 Ch. D. 388; 15 App. Cas. 267.
(4) 9 ed. s. 324.
(5) 2 ed. p. 57.
(6) 13 App. Cas. 333.
(7) [1891] 1 Ch. 270.

1 91

DUGGAN v. LONDON & CANADIAN LOAN CO.

As to the intention of the parties in the transaction between Duggan and Scarth & Cochran see *Bradford Banking Co.* v. *Briggs* (1).

The learned counsel also referred to *Shaw* v. *Spencer* (2); *Muir* v. *Carter* (3); *Raphael* v. *McFarlane* (4); *Bank of Montreal* v. *Sweeny* (5).

E. Blake Q.C. and *Howland* for the respondents. In *Bank of Montreal* v. *Sweeny* (5) the bank dealt with a person who on the face of the instrument was a trustee for some person undisclosed. In this case the only fact brought to the knowledge of the respondents was that the transfer to them was signed "manager in trust." That reasonably meant in trust for the bank of which he was manager.

If a buyer of stock is obliged to make an inquiry in a case of this kind, in which inquiry he is liable to be met with false statements and evasions, there would be an end of buying and selling stocks as no one would be safe in investing money in them.

The respondents acquired an absolute title to the shares subject to redemption on payment of the advance made on them. *Briggs* v. *Massey* (6).

R. S. O. (1887) ch. 128 is an act similar to the Factors Act in England, and sections 1, 10 and 11 apply to this transaction and are a complete bar to the relief sought by the appellant. See *Williams* v. *The Colonial Bank* (7) and *City Bank* v. *Barrow* (8).

The respondents took shares without notice and the appellant must show some equitable ground upon which they should be re-transferred. *Burkinshaw* v. *Nicolls* (9).

(1) 12 App. Cas. 29.
(2) 100 Mass. 382.
(3) 16 Can. S. C. R. 473.
(4) 18 Can. S. C. R. 183.
(5) 12 Can. S.C.R. 661; 12 App. Cas. 617.
(6) 42 L. T. N. S. 49.
(7) 36 Ch. D. 659.
(8) 5 App. Cas. 664.
(9) 3 App. Cas. 1004.

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Ritchie C.J.

Sir W. J. RITCHIE C. J.—I entirely agree with the judgment of Mr. Justice Street in this case and think this appeal should be allowed and his judgment restored. I think that where stock is transferred in trust, and that fact appears on the face of the transfer, it is it is the bounden duty of all or any parties to whom the said stock is about to be transferred to make all reasonable inquiries and proper investigation as to the nature of the trust on which the transfer has been made, and had that been done in this case I cannot escape the conclusion that the nature of the trust to Scarth & Cochran would have been discovered, and that Scarth & Cochran never had more than a qualified interest in the shares in question; and this duty of making inquiries was not only on those who took these shares from Scarth & Cochran but on all subsequent transferees, all these transfers having been made for the benefit of Scarth & Cochran in trust. I think the defendants had such information as made it not only reasonable and proper, but their duty, to make inquiry into the origin of the title and all intermediate transfers, more particularly as the transaction was in fact between the defendants and Cochran, and had such inquiries been honestly made with a view of discovering the true position of the stock it is to be presumed correct information would have been given. It would have resulted in a discovery of the true facts, and as no such inquiry was made it is no answer to say that had the inquiry been made they might have been met by false or misleading information.

I entirely repudiate the doctrine, as I did in *The Bank of Montreal* v. *Sweeny* (1), approved of by the Privy Council (2), that banks or any others can, after their attention is called by the transfer itself to the fact that the stock is held in trust, blindly and without inquiry

(1) 12 Can. S.C.R. 661. (2) 12 App. Cas. 617.

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Ritchie C. J.

accept transfers of such stock and so deprive the *cestui que trust* of his property.

The money throughout was all advanced, by each and every one through whom the stock passed, for and to Scarth or Scarth & Cochran. In fact all dealings in reference thereto, including the defendants', were with Cochran. A simple inquiry from Cochran would have elicited a development of all the facts connected with the shares. Cochran having actually made the transfers to Turnbull for the defendants, as Mr. Turnbull says, "we made no inquiry, we did not think it necessary. It might belong to him or somebody else we did not know;" and I think he might have added, "We did not care."

When the transferees find on the books of the company that the shares are held in trust then, in my opinion, arises the duty to inquire.

I think this case does not come within the Factors Act.

The case to which our attention has been called of *Joint Stock Bank* v. *Simmons* (1) has no application whatever to this case. There the instrument was negotiable and there was nothing in connection with it to put any parties on inquiry. It was the case of a bond payable to vendor and a negotiable security of which plaintiffs were *bonâ fide* holders who received it for value in good faith and without knowledge of want of title in its predecessor, and without anything in connection therewith to put the holder on inquiry, and it entirely differs in its state of facts from those which this case presents.

STRONG J. concurred in the judgment of Mr. Justice Gwynne.

(1) 8 Times L.R. 478; [1892] A. C. 201.

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Taschereau J.

TASCHEREAU J.—I would dismiss this appeal and hold that the appellant cannot recover against the respondents. The case of *Sweeny* v. *The Bank of Montreal* (1) is not applicable. I adopt the reasoning of the learned judges in the Court of Appeal.

GWYNNE J.—This action was brought to redeem certain shares in the stock of an incorporated company called the Landed Security Company which the plaintiff, as was alleged, had about ten years ago transferred to the defendants William B. Scarth and Robert Cochran, then carrying on business in partnership in the city of Toronto as stock brokers and money brokers, upon certain trusts and by way of security for certain advances made by them to him, and which shares by divers mesne assignments from them had been transferred to the defendants the Canadian Loan and Agency Company, of which company, at the time of their becoming possessed of the shares, the defendant Turnbull was manager. The learned judge before whom the case was tried rendered judgment for the plaintiff against all the defendants. His decree was that:

> The defendants do pay to the plaintiff the value of the one hundred and sixty shares of stock of the Landed Security Company less the balance remaining due by the plaintiff of the debt due by him to the firm of Scarth & Cochran at the time of its dissolution, and that the within named defendants other than defendant Scarth do also pay to the plaintiff the value of the six hundred and thirty-eight shares of the said stock less the balance due by the defendant Cochran in respect of their dealings subsequent to the dissolution of the said firm; the value of the shares in each case to be taken at their market value between the 15th December, 1887, the date of the plaintiff's tender to the defendants the London and Canadian Loan and Agency Company, and the 8th March, 1890.

And it was by the said decree referred to a referee to ascertain such value and to take the necessary accounts. From this judgment the London and Canadian

(1) 12 Can. S.C.R. 661; 12 App. Cas. 617.

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

Loan and Agency Company and the defendant Turnbull appealed to the Court of Appeal for Ontario; that court allowed their appeal and from the judgment of that court this appeal is brought by the plaintiff. Although the judgment of Mr. Justice Street remains unimpeached against the defendants Scarth and Cochran respectively, it will be necessary to enter into a consideration of the transaction from its initiation between Duggan and Scarth & Cochran in order to the determination of the question raised by the appeal as to the liability of the defendants, the London and Canadian Loan and Agency Company, to the plaintiff.

In 1881 the appellant was possessed as absolute owner of 160 fully paid up shares in the capital stock of a company incorporated by an act of the legislature of the province of Ontario under the name of "The Toronto House Building Association," which name was subsequently by another act of the legislature changed to "The Landed Security Company." By the act of incorporation of the above company it was enacted that the stock of the company should be deemed to be personalty and should be assignable, but that on transfer of any share should be valid until entered in the books of the company according to such forms as the directors might from time to time appoint. The directors accordingly opened a book in which all transfers should be made in a form adopted by the directors and printed in the book which was called the transfer book.

The act of incorporation did not require the company to issue, and there is no evidence that they ever did issue, any certificates of ownership of shares in the company. An owner of shares in the company had no means, so far as appeared at least, of evidencing his title to shares in the company except by reference to the books of the company which contained the only

evidence of any person being a proprietor of shares in the company, whether he was such by original allotment by the directors or by transfer from an original allottee. Being so possessed of the above 160 shares the appellant applied to the defendants Scarth & Cochran, then carrying on the business of stock brokers and money lenders in partnership, for a loan of $1,500. The negotiation for such loan was made and completed with the defendant Cochran, and it was agreed that the appellant should transfer to the defendants Scarth & Cochran 80 of the said shares as security for such loan. To perfect this transaction the appellant on the 26th day of October, 1881, went to the office of the company and had the printed form of transfer in the books of the company filled up and signed the same, which when so filled up and signed was as follows:—

For value received I, Edmund H. Duggan, of Toronto, do hereby assign and transfer unto W. B. Scarth and Robert Cochran in trust of Toronto, eighty (80) shares in the stock of the funds of the Toronto House Building Association of Toronto, numbered in the books of the association as shares No. ——— on which has been paid the sum of two thousand dollars subject to the provisions of the act of Parliament authorising the incorporation of the association and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith.

Witness my hand at the office of the association this 26th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

(Sgd.) E. H. DUGGAN.

On the following day, on the 27th October, 1881, the defendants Scarth & Cochran signed an acceptance of the above transfer at the foot of the transfer in the books of the company as follows:

I hereby accept the foregoing transfer of eighty (80) shares of the stock of the Toronto House Building Association on the conditions and subject to the provisions above mentioned.

(Sgd.) W. B. SCARTH,
" ROBERT COCHRAN, } *In trust.*

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

It does not appear what was the time, if any was named, for repayment of the loan and in the absence of a time fixed by agreement of the parties we must take it to have been repayable upon notice being given to the appellant demanding repayment, and there is no suggestion that any such demand ever was made. It was not disputed that the transfer of the shares was to be solely as security for repayment of the loan, or that the agreement upon which the loan was effected was that the transferees of the shares should have power, in the event of default in repayment of the loan, to sell the shares or so many thereof as might be necessary to realize repayment of the loan with interest, and that they should pay or transfer to the appellant any surplus of money or of shares which might remain after such repayment. Upon the transfer of the eighty shares to the defendants Scarth & Cochran in trust as expressed in the instrument of transfer the loan was made, and there does not appear on the evidence to have been any default committed by the appellant so as to have given any occasion for the exercise of the transferees' power of sale of the shares. In the month of February, 1882, the appellant entered into a further agreement with the defendants Scarth & Cochran, namely, that they should in their capacity of stock brokers purchase shares for him on margin, as it is called, in the Hudson Bay Company and Canada N.W. Land Company upon the security of divers other shares then held by the appellant in different companies, such shares when transferred by the defendants Scarth & Cochran to be held by them as collateral security merely for any balance that upon an account taken between them and the appellant should become due to them by the appellant upon the purchase of said shares in the said Hudson Bay Company, and in the said Canada N. W. Land Company; accordingly in pursuance of such

agreement among other shares transferred to the defendants Scarth & Cochran by the appellant he, upon the 20th day of February, 1882, transferred to them eighty other fully paid up shares in the said Toronto House Building Association by an instrument duly filled up and signed by him in the transfer book of the said association, which instrument so signed is as follows :—

For value received I, Edmund Henry Duggan, of Toronto, Esquire, do hereby assign and transfer unto Messrs. Scarth & Cochran Brokers, of Toronto, in trust, eighty shares in the stock of the funds of the Toronto House-building Association of Toronto, numbered in the books of the association as shares No. , on which has been paid the sum of two thousand dollars, subject to the provisions of the Act of Parliament authorizing the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith. Witness my hand at the office of the association this 20th day of February, 1882.

(Sgd.) E. H. DUGGAN.

And on the 22nd day of the said month of February, the defendants Scarth & Cochran accepted the above by a note at the foot of the said transfer in the transfer book of the said association as follows :

I hereby accept the foregoing transfer of eighty shares of the Toronto House Building Association, on the conditions and subject to the provisions above mentioned. Dated this 22nd day of February, 1882.

(Sgd.) SCARTH, COCHRAN & Co.

Now that the defendants Scarth & Cochran held these last-mentioned shares solely upon trust cannot, I apprehend, admit of a doubt, and that such trust was that the shares so transferred by the appellant in trust should be held by the transferees only as collateral security to await the result of the transaction entered into by the appellant through them as brokers in the purchase on margin for the appellant of shares in the Hudson Bay Company, and in the Canada N. W. Land Company; and that this was well

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

understood by the defendants Scarth & Cochran fully appears by the accounts rendered by them from time to time to the appellant, wherein also it appears that they themselves transferred to the like account and acknowledged themselves to hold the eighty shares transferred to them in security for the $1,500 loan upon the like trust as the shares transferred in February, 1882, namely, as collateral security only to await the result of the said purchases as margin. In the month of October, 1882, in an account then rendered by them to the appellant of shares purchased for him in the Hudson Bay Company and in the Canada N.W. Land Company they acknowledge themselves to then hold as stocks of the appellant held as margin the following shares:

50 Building and Loan	$1,250	
80 Land Security	2,100	
80 do do 80 British Am. As. Co.	6,600	$9,950

On the 2nd February, 1883, they charge the appellant in account with him in respect of the purchases on margin with $1,610.33 which appears by the evidence to be the amount of the loan of $1,500 obtained in October, 1881; and in an account rendered by them on the 31st January, 1886, they bring in the appellant their debtor in the sum of $3,751.14, for which they still acknowledge themselves to hold as "collateral" the 160 shares landed security and 50 shares Building and Loan. On the 6th March, 1886, they charge the appellant with $1,487.50 paid by them for him for new shares, to which the appellant became entitled in the Landed Security Company as holder of the old 160 shares in Toronto Building Association, and on the 30th September, 1886, the defendant Robert Cochran renders to the appellant an account of everything from the beginning in his Robert Cochran's own name, and not

in the names of Scarth & Cochran in which account, including the amount charged on March the 6th as paid for new shares accrued to the appellant in the Landed Security Company the appellant is brought in debtor in the sum of $5,142.94, and between that date and the 1st of July, 1887, the appellant is debited with other large sums of money as paid on account of other new shares in the Landed Security Company as accruing to him in right of the old 160 shares in the Toronto Building Association, such new shares in the whole amounting to 638, and during all this time Scarth & Cochran and Robert Cochran in the accounts rendered on the 30th September, 1886, and subsequently thereto, give the appellant credit for the dividends at the 160 old shares and the 638 new shares regularly as they became due and payable. Now under these circumstances there can be no doubt that the defendants Scarth & Cochran held the appellant's shares in the Landed Security Company, both the old and the new shares which accrued in right of the old, upon trust only as security for the balance of their account on their transactions with the appellant; neither can there, I think, be any doubt that the words "in trust" as inserted by the appellant in the instrument which he signed transferring the legal interest in the shares so transferred must be read as having been inserted by the appellant for the purpose of securing himself in the event of any breach by the defendants Scarth & Cochran of the trust condition subject to which they held the shares, and in the reasonable expectation that any person accepting a transfer of the shares from them would be put upon inquiry as to the nature of the trust. That the defendants Scarth & Cochran committed a palpable breach of the trust condition subject to which they held the shares cannot admit of doubt, and the only question before us is

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

whether under the circumstances appearing in evidence the Canadian Loan and Agency Company are to be affected by that trust or can they hold the shares which they acknowledge they acquired in virtue only of their contract with Cochran free from all obligation to the appellant in respect of shares which Scarth & Cochran held from him subject to a trust condition in his favour, or in the words of Lord Bramwell in *The Earl of Sheffield* v. *The London Joint Stock Bank* (1), whether under the circumstances appearing the defendants, The London and Canadian Loan and Agency Company, must not be held to have had notice of such facts and matters as made it reasonable that inquiry should have been made by them into Cochran's title to deal with the shares as his own. The evidence bearing upon this point is that upon the 7th September, 1887, Cochran applied to the company through their manager and agent, the defendant Turnbull, for a loan of $14,300 upon the security of 160 old shares and 638 new shares of the Landed Security Company of which he represented himself to be the owner. Mr. Turnbull knew Cochran to be a stock broker and had had previous dealing with him as such; he did not, he says, consider whether the shares were Cochran's own or shares belonging to his clients; Cochran represented them to be his own and Turnbull dealt with him as the owner upon such representation; thereupon Turnbull, on the behalf of his company, came to an agreement with Cochran to lend him the $14,300 upon the terms set forth in a deed of hypothecation which upon the transfer of the shares being effected as hereinafter mentioned Cochran executed under his hand and seal, and which as so executed is as follows:

In consideration of fourteen thousand three hundred dollars this day advanced by the London and Canadian Loan and Agency Com-

(1) 13 App. Cas. 346.

pany (limited), I have deposited with the said company as security the following shares, viz., one hundred and sixty shares of fully paid up Landed Security Company, say, $4,000, and six hundred and thirty-eight shares of 20 per cent paid Landed Security Company, say $3,190, and covenant and agree to repay the said advance to the said company in three months with interest thereon until repaid at the rate of six and one-half per cent per annum, at their head office in Toronto, and in default thereof, but without prejudice to the company to recover on the said covenant, hereby authorize the company to sell the said shares without notice in such manner, and either by public or private sale, as they may see fit, the net proceeds to be applied to the payment of the said advance and interest, and the surplus, if any, to be accounted for to the undersigned. In case of deficiency I promise to pay to the company the amount thereof forthwith thereafter with interest thereon as aforesaid. If at any time the said shares should be quoted in the ordinary newspaper reports at a price under 220 per cent respectively on the nominal par value of such shares I undertake to make good to the company on demand forthwith the difference between the value of the said shares at the price above mentioned and at such reduced quotations, in default whereof the company are to be entitled to claim payment at once of the full amount of the said loan with interest thereon as aforesaid, and in case of non-payment to be at liberty to sell the said shares as above mentioned, and the company are not in any case to be liable for any loss arising from any sale of said shares. In the event of the undersigned having any other loan or loans from the said company the margin of which is insufficient, or in which any deficiency may exist under their respective terms, the company shall not be bound to release the securities hereby deposited until such insufficiency of margin or deficiency shall be made good; and in the event of any sale of the above securities under the powers granted to the company hereunder the company may apply any surplus that may remain in satisfaction, of any claim which they may have against the undersigned in respect of any other loan or loans under the respective provisions thereof. Any demand or notice which the company may think necessary to make or give is to be held sufficient if mailed to the persons so to be notified at their usual post office address or left at their usual place of business, but it is not to be obligatory on the company to make or give any such demand or notice.

Dated at Toronto this 7th day of September, 1887.

(Sgd.) ROBT. COCHRAN. [SEAL.]

The terms of loan having been agreed upon Cochran and Turnbull went to the office of the Landed Security

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

Company and there Cochran produced a power of attorney bearing date the same 7th day of September, executed in his favour by one James Oliver Buchanan as manager of the Federal Bank, of which bank he then was manager, which power of attorney was in the words following:

Know all men by these presents that I, James Oliver Buchanan, Manager in trust, of Toronto, hereby nominate and appoint Robert Cochran, broker, of Toronto, my true and lawful attorney for me and in my name to transfer one hundred and sixty fully paid up shares and six hundred and thirty-eight 20 p.c. paid up shares in the stock of the Land Security Company, and as my act and deed to execute all covenants and agreements required to be executed by members subscribing for unadvanced shares and I hereby agree to ratify and confirm whatever my said attorney shall lawfully do in the premises by virtue hereof.

Witness my hand and seal this 7th day of Sept., 1887.

(Sgd.) J. O. BUCHANAN, (SEAL.)
Manager in trust.

Thereupon Cochran under and in virtue of the said power of attorney executed, in the transfer book of the Landed Security Company, two several instruments of transfer of shares which the said London and Canadian Loan and Agency Company through their manager and agent accepted (for that appears to me the effect of the transaction) and which instruments of transfer and acceptances thereof are as follows:

1st. For value received I, J. O. Buchanan, manager in trust, do hereby assign and transfer unto James Turnbull in trust, one hundred and sixty old shares in the stock of the funds of the Land Security Company of Toronto numbered in the books of the company as shares No.——— on which has been paid the sum of four thousand dollars ($4000) subject to the provisions of the Act of Parliament authorising the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith. Witness my hand at the office of the company this 7th day of September, 1887.

J. O. BUCHANAN,
Manager, in trust.
Per ROBERT COCHRAN,
His Attorney.

I hereby accept the foregoing transfer of one hundred and sixty (160) old shares of the stock of the Land Security Company at the conditions and subject to the provisions above mentioned.

Dated this 7th day of September, A.D. 1887.

JAMES TURNBULL,
In trust.

2nd. For value received I, J. O. Buchanan, manager in trust, of Toronto, do hereby assign and transfer unto James Turnbull, in trust, six hundred and thirty-eight (638) new shares in the stock of the funds of the Land Security Company, of Toronto, numbered in the books of the company as shares No. ———, on which has been paid the sum of $3,190, thirty-one hundred and ninety dollars, subject to the provisions of the act of parliament authorizing the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith.

Witness my hand at the office of the company this 7th day of September, 1887.

J. O. BUCHANAN,
Manager, in trust.
Per ROBERT COCHRAN,
His Attorney.

I hereby accept the foregoing transfer of six hundred and thirty-eight (638) shares of the stock of the Land Security Company on the conditions and subject to the provisions above mentioned.

Dated this 7th day of September, A.D. 1887.

J. TURNBULL,
In trust.

Now the manager of the London and Canadian Loan and Agency Company having thus accepted these transfers to give effect to the terms of the hypothecation deed above set out in full, and by way of security for the loan then made by the company to Cochran, the company through their manager had notice that the shares which Cochran had offered to the company as security for the loan he was negotiating with them for, and of which shares he had represented himself to be the owner, did not belong to him, but were in truth the property of the Federal Bank, held for them in the books of the Land Security Company in the name of their manager, J. O. Buchanan. Mr. Turnbull not-

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

withstanding never asked Cochran for any explanation of this discrepancy between his statement as to the ownership of the shares, and his transferring them as the property of the bank who appear to have held them in the name of their manager subject to some trust and under a power of attorney given to him, Cochran, by the bank's manager. He says:

> We, that is the company, made no inquiries as to the title to the stock. We believed the stock might belong to him (Cochran) or it might belong to some body else. We did not know and of course, in the absence of anything to the contrary, we assumed it to belong to him.

Again:

> We did not think it necessary to inquire whether he was the owner or not the owner. We did not think it was any part of our business.

But he had notice by the transfers that Cochran was not the owner and that the Federal Bank were, yet he made no inquiries. The transfers having been executed by the manager of the bank with the words "manager in trust" added to his name, the London and Canadian Loan and Agency Company and their manager were, I think, put upon inquiry whether there was any, and if any what, trust attached to the shares and what was the nature of the bank's title. We see that if the manager of the London and Canadian Loan and Agency had made inquiry of Cochran or the bank, he must have learned that the title which the Federal Bank had was derived from the Standard Bank and the Home Savings and Loan Company, which institutions also held the shares transferred by them respectively subject to some trust, and that they severally derived title from the Merchants Bank who also held the shares subject to some trust and acquired title from the defendants Scarth & Cochran, who claimed title only under transfers executed by the appellant to them, which transfers expressly stated that the shares

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

were only transferred by the appellant to them on some trust. They would then have learned that Cochran alone had never any title to the shares, and that the defendants Scarth & Cochran held them only as trustees and subject to a trust imposed by the appellant the nature of which he could explain. If the Loan Company and their agent Turnbull abstained from inquiry as to the nature of the trust from a conception formed in the mind of their manager that the words "in trust" and "manager in trust," as used in the instruments of transfer from the Federal Bank had a meaning more limited than upon inquiry might prove to be correct, they must abide the consequences of their misconception. Cochran produced no certificate of ownership or any other document evidencing his ownership of the shares. It does not appear that any document ever had been in existence evidencing any title to the shares in him other than the instrument of transfer to Scarth & Cochran in trust, executed by the appellant; the case was not that of one offering a pledge of his evidence of title to the shares as the owner but it was the case of one dealing with shares as owner, but offering no evidence whatever of ownership, and the persons making him a loan upon the security of the shares having notice by the transfer which they accepted that he was not the owner but that the Federal Bank who held them upon some trust were. Under these circumstances the Loan and Agency Company were, in my opinion, put upon inquiry into the nature of Cochran's title to the shares and his right to deal with them and such inquiry must have led them to the knowledge that he never had any right to deal with them to any greater extent than the amount of the appellant's liability to the defendants Scarth & Cochran from whom the loan company's title to the shares is traced. Having made no inquiry into the

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Gwynne J.

nature of the title of the persons with whom they dealt for the shares it is but reasonable that they should take subject to the trust to which he was subjected by the instrument of transfer which constituted his sole title. This is the principle involved in *Shaw* v. *Spencer* (1) which, in my opinion, enunciates sound law. It cannot be said that the appellant enabled Scarth & Cochran or either of them to commit the fraudulent breach of trust which they have committed to the appellant's prejudice when be declared on the face of the instrument transferring the title to them that it was to them as trustees that the shares were transferred. If the contention of the respondent should prevail under the circumstances appearing in the present case it must equally prevail although the instrument of transfer executed by the appellant should have set out in the most precise terms the trust purposes upon and subject to which the transfer of the shares was made. If we should hold that the London and Canadian Loan Company were not under the circumstances appearing in the present case put upon inquiry into the nature of the title they were acquiring through their agreement with Cochran, I can see no possible mode by which an owner of shares in the company could transfer them to trustees upon trust in favour of the transferrer if the statement in the deed of transfer that the transfer is made to the transferees in trust is not sufficient to put all persons dealing with such transferee who at least as in the present case produces no document whatever evidencing his title upon inquiry as to the nature of his title. The appeal must, in my opinion, be allowed and the judgment of Mr. Justice Street be restored.

PATTERSON J.—The learned judges who delivered their opinions in the court below have ably and ex-

(1) 100 Mass 382.

haustively explained the grounds on which the judgment is based. I think we should affirm the judgment upon the same grounds. Great reliance was placed in support of the appeal upon the case of *The Earl of Sheffield* v. *London Joint Stock Bank* (1) before the House of Lords, and *Simmons* v. *London Joint Stock Bank* (2) before the Court of Appeal, but the view taken of those cases in the court below is borne out by the recent decision of the House of Lords in the latter case (3) reversing the judgment of the Court of Appeal and explaining the effect of the judgment in the *Earl of Sheffield's Case* (1).

The defendant company, through the defendant Turnbull who was assistant manager of the company, took a transfer of the shares in question from J. O. Buchanan, the manager of the Federal Bank, as security for money lent by the company to Cochran. Mr. Buchanan had held the shares on behalf of his bank as security for money lent to Cochran. Some of the shares had been transferred to him on the books of the company by previous holders, and some were new stock allotted to him as the holder of the older shares. In each case the transfer or allotment was to "J. O. Buchanan, manager, in trust." He transferred the shares to Turnbull by a document which described him as "J. O. Buchanan, manager, in trust," and was signed "J. O. Buchanan, manager in trust, per Robt. Cochran his attorney," transferring the shares to "James Turnbull, in trust."

The argument has turned to a great extent on the force to be attributed to these words "in trust." In two or three cases which came to this court from the province of Quebec, the leading case being *Sweeny* v. *The Bank of Montreal* (4) which went to the Privy

(1) 13 App. Cas. 333.
(2) [1891] 1 Ch. 270.
(3) [1892] A. C. 201.
(4) 12 Can. S. C. R. 661.

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Patterson J.

Council (1), the term was held to convey an intimation that the property was held on behalf of a *cestui que trust* and to call for inquiry by one dealing with the nominal holder as to who was the *cestui que trust*, and the title was read just as if, instead of stopping at the word "trust," it had gone on to say "in trust for so and so." Now suppose the extended form of expression had been used in the transfers to Buchanan and to Turnbull. It would be "Buchanan in trust for the Federal Bank" and "Turnbull in trust for the Land Security Company." That was what was meant and what the parties all understood. The transfers might as well, except for the form which was adopted for convenience sake, have been direct to the bank and to the company. Whether Turnbull or his company found the Federal Bank recognized on the books of the Land Security Company as the absolute holder of the shares, or found that they were held by Buchanan on behalf of the bank, I find no authority for holding that there was a duty to carry any inquiry into the title farther back. The existence of such a duty can be contended for only, as it appears to me, by attributing to those words "in trust" a meaning that was not intended by the persons who wrote them and which they would not naturally convey to a person reading together the associated words "J. O. Buchanan manager in trust." Buchanan would naturally be understood, as Turnbull understood from the document without further inquiry, to hold as manager in trust for his bank. That is the extent of the notice conveyed by the words, and there is nothing to suggest that the legal estate which passed by the transfer may be subject to any equities as against the bank.

There might, as I apprehend, be serious practical difficulties in the way of tracing back the title to

(1) 12 App. Cas. 617.

shares which have nothing in the way of numbers or certificates by which they may be identified, but which are transferred only in the books of the company. The possibility of this may be a reason for caution before acceding to the general proposition on which the action is founded. But however this may be I am not satisfied that the inquiry, if carried back in the present case, would compel the result for which the appellant contends. We should find, it is true, one or two instances in which the words "in trust" may be less distinct in their application than in the case of Buchanan. Thus we find 45 shares once transferred as security for a loan to the Home Savings and Loan Company in trust, not to an officer of the company, and we find that while the plaintiff's first transfer of 80 shares to Scarth & Cochran in trust was to secure a loan from a company of which they were managers, his second transfer of 80 shares to "Scarth & Cochran, brokers in trust," was as collateral security on another transaction and not in respect of a loan effected at the time. The use of the words "in trust," may in these two instances be capable of some explanation that does not now call for close examination, possibly, in the case of the Home Company, that the transfer which was from "Wm. Cooke, cashier in trust," was upon a printed form similar to that on which Mr. Cooke on the same day transferred 235 shares to "H. S. Strathy, cashier in trust,"—forms seemingly prepared for transfers to individual officers and not to corporations—and in the case of the second 80 shares there may be the same or some other way of accounting for the use of the words. The question would be whether the words implied a declaration of trust in favour of the plaintiff, or would properly be so understood. It is undeniable that, as between the plaintiff and Scarth & Cochran, the plaintiff's right to

1892

DUGGAN v. LONDON & CANADIAN LOAN CO.

Patterson J.

redeem his stock in no way depended on those words. It may be easily assumed that if those parties had intended to say that the transfer was by way of pledge or mortgage they would have said so. In place of that they use an expression which appears to be not unusual in these transactions where one lending money for another, whether as broker or manager of a bank or a loan company, takes security in his own name, and which in that situation is an apt expression. We may further note that whatever difference, if any, there may have been in the two transfers of 80 shares each, yet the whole 160 original shares together with the 638 new shares would seem to have been afterwards regarded by the plaintiff as on exactly the same footing. The decision of the appeal does not, in my view, turn upon this topic. I allude to it chiefly for the purpose of expressing my doubts of the ability of the plaintiff to sustain his claim even if it were to be held that the respondents ought to have inquired further into the history of the shares.

In my opinion we should dismiss the appeal.

Appeal allowed with costs (1).

Solicitors for appellant: *Kerr, McDonald, Davidson, & Patterson.*

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

---

(1) Leave to appeal to the Judicial Committee of the Privy Council has been granted in this case.

THE CITY OF HALIFAX (DEFENDANT)..APPELLANT; 1892

AND *Feb. 26,29.

MARY ANN LORDLY (PLAINTIFF)... ..RESPONDENT. *May 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Duty to light streets—Liability for negligence—Obstruction on sidewalk—Position of hydrant.

L. was walking along the sidewalk of a street in Halifax at night when an electric lamp went out and in the darkness she fell over a hydrant and was injured. In an action against the city for damages it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted but authorize them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times.

Held, reversing the judgment of the court below, Strong and Taschereau JJ. dissenting, that the city was not liable; that the corporation being under no statutory duty to light the streets the relation between it and the contractors was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation and that L. could have avoided the accident by the exercise of reasonable care.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment for the plaintiff at the trial.

The facts presented to the court on this appeal sufficiently appear from the above head-note and from the judgment of Mr. Justice Gwynne.

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

1892

THE CITY OF HALIFAX v. LORDLY.

MacCoy Q.C. for the appellant. As to the general liability of a corporation for negligence see *McCafferty* v. *Spuyten Duyvil, &c., Railway Co.* (1); *Chicago* v. *Starr* (2).

The statement of claim does not show any cause of action against the city. *Rounds* v. *Stratford* (3); *Soule* v. *The Grand Trunk Railway Company* (4).

Drysdale for the respondent, referred to *Carty* v. *City of London* (5).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be allowed for the reasons contained in the judgment of Mr. Justice Gwynne.

STRONG J.—I agree in all respects with the judgment of Mr. Justice Graham before whom this action was tried. The hydrant was an obstruction placed in the public highway, the sidewalk being, of course, part of the highway. I do not say that the city had not power to maintain the hydrant within the limits of the sidewalk, or that it was guilty of a nuisance in so maintaining it.

My opinion proceeds upon this, that in exercising statutory powers the city was bound to exercise due diligence and to proceed without negligence. This is a general principle of law well and authoritatively laid down in Lord Blackburn's judgment in the case of *Geddis* v. *Proprietors of Bann Reservoir* (6) cited in the judgment of Mr. Justice Meagher. It therefore becomes a question of fact whether the appellants were guilty of negligence in maintaining this hydrant within the limit of the way for foot passengers in a street lighted only by an uncertain mode of illumination,

(1) 19 Am. R. 267.
(2) 89 Am. Dec. 422.
(3) 25 U.C.C.P. 123.
(4) 21 U.C.C.P. 308.
(5) 18 O.R. 122.
(6) 3 App. Cas. 430.

such as the electric light described in the evidence, and I am of opinion that on this question of fact the learned judge who tried the action rightly found for the plaintiff. The question of the cost of removing the hydrant outside the sidewalk is no element in the case; the paramount duty was that of caring for the safety of the public using the street, and this, as a judge of fact and speaking from the evidence, I hold was not properly provided for.

The appeal should be dismissed.

TASCHEREAU J.—I dissent. I have come to the conclusion that the city is liable for negligently and improperly placing an iron hydrant on the sidewalk on Barrington street in such a position as to be dangerous to persons lawfully using that street, and wrongfully and negligently keeping and continuing such hydrant in that position. I would dismiss the appeal.

GWYNNE J.—The plaintiff's right of action in her statement of claim is rested upon the following grounds, namely, that Barrington street is a street in the city of Halifax, owned by and in possession of and under the control and management of the defendants; that the night of the 28th August, 1889, was dark, and that the lights provided for lighting the said street were so negligently and improperly managed, and the machinery provided therefor was so inadequate and inefficient, that the said lights so provided were not lit on said night and did not afford any light; that the defendants had notice and knowledge for a long time previous to said night that said lights provided for lighting said street were negligently and improperly managed, and that the machinery provided therefor was inadequate and inefficient, and that the lights in the said street were very frequently not

1892

THE CITY OF HALIFAX v. LORDLY.

Gwynne J.

lighted, and that the said street was very frequently entirely without light and left in total darkness; that the defendants had long prior to said 28th day of August negligently and improperly placed an iron hydrant on the sidewalk on Barrington street aforesaid in such a position as to be dangerous to persons lawfully using said street, and the defendants wrongfully and negligently kept and continued said hydrant in said position; and that the plaintiff on the night of the said 28th of August, and while Barrington street aforesaid was in total darkness, was lawfully walking along the said sidewalk, and in consequence of the said street not being properly lighted and the said hydrant being so improperly placed and continued on said sidewalk the plaintiff fell over the said hydrant and was bruised and seriously injured, &c. The question now is whether there was any evidence to support the judgment for the plaintiff which was rendered by the learned judge who tried the case, and I am of opinion that there was not. With the unanimous judgment of the learned judges of the Supreme Court of Nova Scotia, that the maintaining the hydrant complained of in the place where it was lawfully erected upwards of twenty years ago constituted no evidence of negligence upon the part of the defendants as to the hydrant, I entirely concur.

Then as to the charge of negligence in the alleged defect in the lighting of Barrington street on the night in question. The city of Halifax was first incorporated by the provincial statute, chapter 55 of the statutes of 1841. That statute not only did not impose any obligation or duty upon the city to light the streets, but it did not make any provision empowering the city to raise funds necessary for that purpose. Provision had been made by the legislature for lighting the town of Halifax be-

fore its incorporation as a city by an act of the legislature, ch. 16 of the statutes of 1840, which incorporated a company under the name of the Gas Light and Water Company, which act was amended by an act of the Nova Scotia Legislature in ch. 72 of the statutes of 1844, whereby the powers of the said company to supply the city of Halifax with water were expressly repealed and the name of the said company was declared thenceforth to be the Halifax Gas Light Company. Now, the provision made for lighting the city by the act of incorporation of this company was wholly independent of the city corporation. It rested wholly with the proprietors or a majority of the proprietors of any street whether such street should be lighted or not. If a majority only of the proprietors and not all desired their street to be lighted they had to apply to the Court of General Sessions of the Peace, before the incorporation of the city, or to the city council since such incorporation, who, on being satisfied that a majority of said proprietors had actually agreed that the street in question should be lighted, were required to cause a fair and proportionate rate to be made on the whole of the property in such street, and when such rate should be made and approved by the court, the court (*i.e.* city council) should order such street to be lighted. If all the proprietors on any street should by written agreement fix a rate they might contract with the company without the intervention of the city council, and provision was made for enforcing payment of the rate agreed upon as well as of that imposed under the authority of and approved by the city council. Under this act the streets of the city of Halifax which were lighted were lighted until the month of November, 1887, the Gas Company increasing the number of lamps in any street and locating them according to the wishes of the council. In the meantime in the year

1892

THE CITY OF HALIFAX v. LORDLY.

Gwynne J.

1851 the city council was first empowered to control and regulate the lighting of the city. By the 149th section of an act of the legislature of 1851, 14th Vic. ch. 19, it was enacted as follows:

> The city council shall make by-laws, orders and regulations for lighting the city, and also for supplying water therein, and they may make any necessary contracts on behalf of the city for these purposes.

And by the 152nd section it was enacted that a sum of not less than £400 should be annually included in the general assessment for the purpose of supplying the city with public fountains, hydrants and fire plugs, and that the Halifax Water Company should for that sum of £400, to be paid to them annually by the city, supply a specified number of fountains, hydrants and fire plugs in such places as had been or might be appointed by the city council. At the time of the passing of the above act the city of Halifax was supplied with water by the Halifax Water Company, and with light by the Halifax Gas Light Company, under the provisions of the statute ch. 16 of the statutes of 1840 above referred to; the section 149 of the statute of 1851 in so far as lighting the city was concerned, was acted upon by the city council thenceforward in determining the number of lamps which should be erected in each street and locating them and paying therefor, and for the gas light supplied. Now by the provincial act, 27 Vic. ch 81, provision was made enabling the city of Halifax to purchase the property, rights and privileges of the Halifax Water Company, and enacting several precise clauses enabling the city council to undertake itself the duty of supplying the city with water. No such provision is at all made with respect to lighting the city. The only provision upon that subject is made by section 409 which is a limitation of the provision of section 149 of the act of 1851, as follows:

The city council shall make by-laws, orders and regulations for lighting the city, and they make any necessary contracts on behalf of the city for that purpose.

1892

THE CITY OF HALIFAX v. LORDLY.

Gwynne J.

And on the same day as this act 27 Vic. ch. 81 was passed an act 27 Vic. ch. 64, enabling the city council to inspect, test and prove the accuracy of the gas meters furnished for use by the Halifax Gas Light Company, or by any other gas light company which might thereafter be established within the city; and by that act it was enacted that towards payment of the inspector by the city the gas light company should pay $200 annually into the hands of the city treasurer. It is obvious, therefore, I think, that section 409 of 27 Vic. ch 81, which is the provision on the subject still in force, is fully complied with by the city council making the necessary contract for the lighting the city with persons or companies competent to enter into the same with the city, and that not only is no obligation imposed upon the city to erect, maintain and work the necessary works for providing gas or other light, but that they are not empowered to erect or purchase, or to raise the funds necessary for the erection and purchase, of such works. Now, as already said, the sections 149 of 14 Vic. ch. 1 and 409 of 27 Vic. ch. 81, have been complied with by the city council making contracts for the lighting of the city with the Halifax Gas Light Company until the month of November, 1887, when a contract went into operation which the city council entered into in the month of September previous with a company doing business under the name, style and firm of J. W. Chandler and Company, for the lighting of the city with electric lamps for three years from the 24th November, 1887. That company, in accordance with the provisions of that contract, erected the lamps, and it is for the failure of one of those lamps to give light on

1892

THE CITY OF HALIFAX v. LORDLY.

Gwynne J.

the night of the 28th August, 1889, that, as is alleged, the injury sustained by the plaintiff was occasioned, which failure of such lamp to give light at the time in question is charged as negligence of the defendants giving cause of action to the plaintiff. In the statement of claim this negligence is charged thus:

> That the lights provided for lighting said street (Barrington street), were negligently and improperly managed and the machinery provided therefor was inadequate and inefficient.

As already shown, the lights and the machinery provided for supplying the electric lights were not under the management of, or provided by, the city council but under the management of, and provided by, the company with which the city council had, under the authority of sec. 409 of 27 Vic. ch. 87, entered into a contract for lighting the city. But it was contended that the city could not avail themselves of their contract with the electric light company to relieve themselves from responsibility to the plaintiff upon the principle of law that a person upon whom a liability is imposed, whether by common law or by statute, cannot absolve himself from his liability by delegating his duty to another, and in support of this contention were cited *Gray* v. *Pullen* (1); *Pickard* v. *Smith* (2); and *Carty* v. *The City of London* (3). The principle is not questioned but its application to the present case is. It is not disputed that where a particular duty is imposed upon any person as incidental to the doing of any work which he by statute is authorized to do such person cannot, by employing a contractor to do the work authorized, evade responsibility to a person injured by the non-fulfilment of the incidental duty imposed. That was the case of *Grey* v. *Pullen* (1), *Pickard* v. *Smith*, (2) and *Carty* v. *City of London* (3). But in entering into the

(1) 5 B. & S. 970.
(2) 10 C.B.N.S. 470.
(3) 18 O.R. 122.

contract with the Chandler Electric Light Company, the terms of which the city council had full power to arrange, the council while thus exercising the power vested in them by the statute discharged the duty imposed upon them by the statute; they were not employing the company to do work which the statute had required them to do themselves, nor had the statute imposed upon the council the duty of lighting the city by works of their own, or enabled them to raise the funds necessary for the purchase or erection and maintenance of the necessary works; they had in effect no power but that of entering into contracts with persons able to supply the light which in the exercise of their discretion the council should think necessary, and this they did by the contract they entered into with the Chandler Electric Light Company. The relation thus, which by statutory authority was created between the council and the company, was not that of master and servant or of principal and agent but that of employer and independent contractors, and the law applicable to such a case applies, namely, that if any one suffers injury from any negligence in the execution by the contractors of the work they have undertaken the contractors alone are responsible. In the present case the negligence alleged to have existed is improper management of the lights on Barrington street and defect in the machinery provided for producing the light. No evidence whatever, either of defect in the machinery or in the management of the light, was offered by the plaintiff. The plaintiff's case as to negligence causing the light in question to go out consisted solely of the bare fact that as the plaintiff reached the place where the hydrant over which she fell was the light in the street flickered and went out—a thing not unusual in the use of electric light, the cause of which does not seem to be well known, or at least it was not

1892

THE CITY OF HALIFAX v. LORDLY.

Gwynne J.

shown in evidence to be attributable to any negligence. Evidence was given to the effect that "it is not possible to prevent a single lamp, neither is it possible to prevent a batch of lamps, going out; it is not possible to guard against particular lights going out suddenly." So that the evidence failed to show that the flickering and going out of the particular lamp in question was attributable to any negligence whatever. Much irrelevant matter was admitted in evidence from which it appeared that the council were not quite satisfied with the manner in which the company fulfilled their contract with the city in other parts of the city quite apart from the place where the plaintiff met with her accident, and the case seems to have been determined by the learned judge who tried the case upon this irrelevant matter. The gist of the case lay in establishing, 1st, negligence to have been the cause of the light on Barrington street flickering and going out, for if the light had been good the plaintiff beyond doubt could and should have avoided the hydrant; and 2ndly, that the city corporation is responsible for such negligence; in both of these points the evidence, in my opinion, wholly fails, and therefore the appeal must be allowed with costs and the action in the court below dismissed with costs.

PATTERSON J.—I am also of opinion that this appeal should be allowed and the plaintiff's action dismissed.

Appeal allowed with costs.

Solicitor for appellants: *W. F. MacCoy.*

Solicitor for respondent: *Joseph A. Chisholm.*

SERAPHIN MORIN (CLAIMANT).....APPELLANT; 1892

AND *Mar. 7.
*May 2.

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway—43 Vic. ch. 8, construction of—Damage to farm from overflow of water—Negligence—Boundary ditches—Maintenance of.

Held, affirming the judgment of the Exchequer Court, that under 43 Vic. ch. 8 confirming the agreement of sale by the Grand Trunk Railway Company to the Crown of the purchase of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the appellant's claim for damages with costs.

This was a claim for damages for the flooding of the appellant's farm. The claimant complained that the ditches on each side of the Intercolonial Railway where it crosses his farm, had not been kept cleaned out and in proper state of repair, and that in consequence water had been allowed to accumulate on each side of the railway track in such quantity, that it overflowed his land on each side and claimed $1,000 for such damages. The claimant alleged also that by this deed of conveyance to the Grand Trunk Railway

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

(1) 2 Can. Ex. C. R. 396.

1892

MORIN v. THE QUEEN.

in 1859, the Crown was bound to maintain in good order and repair sufficient ditches to carry away all the surface water. The Crown denied its liability and by consent of parties the case was determined upon the evidence taken in that case of *Simoneau* v. *The Queen* (1). The learned judge of the Exchequer Court found upon that evidence—which is reviewed in the report of the case in 2 Can. Ex. C. R. p. 391—that the damages to the plaintiff were the result of his own neglect to clean his boundary ditches so that the water that collected near the railway had no means of escape, and held that the deed of conveyance did not impose upon the Crown the obligation to keep open and in good repair these boundary ditches.

Belcourt for appellant in addition to the points of arguments and cases cited in the Exchequer Court (2), relied on *Bell* v. *Grand Trunk Railway Co.* (3); *Pouliot* v. *The Queen* (4); *Smith* v. *The Atlantic & North-west Railway Co.* (5); *Leonard* v. *Canadian Pacific Railway Co.* (6); *Workman* v. *Great Northern Railway* (7); and 50–51 Vic. ch. 18.

Hogg Q. C. for the respondent, contended on the evidence that the Crown had maintained the railway ditches in good repair, and was not liable under the deed of 43 Vic. ch. 8, to repair boundary ditches between farms crossed by the Intercolonial Railway.

Sir W. J. RITCHIE C.J.—Concurred with Taschereau J.

STRONG J.—I am of opinion that this appeal must be dismissed. I am unable to understand the evidence (which was that taken before the registrar in another

(1) 2 Can. Ex. C. R. 391.
(2) 2 Can. Ex. C.R. 397.
(3) 20 Can. Law Jour. 346.
(4) 1 Can. Ex. C.R. 313.
(5) M.L.R. 5 S.C. 148.
(6) 15 Q.L.R. 93.
(7) 32 L.J. (Q.B.) 279.

1892

MORIN v. THE QUEEN.

Strong J.

cause, between different parties, and relating to different lands) as applied to the land alleged to be damaged in the present case. The use of this evidence on this petition seems, however, to have been sanctioned by the Exchequer Court. Under these circumstances I think the appeal should be dismissed without costs.

TASCHEREAU J.—Cette cause est un appel de la cour d'Echiquier. Les faits peuvent se résumer comme suit:

L'appelant est propriétaire du lot 347 sur le plan du cadastre de la paroisse du Cap St. Ignace, dans le comté de Montmagny, dans la province de Québec. Le chemin de fer de l'Intercolonial traverse une partie de ce lot, et le demandeur se plaint que les fossés de chaque côté de la voie ferrée où elle traverse sa terre, n'ont pas été vidés et tenus en bon état de réparation, et qu'en conséquence l'eau s'est amassée de chaque côté de la voie ferrée en telle quantité qu'elle a débordé sur ses terres de chaque côté, ce qui lui a causé des dommages, et par son action il réclame $1,000 pour tels dommages.

La cour d'Echiquier a renvoyé l'action; de ce jugement le demandeur appelle à cette cour.

Avant de procéder avec cette action, il fut convenu entre les conseils représentant le demandeur et le défendeur, que la preuve prise dans la cause de *Simoneau* v. *la Reine* (1) qui avait été entendue et jugée dans la cour d'Echiquier en février 1890, formerait et serait la preuve dans cette présente cause, et que l'action serait jugée d'après cette preuve et les exhibits produits dans la dite cause.

La propriété qui est alléguée avoir été endommagée dans la cause de *Simoneau* v. *la Reine* (1) est un lot de terre voisin de celui du présent appelant, et le demandeur alléguait dans cette cause que la propriété avait été endommagée par l'eau et par les mêmes causes que

(1) 2 Can. Ex. C. R. 391.

1892
MORIN
v.
THE QUEEN.
Taschereau J.

celles alléguées par le demandeur dans la présente action. En conséquence aucune preuve n'a été entendue dans la présente cause dans la cour d'Echiquier, mais la cause a été plaidée sur la preuve prise dans la cause de Simoneau, maintenant reproduite dans la présente cause ; et l'appelant soutient que d'après la preuve dans la cause de Simoneau, la Couronne est responsable des dommages dont il se plaint.

Je suis d'opinion qu'il ne peut réussir.

1. Le titre de la Couronne à la partie du lot 347 requis pour le chemin de fer au lieu en question fut acquis de la compagnie de chemin de fer du Grand Tronc du Canada sous le statut 43 Vic. cap. 8, qui confirmait l'achat par le gouvernement du Canada de cette partie du chemin de fer du Grand Tronc s'étendant de Hadlow à la Rivière du Loup, d'après lequel acte la Couronne se rendait responsable de toutes réclamations pour dommages survenant après la date du transfert du dit chemin. La compagnie de chemin de fer du Grand Tronc eut besoin en 1854 de la dite partie du lot n° 347 pour la construction, le maintien, et l'usage du dit chemin de fer et acquit le titre à cette propriété par acte de Joseph Méthot le 3e jour de janvier 1854, et le même acte renferme non seulement un transfert absolu de la dite partie de la dite terre à la dite compagnie pour le montant spécifié dans l'acte, mais de plus il y est stipulé que le montant payé comprend la compensation qui doit être allouée au dit Méthot pour tous dommages provenant de l'expropriation du dit morceau de terre.

D'après cet acte, l'appelant ou ses auteurs ont déjà reçu une entière compensation pour les dommages causés par la prise de possession de la terre et par la construction du dit chemin de fer, et à moins que la preuve ne démontre que, à raison de quelque changement dans la condition du chemin de fer depuis la date

1892

MORIN
v.
THE
QUEEN.

Taschereau J.

du dit acte, la position de l'appelant est devenue plus onéreuse, l'appelant est déchu du droit de recouvrer les dommages qu'il réclame maintenant.

2. L'appelant prétend que d'après le dit acte la compagnie de chemin de fer du Grand Tronc était et que la Couronne est maintenant tenue d'entretenir les fossés et les cours d'eau ouverts et avec passage libre pour l'eau de chaque côté de la voie du chemin de fer, ainsi que les ponceaux traversant la voie d'un côté à l'autre. Mais la preuve démontre aussi clairement que possible que la compagnie du chemin de fer a toujours entretenu ses fossés dans un bon état, et que la Couronne n'est aucunement en faute à cet égard.

L'inondation de la terre de l'appelant a été causée par sa propre négligence, en omettant de faire les travaux nécessaires.

La preuve démontre que les fossés de ligne sur sa terre qui devaient donner cours à l'eau qui pouvait s'amasser près de la voie ferrée et qui ont servi à cela pendant plusieurs années n'ont pas été nettoyés par l'appelant, et il est prouvé clairement que c'est par cette négligence qu'il a souffert des dommages.

Il ne prétend pas et ne peut prétendre que la Couronne soit obligée d'entretenir les fossés de ligne sur sa terre. Tout le trouble et tous les dommages dont il souffre proviennent donc de sa propre négligence.

GWYNNE and PATTERSON JJ. concurred.

Appeal dismissed with costs.

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

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

1891
*Nov. 19.
1892
*May 2.

THE CORPORATION OF THE CITY OF NEW WESTMINSTER (DEFENDANTS) ..... } APPELLANTS;

AND

MANUELLA BRIGHOUSE (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Municipal corporation—Improvement or alteration of street—Lowering grade—Injury to adjacent land—Remedy—Action—Compensation under statutory provisions—By-law—51 V. c. 42 s. 190 (B.C.).

The act incorporating the city of New Westminster, 51 V. c. 42 (B.C.) by s. 190, empowers the council of the city to order by by-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in subsections 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land; subsection 13 provides for the confirmation of the appointment and 15 for the deposit in court of said price by the council which deposit should vest in them the title to said land.

Subsection 17 of section 190 enacts that subsections 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality.

The council was authorized by by-law to raise money for improving certain streets but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult and no retaining wall having been built the soil of said lot caved and sunk thereby weakening the supports of the buildings thereon.

Held, affirming the decision of the court below, Ritchie C.J. and Taschereau J. dissenting, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the

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

1891

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

street and was not obliged to seek redress under the statute; that subsection 17 of section 190 which dispenses with the formalities required by prior subsections only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets the corporation must comply with the formalities prescribed by subsections 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they are liable for the damage thereby caused.

Held further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained.

Held, per Patterson J., that in the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favour of the plaintiff.

The action in this case was brought to recover damages for injury alleged to have been sustained by the plaintiff in consequence of the street on which her property is situate being excavated, in order to lower the grade, to such a depth that the soil of her lot caved in and fell into the excavation and the supports of the buildings were weakened defendants having neglected to put up a retaining wall or other support. The questions raised on the appeal were whether or not plaintiff was entitled to compensation for such injury, and if she was if she could bring an action to recover it.

The pleadings in the case and the statutes governing it are all set out in the judgment of Mr. Justice Gwynne.

Robinson Q.C. for the appellants argued that under the charter of New Westminster, 51 Vic. ch. 42, plain-

1891

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

tiff could not bring an action but must follow the statutory provisions for her remedy if she had any, citing *Adams* v. *City of Toronto* (1); *Coverdale* v. *Charlton* (2); *Pratt* v. *Corporation of Stratford* (3); *Vandecar* v. *Corporation of Oxford* (4); *Ayers* v. *Corporation of Windsor* (5).

Osler Q.C. for the respondent referred to *West* v. *Parkdale* (6) and *North Shore Railway Co.* v. *Pion* (7).

Sir W. J. RITCHIE C.J.—The by-law authorizes the raising of money for improving the street in question. This necessarily involves, in my opinion, authority to expend the money for the purpose for which it was raised. It would be extraordinary if the corporation had authority to raise money for a particular object and had no power to expend it when so raised. And this being so the corporation in improving the street had the unquestionable right to lower and grade it, and if in doing so the land of any proprietors adjoining the street was injuriously affected if they are entitled to claim compensation therefor it can only be under the provisions of the act.

Gale on Easements (8):

Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary violence, there seems nothing to take this class of cases out of the rule before adverted to: "That a party confining himself within the limits of his own property may deal with it as he will." [This view is supported by *Gayford App. Nicholls, Resp.* (1854)(9) in which, the plaint being in part for negligently taking away the support of a modern house, the judge was held to have misdirected the jury in leaving to them the question of negligence. In several modern text books, not including Wms. Saund. (10)

(1) 12 O. R. 243.
(2) 4 Q. B. D. 104.
(3) 16 Ont. App. R. 5.
(4) 3 Ont. App. R. 131.
(5) 14 O. R. 682.
(6) 12 App. Cas. 602.
(7) 14 App. Cas. 612.
(8) 6th ed. p. 390.
(9) 9 Ex. 702.
(10) See vol. 2, 400, n. *(a)* of that invaluable work, 2 Notes to Saund. 802.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Ritchie C. J.

it is laid down, without further authority than the cases above distinguished, by the learned editors that an action is maintainable against a landowner for negligence in removing the support afforded by his land to the modern house of his neighbour. This may to some extent be attributable to vagueness in the use of the relative term negligence (1)—of which a definition is given by Alderson B. in *Blyth* v. *Birmingham Waterworks Company* (1856) (2); and Willes J., *Vaughan* v. *Taff Vale Rail. Co.* (1860) (3). It should seem that in this class of cases if the mere removal occasions the fall the defendant is not liable, however negligent may have been the manner of the removal—for his act was confined to his own land.] If he dig a pit he is not bound to put a fence round it to keep trespassers from falling into it, [(1 Roll abr. 88 pl. 4), fully supported in *Jordin* v. *Crump* (1841) (4); but qualified by *Barnes* v. *Ward* (1850), (5), to the extent that if the pit abuts on a highway and renders the highway dangerous to persons passing along it with ordinary care, then the occupier is bound to fence it. Cf. *Stone* v *Jackson* (1855) (6); *Hurst* v. *Taylor* (1885) (7). This is on the ground that such a pit is a public nuisance, interfering with the use of the way. But if the pit or other excavation be not substantially adjacent to the way there is no obligation to fence it, and no action is maintainable against the owner of the land if a person accidentally or otherwise straying off the way falls into the pit; *Hardcastle v. South Yorkshire Railway &c. Company* (1859) (8); *Hounsell* v. *Smyth* (1860) (9).]

Dillon's Municipal Corporations (10):

990 (783). No common law liability for consequential damages for change of grade. Accordingly, the courts, by numerous decisions in most of the States, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level and improve streets, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, unless there is a provision in the constitution of the State in the charter of the corporation, or in

(1) Per Erle C.J., 29 L. J. C. P. 319; Bramwell B., 1 H. & N. 251; 3 H. & N. 318; Watson B., 28 L.J. Ex. 250.
(2) 11 Ex. 784.
(3) 5 H. & N. 687, 688.
(4) 8 M. & W. 788.
(5) 9 C. B. 392.
(6) 16 C. B. 199.
(7) 14 Q. B. D. 918.
(8) 4 H. & N. 67.
(9) 7 C. B. N. S. 731. S. C. 29 L. J. C. P. 203.
(10) 4 ed. p. 1218.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Ritchie C.J.

some statute, creating the liability. There is no such implied or common law liability even though in grading and levelling the street, a portion of the adjoining lot, in consequence of the removal of its natural support falls into the highway. And the same principle applies, and the like freedom from implied liability exists, if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult the access to the adjacent property. And this is so although the grade of the street has been before established, and the adjoining property owner had erected buildings or made improvements with reference to such grade.

991. Same subject. No right to lateral support of soil (1). Where the power is not exceeded there is no implied or common law liability to the adjacent owner for grading the whole width of the street, and so close to his line as to cause his earth or fences or improvements to fall, and the corporation is not bound to furnish supports or build a wall to protect it. The abutting owner has as against a city no right to the lateral support of the soil of the street and can acquire none from prescription or lapse of time.

In addition to which I cannot think that a corporation has not a right, by order, to level and grade a street as incident to their right to put and keep the street which has been duly laid out in a proper state of repair to enable the same to be used as streets and highways usually are. What are they but ordinary and necessary repairs to enable the public to use the streets and highways in the ordinary course of the traffic of the city?

Therefore a by-law was unnecessary, but if necessary then there was, as I have said, a good by-law.

I do not think in levelling this street there was any negligence or carelessness on the part of the Commissioners; they simply acted in the discharge of a public duty in the exercise of a public trust for the public benefit, and inasmuch as they confined the excavation within the lines of the street no action can be sustained against them by any individual who may have sustained a special injury or consequential damage from the act done, the act itself being lawful and

(1) P. 1228.

there being nothing in the mode in which it was carried into execution to make it unlawful. The case of *Boulton* v. *Crowther* (1) establishes this beyond all question.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Ritchie C.J.

The commissioners did no wrong. They could not repair or improve by levelling and grading the street without making the excavation complained of; there is no question but that they acted *bonâ fide* ; they were required to grade and level the streets; in doing so their acts were justifiable. I cannot see that any wrongful act can be alleged against them. The only way the damage complained of could have been avoided, was by leaving a large part of the road unexcavated; this would have frustrated the very object sought to be accomplished, viz., reducing the street to a proper grade. If plaintiff has sustained damages by her property being injuriously affected the law has provided how she may obtain compensation; or if it has not she is without remedy.

It was relied on in the court below that the statute giving compensation was not pleaded. I cannot think there could be any necessity for pleading that plaintiff should not have brought her action inasmuch as she could have obtained compensation under the statute. The plaintiff had a right to bring an action or not. She certainly had no right to bring an action if the law gave a remedy she was bound to pursue and had failed to adopt it, and which precluded the right to bring an action. Surely when on the trial of the case the facts, as proved, developed that she had mistaken her remedy or had no remedy, it would be impossible for the court to give her judgment in an action in which she had misconceived her remedy.

(1) 2 B. & C. 703.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Strong J.

STRONG J.—I am of opinion that this appeal must be dismissed. First, it is an undeniable fact that no by-law was passed authorizing the interference with her property for which the respondent brought this action. The case is not therefore within the statute authorizing expropriation or encroachment on private property. This is so plain as a legal conclusion that no authority need be cited to sustain it. It is a general proposition of law, that in the case of all statutes authorizing the taking or interfering with private property for public purposes the procedure directed by the statute must be followed with exactitude.

But even if there had been a by-law, and the statute had been followed so far as concerned procedure, I should still have thought the respondent entitled to retain the judgment she has recovered on another and distinct ground.

It is, I take it, an established rule that in all cases where public works are executed under statutory authority to the extent of an infringement on private rights of property the statutory powers must be executed without negligence and in such a way as to do the least possible injury to the private owner. This principle received the approbation of the House of Lords in *Geddis* v. *Bann Reservoir* (1), and is particularly enunciated in the judgment of Lord Blackburn in that case.

In the present case negligence in the execution of the work is distinctly alleged in the statement of claim and is, in my opinion, amply proved. The neglect to build a revetement wall, or to put up some support to the respondent's property after making the escarpment complained of, is conclusive proof of negligence.

(1) 3 App. Cas. 430.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Taschereau J.

Upon both grounds I am of opinion that the judgment ought to be sustained and this appeal dismissed with costs.

TASCHEREAU J.—I also dissent with His Lordship and for the reasons by him given, from the judgment about to be entered. I would allow this appeal. A by-law was not necessary as, in my opinion, was amply demonstrated by Mr. Justice McCreight in the court below. Then, if one was necessary, that of the 17th June, 1889, covers the case, and the plaintiff's only remedy was by arbitration under the compensation clauses of the act of 1888. If necessary the defendants should be allowed to amend their defence under sections 63 and 64 of the Supreme Court Act.

GWYNNE J.—The plaintiff in her statement of claim complains that the defendants have wrongfully excavated and lowered Agnes street in the city of New Westminster to the depth of 15 feet or thereabouts in front of a lot of land of the plaintiff whereon she had a house erected, and that thereby they have withdrawn the support of her said lot and that the soil of her said lot has in consequence sunk, given way and caved into the said street, and her house thereon is weakened and cracked and has settled and is liable to further settlement; and she complains that the defendants excavated and lowered the said street as alleged negligently, carelessly and unskilfully in not leaving sufficient support to the said lot from the soil of the said street and in not erecting a retaining wall or other fixture to prevent the soil of the said lot from caving or falling into the said street; and that they lowered the said street as alleged without any by-law being passed by the council of the said city authorizing the same and without any legal authority, and she claimed damages for such alleged injuries.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

The defendants in their statement of defence allege that they are a municipal corporation incorporated by and subject to the provisions of an act of the Legislative Assembly of the province of British Columbia passed in the 51st year of Her Majesty's reign and known as "The New Westminster Act 1888," and they say that acting in pursuance of the powers and in performance of the duties conferred and cast upon them by the said act, for the purpose of repairing, levelling and grading the said street, they cut down the same in some places and raised the same in other places, one of the places where the same was so cut down being opposite the land of the plaintiff which are the alleged wrongful acts of the defendants in the plaintiff's statement of claim mentioned, and they deny that the plaintiff's land was entitled to the support of the land of the street or that the execution of the said works have deprived the plaintiff of any support to which she was entitled as owner of the said lands. And they further deny that the said work was executed in a negligent, careless or unskilful way as alleged in the plaintiff's statement of claim, and they deny that the work was executed without the passing of a by-law or without legal authority. The above contains the whole substance of the complaint and defence to which it is necessary to advert.

At the trial it appeared that Agnes street had been excavated along the front of the plaintiff's lot to a depth varying from 8⅘ feet to ten and one-third, 10⅓, feet, and that the natural consequence of such excavation, though made within the limits of the street, was to withdraw support from the plaintiff's lot to such an extent that a large portion thereof was carried away and sunk, and caved into the excavation made in the street whereby the foundation of the plaintiff's house settled and became injured. No by-law

authorizing to be done the work which was done was ever passed by the municipal council of the city. A by-law was passed intituled "A by-law to raise by loan the sum of $85,000 for street and park improvements," by which it was enacted that it should be lawful for the mayor of the city to raise by way of loan, from any person or persons, bodies or body corporate, who might be willing to advance the same upon the credit of the debentures thereinafter mentioned, a sum of money not exceeding $85,000, and that the proceeds of the debentures issued and sold under the authority of the by-law should be applied to improvments on Queen's Park and the streets thereinafter mentioned, and as nearly in the proportion in the by-law also mentioned as might to the council seem expedient, that is to say, "Queen's Park $15,000, Columbia street $1,000, Agnes street $2,500," and divers other streets, divers other sums appropriated to each :—

Provided that out of the said sum of $15,000 set apart for the improvement of Queen's Park there should be paid into the city treasury to the credit of the general account the sum of $3,000, being the sum already expended out of the general revenue for park improvements; provided, also, that if the requirements of any of the streets above mentioned should be found to be less or greater than the sum apportioned to the said street, the said sum may be increased or diminished, as in the circumstances may seem to the council expedient, and the surplus, if any, remaining out of the appropriations above set out after said streets have been completed may be applied to other works of permanent improvement not specified herein at the discretion of the council.

The contention on behalf of the defendants was, 1st. That for the work which was done on Agnes street no by-law was necessary; 2nd. That if a by-law was necessary the above by-law for raising $85,000 was sufficient; 3rd. That the work as done was authorized by the powers vested in the council by the act incorporating the city, being the provincial statute 51 Vic.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

ch. 42, the 116th subsection of section 142 of which act was specially relied upon, and that there was no negligence committed in the performance of the work and that therefore, 4th. No action lay; 5th. That the plaintiff was either entitled to no redress at all or could seek redress only under some provision in the statute for that purpose, but it was not set up by way of defence upon the record that the plaintiff had any remedy given to her by the statute which she was restricted to instead of proceeding by action.

The learned judge before whom the case was tried without a jury rendered a verdict in favour of the plaintiff for $681; that verdict was sustained by the Supreme Court of British Columbia from the judgment of which court this appeal is taken, and the grounds urged before us in support of the appeal were those above stated.

By the 204th and 205th sections of the above act of the legislature of British Columbia, 51 Vic. ch. 42, incorporating the city of New Westminster, it is enacted that every public street, road, square, lane, bridge or other highway in the city shall be vested in the city, and that every such public street, road, square, lane, bridge and highway shall be kept in repair by the corporation.

By the 142nd section it is enacted that the council may from time to time alter and repeal by-laws for, among other things (1):

> Opening, making, preserving, improving, repairing, widening, altering, stopping up and putting down drains, sewers, water-courses, roads, streets, squares, alleys, lanes and other public communications within the jurisdiction of the council, &c., and for entering upon, breaking up, taking or using any land in any way necessary or convenient for said purpose.

By section 190 it is enacted that:

(1) Subsec. 116.

The council of the city shall have full power and authority to order by by-law the opening or extending of streets, lanes, public places, squares and highways, or the construction of a public wharf or wharves, &c., and to order at the same time that such improvements should be made out of the city funds, or that the cost thereof shall be assessed in the whole or in part upon the pieces or parcels of land belonging to the parties interested in or benefitted by said improvements, and to purchase, acquire, take and enter into any land whatsoever within the limits of the said city, either by private contract between the council of the said city and the corporation or other persons interested, or by complying with all the formalities hereinafter prescribed for opening streets, &c., or for continuing or improving the same, &c., &c.

The formalities which are then prescribed for acquiring any land required by the corporation for the purpose of said improvements, and by compliance with which alone the corporation can acquire or take any land the property of any person, are set forth in the 3rd and 4th subsections of section 190 as conditions precedent necessary to be fulfilled before the corporation can take or interfere with any such land, and are as follows :—

The council shall cause to be served upon the owner of the property required for the purpose of any such improvement a notice, either personally or by a notice addressed through the post office to the person last assessed as proprietor at his actual or last known domicile, and shall also give public notice by three insertions in at least one newspaper published in said city and in the *British Columbia Gazette*, that they would on a day and hour mentioned in such notices (not less than one week distant) present to the Supreme Court of British Columbia or to a judge thereof in chambers, or to a county court judge, a petition calling upon the said court or judge to nominate three competent and disinterested persons to act as commissioners to fix and determine the price to be allowed for each and every piece of ground or property which may be required by

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

the corporation for said improvements, and which shall be designated in the said notices by a general description and by reference to a map or plan in the office of the solicitor of the corporation, and one week at least shall elapse from the date of the last insertion of the said notice in the said papers to the day appointed for presentation of the said petition and a copy of the said notice shall be posted near or in the neighbourhood of the property to be expropriated. Then by subsec. 4 it is enacted that the court or judge to whom such petition should be presented shall appoint three commissioners as aforesaid, and shall fix the day on which the said commissioners shall begin their operations and also the day on which they shall make their report, &c. Provision is then made for the course to be pursued by the commissioners in making their appraisement and their report thereon, and then by subsection 14 it is enacted that—

On the day fixed in and by the order appointing the commissioners the council of the city shall submit to the court or to any of the said judges the report containing the appraisement of the said commissioners for the purpose of being confirmed to all intents and purposes, and the said court or any of the said judges may thereupon, after hearing any or all of the parties interested therein who may appear, pronounce the confirmation of the said report, which shall be final as regards all parties interested and not open to any appeal.

Then by subsection 15, it is enacted that:

The council of the said city shall, within one month after the confirmation of the report of the commissioners, make in the hands of the registrar or clerk of the court a deposit of the price or compensation and damages settled and determined in and by said report, and the act of such deposit shall constitute a legal title in the city to the property in the said piece of land, &c., &c., and the said council shall be vested with said piece of land, &c., &c., and may of right, without any further formality, enter into possession of and use the same for any of the purposes authorised by the act.

Then by subsection 17 it is enacted that all the provisions of the said 3rd and 4th subsections shall apply and be extended:

To all cases in which it shall become necessary to ascertain the amount of compensation to be paid by the said council to any proprietor of real or personal estate, or his representative, for any damage he or they may have sustained by reason of any alteration made by order of the council in the line or level of any street, &c., &c., and the amount of such compensation it is directed shall be paid at once by the council to the party having a right to the same without further formality.

Then follows a provision, that:

Any person who shall erect any building whatever upon or contiguous to any established or contemplated street, &c., &c., without having previously obtained from the City Engineer or Surveyor the level and line of such street, &c., shall forfeit his or her claim for damages or compensation by reason of any injury caused to the property or building when such level or line shall be settled and determined by the council.

With respect to this provision it is only necessary to observe that it has no application to the present case for the plaintiff's house was erected prior to the passing of the act.

Now, while by subsection 116 of section 142 the corporation is empowered to make by-laws for opening, making, improving, repairing, widening and altering streets, &c., &c., and for taking and using any land in any way necessary or convenient for any such purpose; and although it may be that any improvement or alteration made wholly within the limits of the street can be lawfully performed without a by-law; yet it cannot, I think, be doubted that if any such improvement or alteration should require the taking, using or encroaching upon any adjacent land belonging to any person other than the corporation as necessary or convenient for the making the proposed improvement or alteration, the right to take, use or encroach upon such land for such purpose could only be acquired under a by-law and by compliance with the provisions of section 190 and the subsections thereof; while if the improvement or alteration can

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

be and is made within the limits of the street improved or altered without the taking, using or appropriating any adjacent land for the purpose, and without encroaching upon or affecting such land otherwise than by injuring the access thereto by alteration in the level of the street the corporation may make the alteration subject to having compensation awarded under the provisions of subsection 17 of the section 190.

Subsections 1 to 15 of section 190 plainly, as it seems to me, apply to any land adjacent to the line of a street, the level of which is altered, that is necessary to be appropriated, taken or used in the making or maintaining the altered level, while subsection 17 applies to the cases of land not so taken or used but which, although not so taken or used, is injuriously affected by the alteration of the level. The contention on the part of the appellants was that what they caused to be done in the alteration of the level of Agnes street they were authorized to do without a by-law, and that if the plaintiff was entitled to any remedy or compensation she was entitled to it only under subsection 17 of section 190. If the injury sustained by the plaintiff was only that her lot was injuriously affected by the access thereto having been injured by a work completely executed by the corporation within the limits of the street, as would have been the case if the corporation by the erection of a sufficient retaining wall had prevented the subsidence of a portion of her land into the excavation, she might have been barred of her right of action, and remitted to her remedy under section 190 subsection 17, but under the circumstances of the present case I do not think that the plaintiff is driven to that subsection for the redress to which she is entitled.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

We must take it as established beyond controversy that the subsidence of that portion of the plaintiff's land which has sunk and caved into the excavation made in the street was the natural and inevitable consequence of the excavation having been made to the depth it was made, unless such subsidence should have been prevented by the erection of a sufficient retaining wall. The consequence being natural and inevitable, unless so prevented, must have been and should have been foreseen by the corporation and its officers, and it was therefore incumbent on the corporation either to have acquired before making the excavation the right to take and use so much of the plaintiff's land as must, by reason of the depth of the excavation, fall into the excavation when made, or to have prevented the subsidence by the erection of a sufficient retaining wall, in which latter event the plaintiff could have claimed compensation, limited, however, to the damage sustained by her land being injuriously affected in the access thereto; when then the corporation made an excavation in the street, although made within the limits thereof but to such a depth as of necessity to have caused the total subsidence of a large portion of the plaintiff's land into the excavation, they must, in my opinion, be regarded as having taken and used the land of the plaintiff so sunk into the excavation as having been necessary to the making of the excavation as made, just as much as if the level of the street, instead of having been lowered, had been raised to such as height that the base of the embankment necessarily covered a portion of the plaintiff's land. In either case the land of the plaintiff so appropriated, taken or used for the purpose of the alteration must be regarded as so much land taken from the plaintiff for the necessary purposes of the alteration in

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Gwynne J.

the level made by the corporation. The right to take or use any part of the plaintiff's land as in any way necessary or convenient for the purpose of making or maintaining the alteration contemplated to be made in the street could only be acquired under a by-law, and by compliance on the part of the corporation with the provisions of subsections 3, 4, 14 and 15 of section 190 as conditions precedent. No such right ever was acquired, but the corporation, in making the excavation which they have made in their own land to such a depth and in such a manner as of necessity to cause a large portion of the plaintiff's land to sink into the excavation so made, have, as a necessary attendant upon the making the alteration made in the street, taken and used, and deprived the plaintiff of, so much of her land as has so necessarily sunk into the street, and in so doing they have wrongfully taken and deprived the plaintiff of so much of her land. As to the case of *Pratt* v. *Corporation of Stratford* (1) and other cases of a like nature in the Ontario courts upon which the learned counsel for the appellants relied as justifying what they have done in the present case, it is only necessary to say that in the view which I have taken they do not apply. In those cases the complaint was not, as here, of the plaintiff having been deprived of a portion of her land in the doing the work done by the corporation, but that the work done merely injuriously affected the access to the plaintiff's land, none of which was in any way taken or used in the performance of the work, and of none of which was the plaintiff in any of those cases deprived by the manner in which the work was executed.

But the plaintiff is, in my opinion, entitled to maintain this action also upon the principle that the non-prevention of the subsidence of the

(1) 16 Ont. App. R. 5.

plaintiff's land into the excavation made by the corporation in the street, however legal the making of the excavation may have been if skilfully executed, constituted such negligence in the manner in which the work was executed as to entitle the plaintiff to recover in this action. It is clear upon the evidence that the injury to the plaintiff's land which is complained of could have been prevented by the erection of a retaining wall. It was, therefore, incumbent upon the corporation to have erected such a wall as a necessary precaution to prevent the sinking of the plaintiff's land into the excavation made by the corporation for their own purposes in the street, and thereby to have reduced the plaintiff's claim to compensation under subsection 17 of section 190 by reason of the alteration in the level of the street injuriously affecting the access to the plaintiff's land. The appeal, in my opinion, must be dismissed with costs.

PATTERSON J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Gwynne. I have had an opportunity of reading the judgment which he has now delivered. I shall not attempt to go over the matters which he has so fully discussed, but I shall merely refer to some additional authority on one point. The excavation and lowering of the street in front of and up to the line of the plaintiff's land was, as has been shown, an act within the powers of the council. It would have been competent for the council, if it were desired or were necessary to break in upon the plaintiff's land to do so, taking the preliminary steps and adjusting the compensation under the statute. What was intended was not to touch the corpus of the plaintiff's property but to confine the works to the limits of the

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Patterson J.

street. In doing that, however, the support which the plaintiff's land received from the adjacent soil of the street was removed, causing a fall of the soil and injuriously affecting the supports of the plaintiff's house. It is not shown or alleged that the house, which was a recent structure, contributed by its weight to the falling in of the soil, or that the soil would not have fallen to the same extent if the house had not been there.

Now, in the absence of the statutory preliminaries, I do not understand that the municipality, as owner of the street, has any greater right to disturb the plaintiff's soil than any other owner of adjacent land would have. An ajdacent owner may, as I understand the law, excavate and remove his land up to his neighbour's line, but if in so doing he removes the natural support to which his neighbour is entitled he must replace it by artificial support. In this case the required support would have been a retaining wall.

In Goddard on Easements (1), I find that the law thus stated:

> Every person has a right *ex jure naturæ* that his land shall not be disturbed by the removal of the support naturally rendered by the subjacent and adjacent soil.

The author then shows that the right to subjacent support has been decided to be similar to the right to adjacent support, and adds:

> The natural right to support, then, being established by-law it is necessary to understand what is the exact nature of this right—that is, to what land owners are really by law entitled. The right to support is not a right to a particular means of support—as, for instance, if support has always been received from subjacent coal, that the coal, or a certain portion sufficient to sustain the superincumbent weight of the soil, shall never be removed; but it is a right that the ordinary enjoyment of land shall not be interrupted, so that, until the enjoy-

(1) 1st ed. p. 34. See 4th ed. p. 55.

ment of the surface land is disturbed, the owner has no right to complain of the removal of the minerals. It is, therefore, perfectly justifiable for a mine owner to excavate the whole of the minerals and substitute artificial props to support the surface land in lieu of the natural means of support which he has removed. * * * * It is commonly said that the natural right to support continues only while land remains in its natural condition unburdened with houses ; this is not correct, for the natural right remains though houses are built ; but the owner of land cannot suddenly increase his right, or impose a new or additional burden on the servient tenement, by erecting buildings, and the servient owner is therefore not responsible if the land sinks when he excavates if the sinking is produced by the increased weight the dominant owner has imposed on the surface. That the natural right remains is clear from the decisions in the cases of *Brown* v. *Robins* (1) and *Stroyan* v. *Knowles* (2), in which it was held that an action would lie for the removal of the support necessary for the adjoining land in its natural condition, notwithstanding houses had been recently erected on the surface, provided the weight of the houses did not produce the sinking of the land—that is, providing the land would have sunk in the same manner had no houses been erected.

The case of *The Corporation of Birmingham* v. *Allen* (3) was decided after the publication of the first edition of Mr. Goddard's treatise from which I have quoted those passages, which are not materially altered in the later editions. The judgments in that case contain an instructive discussion of the question of support in the peculiar aspect in which it there arose. I shall read a short passage from the judgment of Jessell M. R.

As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse* v. *Bonomi* (4), that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement, it is a right of property. That being so, if the plaintiff's land had been in its natural state no doubt the defendants must not do anything to let that land slip, or go down or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect I have no doubt this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened.

(1) 4 H. & N. 186.
(2) 6 H. & N. 454.
(3) 6 Ch. D. 284.
(4) 9 H. L. Cas. 503.

1892

THE CORPORATION OF THE CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Patterson J.

In *Siddons* v. *Short* (1) we have an instance of the granting of an injunction to restrain mining operations which would cause neighbouring land to sink although buildings had been recently erected there on the ground that the operations would have caused the land to sink even if the buildings had not been placed upon it.

I have no doubt of the power of the corporation to improve the street by altering its level, or in any other way, without first passing a by-law on the subject. On this topic I refer to my remarks in the recent case of *Bernardin* v. *North Dufferin* (2). I may add that when the necessity for a by-law is insisted on, as it has been in argument in this case, on the notion that while pending before the council persons interested would know from its terms what was proposed to be done and might oppose its passing, an assumption is made which nothing in the statute warrants. The provision that by-laws may be passed on certain subjects requires no particular form, no details, and in this case would, as I think, be satisfied, if a by-law were required, by the one that was passed appropriating money for the improvement of Agnes street. My judgment proceeds not upon any question of the authority of the corporation to make the improvements in the street, but upon the unauthorized injury to the plaintiff's property which I think was a wrong for which an action lies, and not an injurious affecting of the property by a lawful act the remedy for which would be by proceedings for compensation.

Appeal dismissed with costs.

Solicitors for appellants : *Carbould, McColl, Wilson & Campbell.*

Solicitors for respondent : *Armstrong, Eckstein & Gaynor.*

(1) 2 C. P. D. 572.

(2) 19 Can. S.C.R. 581.

THE PEOPLES' BANK OF HALIFAX (PLAINTIFF) ..... APPELLANT;

AND

THOMAS JOHNSON (DEFENDANT).....RESPONDENT

1892

*Feb. 29.

*May 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Surety—Consideration—Stifling prosecution.

In an action on a bond executed by J. to secure an indebtedness of L. to plaintiff bank the evidence showed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute.

Held, affirming the judgment of the court below, that the consideration for said bond was illegal and J. was not liable thereon.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment for the plaintiff at the trial.

The action in this case was brought to recover the amount due the plaintiff bank on a bond executed by the defendant to secure an indebtedness to the bank of H. & A. Locke, a firm doing business at Lockeport, N. S. Austin Locke, one of the members of said firm, was agent of the bank at Lockeport, and had embezzled money of his principals. He had married an adopted daughter of the defendant. The action was defended on the ground that the defendant executed the bond to prevent Austin Locke from being prosecuted for such embezzlement and evidence was given on the trial of threats by the cashier of the bank to prosecute unless security was given for the debt of the firm.

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

1892

THE PEOPLE'S BANK OF HALIFAX v. JOHNSON.

The facts are more fully stated in the judgment of the Chief Justice.

Ross Q.C. for the appellant. The cashier could not bind the bank by any threats that he made. *Downer* v. *Carpenter* (1); *Stainer* v. *Tysen* (2); *Black River Savings Bank* v. *Edwards* (3).

The leading case as to duress and illegality of consideration is *Wallace* v. *Hardacre* (4). See also *Ward* v. *Lloyd* (5); *McLatchie* v. *Haslam* (6).

Drysdale for the respondent cited *Jones* v. *Merionethshire Permanent Building Society* (7).

Sir W. J. RITCHIE C J.—This appeal is from the judgment of the Supreme Court of Nova Scotia sitting *in banco*. The action is upon promissory notes and upon a guarantee, whereby the defendant guaranteed to the plaintiff payment of the indebtedness of H. A. Locke. The trial was before Mr. Justice Graham who decided in favour of the defendant as to the promissory notes sued on, and in favour of the plaintiff upon the guarantee. No appeal has been asserted in respect of the judgment for defendant upon the promissory notes. The defendant appealed from the judgment against him upon the guarantee, and his appeal was unanimously sustained,—the Supreme Court *in banco* reversing Mr. Justice Graham's judgment and directing judgment to be entered for defendant. From this judgment the plaintiff has taken the present appeal.

The evidence with reasonable certainty, in my opinion, establishes that the defendant signed the guarantee in order to relieve Austin Locke from criminal proceedings which were then being threatened against

(1) 1 Hun. (N.Y.) 591.
(2) 3 Hill (N.Y.) 279.
(3) 10 Gray (Mass.) 387.
(4) 1 Camp. 45.
(5) 6 M. & G. 785.
(6) 8 Times L. R. 134.
(7) [1891] 2 Ch. 587; 8 Times L.R. 133.

him by Braine the plaintiff's agent, and under representations from Braine that such proceedings would be instituted unless the security were given.

Austin Locke was the manager of the plaintiff's branch bank at Lockeport. He had embezzled the plaintiff's money. It was for this embezzlement that the criminal proceedings were threatened, and it was to secure the indebtedness of Austin Locke and his partner Sydney Locke, who composed the firm of H. & A. Locke, that the guarantee was exacted.

At the argument of the appeal plaintiff's counsel contended that the fact of an agreement to compromise the crime of Austin Locke had not been pleaded. This defence, however, is fully raised by the 2nd, 3rd and 4th paragraphs of the defence and was so regarded at the trial, a great part of the evidence on both sides being devoted to this single issue. It is stated in terms in the 4th paragraph of the defence that the guarantee was executed in order to stifle the threatened prosecution for embezzlement.

I quite agree that the defence now relied on was sufficiently pleaded.

I think it a mistake to treat this, as the learned trial judge appears to have done, as a question of duress. It is the question of an agreement entered into to secure the payment of certain moneys in consideration of no proceedings being taken against a party for embezzlement, in other words compounding a felony. In this case there was no other consideration either alleged or proved, and such a consideration, being contrary to the policy of the law, cannot be relied on. I think the evidence very clearly shows that the understanding on which the security was given was that no prosecution would be instituted on the part of the bank, and had that not been the understanding I do

1892

THE PEOPLES' BANK OF HALIFAX v. JOHNSON.

Ritchie C.J.

not think the defendant would have entered into the arrangement.

The learned trial judge says: "I have not thought it necessary to decide as to whether or not Mr. Braine did make the threat alleged because I have come to the conclusion that if it was made it did not so operate upon the mind and will of the defendant that it destroyed his free agency and rendered him unable to give his assent to the contract."

Even in the learned judge's view of the case it seems to me it would have been better for the learned judge to have decided one way or the other, whether the threat was or was not made, for if made it appears to me difficult, if not almost impossible, to say what effect it had on the mind and will of the defendant, or how it operated on him; but whether this operated on the mind or will of the defendant is, in my opinion, entirely beside the question, because outside of any question of duress or its effect on the free agency of the defendant any consideration of forbearance to prosecute a felony is void as being against public policy. *Keir* v. *Leeman* (1). It is clear that a consideration must not only be valuable but it must be a lawful consideration, and not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur.*

The allowance of such an objection as this is not for the sake of the party who raises it but is grounded on general principles of policy. Where the fact comes to the knowledge of a party, as this most assuredly did, that a felony has been committed, if it is not his duty to prosecute it certainly is contrary to his duty to compromise or compound the felony, because by so doing he is thereby enabled to secure to himself a pecuniary advantage by obtaining security for the amount embezzled or stolen. Considering that em-

(1) 9 Q.B. 371.

bezzlement is rampant at the present day, if we may judge from the cases from day to day detailed in the public print, one would think the banks especially would endeavour to put a stop to such practices instead of practically encouraging them by hushing the offence up on being secured the pecuniary loss they would otherwise sustain.

If they will not prosecute is it not right and proper that courts should not allow them to benefit by agreements made to compensate their loss by letting the offender go free in consideration of their not prosecuting? Surely it is the duty of banks and monetary institutions, and one would think their interest, to prosecute and to bring offenders of this sort to justice rather than, by concealing and stifling prosecutions, if not to encourage practically not to discourage such offences, all parties being well aware by confessions of the embezzler that a large amount of the plaintiff's money had been embezzled.

Inasmuch as I can discover no other consideration for the defendant entering into this contract with the plaintiff but the clear intimation that if he did not do so criminal proceedings would be instituted against the embezzler, and the irresistible inference from the evidence being that if he did nothing would be done in the matter, and the contract now sought to be enforced having been entered into under these circumstances, I am of opinion that such consideration was unlawful and no court can be asked to enforce a contract based on such an unlawful consideration.

STRONG J.—The judgment appealed against seems to me to be in all respects correct. The defence that the bond sued upon was given for the purpose of inducing the appellants to refrain from instituting criminal pro-

1892

THE PEOPLES' BANK OF HALIFAX v. JOHNSON.

Strong J.

ceedings against Austin Locke, which proceedings were threatened by their agent, Braine, is sufficiently pleaded and was substantially proved. It is impossible to suppose that the respondent, who appears from the evidence to be an experienced man of business, would have become a surety for a person in the position of Locke unless there had been some inducement of the most urgent kind. Then no other motive for the respondent's intervention has been suggested than that he executed the bond to save his relation or connection Locke from prosecution. The irresistible inference, therefore, is that it was given for this purpose alone.

The case is in all respects like that of *Jones* v. *Merionethshire Building Society* (1) and does not resemble that of *McClatchie* v. *Haslam* (2) where a married woman gave a security for her husband's debt and afterwards impeached it as having been given to stifle a prosecution. In the last cited case the court were able to say that the inducement to give the security might have been the conjugal influence of the husband, and that there was consequently a motive to which it might be ascribed other than that of an intention and desire to shelter a relative from a prosecution by compounding a criminal offence.

The appeal must be dismissed.

TASCHEREAU J.—It seems to me evident that the bank cannot recover in this case. The transaction upon which they base their claim arose out of an agreement to stifle a criminal prosecution illegally made by their agent, of whose illegal acts they cannot take advantage. The evidence, it seems to me, leaves no room for another conclusion as to this fact, and it is settled law that "any contract or engagement having a tendency, however slight, to affect the adminis-

(1) 1892 1 Ch. 173. (2) 65 L. T. R. 691.

tration of justice, is illegal and void." Per Lord Lyndhurst in *Egerton* v. *Earl Brownlow* (1). The case of *Jones* v. *The Merionethshire Permanent Building Society* (2), has, since the judgment in the present case, been affirmed by the Court of Appeal (3). I refer to it.

GWYNNE J.—I entirely agree with the review of the evidence as made by Justices Weatherbe and Townshend, and concur with them that the fair conclusion to be drawn from it is that the defendant was induced to give the guarantee which is the subject of this suit upon the faith of an agreement that by his so doing Austin Locke, who had rendered himself liable to a criminal prosecution for fraud upon the plaintiffs, and who was married to a young lady who had been adopted and brought up by the defendant as his daughter, should not be prosecuted. The guarantee was given upon an illegal contract or to stifle a criminal prosecution. The appeal must therefore, in my opinion, be dismissed with costs.

PATTERSON J.—I concur in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitor for appellant: *A. A. Mackay.*

Solicitor for respondent: *N. W. White.*

---

(1) 4 H.L. Cases 1, 163. (2) 1891 2 Ch. 587.
(3) 8 Times L.R. 133.

1891
*Nov. 20, 23, 24.
1892
*May 2.

MARGARET S. McMICKEN, BY WILLIAM B. SCARTH, HER NEXT FRIEND (PLAINTIFF)..... APPELLANT;

AND

THE ONTARIO BANK AND OTHERS (DEFENDANTS)..... RESPONDENTS.

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

Evidence—Deed absolute in form intended to operate as mortgage—Intention—Character of evidence of.

To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, affirming the judgment at the trial by which plaintiff's bill of complaint was dismissed.

The facts of this case are fully set out in the judgment of Mr. Justice Gwynne.

The result of the trial before Mr. Justice Dubuc was that the plaintiff's bill was dismissed, and on a rehearing before the Chief Justice and Dubuc J., (Bain and Killam JJ. having been engaged in the case while at the bar,) the decision of the trial judge was affirmed. The plaintiff appealed.

Haegel Q.C. and *Kennedy* Q.C., for the appellant referred to *Peugh* v. *Davis* (1); *Russell* v. *Southard* (2); *Holmes* v. *Matthews* (3); *Locking* v. *Parker* (4).

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

(1) 96 U.S.R. 332.
(2) 12 How. 139.
(3) 3 Gr. 379.
(4) 8 Ch. App. 30.

1892

McMICKEN v. THE ONTARIO BANK.

McCarthy Q.C. and *Richards* for the respondents cited *Turner* v. *Collins* (1); *Lindsay Petroleum Co.* v. *Hurd* (2).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be dismissed with costs.

STRONG J.—Assuming the law as to the admission of parol evidence to establish that the conveyances, under which the respondents claim, were intended to operate merely by way of security and not as absolute deeds to be as the appellants contend, I am nevertheless of opinion that this appeal must be dismissed. The conveyance is impeached on the ground of fraud and misrepresentation, and in the alternative it is alleged that it was given as a mere mortgage or security. Neither of these alternative cases is supported by the evidence.

Treating the questions on which the decision depends exclusively as questions of fact it is, in my opinion, manifest that the appellant fails to establish either of the propositions she contends for.

As I am, on this head, entirely of the same opinion as the learned Chief Justice of Manitoba it would serve no useful purpose to enter upon an analysis of the evidence. I therefore content myself with saying that I agree with the Chief Justice of Manitoba and adopt his judgment as to the facts of the case. The objections to the deed founded on the Banking Act are fully answered in the able judgment delivered by Mr. Justice Dubuc on the original hearing.

The appeal must therefore be dismissed.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed. The appellant's bill of

(1) 7 Ch. App. 329. (2) L.R. 5 P.C. 221.

1892

McMICKEN v. THE ONTARIO BANK.

Taschereau J.

complaint was rightly dismissed in the court below. The case turns mainly upon the questions of fact, and we cannot, in my opinion, interfere with the finding of the learned judge at the trial, concurred in as it was by the court *in banco*. The fact that there was virtually only one judge who re-heard the case cannot affect the result.

GWYNNE J.—By indenture of lease bearing date the 14th day of June, 1875, Alexander McMicken, then carrying on the business of a private banker in the city of Winnipeg, in the province of Manitoba, and being possessed, under a contract of purchase made with the Hudson Bay Company, of town lots numbers 33 and 34 in block 3 according to a map or plan of the Hudson Bay Company's Reserve at Fort Garry, dated the 1st day of July, 1872, and registered in the registry office of the county of Selkirk, of which town lots the said Hudson Bay Company were seized in fee, did demise and lease the said two lots to the Ontario Bank for the term of three years, to be computed from the date of the said indenture at the yearly rent of $1,600, to be paid to the said Alexander McMicken, his heirs and assigns; and by the said indenture the said Alexander McMicken covenanted that at the expiration of the said term he would extend the lease of the said premises for a further period of two years at the same rent if requested so to do by the said Ontario Bank. In the summer of the year 1877 the said bank, at the request of the said Alexander McMicken, advanced and paid to the Hudson Bay Company the amount due by the said Alexander McMicken to the said company as and for the purchase money of the said two lots, and of another town lot numbered 48 in the said block 3, described in the same plan of the said company's survey at Fort Garry, amounting in the

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

whole to the sum of $2,700, and thereupon the said company, by three several deeds bearing date respectively the 3rd of July, 1877, granted, bargained, sold and conveyed the said three lots severally and respectively unto the said Alexander McMicken, his heirs and assigns forever. On the 23rd April, 1877, the said Alexander McMicken, by a deed of bargain and sale of that date, for the consideration therein expressed of $1,500, acknowledged to have been paid to him by one Gilbert McMicken, the father of the said Alexander McMicken, granted, bargained, sold and conveyed unto his said father in fee simple, the said three lots numbered 33, 34 and 48, and also a considerable number of other lots in the province of Manitoba, by the following description, that is to say:

The south half of section thirty-five in Township eleven, Range (4) four east of the principal meridian according to the Dominion Government survey of the province of Manitoba, also all those lots in the city of Winnipeg in said province described as follows, viz.: Lots numbers twenty-eight (28), thirty-three (33), thirty-four (34), thirty-seven (37), forty-eight (48), and the south half of lot thirty-six (36) all in block three (3) according to a map or plan of the Hudson Bay Company's Reserve at Fort Garry signed by Donald Alexander Smith, dated the first day of July, A.D. 1872, and duly filed in the registry office for the county of Selkirk. Also that lot of land in Winnipeg aforesaid on the north side of Notre Dame street bounded on the west by a lot belonging to one Charles Turner, on the north by a lot belonging to one Robert Patterson, on the east by a lot now or formerly belonging to one John Schultz, on the south by Notre Dame street, and having a frontage and depth of one chain; also acre lots numbers forty-four (44), forty-five (45), forty-six (46), forty-seven (47), and forty-eight (48) as the same are shown on a subdivision of the James Ross estate known as lot number nine (9) of the Dominion Government survey of the parish of St. John made by Duncan Sinclair, D.L.S. and registered in the registry office of the county of Selkirk as number forty-five (45).

And the said Alexander McMicken covenanted with the said Gilbert McMicken that he the said Alexander McMicken had right to convey the said lands in

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

manner aforesaid free from all incumbrances. In the year 1875 a firm of hardware merchants, trading in the city of Winnipeg under the name and style of McMicken and Taylor, one of the partners in which firm, namely, Hamilton Grant McMicken, was a son of the said Gilbert McMicken, became indebted to the said bank upon the paper of the said firm discounted for the firm upon which paper the said Gilbert McMicken was liable as endorser. In the month of February, 1876, the liability of the firm and of Gilbert McMicken as their endorser to the bank, amounted to the sum of $8,000; to secure Gilbert McMicken for such his liability as endorser, and for his undertaking to renew the paper of the firm from time to time, the firm gave to him security by a chattel mortgage upon certain goods and chattels of the firm. This chattel mortgage was duly renewed in February, 1877, the liability of Gilbert McMicken to the bank as endorser of the paper of the firm in the bank still continuing to exist as in the previous year. In the month of September, 1877, the said Alexander McMicken was indebted to the bank in the sum of $4,000, theretofore advanced and lent to him and for which the bank then held his promissory note. He was also indebted to the bank in the further sum of $6,000 theretofore advanced to him, and for which the bank held his note endorsed by the said Gilbert McMicken. On the 17th September, 1877, by indenture of mortgage of that date, Gilbert McMicken, at the special instance and request, as he himself says, of his son, the said Alexander McMicken, conveyed the said town lots Nos. 33, 34 and 48, by way of security to the Ontario Bank for the principal sum of $12,700 together with interest as in the said indenture mentioned, such principal sum being composed of the said sums of $2,700 $4,000 and $6,000, in which the said Alexander Mc-

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

Micken was so indebted to the bank. This indenture of mortgage was subject to a proviso for avoiding the same upon payment of the said principal sum with interest thereon at the rate in the said indenture mentioned on or before the 15th day of August, 1878, and that in default of such payment the said bank upon giving one month's notice might enter upon, lease, or sell the said lands. This indenture was duly registered in the registry office in and for the city of Winnipeg on the 20th day of September, 1877. Upon the 24th day of November, 1877, the said bank recovered a judgment in the Court of Queen's Bench in the province of Manitoba against the said Gilbert McMicken, as endorser of certain promissory notes of the firm of McMicken & Taylor for the sum of $7,707.75 then due by him as such endorser to the bank; a certificate of that judgment was duly registered in the registry office of the county of Selkirk upon the said 24th day of November. This registration according to the law of Manitoba had the effect of making the said judgment operate as a charge upon all lands within the said county of Selkirk whereof the said Gilbert McMicken was seized, or whereunto he was entitled. On the same 24th day of November, 1877, the said bank recovered two several judgments in the Court of Queen's Bench of the province of Manitoba against the said Gilbert McMicken and Alexander McMicken for the further sums respectively of $417.90 and $403.79. Upon these three judgments writs of *fieri facias* against the goods and also against the lands of the defendants in the said respective judgments were issued out of the said court and placed in the hands of the sheriff of the said county of Selkirk; the several writs against goods were renewed for one year upon and from the 19th day of November, 1878, but were not again renewed, and the said writs against lands were never renewed.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

Prior to the month of November, 1877, the said firm of McMicken & Taylor had become insolvent and the said Gilbert McMicken turned over to their assignee in insolvency the chattel mortgage executed by the said firm as security to him for his endorsing their paper to the Ontario Bank. The evidence of this point is that of Mr. Gilbert McMicken himself, who, in his evidence says that:—

He did nothing with the chattel mortgage himself—that was left among McMicken & Taylor's effects when they went into insolvency, the property being turned over.

The moneys secured by the above mortgage not having been paid according to the tenor thereof, the bank on the 24th November, 1878, filed a bill of foreclosure of the mortgage against the said Gilbert McMicken, in the proper court in that behalf in the province of Manitoba, and a decree *nisi* for foreclosure appears to have been obtained therein, proceedings upon which the bank at the special instance and request of the said Gilbert McMicken agreed to stay, and did accordingly stay by a letter of the date of the 8th of November, 1878, addressed by the general manager of the bank at Toronto, to the agent of the bank at Winnipeg, which letter is as follows:

GEORGE BROWN, Esq., Manager, Winnipeg.

DEAR SIR,—I telegraphed you to-day to stay the proceedings in the matter of foreclosure of the mortgage against Mr. McMicken. We have a letter from him asking that proceedings may be withdrawn until the expiry of our present lease about 18 months hence, which my board are not willing to agree to, but for the present consent to a stay of proceedings, with the hope that Mr. McMicken will use his best efforts to pay off our claims and get the property entirely into his own hands.

Truly yours,

D. FISHER,

Gen. Manager.

While the proceedings were thus stayed, both Gilbert McMicken and his son Alexander entered into

negotiations with one McCrosson, to procure him to purchase the lots numbered 33 and 34, and these negotiations appear to have proceeded so far that a price was agreed upon to be paid by McCrosson, which was somewhat in excess of the amount due under the mortgage, subject to the concurrence of the bank.

In relation to this negotiation Mr. Gilbert McMicken, on the 10th July, 1879, addressed and sent the letter following to the cashier of the bank at Toronto :

WINNIPEG, 10th July, 1879.

TO THE CASHIER ONTARIO BANK, TORONTO.

DEAR SIR,—I have to request the favour of your bringing the subjoined proposition before your board, and to ask for it a favourable consideration inasmuch as by accepting it the bank will be secured in an early cash settlement of the indebtedness for which the mortgage now existing is pressed to foreclosure. The effect to me would be merely the saving of the back lot which was included in the mortgage to give the bank greater security. I would wish very much to get as early a reply as convenient, and as the season for building is wearing on, the party to whom reference is made in the proposition is also very desirous of early information on the subject, so that if it meets the concurrence of the board he might at once contract for material.

I am, dear Sir,

Your obedient servant,

G. McMICKEN.

The proposition inclosed in this letter is as follows :

WINNIPEG, 18th July, 1879.

Proposition for submission to the board of directors of the Ontario Bank *re* the mortgage of G. McMicken on property in Winnipeg, viz., that the bank, on the mortgagor at once yielding up his equity of redemption, sell or make over to Thomas McCrosson the two lots on Main street for the amount of the debt, $12,700, McCrosson to pay $700 cash, to bind himself to build forthwith on the vacant space a building to cost not less than $6,000, to make over the rents to the bank of the new building with a further cash payment of not less than $2,000 yearly until the whole is paid off. The bank, as soon as McCrosson has erected the said buildings to release to me the back lot. This would make certain the bank being recouped their whole advance within three years. Respectfully submitted by

G. McMICKEN.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

Upon the 8th of August, 1879, Mr. Gilbert McMicken addressed and sent to the cashier of the bank at Toronto, by the hands of Mr. McCrosson, the following letter:

WINNIPEG, 8th August, 1879.

DEAR SIR,—Mr. McCrosson having occasion to be in Toronto, will call upon you respecting the proposition I submitted to you of date 10th July for the purchase of the two lots on Main street now under mortgage by me to the bank securing indebtedness of A. McMicken. To the proposition then submitted I have hot heard from you, and hoped when Lt.-Governor Macdonald arrived he would have been able to deal in some measure with it. I think the offer of Mr. McC. a good one for the bank, and it will aid me in so far as I wrote to you. Mr. McC. will now offer a substitutional proposal should the bank prefer it, viz.: Waiving building obligation to pay the bank weekly payments of $100 until the whole sum of $12,700 and interest is paid off.

I would respectfully urge the acceptance of one or other of these offers of Mr. McC. He is a reliable man in every respect.

Yours truly,

G. McMICKEN.

Lieutenant-Governor Macdonald referred to in the above latter was a director in the bank and a friend of Mr. McMicken, and whom Mr. McMicken had been in negotiation with to procure his influence with the board of the bank in support of his applications to the bank in relation to the matter.

Neither of the above offers was accepted by the bank. It will be observed that in neither of them was any provision whatever proposed to be made for payment of the amount remaining due to the bank on the judgment recovered against Gilbert McMicken for the sum of $7,707.75 upon which a balance exceeding $4,400 still remained due, the difference having been paid out of the estate of McMicken & Taylor; nor was any provision proposed for payment of the amounts due upon the two judgments recovered against Gilbert and Alexander McMicken for the several sums of $417.90 and $403.79. The agent of

the bank at Winnipeg appears to have been opposed to the acceptance of any arrangement which did not provide for the payment of the whole of the amount remaining due under the said respective judgments as well as of the amount due upon the security of the mortgage, under the apprehension that otherwise the bank would be prejudiced in the recovery of the amount due under the judgments. The negotiations between the McMickens and McCrosson for the purchase by the latter of the two lots Nos. 33 and 34 proceeded so far that one W. H. Ross, a solicitor then practising in Winnipeg, since deceased, was employed to investigate the title to the lots for McCrosson. He appears to have found upon registry in the registry office of the county of Selkirk deeds to the purport and effect following:—

1st. An indenture bearing date the 1st day of September, A.D. 1877, and registered upon the 1st day of October in that year and purporting to be made between Gilbert McMicken, of the city of Winnipeg, Esquire, of the first part and Margaret Jane McMicken of the same place, wife of Alexander McMicken of the second part, whereby the said Gilbert McMicken for the expressed consideration of one thousand five hundred dollars therein acknowledged to have been paid to him by the said Margaret Sarah McMicken, did grant unto her, her heirs and assigns forever, the several pieces of land in the said indenture mentioned, comprising all of the several parcels of land mentioned in the above recited indenture of the 3rd day of April, 1877, and by that indenture conveyed to Gilbert McMicken by Alexander McMicken, except the lot No. 28 in the block number (3) three in the city of Winnipeg in that indenture mentioned, and comprising also another lot of land not in that indenture of the 3rd of April mentioned, described as being situate on the

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

south side of Notre Dame street in the city of Winnipeg, and as being lot number ten according to a map or plan of the property of one John Shultz, known as lot number two of the Dominion Government surveys of the parish of St. Johns on file in the registry office of the county of Selkirk; 2ndly. An indenture bearing date the 28th day of October, A.D. 1874, registered in the registry office of the county of Selkirk on the 11th day of November, 1874, and purporting to be made between Alexander McMicken, of the first part, and Gilbert McMicken and Sedley Blanchard, of the second part, whereby the said Alexander McMicken for and in consideration of one dollar therein expressed to have been paid to him did grant, bargain, sell and confirm unto them the said Gilbert McMicken and Sedley Blanchard and the survivor of them and the heirs and assigns of such survivor for ever, all that land and premises in the said city of Winnipeg described as follows (the said lots 33 and 34 in block 3), together with all and singular the buildings and improvements to the same belonging or in any wise appertaining; in trust nevertheless and for the uses following and none other, that is to say, for the sole and separate use of Margaret Sarah McMicken, the wife of the said Alexander McMicken, party of the first part for and during her natural life, and so as she alone or such person as she shall appoint shall take and receive the rents, issues and profits thereof, and so as her said husband shall not in any wise intermeddle therewith, and in case the said Alexander McMicken shall survive his said wife then in trust to reconvey the said lands and premises to him the said Alexander McMicken, his heirs and assigns upon the death of the said Margaret Sarah McMicken; and in case the said Margaret Sarah McMicken shall survive the said Alexander, then upon

the death of the said Margaret Sarah McMicken in trust to reconvey the said lands and premises to the lawful heirs of the said Alexander McMicken. Provided, however, that the said trustees or the survivor of them, the heirs, executors or administrators of such survivor, shall hold the said lands and premises upon the further trust to sell and convey the whole or any part of the aforesaid premises and appurtenances to any person or persons and for such sum or sums of money as the said Alexander McMicken and Margaret Sarah McMicken, by writing under their hands and seals, and duly executed at any time during their natural lives, may appoint and direct; and 3rdly. An instrument under the hands and seals of the said Alexander and Margaret Sarah McMicken, bearing date the 21st day of December, A.D. 1874, and registered in the registry office for the county of Selkirk on the 20th day of January, A.D. 1875, in the words following :—

We, Alexander McMicken, of the city of Winnipeg, in the Province of Manitoba, banker, and Margaret Sarah McMicken, wife of the said Alexander McMicken, under and by virtue of the provision in that behalf, made in a certain deed of trust made by the said Alexander McMicken to you Gilbert McMicken and Sedley Blanchard, both of the city of Winnipeg, Esquires, dated the 28th day of October, A.D. 1874, and duly registered in the registry office in and for the county of Selkirk, in said province of Manitoba, in book 5, folio 261, do hereby authorize, enjoin, empower and direct you, the said Gilbert McMicken and Sedley Blanchard as trustees, under and by virtue of the said indenture of trust to convey, transfer, sell and make over to Alexander McMicken above named, in consideration of the sum of one dollar the lands and premises in said trust deed mentioned and described and conveyed or intended so to be, and to hold the same unto the said Alexander McMicken, his heirs and assigns to his and their own free and absolute use, benefit and behoof for ever.

With reference to these two latter instruments Alexander McMicken stated in his evidence that he deeded the lots 33 and 34 to his father and Mr. Blanchard (who was his solicitor and since deceased) as trustees

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

for his wife, and that afterwards he got into difficulty and that Mr. Blanchard and one Mr. McArthur thought it would look better for him to have the property put back into his own name again and that it was done; ultimately he says it was conveyed to his father who, with his consent, gave the mortgage to the bank to secure $12,700. The conveyance to his father was that of the 3rd April, 1877, whereby, for the consideration expressed therein of $1,500, Alexander conveyed to his father not only the said lots Nos. 33 and 34, but all the other property therein mentioned and above detailed. How the registration of these instruments escaped the notice of the solicitor of the bank who had instituted for them the suit against Gilbert McMicken alone for the foreclosure of the mortgage was not explained, the solicitor having died in the year 1881, long prior to the commencement of this suit. It was suggested that the non-discovery of the existence of the deed of the date of the 1st September, 1877, was attributable to the default and neglect of the registrar. But however this may be, the bank first acquired knowledge of the existence of any such deed by the discovery made by Mr. W. H. Ross upon behalf of Mr. McCrosson having been communicated to Mr. Brown, the agent of the bank at Winnipeg upon or immediately before the 20th of September, 1879, upon which day he left Winnipeg on leave for his summer holiday, and did not return until the 16th of October. During his absence a Mr. Smith, an inspector of the bank, discharged his duties and he applied to Mr. Ross who had discovered the deed upon registry and procured from him for the bank his opinion respecting the interests of the bank under the circumstances, which opinion he forwarded to the head office of the Bank at Toronto; meantime the solicitor of the bank in the foreclosure suit against Mr. Gilbert McMicken, finding his proceedings in that

suit rendered nugatory by the discovery of the deed of the 1st of September, 1877, fited a new bill of foreclosure against Margaret S. McMicken, the grantee of that deed. The agent of the bank upon his return to Winnipeg, upon the 16th of October, immediately renewed negotiations with Mr. Gilbert McMicken to procure a settlement of the bank's claim, and he retained Mr. W. H. Ross who had discovered the deed on registry, and since deceased, to act as solicitor of the bank in the matter, who as such solicitor procured the execution of the deed of the 22nd October, 1879, whereby Margaret Sarah McMicken, wife of Alexander McMicken of the city of Winnipeg, in the province of Manitoba, and the said Alexander McMicken, of the same place, gentleman, therein described as the parties of the first part, in consideration of the sum of fifteen thousand dollars of lawful money of Canada therein acknowledged to have been paid to them, the said parties of the first part, did grant unto the Ontario Bank the parties to the said deed of the second part their successors and assigns for ever, lots numbers thirty-three, thirty-four and forty-eight in block three of the Hudson's Bay Company's survey, in said city of Winnipeg, to have and to hold to the said parties of the second part to the said deed, their successors and assigns, to and for their sole and only use for ever. And the said parties of the first part did thereby covenant with the said parties of the second part that they had power to convey the said lands to the said parties of the second part, and that the said parties of the second part should have quiet possession of the said lands free from all incumbrances, and that the said parties of the first part would execute such further assurances of the said lands as might be requisite. And the said parties of the first part released to the said parties of the second part all their claims upon the said lands.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

In order to the perfection of the title purported to be conveyed by the said deed Mr. Ross prepared, and procured to be signed by the said Gilbert and Alexander McMicken, the declaration following :—

We, Gilbert McMicken and Alexander McMicken, of the city of Winnipeg in the county of Selkirk, do hereby declare that the conveyance from Alexander McMicken to Gilbert McMicken of lots thirty-three, thirty-four and forty-eight, block 3, H. B. Co. survey, was made for valuable consideration, as Alexander McMicken at that time owed a much larger amount to Gilbert McMicken than the value of the property over and above mortgage to Ontario Bank, and that Gilbert McMicken was not intended to be a trustee for Alex. McMicken, but *bonâ fide* absolute owner in fee simple.

(Signed,) G. McMICKEN.
" A. McMICKEN.

Dated Oct. 22, 1879.

Mr. Ross at the same time procured to be signed by the said Gilbert McMicken, Alexander McMicken and Margaret Sarah McMicken a receipt in the words following :—

Received from the Ontario Bank payment in full of all charges, claims or accounts against the Ontario Bank by us, and we hereby release the Ontario Bank from all such charges, claims or accounts now due or accruing due.

Dated at Winnipeg the 22nd day of October, A.D. 1879.

(Signed,) G. McMICKEN.
" A. McMICKEN.
" MARGARET S. McMICKEN.

And at the same time he procured to be signed by the manager of the bank at Winnipeg a receipt in the words following :—

Received from Gilbert McMicken and Alexander McMicken payment in full of all charges, claims and accounts whether by judgment or otherwise due by them, or either of them, to the Ontario Bank, save and except a note for nine hundred dollars due by Gilbert McMicken, and we hereby release all such claims.

Dated at Winnipeg the 22nd day of October, A D. 1879.

(Sgd.) GEORGE BROWN,
Manager.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

Upon the 12th of November, 1879, Mr. Ross forwarded to the manager of the bank a letter signed in the name of the firm of Ross, Ross and Killam of which he was a member, explaining the reasons why he, as the solicitor employed by the bank in the matter, had taken the precautions which, by the above papers, he appears to have taken in closing the transaction wherein he says:—

Re McMICKEN.

DEAR SIR,—Referring to the lands with respect to which we advised Mr. Smith by letter on the 9th ult., we have now at your request to explain the steps since taken to secure the equity of redemption to the bank. Subsequently to our writing that letter, Mr. Alex. McMicken in endeavouring to induce us to accept the title for the party then proposing to purchase from Mrs. McMicken, informed us that it was not correct that Mr. Gilbert McMicken got the property without consideration, but that it was transferred in consideration of a debt due from Alexander to Gilbert McMicken, and on further pressing it appeared from Gilbert McMicken that he really had an interest in the property and only conveyed it to Mrs. McMicken when he, Gilbert, became involved, and in order to prevent its being taken under execution against him, and we have little doubt that Gilbert McMicken's previous contention that he only held as trustee and had no interest in the property was solely for the purpose of preventing its being held for his own liabilities. At any rate we have procured written statements from Mr. and Mrs. Alexander McMicken and Mr. Gilbert McMicken to the effect mentioned which should be sufficient to induce a purchaser to take the title, as Gilbert McMicken's only liabilities of consequence are to your bank, and any purchaser buying from you for value relying on these statements would be protected. Mr. and Mrs. Alex. McMicken have now by deed duly executed, conveyed these lands to your bank for the expressed consideration of $15,000, but the real consideration is a receipt in full for all debts due the bank from both Alexander and Gilbert McMicken or either of them separately, except a note of Gilbert McMicken's for $900. This consideration is a good one, and even if it should at any time turn out that the conveyance by Alexander McMicken to Gilbert McMicken was wholly without consideration and simply a blind, this conveyance would merely give a preference over other creditors, and would not on that account be void except under proceedings in insolvency which are hardly likely to be now taken against Alexander McMicken as he has been left alone

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

so long. In every view this is the best arrangement in the bank's interest that could be made.

It is to avoid this deed and wholly to alter its character that the present suit was instituted. The first proceeding taken for this purpose was a bill of complaint filed by the plaintiff on the 7th day of July, 1885, wherein she alleged that on the 17th day of September, 1877, Gilbert McMicken was the owner in fee simple of lots 33, 34 and 48 in block 3 in the Hudson Bay Company's reserve in the city of Winnipeg, and that by an indenture of that date registered in the registry office of the city of Winnipeg on the 20th day of the said month of September, he conveyed the said lands to the Ontario Bank as collateral security for the payment of three promissory notes made in favour of the bank, amounting in all to $12,700, and interest thereon, and that by an indenture purporting to bear date the 1st day of September, 1877, and registered in the registry office for the city of Winnipeg, the said Gilbert McMicken conveyed all his right, title and interest in and to the above described lands to her the said plaintiff. She then alleged that in the early part of the month of October, 1879, the defendants, namely, the Ontario Bank, made the following proposal to her, to wit:

> That the plaintiff should convey to the defendants all her right, title and interest whatsoever in and to the said lands and premises in trust for the defendants to sell or otherwise dispose of the same and apply the proceeds of such sale or disposal in and towards, first, the payment of the said three promissory notes amounting in all to $12,700, then the payment of a certain promissory note upon which the said Gilbert McMicken was liable to the defendants, and lastly, that whatever surplus there might be after the said four promissory notes were paid out of the proceeds of the sale or disposal as aforesaid of the said lands and premises, should be forthwith paid over to the plaintiff by the defendants.

She then alleged that she agreed to that proposal and thereupon executed the deed of the 22nd October,

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

1879, in which her husband joined her in conveying the said lands and premises to the bank, and she averred that she never would have executed that conveyance if the defendants had not undertaken to pay over to the plaintiff whatever surplus there might be after the said four promissory notes had been paid out of the proceeds of the sale of the said lands. And she averred that the lands had been sold and that after payment of the said promissory notes there remained a surplus which the defendants refuse to pay to her, and she prayed for an account and payment to her of such surplus. Upon an examination on oath of the plaintiff on this bill she stated that she conveyed the property to the bank to pay off her husband's liability to the bank; that there had been a mortgage on the property but that she did not know whether or not it was existing at the time she conveyed to the bank; that she did not know enough of business to tell who made the mortgage; that she supposed it was given by herself; that so far as she remembered she thought it was; that her husband was indebted to the bank, but that she really did not know whether the mortgage was given to secure that debt or not; that she knew really nothing about the conveyance herself. Being asked what was the arrangements made with the bank, her answer was: that the deed was given to pay off the liability of her husband to the bank; and she added:

> Of course the property was much more valuable than the amount of my husband's debt, and the arrangement I wished made, and that was talked of, was that I was to pay my husband's debt, and then the property was to come back to me, or what was left of it. My father-in-law's liability was also included in what the property was to be security for.

Being asked who talked of this arrangement, she replied that it was her father-in-law, her husband and her solicitor. Being asked whether that arrangement

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

had ever been assented to by the bank, her answer was, "Well, I think it was, that was the understanding so far as I know." Being asked whether they, by which I understand any officers of the bank, were present at any of these interviews between her father-in-law, her husband and her solicitor, she answered, "No." Being asked if she could explain why the bank having already a mortgage upon the property required a deed from her, she answered, "I don't know enough about business to tell you." Being asked if she knew whether the deed given by her was given to cover any greater indebtedness than was covered by the mortgage, her answer was :—

I know the deed covered my father-in-law's debt as well as my husband's, but I really don't know enough of business to tell you. I know I owned the property and I know I gave the deed, but I left the business to my husband and my solicitor.

Being asked if the bank made a proposal to her to convey to them on the terms set out in the bill, she answered, "Not to me personally, but they did to my husband and solicitor."

Being asked who were present at the time she signed the deed, she answered—"The late William Ross, George Brown, my husband and myself, and I think my father-in-law, though I am not sure as to him."

The Mr. Ross here mentioned was the solicitor acting for the bank in the matter; George Brown was the bank agent.

Being then asked whether anything was said at that time, she answered :

Yes, there was a little conversation. I asked Mr. Brown if he was not going to give me something, a silk dress or something, referring to the old custom, and he said, "Never mind, you'll get something better than that out of it by-and-bye." Previous to that there was no conversation.

Being asked if anything was said at that meeting as to the property being conveyed in trust, she answered,

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

"Not that I remember." She said further that "she thought that was the only meeting at which an officer of the bank was present.

Being asked if any other documents were signed that day besides the deed, she replied, "Not that I know of." She did not remember having signed a receipt. She did not remember how often she had signed her name. She remembered giving the deed to relieve her husband and her father-in-law; that she was willing to give the deed because of a conversation of Governor McDonald with her father-in-law in which McDonald assured her father-in-law that the bank only wanted the amount of the debt and that anything over and above that would come back to her, and for that reason she consented to sign the deed. Being asked if she was present at that conversation between Mr. McDonald and her father-in-law, she answered, "no." Her attention having been drawn to the statement in her bill of complaint that Gilbert McMicken, her father-in-law, was the owner of these lands, she said:

> I don't think he was the owner. I got the property from my husband; he settled it upon me when he went into business, when it was free from debt and from any liabilities.

Being asked where that settlement was she answered that she supposed it was in the registry office. Being asked if she knew of her husband conveying the property in question to her father-in-law in 1877, she answered: "I don't know. I don't know about dates." She did not know that her father-in-law was the absolute owner of the property at any time. She did not think he was. Being asked why Gilbert McMicken conveyed the property to her as stated in the bill in September, 1877, she answered: "I don't understand what you mean." Being asked then how he came to execute that conveyance to her, she answered that she

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

did not know. Being asked if any conversation had passed between him and her for that deed, she replied: "How do you mean?" Being asked if she paid him anything, she replied: "Oh no, nothing." She did not know whether he was in difficulty then, in Sept., 1877, or not; she knew of none except that of 1879, when she relieved him and her husband, and being asked again to state the circumstances under which she executed the deed to the bank she replied that it was to relieve her husband and her father-in-law, owing to a debt they then owed the bank, but that it was, so far as she knew, on the understanding that it was only to secure a debt, and what was over was to come back to her, and that she did it on account of what Governor McDonald told her father-in-law. Being asked why she did not have a declaration of trust or something like that when the deed was given, she answered that she left all those things to her husband, that he and her solicitor attended to all her business. The result of that examination of the plaintiff appears to amount simply to this, that she executed the deed impeached to relieve her husband and father-in-law from certain debts they then owed the bank, and that she had herself no personal knowledge of any agreement having been entered into by the bank or any of its officers qualifying the terms of the deed as executed by her. She denies having had any information as to such an agreement having been contemplated or made other than what was received from her father-in-law or her husband; and no reason whatever has been suggested why, if any such agreement had been made or contemplated, it was not reduced into writing. It is not suggested that the bank or any of its officers objected to the deed being drawn up and expressed in the true terms of the actual agreement between the parties to it. Afterwards and by an order

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

of the 3rd day of October, 1888, that bill was dismissed for non-compliance by the plaintiff therein with another order of the court that she should appoint a next friend to carry on the suit on her behalf; and upon the 28th day of December, 1888, the bill of complaint now under consideration was filed. In that bill the plaintiff's claim to the equitable relief which she prays for is placed upon a wholly different foundation from that stated in the bill filed by her on the 7th July, 1885. In the bill now under consideration she avers the lease of the 14th June, 1875, by Alexander McMicken of the lots 33 and 34 in block 3, to the Ontario Bank, and that by indenture dated the 23rd April, 1877, Alexander McMicken conveyed the same lots and lot No. 48 in the said block 3, to Gilbert McMicken in fee, then the mortgage of the 17th September, 1877, by Gilbert McMicken to the bank in security for the principal sum of $12,700. She then avers that by indentures dated on or about the first day of October, 1877, Gilbert McMicken granted and conveyed the same lands to her in fee. Then in the 8th paragraph of her bill she alleges the recovery by the bank on the 24th of November, 1877, of a judgment for $7,707.75 against Gilbert McMicken as endorser upon paper of McMicken and Taylor, and that Gilbert McMicken transferred certain chattel property of McMicken and Taylor which Gilbert held under a chattel mortgage as security for his endorsing the paper of the said firm, the proceeds of which chattel property she avers the bank did receive or should have received. She then avers the insolvency of McMicken and Taylor and the receipt by the bank of a dividend of 40 cents in the dollar out of their estate applicable to payment of the said judgment. She then in the 12th and 13th paragraphs of her bill alleges the particular grounds upon which her claim for the relief prayed is founded, as follows:—

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

12. In or about the month of October, 1879, the defendants, the Ontario Bank, through the defendant Brown acting as their agent and manager by falsely representing to your complainant that if said judgment against the defendant Gilbert McMicken was not paid off or secured every means of recovering the full amount thereof would be taken, and that the said defendant, Gilbert McMicken, would be harassed and pressed for payment in every possible way, and that proceedings of a serious nature against the defendant Gilbert McMicken would be taken, also falsely alleging that the full amount of the said judgment was still due to the defendants the Ontario Bank, and concealing the fact that the defendants, the Ontario Bank, held any security for payment of the judgment set forth in the 8th paragraph of this bill of complaint or that they had been paid any moneys on account thereof, on the 22nd day of October, 1879, induced your complainant to execute to the defendants the Ontario Bank the deed of the said lots 33, 34 and 48 on the terms and conditions hereinafter set forth in order to save said defendant Gilbert McMicken from being harassed and annoyed as aforesaid.

13. The deed mentioned in the last preceding paragraph pretended to be executed for the consideration therein expressed of $15,000 then paid by the defendants the Ontario Bank to your complainant, the receipt whereof your complainant thereby pretended to acknowledge and purported to convey with the ordinary covenants of title an absolute estate in fee simple, free from incumbrances to the defendants the Ontario Bank, whereas in fact no money was then or at any other time paid to your complainant by the defendants the Ontario Bank, and the said deed, though absolute in form, was intended to be and is a mortgage to secure to the defendants the Ontario Bank the judgment set forth in the 8th paragraph of this bill of complaint and was executed for no other purpose whatever.

She then in the 17th paragraph of her bill alleged that the bank took possession of the lands leased to them by Alexander McMicken by the lease of the 14th June, 1875, in the 3rd paragraph of the bill mentioned and since the execution of the mortgage by Gilbert McMicken to the bank, in the 5th paragraph of the bill mentioned, have paid no rent under said lease to any one entitled thereto, but since the execution of said mortgage have been in possession of the lands leased as mortgagees in possession; and in the 18th paragraph of the bill she alleges that the bank, with the assent of

the complainant and after consultation with her, have sold portions of the said lands and have received as purchase money and rents more than enough to pay any moneys they may be entitled to on said mortgage by Gilbert McMicken, and any moneys that may be due to them, if any, on the judgment set forth in the 8th paragraph of said bill. And the bill prays that it may be declared that the deed set forth in the 12th paragraph of the bill, that is the deed of the 22nd of October, 1879, was intended to be and is a mortgage to secure the moneys due on said judgment, and that the complainant may be let in to redeem the said lands remaining unsold, and that the defendants, the Ontario Bank, may be ordered to reconvey to the complainant the said lands on payment of any moneys that may be found due and owing to the defendants, the Ontario Bank, under and by virtue of said judgment and said mortgage; and that in the event of the said deed of the 22nd October, 1879, not being held to be a mortgage that it may be declared that the said deed was obtained from complainant by fraudulent and false representations, and on that ground should be declared void and set aside; and that it may be declared invalid and void as being in contravention of the charter of the bank and the several acts of the Dominion of Canada relating to banks and banking; or that, in default of such relief being granted, that the bank may be ordered to pay to complainant the sum of $15,000; and that the defendant George Brown and the defendants the Ontario Bank may be ordered to pay to the complainant any profits received by them or either of them by reason of the sale of any portion of the mortgaged premises.

The plaintiff was examined as a witness on her own behalf in support of the relief claimed in this her bill of complaint, and upon her examination in chief

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

she stated that she did not remember any transaction in the year 1879 in relation to the property in question only that she gave the deed to the bank; that previously to giving that deed she had not personally any conversation with any person relating to the giving of the deed, but that her husband on two or three occasions which she mentioned in the summer of 1879 had conversations in her presence with the defendant Brown, and being asked to state the substance of such conversations she answered:

My father-in-law owed the bank, and Mr. Brown wanted a deed given of this property to pay off the debt of my husband and my father-in-law, and that it would make all things smooth and it would relieve my father-in-law of his liability and make all things smooth and right, and that he was constantly pressed by the authorities in Toronto, the heads of the bank.

And being asked if Mr. Brown had said anything else she answered: "No, I don't remember anything —that was the conversation—and she added, "and of course anything that was over and above" when she was interrupted by her counsel asking: "Was the property to be sold?" To which she replied, "Yes, Mr. McDonald having been up here, assured my father-in-law"—and her stating anything which Mr. McDonald may have assured her father-in-law being objected to she was asked by her counsel "What was the conversation?"

She answered:

He wanted me to give the deed to the bank for these two debts, and that all over and above would come back to me after the property was sold. Being asked: How came you to sign this deed at all? She answered: My husband asked me to sign it. Being then asked: Did you sign more than this deed? She answered, I signed other papers; I don't know what they were, but I signed everything else that I was asked to sign on that occasion.

She said further that with the exception of the occasion of her signing the deed she had personally no transaction with the bank or any of its officers in rela-

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

tion to the matter. To a question put to her in the following form: "You say this deed was not read over to you at the time it was signed?" she answered, "I don't think it was, I am sure it was not." She added that the transaction was not explained to her in any way—that she simply did what her husband told her.

On her cross-examination she said that she did not remember having ever heard that her husband conveyed the property in question to her father-in-law in 1877. She did not know that her father-in-law had mortgaged the property to the bank. She had heard of mortgages and deeds and all that but could not tell anything about them. When she executed the deed to the bank she knew that there was a mortgage on the property for a debt of her husband's of $12,000, but she knew nothing about her father-in-law having conveyed the property to her. She did not remember having ever been consulted about that. She first heard in 1879 of the mortgage that was given to the bank for her husband's debt. She had not been consulted about that, that her husband attended to her business and did not consult her about anything much; that he attended to all her business and that she did not know anything about the deeds—that he never consulted her. Being then shown the declaration signed by her husband and father-in-law on the 22nd of October, 1879, upon the occasion of the execution of the deed she professed to know nothing at all about it. She admitted that her husband knew more about the ownership of property than she knew herself; she could give no explanation as to how her husband signed that declaration; and being thereupon asked whether as between him and her he would not be more correct than she was, she answered, "in business matters I know very little about." She left all her business with her husband. The deed was given as she supposed to pay off both

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

the debt of her husband and of her father-in-law, that is, the two debts already spoken of the mortgage and the judgment; she understood the deed was to pay those two debts. Then her examination upon former occasions is produced. She is shown one wherein she had said that she never heard Mr. Brown speak of the terms upon which the deed was to be given; she admitted her signature to the examination and she said that she supposed that that meant she had not personally. Then she said that she did not remember that a deed was mentioned but that he wished to have the payment of the debt attended to; but she did not remember that the giving of the deed or the terms upon which it should be given was specifically referred to. The instructions for the former suit she said were given by her husband but with her consent. She did not remember whether she accompanied him or not when he gave instructions to the solicitor, but she did not think that she did. Then, with reference to a stable on lot 48 which she said she occupied for some time after the execution of the deed of the 22nd October, 1879, she said there was no agreement whatever with the bank that she should so use it. She "just stayed there" she said, that is to say, her husband who lived some distance off kept a horse there for some time.

She said that she never had any conversation or interview with Mr. Brown or any other officer of the bank about giving the deed; that Mr. Brown had spoken to her husband in her presence about the matter in the summer of 1879. Being asked how she had heard him speak about the giving a deed, she replied, "Not often of the deed, I was speaking more of the liability than of the deed. I heard Mr. Brown talking of the debt;" and again that "he wished to have the paying of the debt attended to;" and again that "he was pressing to have papa's liability attended to." She did

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

not remember that the terms upon which a deed should be given was ever specially referred to. She said in fact that:

> What she understood was that the deed when given would pay her husband's and her father-in-law's liability, and her father-in-law told her that Governor McDonald had assured him that all the bank wanted was their money and that when the property was sold everything over that debt would be returned to her, and upon that understanding she signed the deed.

The plaintiff has, in my opinion, wholly failed to establish her contention. I do not think it necessary to review the cases in which parol evidence has been received to qualify and cut down a deed of conveyance of land which is absolute in its terms into a mortgage. In cases of this kind, as is laid down by the Privy Council in *Holmes* v. *Matthews* (1), the onus rests altogether upon the appellant not only to rebut the presumption that the title as appearing in the written instrument is in perfect accordance with the intention of the parties, but he must also establish to the satisfaction of the appellate court that the judgment of the court below adverse to his contention is erroneous. In *Rose* v. *Hickey* (2), decided in this court in 1880, we held that the evidence necessary for this purpose must be of the clearest and most conclusive and unquestionable character. It will be sufficient to refer to the facts of the case of *Lincoln* v. *Wright* (3) and the judgment therein as the case ordinarily relied upon in illustration of the principles upon which the court proceeds in cases of this nature and of the evidence required to justify the court in declaring a deed absolute on its face to be different from what its terms represent it to be. In *Lincoln* v. *Wright* (3) certain real property of the plaintiff, together with a policy of

(1) 9 Moore P.C. 413; also reported in 5 Grant Ch. Rep. 108.

(2) Cassels's Dig. 292.

(3) 5 Jur. N.S. 1142.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

insurance effected by him upon his own life, were under mortgage as security for a loan to the plaintiff. The mortgage deed contained a power of sale by the mortgagee. The mortgaged property consisted of seven cottages, in one of which the plaintiff himself resided, a chapel or meeting-house and six acres of land. The plaintiff, while the mortgage was current, executed a deed whereby he conveyed and assigned all his estate and effects to one Gamble upon trust for the benefit of his creditors. Afterwards the mortgagee caused the property to be put up for sale under the power in his mortgage, but no sale was effected. Shortly afterwards Gamble was informed by his solicitors, who were also solicitors for the mortgagee, that the mortgagee had been offered £220 for the property, and that unless a higher price could be obtained it would be sold at that price. The bill stated that thereupon Gamble communicated with the plaintiff who at once went to a Mr. Wright since deceased, the father of the defendant, his daughter, and asked him to purchase the property for the plaintiff upon the terms that Mr. Wright should be repaid the purchase money and interest out of the rents of the cottages and chapel, and that he should also allow the plaintiff to continue in the occupation of the house and land which he then occupied. On the evening of the following day the plaintiff and Gamble called on Mr. Wright, who told Gamble that the plaintiff had been asking him to buy the property for the family of the plaintiff, and he was anxious to know ift he money would be safe. Gamble in reply assured him that it would, and pointed out the mode in which he could repay himself with interest, and Mr. Wright then agreed to purchase the plaintiff's interest, which was a life interest in the mortgaged property, and the said policy of life insurance in behalf of and for the benefit of the plaintiff on the terms that Wright should

pay £230 as purchase money and retain the rents of the cottages and chapel, and apply the same towards liquidating or reimbursing to himself the said sum of £230, and that in the meantime the plaintiff should pay interest and retain possession of the messuage then occupied by him and pay the premiums to accrue due on the policy. Gamble then added that it would be necessary to raise the rents of the other cottages, and that this with the income from the chapel would enable the plaintiff to pay £50 yearly in liquidation of the sum advanced. This arrangement was communicated to the mortgagee who acquiesced in it and the bill alleged that Mr. Wright, upon the 24th October, 1855, became the purchaser upon the terms and conditions above mentioned. From the time of the contract the plaintiff continued to reside in the house in which he had before resided and never paid any rent but he paid all taxes. He also regularly paid the premiums on the policy, except one in June, 1858, which he also would have paid but that he learned that it had been paid by some person acting on behalf of the defendant without any request on his part; when the premium for 1856 was due the plaintiff received a note from Mr. Wright informing him that the same must be paid without delay. Towards the end of the year 1855 Mr. Gamble had a conversation with Mr. Wright which led the former to suspect that Wright meant to depart from the arrangement and to claim the property as his own, and he thereupon wrote to Wright a letter reminding him of the original terms and stating his suspicions, in answer to which letter Wright wrote to Gamble as follows:—

January 8th, 1886.

SIR,—I do not understand the purport of your note. You and Lincoln cannot have forgotten the conditions on which I purchased the life interest, namely, that I would allow him and his family the use of the house and land, paying therefor the policy and other outgoings,

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

and that I would take the cottages and the meeting-house, commonly called a chapel, into my own hands, and that he should pay for the furniture by instalments. These are the conditions I named to Mr. Brown and several other neighbours even before I made the purchase. The deed which the society holds from Lincoln, Mr. Partridge has informed me, is null and void. The rent I have fixed upon is £10 a year to be paid in advance commencing on the day of purchase.

Yours obediently,

JOSEPH WRIGHT.

On the 15th June, 1856, Mr. Wright wrote to a member of the religious society which had previously rented the chapel the following letter :—

SIR,—You no doubt may be aware that I have purchased the life interest of Mr. John Lincoln, allowing him the house in which he lives and the land rent free for the benefit of his wife and young children, keeping in my possession the cottages and the meeting-house, commonly called a chapel, upon the latter of which I have fixed a rent of £10 per year to be paid in advance, commencing on the 24th October, 1855, the day on which the purchase was made.

Mr. Wright died at the end of the year 1856, and by his will he devised all his real estate to his daughter the defendant, then under age, and he appointed one Thomas Beck her guardian and sole executor of his will. Mr. Wright had received the rents during his life, and since his death they had been received by Mr. Beck, his daughter's guardian. After Mr. Wright's death Mr. Beck offered to allow the plaintiff £10 a year for his life if he would give up the house and land. The bill alleged that this offer was a repetition of one which had been made by Mr. Wright in his lifetime. Upon the plaintiff refusing Beck's offer he, as a next friend of Miss Wright, instituted an action of ejectment against Lincoln, who thereupon filed his bill praying for an injunction and a decree that Wright had purchased the premises as trustee for the plaintiff, and that upon payment to Wright's representatives of what was due to them they might be decreed to convey and assign the property and the policy to the plaintiff.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

Now with reference to the case as alleged in that bill, the agreement upon which it was alleged Wright had purchased the premises for and on behalf of the plaintiff was most unequivocally proved by Mr. Gamble, a perfectly disinterested witness, whose narrative of which had taken place left no doubt and could leave no doubt as to the truth of the allegations in the bill. This fact was dwelt upon by V. C. Kindersley, who heard the case, and who was of opinion that the letters of Wright were consistent with that agreement and supported the plaintiff's case. Referring to the facts of the case he said :—

The agreement was clearly proved by the plaintiff and Gamble who was a disinterested witness, and the letters of Wright were consistent with it.

The fact that the plaintiff also paid the premiums on the policy was a strong circumstance in support of the plaintiff's case, as in perfect accordance with the agreement established by the disinterested witness Gamble. A decree was accordingly made as prayed. Upon appeal Lord Justice Turner said :—

The question was whether there has been such an agreement as the bill alleged. His mind was satisfied that there had been, the questions deposed to as having been put by Mr. Wright whether the investment would be safe, whether the interest would be regularly paid and the arrangement for repaying the principal out of the surplus interest and other similar particulars, satisfied his mind even more than if the evidence had been more positively direct. If no such agreement existed to what could Mr. Beck's offer of £10 a year be ascribed. The case was not one of mere trust but of equitable fraud.

It is to be observed that the complainant in no part of her evidence has asserted that after the return of Mr. Brown to Winnipeg on the 16th October, 1879, she was present at any interview between him and her husband or her father-in-law, or any other person in relation to the matter excepting the one occasion of her executing the deed which she did, as she says, because

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

her husband asked her. Upon that occasion also she signed the receipt of that date together with her husband and father-in-law at the direction and request of her husband. Now as to the conversations which she speaks of as having taken place in the summer of 1879, there does not appear to be any reason to entertain any doubt that, while these conversations are alleged to have taken place, neither Mr. Brown nor the bank had any knowledge that the plaintiff had or claimed to have any estate in the lands in question which the bank were proceeding in court to foreclose as the property of Gilbert McMicken alone who had executed the mortgage; these conversations therefore must have, as indeed the plaintiff in her cross-examination admits, related wholly to Mr. Brown's pressing to get Gilbert McMicken's liability upon the judgment against him as endorser of McMicken and Taylor's property paid as well as his mortgage debt for the recovery of which the foreclosure proceedings were pending, and to the difference upon that subject existing between Mr. Brown and him as appearing in Mr. Gilbert McMicken's correspondence with the bank. The reference made to what Gilbert McMicken alleged had taken place between himself and Governor McDonald, who appears to have been supposed to have had some influence with the board of directors of the bank, to procure them to take Mr. McMicken's view of the propositions made by him instead of the view which appears to have been taken by the Winnipeg manager of the bank appears to have been the sole foundation for the plaintiff's expectation, if she ever did expect, to receive any surplus of the value of the mortgaged property if any should remain after payment of what was due to the bank in virtue of the mortgage and said judgment. In connection with these alleged conversations it is not to be lost sight of that

the representations alleged in the plaintiff's letter as having been made to her by Mr. Brown, and which are there made to be the sole foundation of the plaintiff's claim entirely, are in both of the letters filed by her, the instructions for which must have been given by the plaintiff and her husband (or perhaps by her husband alone), stated to have been made "in the month of October, 1879," while it appears that Mr. Brown was not in Winnipeg from the 20th September until the 16th October, and the deed was executed on the 22nd —six days after his return. Moreover, it is to be borne in mind that the allegation in the bill of the delivery to Mr. Brown and the sale by him, and the receipt by him of the proceeds of the value of, the chattel property assigned to Gilbert McMicken by McMicken and Taylor by way of security to him for endorsing their paper, is proved to be without foundation by Gilbert McMicken himself who gave evidence that that property was left by him to be dealt with in the insolvency of McMicken and Taylor as their property out of which the bank received their dividend of 40 cents equally as all other creditors of the firm.

Mr. Ross, the solicitor acting for the bank in the matter of the deed of October, 1879, and who is since deceased, appears, in view of the relationship between the parties appearing on the registry to have been from time to time owners of the property, and in view of the consideration appearing on the deeds by which the property thereby conveyed was conveyed from the one to the other, to have taken not unnecessary or unreasonable precautions in procuring the execution of the deed, and of the other documents required by him to be signed at the same time for the purpose of protecting the bank from any claim being thereafter made in respect of the property either by Gilbert McMicken, Alexander McMicken or his wife, the present plaintiff.

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

She had no better title to the mortgaged lots than she had to all the other property purported to be conveyed to her by the deed executed to her by Gilbert McMicken. That she paid nothing whatever by way of consideration for that deed is admitted by herself. She could not say why that deed was executed. She did not seem to know that it ever had been executed. The solicitor, Mr. Ross, appears to have had abundant reason to doubt the validity of that deed, and if invalid it is plain that the plaintiff had no title to the property. Under these circumstances her readiness to sign without inquiry whatever her husband should direct her to sign is easily understood. However Mr. Ross acted apparently with great prudence in requiring Gilbert McMicken and Alexander to sign the statement as to title which they declared to be true, as appears in the exhibit 42, and to get them and the present plaintiff to sign the receipt contained in exhibit 43 executed at the same time as the deed, for by that receipt all claims as to the rent payable under the lease which had been credited by the bank on the account kept with the mortgage debt were effectually determined whether such rent belonged in truth either to Alexander McMicken alone in whole or in part, or to Gilbert, or to the present plaintiff to whom it is clear that it did, in point of fact, belong ever since the date of the deed from Gilbert McMicken to her if Gilbert McMicken's own title and his conveyance to her could be held to have been executed *bonâ fide* for value. Again it is to be observed that in no part of the plaintiff's evidence is there any pretense that Mr. Brown ever made the allegations and representations alleged in the 12th paragraph of her bill, and which are made the corner stone of the foundation upon which the plaintiff's claim for relief is in her bill rested. True it is that Alexander McMicken alleges that in August, 1879, Mr. Brown did promise him

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

that if the bank got a deed of the property, and if upon its being sold it should realize more than enough to pay the two debts, the balance should come to his wife. He also says that on the morning that the deed was executed he finally made an arrangement with Mr. Brown that his, Alexander's, wife should sign the deed upon the distinct understanding that she should receive any surplus in the event of there being any after payment of said two debts out of the proceeds of the sale of the lands.

Now it sufficiently, I think, appears upon the evidence that Alexander McMicken is in reality the person interested in this action, and that it is he who is carrying it on, in the name it is true of his wife, but for his own benefit, although he is named on the record as a defendant. His evidence then must be regarded as that of a person most deeply interested; and when given for the purpose of varying the terms and effect of a deed deliberately signed by himself without any explanation being offered as to why what he alleges to have been the true terms upon which the deed was given were not reduced into writing must be received with the greatest caution and indeed suspicion. He was aware of the foreclosure proceedings taken against Gilbert McMicken on the mortgage. It was after the decree *nisi* was obtained in that suit that Gilbert McMicken was endeavouring to make the terms with the bank which appear in his letters, while Brown, the agent of the bank, was pressing to get a settlement of the amount due under the judgment, as well as that due under the mortgage. As I have already observed there is no reason to doubt the truth of the fact alleged by Mr. Brown, that neither the bank nor he had any knowledge that the plaintiff claimed to have any interest in the property until the discovery of the deed on registry from Gilbert to her by Mr. Ross as

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

solicitor for McCrosson on the occasion of his investigating the title with a view to negotiations between Gilbert and Alexander McMicken and McCrosson for the sale by Gilbert to McCrosson if they could obtain the concurrence of the bank. This discovery appears to have been first communicated to Mr. Brown immediately before his leaving Winnipeg on the 20th September, 1879. During the whole of the summer of that year Mr. Gilbert McMicken was dealing with the property, and was dealt with by the bank, as being sole owner of the equity of redemption therein. It seems, therefore, difficult to conceive that during the period Brown was negotiating with Alexander McMicken as representing his wife as true owner of that equity of redemption, and was making propositions to him or agreements with him founded upon the fact that his wife was the owner of the equity of redemption in the property mortgaged by Gilbert McMicken to the bank. I must say that, in my opinion, no reliance can be placed upon any of the evidence given to that effect.

Then with reference to what is alleged by Alexander to have taken place on the morning of the 22nd October, what he alleges took place then is, that what was said was said as in repetition merely of something alleged to have been previously agreed upon in the summer. He offers no reason whatever why, if that was the arrangement, it was not reduced into writing. There is no suggestion that the bank or their agent, Mr. Brown, wished that the true terms of the transaction should not appear in writing; however, Mr. Brown says that the arrangement as to the giving of the deed was not made with Alexander McMicken at all, but that it was made between him and Mr. Gilbert McMicken, and that the agreement was that the bank should have a deed of the property in liquidation of the whole indebtedness, irrespective of a note of

$900.00 which was Gilbert's own personal indebtedness. I may here repeat that there is no evidence that Mr. Brown ever claimed or asserted that the whole of the amount recovered by the judgment against Gilbert McMicken as endorser of the McMicken and Taylor paper still remained due, nor is there any reason to infer that either Gilbert or Alexander was ignorant that the bank had received the dividend of 40 cents in the dollar, declared out of the estate of McMicken and Taylor in insolvency and for which the bank had given credit on the judgment. Now this agreement alleged by Brown to have been made with him by Gilbert McMicken is the very one which was in terms subsequently carried out by Mr. Ross. Mr. Brown also says that when he and Gilbert McMicken made the above agreement Gilbert went out of his Brown's office to see Alexander, and to arrange to have the deed drawn, and we have the evidence of a young man then a student in the office of Mr. Ross who was acting in the matter as solicitor of the bank, that Alexander McMicken came to Mr. Ross's office and had an interview with Mr. Ross, and that he then gave instructions for preparation of the deed, saying that

> he was giving the bank the property, and that they were to release their claims against his father and himself, and that he wanted the deed drawn and sent across the river.

Thereupon it appears that Mr. Ross, in view it would seem of the doubtful state of the title, required the transaction to be closed by the execution of the several documents which accompanied the deed, and which were prepared by himself in his own handwriting. It is true that Alexander McMicken denies that he did give instructions for the preparation of the deed as alleged by the witness who testified to that effect, but as the onus lies upon the parties who seek

1892

McMICKEN v. THE ONTARIO BANK.

Gwynne J.

to vary the terms and effect of a deed deliberately executed by themselves it is sufficient to say that after the death of the solicitor who prepared and required the documents accompanying the deed to be signed, and after the death of the sole witness to the execution of the deed, there would be no security whatever in transactions affecting the transfer of the absolute interest in real estate if a court should interfere, upon such evidence as is given by the interested parties here, to vary the title as appearing in the documents so prepared and signed by the parties who now allege that those documents do not represent the intention of the parties.

In my opinion the appeal must be dismissed with costs.

PATTERSON J. concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Kennedy & O'Reilly.*

Solicitors for respondents, the Ontario Bank and Brown: *Richards & Bradshaw.*

Solicitor for respondents McMickens: *J. W. E. Darby.*

ROBERT GIBBONS, ASSIGNEE OF THE ESTATE OF ANDREW MORRISON, AN INSOLVENT (PLAINTIFF)..... APPELLANT;

AND

LEWIS McDONALD AND JOHN C. HEFFERNAN (DEFENDANTS)..... RESPONDENTS.

1891
*Nov. 26, 27.
1892
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Debtor and creditor—Mortgage—Preference by—Pressure—R.S.O. (1887) *c.* 124 *s.* 2.

A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as the result of pressure and for a *bonâ fide* debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank* v. *Halter* (18 Can. S.C.R. 88) and *Stephens* v. *McArthur* (19 Can. S.C.R 446) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favour of the defendants.

The plaintiff was assignee of one Morrison under an assignment for the general benefit of creditors and the action was brought to set aside a mortgage of a farm given by Morrison to the defendant McDonald a month before the assignment. The plaintiff claimed that this mortgage was void as a preference under R. S. O. (1887) ch. 124 sec. 2. The defendant McDonald had, before the action was brought, assigned the mortgage to the defendant Heffernan and plaintiff claimed as an alternative payment from McDonald of the proceeds of the assignment.

The facts proved on the trial were that Morrison was indebted to the defendant McDonald on certain pro-

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

(1) 18 Ont. App. R. 159. (2) 19 O.R. 290.

1891

GIBBONS v. McDONALD.

missory notes and wishing to leave the province of Ontario and go to Manitoba he proposed to give McDonald a mortgage on his farm for the amount and a further advance, McDonald having previously demanded payment of his debt. This arrangement was carried out. At the time Morrison knew that he was unable to pay his debts in full but as his credit had always remained good McDonald believed him to be solvent.

The action was tried before Mr. Justice Street who gave judgment for the defendants on the ground that McDonald had no knowledge of the insolvent condition of his debtor when he took the mortgage. The Court of Appeal affirmed this decision following *Molsons Bank* v. *Halter* (1) which had, then, just been decided. The plaintiff appealed.

Garrow Q.C. for the appellant. This case differs from *Molsons Bank* v. *Halter* (1) and *Stephens* v. *McArthur* (2) in two respects; there was no pressure and the whole estate of the debtor was assigned to McDonald.

As to what constitutes pressure see *Long* v. *Hancock* (3); *Brayley* v. *Ellis* (4); *Ex parte Griffith* (5). And as to the effect of assigning the whole estate see *Ex parte Fisher* (6); *In re Baum* (7); *Davies* v. *Gillard* (8).

Lash Q.C. for the respondent McDonald and *McDonald* Q.C. for respondent Heffernan cited *Stuart* v. *Tremain* (9); *McMaster* v. *Clare* (10).

Sir W. J. RITCHIE C.J.—I did not take part in the judgment of this court in the case of *Molsons Bank* v. *Halter* (1). I have most carefully read the judgments delivered in that case. Had I been unable to arrive

(1) 18 Can. S. C. R. 88.
(2) 19 Can. S. C. R. 446.
(3) 7 O. R. 154; 12 Can. S. C. R. 532.
(4) 9 Ont. App. R. 565.
(5) 23 Ch. D. 69.
(6) 7 Ch. App. 636.
(7) 10 Ch. D. 313.
(8) 21 Q. R. 431.
(9) 3 O. R. 190.
(10) 7 Gr. 550.

1892

GIBBONS v. McDONALD.

Ritchie C.J.

at a conclusion in consonance with that come to by the majority of the court I should have felt myself bound to follow that decision, but I am happy to say, after a careful consideration of the case, that I entirely agree with the reasoning of my brother Strong and the conclusion at which he arrived.

That case disposes of the present in which there was no concurrence of intent, on the one side to give and on the other to accept, a preference over other creditors, inasmuch as there is nothing to show that the defendant was aware of the insolvency of the debtor, and there is nothing in the evidence to suggest any bad faith or collusion between the defendant and his debtor.

STRONG J.—I am of opinion that this appeal should be dismissed with costs, my reasons for this conclusion being that pressure having been proved there was not a preference such as the statute avoids. Having already in the cases of *Molsons Bank* v. *Halter* (1) and *Stephens* v. *McArthur* (2) stated my opinion as to the proper meaning and construction of the statute I do not feel called upon to repeat them again. Moreover I consider the question settled and concluded so far as authority goes by the decisions of this court in the two cases referred to.

TASCHEREAU and GWYNNE JJ. concurred in dismissing the appeal.

PATTERSON J.—The decisions of this court in *Molsons Bank* v. *Halter* (1) and in *Stephens* v. *McArthur* (2) settle the questions of law in this case against the

(1) 18 Can. S.C.R. 88. (2) 19 Can. S.C.R. 446.

1892

GIBBONS v. McDONALD.

Patterson J.

appellant, and it has been found that there was not in fact any intent to prefer. Therefore the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Dickson & Hays.*

Solicitor for respondent McDonald: *F. Holmstead.*

Solicitor for respondent Heffernan: *J. L. Darling.*

ROBERT B. HUMPHREY (SUPPLIANT)...APPELLANT; 1892

AND *Feb. 22, 23.

HER MAJESTY THE QUEEN (DEFENDANT)..... } RESPONDENT. *May 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Carriage of mails—Authority of P. M. G. to bind the Crown—R. S. C. c. 35.

An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of $10,000 a year, made by parol with the Postmaster-General, and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than $1,000 it could not be made without the authority of an order in council and if temporary it was revocable at the will of the Postmaster-General.

APPEAL from a decision of the Court of Exchequer (1) in favour of the respondent.

The suppliant, as agent of a steamship company, had tendered for the contract to carry the mails between St. John, N.B. and Digby, N.S. His tender was not accepted but the Postmaster-General verbally agreed to allow him to carry the mails until a contract should be made for the service which offer the suppliant accepted by the following letter :—

OTTAWA, Ont., 30th October, 1888.

To the Honourable John Haggart, Postmaster-General:

SIR,—I beg to state that I hereby accept your proposition to carry Her Majesty's mails between St. John and Digby and Annapolis upon usual conditions, and at and upon the same price as has been subsisting between your department and the Nova Scotia Steam-

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

(1) 2 Can. Ex. C. R. 386.

1892

HUMPHREY v. THE QUEEN.

ship Company, temporarily, that is, for a period of nine months, subject, as usual, to cancellation at an earlier period if deemed necessary by your department.

I have the honour to be,

Your obedient servant,

(Signed) ROBERT B. HUMPHREY,

On behalf of N.B. and N.S.SS.Co.

The price formerly paid for the service was $10,000 per annum and the usual cancellation referred to was on giving six months notice, of the intention of the department to terminate the contract.

The suppliant carried the mails under this agreement for some two months when the department notified him that the agreement was at an end, and the mails were thenceforth carried by a government steamer.

The suppliant, by petition of right, claimed damages from the Crown for breach of contract claiming that he had expended considerable money in preparing steamers to carry the mails. The case was tried at St. John, N.B., when judgment was given for the suppliant and a reference ordered to assess the damages.

On application of the Crown the case was reopened and further evidence by the Postmaster-General and his deputy submitted, when the previous decision was reversed and judgment given for the Crown. The suppliant appealed.

Pugsley Q.C., Solicitor General of New Brunswick, for the appellant.

Hogg Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—Assuming a contract was entered into between the Postmaster-General as alleged by the suppliant, had the Postmaster-General power to bind the Crown by such a contract? This de-

1892

HUMPHREY v. THE QUEEN.

Ritchie C.J.

pends on the statutory authority conferred on the Postmaster-General by R. S. C. cap. 35, by which the power of the Postmaster-General to make contracts for the carriage of mails is governed and to the provisions of which every contract or arrangement for the carriage of mails to bind the Crown must conform.

Sections 54, 60 and 62 of the act provide as follows:

MAIL CONTRACTS AND CONTRACTORS.

54. The Postmaster-General, before entering into any contract for carrying the mail involving an annual cost of more than two hundred dollars, shall give at least six weeks previous notice by advertisement in such newspapers as he selects in each case, and by public notices put up in the principal post offices concerned in such contract,—that such contract is intended to be made, and of the day on which tenders for the same will be, by him, received.

2. The contracts, in all cases in which there is more than one tender, shall be awarded to the lowest tenderer who offers sufficient security for the faithful performance of the contract, unless the Postmaster-General is satisfied that it is for the interest of the public not to accept the lowest tender.

60. The Postmaster-General may, with or without previous advertisement, contract with any railway or steamboat company for conveying the mail; but no contract involving the payment of a larger sum than one thousand dollars shall be entered into without the approval of the Governor in Council.

62. The Postmaster-General may make temporary contracts for such services until a regular letting in the form prescribed can take place.

This contract in this case was, as appears by the suppliant's letter of acceptance, only temporary and, as such, terminable when a regular contract was entered into as provided by sec. 62. If not, being for a larger sum than $1,000 the Postmaster General had no authority to enter into it without the approval of the Governor in Council.

STRONG J.—At the conclusion of the argument. I was of opinion that the judgment of the Exchequer Court was clearly right, and subsequent consideration has not led me to alter this opinion.

Under R.S.C. cap. 35 sec. 60 the Postmaster-General had no power to enter into such a contract as this,

1892

HUMPHREY v. THE QUEEN.

Strong J.

without an order in council, save under the authority conferred by sec. 62, which is expressly confined to a temporary contract until a permanent contract should be effected. The Postmaster-General treated this as a temporary contract under sec. 62 and accordingly put an end to it so soon as he had effected a regular permanent contract. In this he was clearly within the terms of the statute. The contract stated in the suppliant's letter of 30th October, 1888, expressly recognizes it as being a temporary contract and one which might be put an end to at an earlier period than nine months at the election of the Postmaster-General. I can see no ground whatever for doubting that this contract is referrible only to the powers conferred by sec. 62 and that it was consequently terminable at the will of the Crown. The words "subject as usual to cancellation at an earlier period if deemed necessary" indicate as strongly as words can that such was its meaning. Further, I am unable to see any reason for implying from the words just quoted any condition that the cancellation should be in any particular terms or otherwise than absolute at the pleasure of the Postmaster-General.

The appeal wholly fails and must be dismissed.

TASCHEREAU J. concurred.

GWYNNE J.—Whether it was or was not prudent in the appellant to enter into a contract in the terms of his letter of the 30th October, 1888, if the receipt of that letter and the manner in which it was dealt with by the Post Office Department constituted a contract in the terms of the letter, is not the question. In my opinion it was not in the power of the Postmaster-General to enter into such a contract, that is to say for a definite period of nine months and exceeding $1,000, and further that if the letter is to be construed as containing the terms of the contract which the appellant

did enter into with the Postmaster-General, it was terminable at the pleasure of the department and therefore that this appeal should be dismissed. I am of opinion further that the learned Judge of the Exchequer Court came to a correct conclusion when he held that the Postmaster-General had not entered into a contract with the appellant for the period of nine months or for any definite period. The intention of the department was, there can I think be no doubt, to enter into an arrangement purely *temporary* in accordance with the usual practice of the department as to which practice the evidence offered was admissible and should have been received.

PATTERSON J.—I do not see how to get over the limitation contained in section 60 of the Postal Service Act (1) which requires the approval of the Governor in Council whenever the contract involves the payment of a larger sum than $1,000. That limitation of the authority of the Postmaster-General seems to apply to temporary contracts effected under section 62 as well as to what that section calls a regular letting in the form prescribed. We have not, therefore, the duty of construing the contract on which the appellant relies, but I may say for myself that I see no great difficulty in holding that it was a contract for nine months, subject to be cancelled at an earlier period *if necessary*, and I do not think any necessity for its cancellation is shown.

The absence of the order in council makes it necessary to dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellant: *W. Pugsley.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

(1) R.S.C. ch. 35.

1892

*Feb. 26

*May 2.

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG, WILLIAM H. DELONG AND OTHERS (DEFENDANTS) ... . } APPELLANTS;

AND

THE ATTORNEY-GENERAL OF NOVA SCOTIA ON THE RELATION OF S. WATSON OXNER (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Maintenance of county buildings—Establishment of county court house and jail—Right to remove from shire town.

By R.S.N.S. 5th Ser. c. 20 s. 1, as amended by 49 V. c. 11, "county or district jails, court houses and sessions houses may be established, erected and repaired by order of the municipal councils in the respective municipalities." In 1891 an act was passed empowering the municipality of Lunenburg to borrow a sum not exceeding $20,000 "for the purpose of erecting and furnishing a court house and jail for the county of Lunenburg, or repairing and improving the present court house in said county" provision being made for the municipality of Chester and the town of Lunenburg (separate corporations in said county) respectively contributing towards payment of said loan.

The town of L. is the shire town of said county where the sittings of the Supreme Court are held as required by statute, and where the county court house and jail had always been situated. In pursuance of the above authority to borrow the council of the municipality, by resolution, proposed to build a court house and jail at B. another town in the county, intending after they were built to petition the legislature to transfer the sittings of the Supreme Court to B. The corporation of L. caused an injunction to be applied for and obtained restraining the municipal council from erecting a court house and jail, for the general purposes of the county, at B. or expending in such erection any funds in which the municipality of C. or the town of L. or either of them, are interested. On appeal from the judgment granting such injunction :—

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

1892

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG v. THE ATTORNEY-GENERAL OF NOVA SCOTIA.

Held, that the municipality could not, under the statutory authority to establish and erect a court house and jail, remove these buildings from the town of L. and so repeal and annul the statutes of the legislature which had established them in L. Without direct legislative authority therefor the county buildings could only be erected in the shire town. The injunction was, therefore, properly granted.

APPEAL from a decision of the Supreme Court of Nova Scotia ordering an injunction to issue against the defendants.

The facts of the case sufficiently appear from the above head-note and from the judgment of Mr. Justice Gwynne who sets out the statutes affecting the proceedings and the resolutions of the municipality in respect to the erection of the buildings in question.

The Supreme Court granted an injunction in the following terms :—

"It is ordered that the defendants herein and each and every of them, their and each and every of their workmen and servants, be and they are hereby restrained and enjoined from erecting or causing to be erected a court house and jail for the general county purposes of the county of Lunenburg at Bridgewater, in the county of Lunenburg, under or in pursuance of the resolution of the municipal council of the municipality of Lunenburg, passed on the 7th day of May, 1891, and said defendants and each and every of them are also hereby restrained and enjoined from expending or causing to be expended in the erection of a court house and jail at Bridgewater, in the county of Lunenburg, any funds of the municipality of Lunenburg in which the municipality of Chester and the municipality of the town of Lunenburg, or either of them, are interested."

From the judgment granting this injunction the defendants appealed.

1892

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG v. THE ATTORNEY-GENERAL OF NOVA SCOTIA.

Ritchie C.J.

W. B. Ritchie for the appellants.

Russell Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—Are the defendants, appellants, in this case not endeavouring indirectly to do that they have no legal authority to do directly, viz., to change the shire or county town of the county of Lunenburg from the town of Lunenburg to the town of Bridgewater? I think the new county court house and jail should not be erected in Bridgewater until the legislature has authorized the change of the place for the transaction of the judicial business of the county from Lunenburg to Bridgewater; and until such legislative action, in my opinion, the county court house and jail cannot be erected elsewhere than in Lunenburg.

Therefore I think the judgment of the Supreme Court of Nova Scotia right and the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal must be dismissed with costs.

TASCHEREAU J.—I am of the same opinion. I think there is nothing in the appeal.

GWYNNE J.—Long prior to the year 1863 the town of Lunenburg was by divers acts of the legislature of the province of Nova Scotia established as the county town of the county of Lunenburg, and the place where the court house and jail for the county were erected and where it was enacted that the sessions of the Supreme Court of the province should be held. In 1863 the township of Chester which constituted a part of the county of Lunenburg was by ch. 52 of the acts of the legislature of that year erected into a separate dis-

trict municipality for certain purposes having a General Sessions of the Peace with the same powers as if it were a separate county, but it was enacted that the district should contribute and pay annually one-fourth part of the sum necessary in each year for the county jail and court house and all expenses connected therewith and with the administration of justice, and it was further expressly enacted that nothing in the act should be construed to exempt the inhabitants of the district from serving as jurors "at the Supreme Court at Lunenburg." At this time the town of Lunenburg where the said jail and court house were erected and where the sessions of the Supreme Court for the county were required to be held was an unincorporated town situate within the county of Lunenburg. In 1879, by an act of the legislature of that year now embodied in ch. 56 of the 5th series of the Revised Statutes enacted in 1884, the inhabitants of the district of Chester were declared to be a body corporate under the name of the municipality of the district of Chester and the inhabitants of the residue of the County of Lunenburg to be a body corporate under the name of the municipality of Lunenburg. In 1885, by chapter 72 of the provincial statutes of that year, the inhabitants of the said town of Lunenburg, within the limits in the act defined, were declared to be a body corporate under the name of the town of Lunenburg for municipal purposes, and it was thereby enacted that the said town thereby incorporated

shall annually pay to the treasurer of the municipality within which the same is situate on the first day of June, an annual sum in lieu of all county rates and assessments hitherto levied or paid, which sum as nearly as may be shall be equivalent to the benefit derived by the town from the public services supported by the revenues of the county. Such sum shall be composed of the following items, that is to say, a *pro ratâ* proportion of the amount paid by the county on account of the administration of criminal justice an amount equal to

1892

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG v. THE ATTORNEY-GENERAL OF NOVA SCOTIA.

Gwynne J.

the cost of maintaining in the county jail all prisoners committed to jail by sentence of the stipendiary magistrate of the town or committed to jail under process out of the municipal court—an amount equal to the cost of maintaining all paupers chargeable to the town who shall be maintained in any poor house or like institution supported by the funds of the county, and its proportion of county school rates under the provisions of ch. 29, Revised Statutes.

In the following year the legislature by ch. 27 of the statutes of 1886, passed in amendment of ch. 58 of the Revised Statutes, 5th series, made provision for ascertaining and determining the amounts in each year payable by all incorporated cities, towns and districts within the limits of a county municipality for county purposes, and for levying such amounts in case of default in levying any of them being committed by any of such incorporated cities, towns or district municipalities. Section 1 of ch. 20 of the Revised Statutes, 5th series, enacted that:

> County or district jails, court houses and session houses may be erected and repaired by order of the municipal councils in the respective municipalities.

By way of amendment of this section it was enacted by ch. 11 of the statutes of 1886 that the word "established" should be inserted between the words "be" and "erected," making the section read:

> County or district jails, court houses and session houses may be established, erected and repaired by order of the municipal councils in the respective municipalities

We are called upon now not to give an exhaustive meaning to the word "established" as thus here introduced; that would perhaps be a very difficult task; but we are called upon to determine whether, by the introduction of that word, the municipal council of the municipality of Lunenburg are empowered to repeal in effect the statutes of the legislature which had established the jail and court house for the county in the town of Lunenburg in which court house the ses-

sions of the Supreme Court for the county are by statute required to be held; and by erecting a jail and court house in a different part of the county to establish such place as the county town and the place where the jail and court house for the county should in future be maintained, and at the same time to hold the district of Chester and the town of Lunenburg liable to contribute to the erection and maintenance of such jail and court house in the same manner as they had been obliged to do by the provisions of the statutes which had subjected them to liability in relation to the jail and court house which the legislature had located in the town of Lunenburg. I cannot concur in the contention that the ch. 27 of the acts of 1886 is open to any such construction. We cannot upon such language as is used in that act attribute to the legislature an intention to vest in a municipal council power at their pleasure to repeal, alter, modify or annul acts of the legislature in such a manner. It may be that Bridgewater is a much better place than Lunenburg for the site of the jail and court house for the county, but that is a matter for the legislature expressly to determine and at the same time to say whether the district of Chester and the town of Lunenburg should be subjected to the same liability as to the jail and court house if Bridgewater should be made the county town as they were subjected to while they were maintained at the town of Lunenburg. That neither the municipal council of tne county nor the legislature entertained the idea that the chap. 27 was open to the construction now contended for on behalf of the municipality of Lunenburg appears from the following circumstances in the evidence laid before us. On the 22nd January, 1891, the council of the municipality passed the following resolution:—

1892

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG v. THE ATTORNEY-GENERAL OF NOVA SCOTIA.

Gwynne J.

Whereas this council has passed a resolution that they would with the co-operation of the town council of Lunenburg and of the municipal council of Chester take steps to build a court house and jail at as early a date as possible: Therefore resolved, that a committee of three be appointed to obtain information in regard to the kind of building or buildings suitable. Also respecting the cost of the same and the best site for the same, and submit to the council such information at the next semi-annual or special session. This committee to co-operate with a committee to be appointed by the town council for the same purposes.

It was then moved and passed that—

Mr. Chesley draft a bill to borrow money and present for approval at evening session.

Accordingly at the evening session of that day, as appears by the minutes of the council,

Mr. Chesley read a bill prepared to be presented at the ensuing session of the local legislature, to enable this municipality to borrow a sum of money not to exceed twenty thousand dollars for the building of a new court house and jail for the county of Lunenburg, and it was thereupon moved, that the bill so read should be placed in the hands of the municipal clerk to be certified and forwarded to the Provincial Secretary.

The session of the legislature commenced on the 2nd day of April, 1891, and the bill so prepared was introduced and upon the 19th day of May became law by an act passed that day intituled "an act to enable the municipality of Lunenburg to borrow money for a court house," whereby the council of the said municipality was empowered to borrow a sum of money not exceeding $20,000 upon debentures to be issued under the act—

For the purpose of erecting and furnishing a court house and jail for the county of Lunenburg, or repairing and improving the present court house in said county.

And for the purpose of paying the principal and interest of the debentures to be issued under the act, it was enacted that:

The municipality of Chester and the town of Lunenburg shall respectively contribute towards the sums required to pay off the principal

and interest of such loan from time to time, amounts in proportion to the ratios of the total assessment of the municipality of Chester and the town of Lunenburg respectively to the total assessment of the whole county of Lunenburg according to the assessment last made before the passing of this act, &c.

Now, if the municipal council had the power now insisted upon under the ch. 27 of the act of 1886, of erecting the court house and jail at Bridgewater wholly irrespective of the above act, for the municipality now say that they are not at all proceeding under this act, there would have been no occasion for the procuring the passage of the above act. While the above bill was before the legislature, and shortly before it was passed into an act, the council of the municipality of Lunenburg, not in co-operation with the municipalities of Chester and the town of Lunenburg, but in despite of and against the remonstrances of those municipalities, upon the 7th May passed a resolution that the new court house and jail should be built at Bridgewater. It was argued that the municipality of Lunenburg had at any rate the right under that resolution to erect a local municipal court house and jail, but the order for the injunction granted by the Supreme Court does not interfere with their doing so. All that it prohibits is the erecting or causing to be erected a court house and jail for the general county business for the county of Lunenburg at Bridgewater, and it restrains and enjoins the defendants from expending or causing to be expended in the erection of a court house and jail at Bridgewater, any funds in which either of the municipalities of the district of Chester or of the town of Lunenburg is interested. The order and the injunction issued thereon must, in my opinion, be maintained and the appeal must be dismissed with costs. Further legislation must, in my opinion, be obtained before the council of the municipality of Lunenburg can attain the object which

1892

THE WARDEN AND COUNCIL OF THE MUNICIPALITY OF LUNENBURG v. THE ATTORNEY-GENERAL OF NOVA SCOTIA.

Gwynne J.

manifestly they have been endeavouring to attain by the course which they have pursued, namely, the removal of the county town and the court house and gaol for the county and the sessions of the Supreme Court from Lunenburg to Bridgewater.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellants: *F. B. Wade.*

Solicitor for respondent: *S. A. Chesley.*

THE KINGSTON AND BATH ROAD COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

HANNAH MARY CAMPBELL (PLAINTIFF) ..... } RESPONDENT.

1891
*Nov. 25,26.

1892
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Liability of Road Co.—Collector of Tolls—Lessee.

C. brought an action against K. & B. Road Co. for injuries sustained from falling over a chain used to fasten the toll-gate on the company's road. On the trial the following facts were proved: The toll-house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell sustaining the injuries for which the action was brought.

The toll collector was made a defendant to the action but did not enter a defence. It was shown that he had made an agreement with the company to pay a fixed sum for the privilege of collecting tolls for the year, and was not to account for the receipts. The company claimed that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contains no express authority for leasing the tolls, but uses the term "renter" in one section, and in another speaks of a "lease or contract" for collecting the tolls.

The company claimed, also, that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part which relieved them from liability for the accident.

---

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

1891

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls the company, under the finding of the jury was liable for his acts.

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

The facts of the case are sufficiently set out in the above head-note and in the judgment of Mr. Justice Gwynne.

The action was tried before a jury who answered the questions submitted to them adversely to the defendants. The questions with the answers of the jury were as follows :—

"1. Was the passage between the toll house and the toll gate at the time of the accident in a reasonable state of repair, and reasonably safe for foot passengers? No.

"2. If not, were the defendants guilty of negligence in not having it so? Yes.

"3. Did such negligence cause the injury to the plaintiff? Yes.

"4. Was the plaintiff at the time of the accident using ordinary care and caution? Yes.

"5. Was the gate and were its attachments the gate and attachments furnished by the defendant company to Ryder for the purpose of collecting toll? Yes.

"6. Was the manner in which the gate and its attachments were fastened at the time of the accident the manner in which Ryder was authorized by the defendant company to fasten them? Yes.

"7. What damage did the plaintiff sustain by reason of the negligence of the defendants? $500."

(1) 18 Ont. App. R. 286.

1891

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

The trial judge reserved a question of law as to the relation between the defendants and the toll collector and subsequently decided that such relation was that of master and servant, not that of lessor and lessee or landlord and tenant. Judgment was entered for the plaintiff for the damages found by the jury.

The Court of Appeal affirmed this judgment, two of the judges dissenting and holding that the toll collector was a lessee of the tolls. The defendants appealed.

Britton Q.C. for the appellants. There was no evidence of negligence sufficient to make the company liable. *Rounds* v. *Town of Stratford* (1); *Ray* v. *Village of Petrolia* (2); *Maxwell* v. *Township of Clarke* (3); *Bleakley* v. *Corporation of Prescott* (4); *Great Western Railway Co.* v. *Davies* (5).

The liability is no greater than if the accident had happened on a private way. *Tolhausen* v. *Davies* (6).

The plaintiff was not entitled to use this board walk as part of the highway. *Crisp* v. *Thomas* (7). And she was guilty of contributory negligence. *Burken* v. *Bilezikdji* (8).

Ryder was lessee of the tolls and defendants are not responsible for his acts. *Rich* v. *Basterfield* (9); *Jones* v. *Corporation of Liverpool* (10).

Lyon for the respondent. Appellants cannot rely on misdirection in the judge as to the question of relation between them and Ryder as they did not take the objection in the divisional court. *Furlong* v. *Reid* (11).

As to negligence see *Tucker* v. *Axbridge Highway Board* (12).

(1) 26 U.C.C. P. 11.
(2) 24 U.C.C. P. 73.
(3) 4 Ont. App. R. 460.
(4) 12 Ont. App. R. 637.
(5) 39 L.T.N.S. 475.
(6) 59 L.T.N.S. 436.
(7) 63 L.T. 756.
(8) 5 Times L.R. 673.
(9) 4 C.B. 783.
(10) 14 Q.B.D. 890.
(11) 12 Ont. P.R. 201.
(12) 5 Times L.R. 26.

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Ritchie C.J.

The chain was a nuisance for the maintenance of which appellants are liable. *Sandford* v. *Clarke* (1); *Todd* v. *Flight* (2).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be dismissed. I think there was ample evidence to show that the chain was not properly attached to the toll gate but was stretched across the sidewalk and that the plaintiff, without any contributory negligence, fell over this chain and sustained the injuries complained of. It was alleged that the toll-keeper was a lessee of the tolls under agreement with the defendants, and that the defendants were not liable for his negligence. But it appears that when he took possession, and for a long time previously thereto, the chain was there held in place by the stone just as it was when the accident in this case occurred. The trial judge held that he was there as a servant of the company; his decision was confirmed by both the courts below and was quite justified by the evidence.

STRONG J.—I am of opinion that this appeal should be dismissed with costs for the reasons given by the majority of the Court of Appeal.

TASCHEREAU J.—I would dismiss this appeal. I do not see that we would be justified in this case in interfering with the verdict of the jury which, in my opinion, is amply justified by the evidence and was approved of by the learned judge at the trial. I adopt Mr. Justice Osler's reasoning in the court below.

GWYNNE J.—The respondent brought an action against the above company and one Joseph Ryder for injuries sustained by her upon a road which is the pro-

(1) 21 Q.B.D. 398. (2) 9 C. B. N. S. 377.

perty of the above company, for which injuries it was contended that both the company and Ryder were liable. The plaintiff in the action alleged, as the fact is, that under the provisions of an act of the Parliament of the late province of Canada the above company are the owners of the road whereon the accident of which she complained happened, and that the defendant Ryder was their servant and as such collects the tolls at gate No. 1 on said road. She then alleged that on the night of the 15th of October, 1889, while lawfully travelling upon the said road she tripped and fell over a chain which the defendants carelessly and negligently had stretched across the said road, and that she sustained serious bodily injury. She then averred that the defendants unlawfully constructed and maintained a nuisance upon the said road whereby the plaintiff received serious bodily injury. She then averred that the defendant company, in disregard of the obligations imposed upon them by their act of incorporation, neglected to keep the said road in repair whereby she sustained injury as aforesaid, and she therefor claimed $5,000 damages.

The defendant company in their statement of defence pleaded that their road on the night in question was in a good and lawful state of repair; that the grievances in the claim mentioned were caused by the plaintiff's own negligence, improper conduct and want of ordinary care; that at the time of the happenings of the said alleged grievances in the statement of claim mentioned the defendant, Joseph Ryder, was the lessee of the tolls collectible at the said toll gate, and was entirely in the charge, management and control of the said toll gate as such lessee and not as the servant of the company, and that it was his duty as such lessee to manage and control the said gate and the chain by which it was fastened; and lastly

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

the defendant company pleaded that at the time of the happening of the said alleged grievances in the statement of claim mentioned, the plaintiff was unlawfully in the place where it is alleged they happened, namely, upon a part of the company's property north of their toll gate there and lawfully reserved from the use of the public. The defendant Ryder suffered judgment by default to go against him, and the case came down for trial against the company before Armour C.J.

The plaintiff was called as a witness on her own behalf but she failed to give any clear account of how the accident happened ; it may be admitted, however, upon the evidence of her daughter who was with her, that when they approached the toll gate, which was closed and apparently fastened, her mother went a few feet—about four feet—ahead of her, and instead of going to the door of the gate house, which could easily have been done, and calling some one to open the gate she went round the gate post nearest the toll house, getting up for that purpose on a narrow plank walk which served as a stoop or approach to the door of the toll house, and immediately after getting round the gate post she jumped on to the macadamized road and in jumping tripped and fell. Now, directly opposite the gate post which she went round there is a bay window which projects across the narrow plank walk or stoop, and reaches to within about ten inches of the gate post. On the Kingston side of the gate, which was the side from which the plaintiff approached the gate, this narrow plank walk which served as a stoop or approach to the door of the toll house extended from the extremity of the house on the Kingston side of the gate to the projecting window 19 inches in width; then it narrowed until at the gate post it was only about 10 inches in width and a little further on the outermost point of the projecting window reached almost to the ex-

tremity of the plank walk, so that there was barely space for a person to pass round from one side of the gate to the other between the projecting window and the gate post where, from whatever cause proceeding, the plaintiff met with the accident which caused her the injuries complained of. The only cause assigned for the accident was a chain about one inch wide and half an inch thick by which the gate when closed was accustomed to be kept so. There were two ways in which this chain, which was not quite three feet long, was accustomed to be used by the lessee of the tolls and toll house. 1st. By a staple on the outside of the outer scantling on which the plank walk is constructed directly opposite the gate post with which the chain was connected; this was the mode and the only mode provided by the company for the purpose; 2nd. By laying the chain flush on the plank and extending it from the gate post across the plank towards the door of the toll house and placing a stone upon it. This was a plan adopted and occasionally made use of by the lessee for the time being, and there was no evidence that any officer of the company was aware of this manner of using and fastening the chain until after the accident. How the chain was fastened on the night of the accident did not directly appear for Ryder the lessee was from home and the gate was in charge of his wife, who said that as she had never heard or known of the accident until a fortnight after it was alleged to have occurred she could not say on which of the above two ways the chain was fastened on the particular night in question. As, however, the evidence was that if fastened to the staple in the way first above mentioned, the chain would not have lain on the plank walk at all, and that in such case the accident could not have been caused by the chain, and as the evidence also was that on the night in question

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

the chain did lie on the plank walk, it may be admitted that upon that night the chain was fastened by the stone and not by the staple.

The evidence further showed that some time prior to the 1st of May, 1889, the company exposed for sale at auction the tolls of the gate in question for one year from the 1st May, 1889, and that Ryder, being the highest bidder of a lump sum, not named, payable in equal monthly instalments, for which he gave at the time endorsed notes, was put by the company into possession of the toll house as lessee thereof, and of the tolls to be collected at the gate for the term of one year from the said 1st day of May, 1889, and he continued to occupy as such lessee throughout the year but no written lease was executed to him. He had, however, the enjoyment of the possession of the house and of the right to collect the tolls leviable at the gate as lessee, and was recognized as such by the company for the full period of the year. It was further in evidence that he never asked for or received from the company any directions as to the manner in which he should fasten the gate. He exercised his own discretion as to that. At the close of the case the learned counsel for the company submitted that as against them there was no evidence sufficient to go to the jury. The learned Chief Justice declined to adopt this view and he submitted to the jury the following questions (1).

All of these questions the jury answered in a sense unfavourable to the defendants, and they assessed the damages sustained by the plaintiff at $500. Upon the answers of the jury to the above questions the learned chief justice, being of opinion that the relation existing between the company and Ryder was, as matter of law, not that of lessor and lessee and landlord and tenant but that of master and servant, and that the company were liable for whatever was done

(1) See p. 606.

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

by Ryder in the course of his employment as such servant of the company, rendered judgment for the plaintiff. From this judgment the defendant company appealed to the Divisional Court of Queen's Bench for Ontario upon the grounds: 1st, that the findings of the jury were against law and evidence, and the weight of evidence, and that the company were not shown to have been guilty of any negligence, and that therefore there should be a new trial; or 2nd, that a nonsuit should be entered as to the defendant company or judgment entered in their favour, and the action against them dismissed on the grounds among others that they were not guilty of any negligence, and that the judgment rendered against them was contrary to law and evidence, and that the company were not liable in law for the alleged grievances of which the plaintiff complained, or for the manner in which the toll gate and chain were managed by their lessee Ryder. The Divisional Court refused to interfere with the judgment, holding that the findings of the jury upon the questions submitted to them were warranted by the evidence, and that the jury had in effect found, and that the evidence warranted the finding, that the company handed Ryder the chain and told him he might stretch it across the highway in a particular manner in order to keep the gate closed. They further were of opinion that the negligence causing the accident was the negligence of the company in supplying Ryder with improper means of closing the gate, and they were further of opinion that the suffering the chain to lie on the plank as described in the evidence constituted sufficient evidence of their not being in repair for which they were expressly by their act of incorporation made liable. Upon appeal to the Court of Appeal for Ontario the learned Chief Justice was of

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

opinion that as nothing was said in the act under which the company became incorporated giving them in express terms power to lease they could not demise or lease their tolls, and therefore that he could not look upon Ryder as occupying any position higher than collector of tolls for the company; that the company were the parties in complete possession and charge of the tolls, toll houses and road, through Ryder as their servant, and therefore answerable for his neglect and omissions. The learned Chief Justice further added:

> It is clear that this passage (by which the plaintiff went round the gate post) was left by defendants for foot passengers at night. I think they were legally bound to see that it was kept in a reasonably safe state for that purpose.

Mr. Justice Burton, in what appears to me a very able judgment, came to the conclusion that in point of law the company could demise the toll house and tolls to Ryder, and that to his mind it was perfectly clear that Ryder was a lessee of the company; that the relation between him and the company was that of landlord and tenant and not of master and servant; and that for Ryder's acts of the nature complained of the company were not responsible; and he was of opinion that judgment ought to be ordered to be entered for them in the court below. He pointed out very clearly that *Hole* v. *Sittingbourne and Sheerness Railway Co.* (1) which had been relied upon by the Divisional Court of Queen's Bench, and cases of that class, had no application whatever to the present case. He was also of opinion that no case of want of repair was shown.

In this judgment Mr. Justice McLennan entirely concurred. Mr. Justice Osler, while apparently of opinion that the company had full power to create between themselves and Ryder the relation of land-

(1) 6 H. & N. 489.

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

lord and tenant, thought himself bound by the findings of the jury, as to which he thought there was some evidence, not much but in his opinion sufficient, to support the findings, and that this being so it mattered not whether Ryder was tenant or servant of the company. He thought the chain being laid where it was when under the stone did not constitute want of repair, but an obstruction of their road for which the company were responsible even if Ryder was their tenant and not their servant; and he thought that although it may have been erroneous in the learned Chief Justice who tried the case to hold that the relation between the company and Ryder was that of master and servant, a new trial was unnecessary, for that upon the answers of the jury to the fifth and sixth questions he thought that the judgment should not be interfered with.

Upon this division of opinion in the Court of Appeal for Ontario the case comes before us. In the judgment of Justices Burton and McLennan I entirely concur, and also in that of Mr. Justice Osler in so far as he concurs with them in the opinion that the company had full power to lease their toll house and tolls to Ryder. As to their perfect power to do so I cannot entertain a doubt. By the 6th section of the act, chapter 159 R. S. O., it is declared that the company when registered as directed in the act may acquire and hold any lands, tenements and hereditaments useful and necessary for the purposes of the company, and may afterwards sell and convey the same. By the 29th section that all lands taken by the company for the purposes of their road, and purchased and paid for by the company, shall become the property of the company. By the 66th section that the road of the company may be sold under legal process against the company, and when

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

sold the sale shall be deemed to pass the road itself with all rights, privileges and appurtenances to the purchaser, subject to all duties and obligations imposed by law on the company. Then these are the sections referred to by Justices Burton and Osler section 98 by which it is declared that nothing in the act contained shall affect the sale of tolls which any party is entitled to collect under any lease or contract executed before the 14th day of June, 1853; section 129 by which it is enacted that if any renter of tolls at any gate on any road takes a greater toll than is authorized by law, he shall forfeit the sum of $20; sec. 156 which enacts that the three preceding sections thereto shall apply to and be held binding upon any lessee of such road or any owners whether a joint stock company or otherwise. Then the clauses containing the provisions as to the tolls authorized to be collected constitute the sole restriction imposed by the act upon the rights and powers possessed and enjoyed by the company over property declared by the act to be vested in them, and the common law right therefore of leasing their own property, subject only to the provision as to the tolls authorized to be collected, is, as it appears to me, beyond all doubt vested in the company. The common law rule, it is true, was that to constitute a good lease it should be by deed executed under the corporate seal, and this is what *Bell* v. *Nixon* (1) decides. The question there arose under an act of Parliament which enacted:

> That all contracts and agreements to be made and entered into for the forming or letting of the tolls of any turnpike roads signed by the trustees or commissioners letting such tolls, or any two of them, or by their clerk or treasurer, &c.

shall be good and valid, &c., and the question was whether where two persons filled the office of clerk to

(1) 9 Bing. 393.

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

the trustees a lease which was signed by one only was binding on the trustees. Tindal C. J. giving judgment there says:—

> I cannot think that where two persons are appointed to fill the office of clerk their principals can be bound in a contract by the signature of one only. By the common law there could be no lease in a case of this kind except under seal.

The case of *Hinckley* v. *Gildersleeve* (1), relied upon by the learned Chief Justice who tried this case, was wholly different from the present. There the corporation professed to demise to a lessee for the term of sixteen years their corporate rights and powers of constructing a canal and to authorize the lessee for the whole period of such term to collect certain tolls named in the lease, whereas the act did not authorize the corporation to establish or fix any rates of toll until they should complete the canal. They also by the lease professed to divest themselves of their corporate power of varying the rates of toll from time to time during the said term. Upon the execution of the lease the company ceased to elect directors, or to hold any meetings or to exercise in any manner any of their corporate powers. That was an attempt by the directors to divest the company during the term named in the demise of the whole of their corporate powers and franchises, and to vest such powers and franchises, including the right to construct the canal, in their lessee. The case therefore is wholly distinguishable from the present. The principle upon which the Court of Common Pleas for Ontario proceeded in *The Corporation of Ancaster* v. *Durrand* (2) is the identical principle upon which I found my opinion in the present case that the appellants had full power to demise their tolls to Ryder, namely, that the appellants by their act of incorporation

(1) 19 Gr. 213. (2) 32 U. C. C. P. 563.

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

have the property in and title to the road, toll houses, &c., &c., vested in them, as the municipal corporation had in *Ancaster* v. *Durrand* (1). The company appellants having then had full power by common law to demise their toll house, and their gate No. 1 and the tolls collectable thereat, it cannot now be doubted that, upon the authority of the *Mayor of Stafford* v. *Till* (2); *Wood* v. *Tate* (3); *Fishmongers Co.* v. *Robertson* (4); *Doe Pennington* v. *Taniere* (5); *Ecclesiastical Commissioners* v. *Merral* (6); *Wilson* v. *West Hartlepool Ry.* (7); *Mayor of Kidderminster* v. *Hardwick* (8); *Co. of Frontenac* v. *Chestnut* (9); *Corporation of Huron* v. *Kerr* (10); and many other cases, where one is by a corporation aggregate put into possession as Ryder was of the toll house and toll gate of the company, and of the receipt of the tolls collectible thereat, under a parol demise for a year, and has enjoyed such property and the benefit of the contract, the relation of landlord and tenant is created, and that this is recognized in law as an exception to the common law rule that a corporation aggregate can only demise by deed under the corporate seal is too well established to be now questioned. As therefore the manner in which the chain was used, which is alleged to have caused the injuries of which the plaintiff complains, was by undisputed evidence of Ryder himself shown to have been his act alone with which the appellants had nothing whatever to do, and as it was also established by undisputed evidence that the company were not aware of such mode of his using the chain until after the accident, I must concur in the judgment of the learned Judges Burton and McLennan that this action cannot be sustained

(1) 32 U. C. C. P. 563.
(2) 4 Bing. 75.
(3) 2 B. & P. (N. R.) 247.
(4) 5 M. & Gr. 131.
(5) 12 Q. B. 998.
(6) L. R. 4 Ex. 162.
(7) 11 Jur. N. S. 124.
(8) L. R. 9 Ex. 13.
(9) 9 U. C. Q. B. 365.
(10) 15 Gr. 265.

against the appellants. But as Mr. Justice Osler seems to have felt himself bound to affirm the judgment in favour of the plaintiff upon the findings of the jury to the fifth and sixth questions, even if Ryder be regarded as the tenant of the appellants, I have perused the evidence with the utmost care and have estimated, as accurately as I could by the plan produced in evidence and made part of the appeal case, the very limited space between the gate post and the bay window of the toll house by which the plaintiff got round the gate to the place where the accident is alleged to have happened and I can find no evidence whatever which, even though Ryder should be regarded as the servant only of the appellants, is in my opinion sufficient to support and justify a judgment against them.

The first question submitted to the jury assumes as a fact established (in support of which I cannot find a particle of evidence) that the very limited space between the gate post, which the plaintiff got round, and the bay window, the outermost joint of which almost reached the extremity of the plank, was a passage way provided by the appellants by which foot-passengers might pass the gate without going through it. The wholly insufficient character of the limited space in question would, in itself, seem to be sufficient to indicate that it never could have been intended for such a purpose. However there is no evidence whatever that it was; on the contrary the plank spoken of in front of the toll house, which at its greatest width was only nineteen inches and was narrowed to about ten inches opposite the gate post, is spoken of in the evidence only as a stoop of the toll house—an appurtenance in fact of that house. The witness Saunder speaks of it as "a plank placed there as he understood as a kind of door step along the house, and the plaintiff's daughter who saw her mother fall just as she got round the gate post

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

says that she thought "it was placed to be a door step" and this no doubt is just what it was and there is no evidence that it was, or was ever thought by any one to be, anything else; so that in truth the plea of the appellants that the plaintiff was unlawfully where the accident happened to her, namely, in a part of the appellants' property reserved by them from the use of the public, was proved. But it was said that if this limited space between the gate post and the bay window was not appropriated by the appellants for foot-passengers no other way was provided for that purpose; well it may be admitted that no other place than the space between the posts of the toll gate was provided. But the act under which the appellants enjoy their corporate rights does not impose on the appellants any obligation to provide any other space than that where the toll gate is across the travelled road for any persons whether on foot or otherwise using the road. The appellants or their tenant had a perfect right to keep the gate closed and no person whether on foot or otherwise has *any right in law* to pass by any other way than through the gate. When the gate is closed it is easy for a foot passenger as for any other person to call out for some person to come and open the gate. Nothing could have been easier on the night in question than for the plaintiff to have crossed the 19 inch plank and to have knocked at the door of the toll house which she passed before reaching the gate post. If there be any obligation on the appellants to provide for foot passengers a passage apart from the gateway, their not providing such a passage way cannot justify the appellants being held responsible for an injury received by the plaintiff in passing round the gate on the stoop of the toll house where no way was provided for that purpose, and by which there is no evidence whatever of her having been invited by any one to

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

pass. As to the 2nd question it is to be observed that there was no suggestion in the evidence of any ground of complaint against the appellants or Ryder as for negligence in causing the accident, save only in suffering the chain not longer than three feet nor wider than one inch nor thicker than half an inch lying flush on the plank between the gate post and the toll house. Now 1st, that plank not having been part of the appellants' property which they had appropriated to the use of the public the leaving the chain there is not a matter of which the plaintiff or any one can complain as constituting negligence; there was no foundation therefore for submitting that question to the jury. 2ndly, even if the plank had been part of the appellants' property which had been appropriated by them to the use of the public the suffering a chain of the dimensions of the chain in question to lie upon it did not, in my opinion, afford sufficient evidence, either of nuisance, obstruction or negligence, to be submitted to the jury as proof of negligence.

The third question has no application except on the assumption of negligence being established; the finding of the jury therefore upon this question amounts simply to a finding that as a matter of fact the chain lying on the plank caused the injury of which the plaintiff complains.

The fourth question also has no application except upon the assumption of negligence causing the injury having been established.

Now, as to the fifth question, there can be no doubt that the gate and its attachments were furnished by the appellants to Ryder for the purpose of his collecting toll but as lessee thereof and of the toll house, and whether he was in the relation of tenant or of servant to the appellants the finding of the jury that the gate and its attachments were furnished to him for the purpose

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Gwynne J.

of his collecting toll can afford no justification for a judgment against the appellants upon such findings.

Then as to the 6th question the answer of the jury is in direct conflict with all the evidence upon the subject in question. Indeed there seems no foundation for submitting such a question to the jury unless accompanied with a direction that upon the evidence on the subject it could be answered properly only in the negative. Ryder himself, in the plainest language, said that he never asked the appellants for any directions, and that he never received from them or any one any directions whatever as to how he should fasten the gate; that he acted in that matter wholly upon his own judgment; and there is besides the independent evidence of the officers of the company that until after the accident to the plaintiff they had no knowledge of Ryder ever using the chain in the manner it was alleged to have been used on the night in question, namely, by laying it across the plank and putting a stone on it. Assuming then Ryder to have been, as I think he certainly was, the appellants' tenant of the tolls, toll house and toll gate, with their appurtenances, I cannot see how the answers of the jury to the 5th and 6th questions, either singly or together, can support a judgment against the appellants; on the contrary, even assuming the relation between the appellants and Ryder to have been that of master and servant, and not of landlord and tenant, I am of opinion for the reasons I have given that there was no evidence whatever given in the case which justified the submission to the jury of the questions which were submitted or which justifies a judgment against the appellants upon the answers given to those questions. The plaintiff seems upon the evidence to have wholly brought upon herself the injury she sustained by her wrongfully at-

tempting to get round the gate post as she did, by a way never intended or adapted to be used in the manner it was used by her, and which was in fact a stoop or appurtenance to the tollhouse, and not at all set apart or appropriated by the appellants for use by the public. The appeal should, in my opinion, be allowed with costs, and judgment be ordered to be entered for the defendant company in the court below with costs.

PATTERSON J.—The toll gate when shut leaves no way for a foot passenger except the narrow bit of platform between the bow window of the toll house and the toll gate. The plaintiff was clearly invited to use that way, and had moreover a right to use it as a part of the public highway. In using it she tripped over a chain which fastened the gate, and was injured. The chain reached across the platform from the gate to the house where it was secured by a stone. It was a nuisance. The plaintiff clearly has a right of action. The question is whether the company is liable or only Ryder the toll collector.

I am of opinion for the reasons given in the court below by the learned Chief Justice and Mr. Justice Osler that the company is liable. It is not disputed that if the company, which must act by some individual, had hired a man at so much a month to collect the tolls it would have been responsible for his acts done in the course of that employment. The law on that point is too well settled to be disputed. But it appears that Ryder was not hired in that way He was paying the company an agreed sum for the year by monthly instalments, and not otherwise accounting for the tolls. He is called lessee of the tolls. I do not quarrel with the name which is convenient enough as a designation of a man holding Ryder's relation to the company. The

1892

THE KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Patterson J.

statute (1) uses the term "renter" in section 129, "renter and collector" in that section apparently meaning the man who pays a fixed sum, or rent, out of the tolls, and the man who is hired to collect the tolls. In section 137 the terms used are "toll gatherer" and "gate keeper," both terms applying indifferently to the renter and the collector. But the term "lessee," convenient though it may be, may easily be made too much of, as I think it is when the liability of the company for the conduct of the man who collects the tolls under the agreement that is called a lease is put on the same footing as that of a freeholder for the acts of his tenant for years. The statutory word "renter" is perhaps less liable to mislead. As far as it concerns the travelling public, as against whom certain rights and powers are conferred on the company with correlative duties, it is the same thing whether the toll gatherer or gate keeper is a renter or a collector. Is the company to be responsible for the acts of gate keeper Smith, who is paid his wages out of the tolls he collects and hands over to the directors, and not responsible for the acts of gate keeper Brown five miles down the road, who collects the tolls in precisely the same way and under the same statutable restrictions but pays a fixed sum to the company? The principle seems to me to be the same in both cases. The difference is in the mode of remunerating the gate keeper, but in each case he is, in my judgment, the company's gate keeper. The discussion respecting the power of a road company existing under the general act to make a lease of its powers and franchises is interesting but is, as it strikes me, scarcely called for by a transaction such as that which in this case is spoken of as a lease, but which seems to be merely an appointment to collect the tolls at one of the company's gates upon certain terms. But

(1) R. S. O. (1887) ch. 159.

even if Ryder should be regarded in the light of a tenant of property using it for the purposes and in the mode contemplated by his lease, I think that, as pointed out by Mr. Justice Osler, there is evidence to support the sixth finding of the jury. Ryder's tenancy began at the 1st of May in the year of the accident. He shows that for years before that it had been usual to fasten the chain in the same way, although the gate keeper could, by taking a little more trouble, have fastened it at the front of the platform where it would have done no harm. I think the evidence of previous user was admissible on the sixth question.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *James Agnew.*

Solicitor for respondent: *Horatio V. Lyon.*

1892

*May 9.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PONTIAC.

THOMAS MURRAY (RESPONDENT)..... APPELLANT;

AND

ARTHUR LYON AND EDWARD DAVIES (PETITIONERS)..... } RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF BOURGEOIS AND MALHIOT JJ.

Election petition—Judgment—R.S.C. c. 9 s. 43—Enlargement of time for commencement of trial—R.S.C. c. 9 s. 33—Notice of trial—Shorthand writer's notes—Appeal—R.S.C. c. 9 s. 50 (b).

In the Pontiac election case the judgment appealed from did not contain any special findings of fact or any statement that any of the charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge and declared that he had not been duly elected and that the election was void. On an appeal to the Supreme Court on the ground that the judgment was too general and vague,

Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the statute R. S. C. c. 9 s. 43.

On the 10th October, 1891, the judge in this case within six months after the filing of the election petition by order enlarged the time for the commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October another order was made by the judge fixing the date of the trial for the 4th November, 1891, and fourteen clear days notice of trial was given and the respondent objected to the jurisdiction of the court.

Held, that the orders made were valid. Secs. 31, 33 ch. 9 R.S.C.

Held, also, 1. That the objection to the sufficiency of the notice of trial given in this case under sec. 31 of ch. 9 R. S. C. was not an objection which could be relied on in an appeal under sec. 50 (*b*) of ch. 9 R.S.C.

---

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

2. That evidence taken by a shorthand writer not an official stenographer of the court, but who has been sworn and appointed by the judge, need not be read over to the witnesses when extended.

1892

PONTIAC ELECTION CASE.

APPEAL from the judgment of the Honourable Justices Bourgeois and Malhiot, setting aside the appellant's election as a member of the House of Commons for the electoral district of Pontiac, by reason of corrupt acts committed by the appellant's agents without his knowledge.

The election petition was in the usual form. It was filed on the 18th April, 1891, and on the 10th October, 1891, within six months of the filing of the petition an order was made by Mr. Justice Malhiot enlarging the time for the commencement of the trial until the 4th November, 1891, and the preliminary objections to the petition having been disposed of, another order was made on the 19th of October by Mr. Justice Malhiot fixing the date of the trial for the 4th November, 1891, and fourteen clear days notice of trial was given to the appellant.

The particulars filed contained a large number of charges, and after hearing the evidence in support of them, and the witnesses for the defence, the court found as follows that the corrupt practices had been committed and voided the election:

"Considérant qu'il est en preuve que des manœuvres frauduleuses ont été pratiquées à et pendant la dite élection par des agents du dit Thomas Murray hors la connaissance du dit Thomas Murray."

On an appeal to the Supreme Court of Canada the appellant limited the subject of the appeal to the following special and defined questions on which he claimed that the said alleged judgment, orders and decisions and each of them is illegal and void:—

"1. That the said Superior Court of the province of Quebec for the district of Ottawa had no jurisdiction

1892

PONTIAC ELECTION CASE.

to render the said judgment, as the said alleged trial was before the said judges and not before the said court, and there were no findings of fact before the said court on which such judgment could issue, and the said judgment does not contain or refer to any special findings by the said court or by the said judges, and the same does not adjudge the appellant or any named agent of his guilty of any specific corrupt practice or of any practice referred to in the petition or bill of particulars, and the same is otherwise too general, illegal and void."

"2. That the said judgment is not signed by the said judges as trial judges or otherwise."

"3. That the said election petition was filed and presented on the eighteenth of April, 1891, and the said trial thereof was not commenced within six months thereafter, by reason whereof and of the statutes in that behalf the said petition was out of court and at an end, and the said judges, or the said court, had no jurisdiction to commence or hold the trial of the said petition on the fourth day of November, 1891, as they in fact did, or to render on the said day, or afterwards, any judgment upon said election petition, other than to declare that it was at an end, and that they had no jurisdiction to try the same."

"4. That the order of Mr. Justice Malhiot, dated on or about the tenth day of October, 1891, pretending to extend the time for the trial of the said election petition until the fourth day of November, 1891, did not include the said fourth day of November, but was exclusive of that day, and the said alleged order was otherwise illegal and void in this, that when the said order was made the preliminary objections filed to the said petition were not then disposed of and the said petition was not then at issue or ready for trial, and there was not then or when the said petition was at issue suffi-

cient time to give, as required by the statute or by the rules of the said court in that behalf, the proper notice of trial before the expiry of the said six months; and that the order of the said Honourable Mr Justice Malhiot, of date the 19th day of October, 1891, fixing a day for the commencement of such trial, was and is illegal, *ultra vires*, null and void for the reasons above stated, and especially for the reason that on the 19th day of October, 1891, the six months within which the said trial should have been fixed and commenced had then expired, and that the day so fixed was beyond the period of the said alleged extension."

"5. That the appellant did not receive nor was there given the fifteen days notice of trial required by the rules of the said court, but the notice as of trial in fact given was only notice for fourteen days."

"6. That the said petition and particulars delivered thereunder contained 20,481 charges of bribery and of other corrupt practices against the appellant, and several other persons alleged to be his agents, and each charge formed a separate and distinct offence and should be separately tried and adjudicated upon, yet the said judges assumed to try and in fact did try and adjudicate upon all said charges together, against the will of the appellant and contrary to the rules of law and natural justice."

"7. That the evidence of the witnesses at the said trial was not properly taken in this, that the shorthand writer appointed by the said Honorable Mr. Justice Malhiot to take the evidence was not qualified in that behalf, or appointed by the Council of the Bar of the district of Ottawa, upon a report of a committee of examiners appointed by such council, or in any other manner whatsoever, to take evidence before the courts and trials of said district of Ottawa, or for any other purpose, or as an official stenographer or

1892

PONTIAC ELECTION CASE.

shorthand writer of said district of Ottawa, and when the evidence was taken it was not read over to the witnesses, nor was it read over to them when extended, and the said evidence is not accurate or reliable.

O'Gara Q. C. and *Aylen* for appellant cited *The Glengarry Case* (1); *The Charlevoix Case* (2); *South Ontario Case* (3).

Rule XXI. of the Election Court for the province of Quebec; Rule XI. of the Superior Court (4); and *Lavoie* v. *Gaboury* (5); *McQuillen* v. *Spencer* (6).

McDougall for the respondents was not called upon. The court proceeded to deliver judgment.

Sir W. J. RITCHIE C.J.—As the appellant has not printed the evidence this court is bound to hold that the learned judges have properly found as matter of fact that corrupt practices had been committed by the respondents' agents.

STRONG J.—(Oral). I have no doubt whatever that none of the objections relied on by the appellant in this case have any weight.

First, as to the enlargement of the time for fixing the date of the trial made by the order of Mr. Justice Malhoit on the 10th of October. I think it was quite competent for the learned judge to make the order although the case was not at issue. It may be that the judge was not at that time prepared to fix a day for the trial, but it was entirely within his power to enlarge the time without fixing the date of trial and the order made was perfectly good and valid.

(1) 14 Can. S.C.R. 453,
(2) 1 Can. S.C.R. 145.
(3) Hodg. El. Cas. 439.
(4) Art. 24 C.P.C.
(5) M.L.R. 1 S.C. 75.
(6) M.L.R. 3 S.C. 247.

Then, as regards the point taken by Mr. Aylen and discussed by Mr. O'Gara that there is no specific report on the charges mentioned in the petition and the particulars—there is nothing in that. We have in the printed case just such a finding by the judges who tried the case as it has been the universal practice to make. In fact we have just what is required by the statute, for the judges have determined that the election of the appellant is void by reason of corrupt practices.

Then as to the fifteen days notice. There is certainly something in this objection which might have been to the advantage of the appellant if it had been made at the proper time. If fifteen clear days notice of trial should be held necessary under the Quebec rules, though no doubt, if construed in accordance with art. 24 C.P.C., both days, the day of service and the terminal day, should be excluded, I am not at all satisfied that fourteen days would not be sufficient, one day being excluded and the other included. However there is no necessity for us to decide this point ; it is quite clear it is not an objection which can be invoked on an appeal to this court. It is neither a judgment or decision on a question of law or of fact of the judges who tried the petition and therefore it is not an appealable point.

The last point relied on is as to the shorthand reporter's notes not having been read over to the witnesses. It is out of the question that such an objection can be entertained. When the reporter was chosen he was duly sworn ; the judges were satisfied with the way in which the evidence was taken and no objection was taken by the counsel. The judge has entire control of the procedure, and in fact it would have been sufficient if mere notes of the evidence had been taken by the judge.

1892

PONTIAC ELECTION CASE.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

Gwynne J.

GWYNNE J.—I entirely concur that this appeal must be dismissed.

The chief point of the argument of the learned counsel for the appellant was that the object of the statute was to obtain a speedy judicial decision on the merits of the election petition, and that therefore no trial was required to be commenced within six months from the filing of the petition. Granting speedy administration of justice to have been, as I agree it was, the object of the statute, I think it is a point worthy of consideration by the legislature whether appeals from the decision of the trial judges should not be altogether done away with, for if appeals like the present upon points of alleged irregularity not in any way affecting the merits and founded upon so frivolous grounds should be encouraged, the administration of justice would be almost indefinitely deferred instead of being speedily administered.

PATTERSON J.—I am also of opinion that this appeal fails on every point. A general finding on so many charges may be inconvenient for an appeal, but all that the statute makes necessary is a decision by the judges who have tried the petition, that the member whose election or return is complained of has been duly elected, or that the election is void, and the statute in this case seems to have been followed literally by the judges' report.

The other points taken are questions of alleged irregularity of one kind or another which are not appealable to this court. As to the question of the regularity of the notice for trial, although we are not bound to

pronounce upon it on this appeal I may say for myself that it strikes me that the notice given was sufficient. Sec. 31 enacts that notice of the time and place at which an election petition will be tried shall be given in the prescribed manner not less than fourteen days before that on which the trial is to take place. The court has thus the right to prescribe the manner of giving the notice, as for example by registered letter which was the mode adopted in this case, but the statute fixes the time, and I do not think the court has power to fix a different time. The notice here was a clear fourteen days' notice.

Appeal dismissed with costs.

Solicitor for appellant: *Henry Aylen.*

Solicitor for respondents: *J. M. McDougall.*

1888
*Oct. 22.
1889
*April 30.

†JOHN MARTLEY AND TRUMAN CELAH CLARK (DEFENDANTS.....) APPELLANTS;

AND

ROBERT CARSON AND JOSEPH EHOLT (PLAINTIFFS.....) RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Land Ordinance, 1865—*Grant of water under—Riparian owners—Right to exclusive use of stream—Unoccupied water—Proof of notice of application for grant.*

The British Columbia Land Ordinance, 1865, contains the following provisions:—

44. "Every person lawfully occupying and *bonâ fide* cultivating lands, may divert any unoccupied water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the Stipendiary Magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require.

45. "Previous to such authority being given the applicant shall post up in a conspicuous place on each person's land through which it is proposed that the water should pass, and on the District Court House, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water specifying all particulars relating thereto, including direction, quantity, purpose and term." In an action by a grantee of water under this ordinance for interference with the use of the same:

Held, affirming the judgment of the court below, that the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder.

---

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

†(This and the remaining cases in this volume the reporters were unable to publish when decided.)

1888

MARTLEY v. CARSON.

Held, further, that the water of a stream, &c., may be unoccupied under the ordinance even though there may be a riparian proprietor upon a part of it.

Held, also, Ritchie C.J. and Strong J. dissenting, that the provisions of s. 45 are merely directory but if imperative a grantee of water under the ordinance who has used the water granted to him for several years would not be required, in an action for damages caused by interference with such user, to prove that he gave the notice required by that section as it would be presumed that the same were given before recording the grant.

Held, per Ritchie C.J. and Strong J., that the water records in evidence were imperfect and the grant to plaintiff was not proved thereby, and having failed to prove authority from the magistrate to divert the water his riparian rights either at common law or under the ordinance were not established and the action failed.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment for defendants at the trial

The facts of the case are fully set out in the judgment of Mr. Justice Gwynne.

S. H. Blake Q.C. and *Bodwell* for the appellants.

Christopher Robinson Q.C. for the respondents.

Sir W. J. RITCHIE C.J.—I do not think the plaintiff has shown that he has any riparian rights, either at common law or under any ordinance or statute of British Columbia, in the waters he now claims the right to divert; he has no title to any of the lands over or through which the water in question flows and, therefore, could have no common law right; nor, indeed, does he claim that he has, but rests his right to divert and use the waters in question by virtue of the authority acquired under certain sections of the ordinance for regulating the acquisition of lands in British Columbia, No. 27, passed 11th April, 1865.

The sections are as follows:—

WATER.

44. Every person lawfully occupying and *bonâ fide* cultivating lands, may divert any unoccupied water from the natural channel of any

1889

MARTLEY
v.
CARSON.

Ritchie C.J.

stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the Stipendiary Magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such Magistrate may require.

45. Previous to such authority being given the applicant shall post up in a conspicuous place on each person's land through which it is proposed that the water should pass, and on the District Court House, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water, specifying all particulars relating thereto, including direction, quantity, purpose and term.

46. Priority of right to any such water privilege, in case of dispute, shall depend on priority of record.

47. The right of entry on and through the lands of others for carrying water for any lawful purpose, upon, over, or under the said land, may be claimed and taken by any person lawfully occupying and *bonâ fide* cultivating as aforesaid, and (previous to entry) upon paying or securing payment of compensation as aforesaid, for the waste or damage so occasioned to the person whose land may be wasted or damaged by such entry or carrying of water.

48. In case of dispute, such compensation or any other question connected with such water privilege, entry, or carrying may be ascertained by the Stipendiary Magistrate of the district in a summary manner, at the option of either of the commanding parties, either with or without a jury of five men, to be summoned as in ordinary cases.

49. It shall be lawful for such magistrate, by an order under his hand directed to the Sheriff or Deputy Sheriff, to summon a jury for such purpose, and in the event of non-attendance of any persons so summoned, he shall have power to impose a fine not exceeding five pounds.

50. Water privileges for mining or other purposes, not otherwise lawfully appropriated, may be claimed, and the said water may be taken upon, under, and over any land so pre-empted or purchased as aforesaid, by obtaining a grant or license from the Stipendiary Magistrate of the District, and previous to taking the same, paying reasonable compensation for waste or damage to the person whose land may be wasted or damaged by such water privilege or carriage of water.

No evidence has been furnished of any written authority by the stipendiary magistrate of the district

for diverting the water in question, nor any records of the same; the only evidence we have, taken from the so-called water records, is as follows:

DOCUMENTARY EVIDENCE.

WATER RECORDS.

(Vide certified copies of originals filed.)

No. 22. JOHN MARTLEY.

Oct. 3rd, 1866.—The right to the water of the creek crossed by the trail running from the 29-Mile House, Pavilion Mountain, to Captain Martley's house at the Grange Pavilion Creek.

A. C. ELLIOTT.

No. 28.

Jan. 4th, 1867.—The right to the water of a creek running from Pavilion Mountain into Pavilion Creek Valley, and running close to Captain Martley's house.

Per A. C. ELLIOTT. T. H. SHARWOOD.

IMPERFECT WATER RECORD.

1868. May 16. No. 43.—Pavilion Mountain—200 in.

A ditch on Pavilion Mountain coming from a large creek on a mountain to about opposite the 26-mile post, said water ditch for farming purpose on my ranch. I wish to record 200 inches of water.

(Signed) E. H. SANDERS, S. M.

No. 35.

Jan. 20th, 1868.—The right to the use of 100 inches water for the purpose of irrigation, to be diverted from a creek on the summit of the mountain known as Pavilion at a point near the 30-m. post.

E. H. SANDERS, S. M.

1868.

May 16—No. 43.—ROBERT CARSON—Pavilion Mountain—200 inches.

A ditch on Pavilion Mountain coming from a large creek on a mountain to about opposite the 26-Mile Post. Said water ditch for farming purposes on my ranch. I wish to record 200 inches of water.

E. H. SANDERS, S. M.

Gov. office March 25, 1885. Certified a correct copy.—F. SOUES, Government Agent.

1868. ROBERT CARSON.

May 18th—No. 44.—The right to 200 inches of water for agricultural purposes to be diverted from a creek crossing the wagon road near the 29-mile Post, on Pavilion mountain.

E. H. SANDERS, S. M.

1889

MARTLEY v. CARSON.

Ritchie C.J.

1870.

May 16th—No. 106.—WILLIAM SAMPSON—Pavilion Mountain —200 inches.

The right to 200 inches of water from a large creek supplying Carson's ditch. The ditch is about six miles east of Carson's farm.

E. E. SANDERS, S. M.

Certified a correct copy.—F. SOUES, Government Agent.

1870.

May 27th—No. 1.—Mr. Gillon, Pavilion Mountain, the right to 200 inches of water for purposes of irrigation, to be diverted from a creek on the summit of the mountain known as Pavilion Mountain, at a point near the 30-mile post, previously recorded by R. Carson, but transferred to M. Gillon.

E. H. SANDERS, S. M.

1876.

March 23rd—LOUIS HOLT—Pavilion Mountain.

The right to 300 inches of water for farming purposes on his ranch, to be diverted from Pavilion Creek, one mile from base of the mountain.

C. E. POPE, Commissioner.

Certified a correct copy.—F. SOUES, Government Agent.

1876.

Dec. 14th—T. C. CLARK—Pavilion—200 inches water from Pavilion Creek, 20 yards below Carson's ditch, for irrigating purposes, on Clark's ranch, Pavilion Mountain.

M. O'CONNOR.

Certified a correct copy.—F. SOUES, Government Agent.

No. 89.

Aug. 27th, 1881.—Recorded this day in favour of Alice Maud Martley, 75 inches of water to be taken from a rivulet which flows above her pre-emption of 160 acres in the S. E. corner of Pavilion Mountain.

F. SOUES, A. C. L. & W., Lillooet District.

1884.

June 2nd—No. 100—Recorded this day in favour of M. Gillon, the water contained in a small creek near the summit of Pavilion Mountain on the north side, said creek crosses the wagon road about half a mile from the summit, the waters to be diverted at some convenient point and carried to his farm on Pavilion Mountain for agricultural purposes. This water is to be measured into the 29-mile creek at some convenient point on Pavilion Mountain in compliance with section 52, Land Act 1884, and the same number of inches measured out of said creek where it passes through M. Gillon's lands.

F. SOUES, A. C. of L. & W., Lillooet District.

1884. 1889

July 17—No. 101—Recorded this day in favour of Michael Gillon, the water contained in a small creek on Pavilion Mountain. Said stream flows from west to east, and empties into the creek known as the 29-mile creek at a point on his farm, Pavilion Mountain. The water to be used for irrigation purposes on his farm, Pavilion Mountain.

MARTLEY v. CARSON. Ritchie C. J.

F. SOUES, A. C. of L. & W., Lillooet District.

1884.

July 25th—No. 103.—Recorded this day in favour of Robert Carson, Pavilion Mountain, 250 inches of water to be diverted from Pavilion Creek on Pavilion Mountain for irrigation purposes on his farm at the 26-mile post.

F. SOUES, A. C. of L. & W., Lillooet District.

No. 105.

Aug. 7th, 1884.—Recorded this day in favour of John Martley, Pavilion, 200 inches of water to be diverted from Pavilion Creek for the purpose of irrigation either in the grange farm or on the purchased land of the said John Martley, and known as "The Corner," situate on Pavilion Mountain.

F. SOUES, A. C. of L. & W., Lillooet District.

No. 106.

Aug. 18th, 1884.—Recorded this day in favour of M. Gillon, the waters in a small lake about ¼ of a mile south of his house, Pavilion Mountain, with the right to dam the outlet of said lake for the purpose of retaining the water, said water to be used for the purposes of irrigation on the farm of the said Michael Gillon, on Pavilion Mountain.

F. SOUES, A. C. of L. & W., Lillooet District.

There does not appear to have been any such due notice given as the ordinance requires before obtaining the written authority of the magistrate and recording the same, specifying the name of the applicant, the quantity of water sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require. Now it is clear, by section 44, that it is only after due notice as hereinbefore mentioned, specifying the above, that the authority can be obtained and recorded, nor is there a particle of evidence to show that, under section 45, previous to such authority

1889
MARTLEY
v.
CARSON.
Ritchie C.J.

being given the applicant posted up., &c., the notice provided. No permission, that I can discover, is furnished by these records which, if records they are, are vague, insensible and amount simply to nothing. The granting permission, if it had been granted by the stipendiary magistrate, is a *quasi* judicial act. Not only must the sanction be obtained but the applicant cannot, under the terms of the ordinance, avail himself of any permission granted until recorded.

With reference to the jurisdiction of persons exercising judicial, or *quasi* judicial, functions it must be as was said in *The Mayor of London* v. *Cox* (1) by Willes J. :—

> Willes J.—The conclusion that the Court is inferior has a double application, first, to the construction of the plea in this case, because "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of an inferior Court but that which specially appears to be so ; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged ;"
>
> P. 262. Another distinction is, that whereas the judgment of a Superior Court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an Inferior Court, involving a question of jurisdiction, is not final. If the decision be for the defendant there is nothing to estop the plaintiff from suing over again in a Superior Court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the plaintiff it is still not conclusive, because "the rule that in Inferior Courts and proceedings by magistrates the maxin *omnia præsumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned ;" Per Holroyd J., *Rex* v. *All Saints-Southampton* (2) ; *The Queen* v. *Bolton* (3) ; *Chew* v. *Holroyd* (4), per Parke, B.

In the absence, then, of evidence of any compliance, in any particular, with the express provisions of the ordinance, how can it be said that these indefinite and really meaningless, so-called, water records confer on

(1) L. R. 2 H. L. 259.
(2) 7 B. & C. 785.
(3) 1. Q. B. 66.
(4) 8 Ex. 249.

any person any rights whatever in any waters of which they are not proprietors, or give a right of entry on or through the land of others for carrying the water upon, over or under such lands? The owners of the land through which the water flows are entitled to the common law riparian rights in such waters, which includes the right of using the water for irrigating purposes, unless deprived of them by virtue of some statutory enactment interfering therewith, and subject always to the provision or reservation in said grant with reference to taking or occupying the water privileges in these words:

> Provided nevertheless that it shall be lawful for any person duly authorized in that behalf by us, our heirs, and successors to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted as may be reasonably required for mining purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid John Martley, his heirs or assigns.

The defendant having pleaded that the written authority of the stipendiary magistrate of the district was never obtained, and certainly the so-called water records do not, in the most remote degree, establish that it was, I am clearly of opinion that the plaintiff acquired no rights under the statute to the waters as claimed by him.

It is unnecessary to discuss the question as to the meaning and application of the term "adjacent" in the ordinance.

It is clear that Clark, as the Chief Justice says, was riparian proprietor at the commencement of this action, in the possession of rights entirely irrespective of Martley, or his agreement, or of the award; and as respects Martley it is equally clear that Carson violently repudiated the award, etc., when, as the learned Chief Justice says, "he wholly cut off Martley's

1889

MARTLEY v. CARSON.

Ritchie C.J.

supply." The evidence as to the agreement itself is set out by the Chief Justice in his judgment.

I cannot say that the damages awarded on the counter-claim are unreasonable or based on any wrong principle. I therefore think the appeal should be allowed and the judgment of the learned Chief Justice restored.

On the second argument I understood Mr. Blake to assent to a reduction of the damages, but I do not remember to what amount.

STRONG J. was also of opinion that the appeal should be allowed.

FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Gwynne.

GWYNNE J.—Robert Carson and Joseph Eholt, not having any joint interest in the subject of litigation in this cause, united as plaintiffs in bringing an action against the defendants Martley and Clark for an alleged obstruction by them of a certain right to the flow of water to the properties of the respective plaintiffs, situate on Pavilion Mountain in the province of British Columbia, which right the plaintiffs respectively and independently each of the other claim to have by virtue of the statute law of the province. The defendants sever in their defence and each claims the existence of the right to the flow of water as claimed by the respective plaintiffs and pleads a counter claim for damages alleged to have been sustained by each severally by reason of an alleged illegal obstruction and abstraction by the plaintiffs of certain water, the uninterrupted flow of which to and through the properties of the respective defendants is claimed by each of them severally.

1889

MARTLEY v. CARSON.

Gwynne J.

The learned Chief Justice, before whom the action was tried without a jury, pronounced a judgment or decree in the cause, whereby it was ordered that judgment should be entered for the defendants with costs, and that judgment should be entered for the defendant Clark on his counter-claim for $500 with costs, and for the defendant Martley on his counter-claim for $200 and costs, and that the said Martley should allow to the plaintiff Carson "out of any moneys payable to him under the judgment the sum of $100 paid as part consideration of the above agreement of the day of , 1868," (no agreement being mentioned in the judgment or decree). And by the said judgment or decree it was declared that the defendants are entitled to the free and uninterrupted enjoyment of the flow of the waters of Pavilion Creek in their accustomed bed in the same manner as they respectively enjoyed the same before the plaintiffs or either of them interfered with such enjoyment, and that the defendant Clark is likewise entitled to the free and uninterrupted enjoyment of the flow of the waters of Milk Ranch Creek in the same manner as he enjoyed the same before the use and enjoyment thereof by the defendant John Martley; and it was thereby further ordered that a perpetual injunction be awarded to restrain the plaintiffs and each of them, their and each of their servants, agents or workmen, from interrupting or interfering with the flow of the waters of the said creeks or streams, or either of them, or from permitting the same to continue unrestored, and from permitting to continue on their or either of their lands any ditches, drains, or works whereby the same is or may be wholly or partially diverted or interfered with in such manner as in any wise to infringe on the rights of the defendants or either of them. This judgment is founded upon the opinion which the learned

1889

MARTLEY v. CARSON.

Gwynne J.

Chief Justice entertained that the land ordinance of British Columbia upon which the plaintiff rested their claim was one the benefit of which was conferred only upon riparian proprietors, and that as neither of the plaintiffs was a riparian proprietor neither of them could acquire any title to a supply of water to his property under and in virtue of the ordinance; and further, as to the claim of Carson, that assuming the ordinance to be applicable to the case of any one but a riparian proprietor the title under which Carson claimed was for other reasons utterly defective and null and void. From this judgment the plaintiffs appealed to the full court of the Supreme Court of British Columbia, and thereby prayed that the above judgment should be reversed or discharged, and that instead thereof judgment should be entered for the plaintiffs, or that a new trial should be granted. After argument of the said appeal it was ordered and adjudged by the judgment or decree of the court bearing date the twentieth day of August, 1885, that—

1. So much of the judgment of the Chief Justice as gives judgment for the defendants against the plaintiff Carson be reversed, and that in lieu thereof the plaintiff Carson do recover from the defendants jointly and severally the sum of eighteen hundred dollars together with the costs of suit, except in so far as such costs are attributable to the counter-claim of the defendants.

2. That the defendants do recover against the plaintiff Eholt so much of their costs of action as were occasioned by reason of the said Eholt being a party plaintiff in the said action.

3. That so much of said judgment as decreed to the defendant Martley, on his counter-claim, damages to the amount of two hundred dollars less one hundred dollars paid on agreement be reversed, and in lieu thereof that the defendant Martley do recover against the plaintiffs Carson and Eholt the sum of one dollar nominal damages together with his costs of his counter-claim against both plaintiffs.

4. That so much of the said judgment as awards to the defendant Clark on his counter-claim, damages to the amount of five hundred dollars against the plaintiffs Carson and Eholt be reversed and in lieu thereof that the defendant Clark do recover against the plaintiffs

Carson and Eholt the sum of two hundred and fifty dollars together with his costs of his counter-claim.

5. That the defendants do recover against the plaintiff Eholt their cost of the appeal and also against the plaintiff Carson so much of their costs of the appeal as are attributable to the counter-claims of the said Martley and Clark ; and

6. That the plaintiff Carson do recover against the defendants the costs of his appeal except in so far as they are attributable to the counter-claims of the said defendants.

1889

MARTLEY v. CARSON.

Gwynne J.

From this judgment the defendants have severally appealed to this court.

Before referring to the pleadings in the action and the matters put in issue thereby and the evidence as given in respect thereof it will be convenient, and indeed necessary, in my opinion, to a proper understanding of the rights and interests of the respective parties, to draw attention first to the condition of things in relation to the properties affected in chronological order, and to refer to several statutes of the province, in order to throw some light upon the matters in contestation on points in which the evidence, as appearing on the appeal case laid before us, seems to me to be defective in view of the magnitude of the damage alleged to have been sustained by each party and the great importance of the matters in litigation, not only as affecting the rights and interests of the respective parties to the present suit but the validity of the titles of all persons similarly situated claiming title under what are called in British Columbia " Water Records " or water rights granted or supposed to have been granted to them under the statute law of the province. To the plaintiff Carson an adverse decision upon the ground of defect in his title arising either from the non-applicability of the statute under which he claims to the circumstances of his case, or from the manner in which the powers conferred by the statute have been administered by the local authorities

1889
MARTLEY
v.
CARSON.
Gwynne J.

intrusted with its administration, would seem to be little short of ruinous, as rendering utterly valueless the land upon which he has settled upon the faith, as it would seem, that the statute as it has been hitherto understood and administered in the province was effectual to secure to him the benefit of the flow of water which he claims to have been granted to him, and to obtain which as absolutely necessary to the beneficial enjoyment of his land he has, as he testifies upon oath, expended upwards of $1,500.

On the 2nd of August, 1858, the Imperial statute 21 & 22 Vic. ch. 99 constituting the province of British Columbia was passed and proclamation thereof was made in the province upon the 19th November, 1858.

By a statute or ordinance duly passed under the provisions and authority of the above act upon the 31st of August, 1859, called the Gold Fields Act of 1859, provision was made for the regulation of gold mining in the province, and among other things for supplying watercourses for the use of persons engaged in mining to enable them beneficially to carry on their work. By this ordinance it was enacted that all persons to whom a certificate called a free miner's certificate should be given by an officer styled a Gold Commissioner should during the continuance of the certificate have the right to enter without let or hindrance upon any of the waste Crown lands not, for the time being, occupied by any other person and to mine on the land so entered upon. At this time all the land in British Columbia belonged to the Crown and gold mining was the staple industry of the province to the free and beneficial cultivation of which all other rights of property, none of which at that early stage of the existence of the province had passed out of the Crown, should be

subservient. By the ordinance the Governor of the province was also authorized to grant leases of any portion of the waste lands of the Crown for mining purposes, for such term of years and upon such conditions as to rent and the mode of working, and as to any water privilege connected therewith, as the Governor should deem expedient; and it was further enacted by the ordinance, among other things, that it should be lawful for the Governor from time to time to make rules and regulations, having the force of laws, concerning all matters relating to claims, and ditch and water privileges and leases of the auriferous lands in the colony; and it was further thereby enacted that all disputes relating to any ditch or water privilege, or to any contract or labour to be done in respect of a ditch or water privilege, mine or claim should be investigated by the Gold Commissioner having jurisdiction in the neighbourhood who alone without a jury should be sole judge of law and fact, subject to appeal in certain cases. Under the provisions of this act the Governor of the province did upon the 7th of April, 1859, publish certain rules and regulations whereby among other things it was provided that any person desiring any exclusive ditch or water privilege should make application to the Gold Commissioner having jurisdiction for the place where the same should be situate, stating for the guidance of the Commissioner in estimating the character of the application the name of the applicant, the proposed ditch head and the quantity of water, the proposed locality of distribution, and if such water should be for sale the price at which it was proposed to sell the same, the general nature of the work to be done and the time within which such work should be completed, and that the Gold Commissioner should enter a note of all such matters as of record so that rent should be paid for such water

1889
MARTLEY
v.
CARSON.
Gwynne J.

privilege as provided in the regulations; that every owner of a ditch or water privilege should be bound to take all reasonable means for utilizing water granted to and taken by him and that in the case of wilful waste the Gold Commissioner, if the offence should be persisted in, might declare all rights to the water to be forfeited; that the owner of any ditch or water privilege should be bound to supply all applicants being free miners in a fair proportion, and should not demand from one person more than from another except when the difficulty of supply is enhanced; that no person not being a free miner should be entitled to be supplied with water at all; and that any person desiring to carry water through or over any land already occupied by any other person might be enabled to do so in proper cases with the sanction of the Gold Commissioner. By certain other rules and regulations published by the Governor, under the provision of the said Gold Fields Act of 1859, upon the 29th day of September, 1862, it was among other things provided that owners for the time being, not being the Government, of any ditch or water privilege should construct and secure the same in a proper and sufficient manner and maintain the same in good repair to the satisfaction of the Gold Commissioner; and by a statute or ordinance of the province duly passed, under the provisions and authority of the Imperial statute, upon the 25th day of March, 1863, it was among other things enacted that where application is intended to be made for the exclusive grant of any surplus water to be taken from any creek or other locality every such applicant, in addition to all existing requirements, should affix a written notice of all the particulars of his application upon some conspicuous part of the premises to be affected by the proposed grant for not less than five days before recording the same, and that every exclu-

sive grant of a ditch or water privilege in occupied or unoccupied creeks should be subject to the rights of such registered free miners as should then be working or should thereafter work in the locality from which it is proposed to take such water.

From the above provisions as extracted from the Gold Fields Act and the rules and regulations made under the authority thereof, it would seem to have been contemplated that the government of the colony should or might have, or that it in fact had, ditches or watercourses dug and constructed either by the government itself wholly through Crown lands, or dug and constructed by miners under the authority and provisions of the Gold Fields Act, and which by reason of abandonment of their gold claims by the original constructors had come into the possession of the Crown for the purposes of the act. Such ditches or watercourses may, I apprehend, have been made directly by the Government Commissioner of Lands and Works independently of the Gold Commissioner, or they may have been made under contracts entered into by the Gold Commissioner under authority from the government, but however made, being constructed for the purpose of enabling free miners to acquire the use of the water running therein for mining purposes they would, so long as the Gold Fields Act should remain in force, be subject to the right of all free miners to acquire grants or leases from the Gold Commissioner under the Gold Fields Act of portions of the water running in such ditches for mining purposes notwithstanding that a portion of the land through which any such ditch or watercourse should be in part constructed should subsequently be granted to a purchaser or settler.

Now it appears that some years prior to the month of February, 1864, but when in particular or by whom

1889
MARTLEY
v.
CARSON.
Gwynne J.

does not appear, there had been constructed wholly through the lands of the Crown across some miles of table land, situate at a high level on a certain mountain known as Pavilion Mountain, such a ditch or watercourse from a point in the bank of a certain stream called Pavilion Creek, which flowing from the east to the west descended from the mountain through a deep precipitous gorge therein into a lake below, and from thence flowed westerly through a valley at the foot of the mountain for some distance, until it fell into the Fraser River to the west of the mountain. The reasonable presumption in the absence of any evidence to the contrary appears to me to be that this ditch or watercourse had been constructed by the Provincial Government or by authority of the Gold Commissioner under the authority of the Gold Fields Act, and that it was constructed for the benefit of all free miners mining west of the Pavilion Mountain who had a right to receive grants of the use of the water running therein under the provisions of the act, and that it was dedicated to their use subject to the provisions of the act as to the Gold Commissioner granting or leasing the use of the water therein.

It is said that prior to the month of February, 1864, certain miners who had had the use of the water running in this ditch or watercourse for mining purposes under the act upon claims on the west end of the Pavilion Mountain had ceased to work their claims; but all the lands of the Crown being open to free miners, any such miners might at some future time acquire a claim which for the due working thereof might require the use of the waters in the ditch. Certain miners abandoning their claims did not divest the Gold Commissioner of the right to let claims in the same locality to other miners, or deprive free miners

1889

MARTLEY v. CARSON.

Gwynne J.

of their right to mine in that locality; and as such miners might require the use of the waters in this ditch as necessary for mining purposes, the water-course itself must needs, as it appears to me, have nevertheless continued to remain under the jurisdiction of the Gold Commissioner, and dedicated to the purposes of the Gold Fields Act. In this condition of things and while the ditch remained open and water flowing in it, although it may not then have been in actual use by any free miner in the working of any claim, the Crown by letters patent bearing date 11th February, 1864, under the seal of the province, granted to the defendant Martley in fee a portion of the table land on the Pavilion Mountain by the following description:

All that tract or parcel of unsurveyed land in British Columbia consisting of fourteen hundred and forty statute acres of land, be the same more or less, with the appurtenances situate at or near the south-east extremity of the table land known as Pavilion Mountain and immediately above the homestead occupied by the said John Martley in the valley; and bounded approximately as follows: On the north by the open range of Pavilion Mountain, the base of which is precipitous and well defined; on the south by the crest of Pavilion Mountain overhanging the valley, or for greater accuracy an imaginary line between two stakes placed east and west along this southern boundary, on the east by the main creek which, coming through a deep gorge in the mountain, runs through the valley into the Fraser River, on the west by a lesser creek which, running from the mountain, falls close by the house of the aforesaid John Martley, in the said valley.

Now, from the above description and the map laid before us it appears that although the eastern boundary of the piece granted is stated to be a creek descending from the mountain that creek where it forms a boundary of the piece granted is described as descending through a deep gorge in the mountain into the valley below, so that from this, as well as from other matters appearing in the case, it seems clear that the grantee of that piece of land never

1889

MARTLEY v. CARSON.

Gwynne J.

could within the bounds of the piece granted draw off any of the waters of the creek on to the piece granted for irrigation or other purposes. In order to draw water from the creek on to the above piece granted to Martley it would be necessary to take the water from a point high up in the creek a long distance above the nearest boundary of the land granted to Martley where the waters of the creek pass through the lands of the Crown. And for this reason it was that the ditch head of the ditch or watercourse before spoken of as having been constructed wholly through the lands of the Crown on the table land of the Pavilion Mountain was placed at a point in the above creek distant from about one mile and a quarter higher up the stream than the above piece granted to Martley, from whence it follows that Martley in virtue or by force of the letters patent granting to him the above piece of land acquired no right at common law or otherwise in the water running from time to time through the artificial watercourse, so as aforesaid constructed prior to his grant, and that he took the piece granted subject at least to a right subsisting in the Crown to maintain that ditch or watercourse for the public purposes for which it was constructed. In this position matters continued until the following year, 1865; for the fact that Martley on the 1st December, 1863, before he had acquired title to the land, mortgaged it to certain persons, who upon default being made in the payment by Martley of a sum of money thereby secured on or before the 1st day of June, 1864, were empowered by a clause in the mortgage to sell the land freed and discharged of all claim of Martley, is immaterial to the consideration of the points in discussion. It may be here observed that the piece of land spoken of in the above letters patent as the "homestead occupied by the said John Martley in

1889

MARTLEY v. CARSON.

Gwynne J.

the valley" consisted of four pre-emption claims of 160 acres each, which had been pre-empted by Martley in his own name and in that of his wife and of a son and of a daughter in 1861, the whole together forming a tract of 640 acres extending in length along the stream flowing through the valley and in depth about a quarter of a mile from the stream to the crest of the table land on the mountain overhanging the valley.

On the 11th day of April, 1865, there was passed a statute called the "Land Ordinance of 1865," certain clauses of which headed "Water" are important and which as interpreted by the 3rd section of another statute or ordinance passed the 31st day of March, 1866, read as follows:

WATER.

44. Every person lawfully occupying and "*bonâ fide*" cultivating lands may divert any unoccupied water from the natural channel of any stream, lake or river adjacent to, or passing through such land, for agricultural purposes upon obtaining the written authority of the Stipendiary Magistrate of any District, acting as Assistant Commissioner of Lands and Works, for the purpose and recording the same with him after due notice as hereinafter mentioned specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require.

45. Previous to such authority being given the applicant shall put up in a conspicuous place on each person's land through which it is proposed that the water should pass and on the District Court-house notices in writing stating his intention to enter such land and through and over the same to take and carry such water, specifying all particulars relating thereto, including direction, quantity, purpose and term.

46. Priority of right to any such water privilege, in case of dispute shall depend on priority of records.

47. The right of entry on and through the lands of others for carrying water for any lawful purpose upon, over or under the said land, may be claimed and taken by any person lawfully occupying and *bonâ fide* cultivating as aforesaid and, (previous to entry) upon paying or securing payment of compensation as aforesaid for the waste or damage so occasioned to the person whose land may be wasted or damaged by such entry or carrying of water.

1889

MARTLEY v. CARSON.

Gwynne J.

48. In case of dispute such compensation or any other question connected with such water privilege, entry or carrying, may be ascertained by the Stipendiary Magistrate of the District, acting as Assistant Commissioner of Lands and Works, in a summary manner at the option of either of the contending parties either with or without a jury of five men to be summoned as in ordinary cases.

50. Water privileges for mining or other purposes not otherwise lawfully appropriated may be claimed, and the said water may be taken upon, under or over any land so (as in the act) pre-empted or purchased as aforesaid by obtaining a grant or license from the Stipendiary Magistrate of the District, acting as Assistant Commissioner of Lands and Works, and previous to taking the same paying reasonable compensation for waste or damage to the person whose land may be wasted or damaged by such water privilege or carriage of water.

The first question which arises upon this statute is: Are riparian proprietors the only persons who come within the operation of the benefits conferred by the above clauses of the act, and can they only draw off water from the streams, &c., upon which they are such riparian proprietors, or does the statute apply for the benefit of all persons requiring the use of water for agricultural or other purposes, whether they be riparian proprietors or not? And, in my opinion, the answer must be that the act is not limited to riparian proprietors but applies equally to persons who are not such proprietors, and that a contrary construction would make the statute quite useless. Instead of contemplating an addition to the common law right of riparian proprietors to the natural flow of the waters in a stream flowing through their properties, the design of the statute was to make provision for enabling all persons requiring the use of water for agricultural or other purposes to obtain it from all neighbouring streams or lakes from which it could advantageously be brought, thus qualifying the common law right of riparian proprietors by substituting therefor those statutory rights which the conformation of the country made absolutely necessary to the bene-

ficial use of by far the greater portion of the whole province consisting, as it does, chiefly of mountain ranges and elevated table lands on the mountain slopes through or near which mountain streams flow rapidly down steep descents through precipitous gorges into valleys which are in many places narrow, and where only riparian proprietors could avail themselves of any benefit from their common law right to the natural flow of running water. The provisions made by the statute do no prejudice to the riparian proprietors who can avail themselves equally with all other persons of the benefits of the act, priority of a grant, recorded under the act, of water not otherwise occupied or appropriated alone giving precedence to any one. For my part I can entertain no doubt as to the language of the act. It does not say that any riparian proprietor on any stream, &c., may draw off from the same stream as it flows through the land of some other person, the waters or any part of the waters of the stream and convey them through a ditch or channel constructed on the lands of one or more riparian proprietors to his own land for his own use; but it plainly says that every person lawfully occupying and *bonâ fide* cultivating lands may divert the water of any stream, lake, or river adjacent to, or passing through, such land upon obtaining the written authority of the Stipendiary Magistrate of the District acting as Assistant Commissioner of Lands and Works so to do. Then by another section it is plain the lands of more persons than one may intervene between the stream, lake or river from which the water is taken and the lands to which it is conveyed; then another section enacts that the right of entry upon and through the lands of others for carrying water for any lawful purpose upon, over or under the said land may be claimed and taken by any person

1889
MARTLEY
v.
CARSON.
Gwynne J.

lawfully occupying and *bonâ fide* cultivating as aforesaid upon payment of compensation for any damage done to the person whose land is entered upon for such carriage of water.

Then another section provides in general terms that water privileges may be claimed for mining and other purposes, an expression large enough to include all lawful purposes, and that the said water may be taken upon, under or over any land pre-empted or purchased under the act by obtaining a grant or license from the Stipendiary Magistrate of the District acting as Assistant Commissioner of Lands and Works—and previous to taking the same paying reasonable compensation to the person whose land may be damaged thereby.

There may be some difficulty at first sight in construing the act by reason of an apparent repetition of powers which upon a careful consideration appear to me not to be repetitions. That, however, the act is not confined in its application to riparian proprietors there can, I think, be no doubt.

In construing the act we must attribute a distinct purpose to the several sections of the act above referred to. The true construction of the act appears to me to be, that by the 44th section leave to divert any unoccupied water may be obtained upon the written authority of the Stipendiary Magistrate acting in the capacity of Assistant Commissioner of Lands and Works. In that case the magistrate as such Assistant Commissioner is directed to see that before he gives the leave the provisions of the 45th section have been complied with; but these provisions are merely directory, for in a province only opened to settlement in 1859 the lands to be affected in the greater number of cases would be the lands of the Crown under the control of the Assistant Commissioner himself of Lands and Works in the

1889

MARTLEY v. CARSON.

Gwynne J.

district, so that in those cases there would be no person to whom the notice referred to could be given. Then by the 47th section the privilege may be claimed, that is to say as I read the act, before the Assistant Commissioner of Lands and Works who must determine whether, and to what extent, the water sought to be diverted is unoccupied, and what would be a reasonable quantity to allow to the applicant for the purpose for which the water is required by him, but the questions of compensation and as to the course the channel for conducting the water shall take through the lands in which it has to be dug, &c., &c., may be left by the Assistant Commissioner to be agreed upon by the parties concerned either of whom, if they fail to agree, may by the 48th section require the Assistant Commissioner himself to determine the questions either with or without a jury, and lastly, by the 50th section, provision is made that water privileges for mining or other purposes may be obtained by a grant or license made by the Stipendiary Magistrate, acting as Assistant Commissioner of Lands and Works, a higher species of right than the "leave" in the 44th section. In that case it appears to be left to the discretion of the magistrate acting as aforesaid to determine the propriety of making the grant in each case, but the making it is of no avail to the party obtaining it until he shall have made reasonable compensation for the waste or damage to the person or persons whose lands may be wasted or damaged by such water privilege; and the propriety of making such grant cannot be questioned after it is made, nor is there any reason why it should be as it cannot be acted upon on the lands of any person which may be affected by it until the parties whose lands may be damaged thereby are compensated. In case the parties should fail to agree as to the compensation,

1889

MARTLEY v. CARSON.

Gwynne J.

I apprehend that the decision of the Assistant Commissioner could be invoked in this case under the 48th section equally as in the case mentioned in the 47th section. The object of the statute, as it appears to me, plainly was to provide means by which, in a country of such peculiar conformation as British Columbia, water required for the beneficial use of land or for any other lawful purpose, including mining might, be obtained with the greatest facility and in the most speedy and summary mode possible, and that no common law grant of the easement is at all necessary. That the statute should be construed as an encroachment upon that venerable embodiment of all wisdom, the common law, is really no hardship but quite the reverse in a country of such modern origin and of such peculiar conformation as British Columbia. The legislature of that country are the best judges of what is most suitable to the condition of the country, and they have, in my opinion, in clear language enough expressed their intention to be as above stated, and that authority to determine in what manner the waters in all the streams, lakes and rivers in this mountainous country shall be distributed among all persons requiring the use of such water, whether for mining or any other lawful purpose, is confided to the discretion of the Stipendiary Magistrate of the district in which such water is, acting in his capacity of Assistant Commissioner of Lands and Works which, as well as Stipendiary Magistrate he is.

No one has any right to complain of its provisions; it does no prejudice to any one, for all Crown grants in the colony have been and are made subject to it.

It would be useless to expect that the table lands upon the mountain ranges stretching throughout the colony should ever attract settlers upon them, or that the staple wealth of the colony could ever be worked

beneficially, if riparian proprietors of land should be permitted to set up the common law of England against the advancement of the material interests of the colony. To my mind the act is infinitely more suited to the condition of the colony and better calculated to promote the interests of all persons becoming settlers in it than the common law of England, however admirable it be, and however entitled to the designation of "perfection of wisdom," when applied to the condition of a country like England.

To carry out the provisions of the act a book appears to have been opened in each district of the colony in which the custom was to enter all grants of water privileges made under the act as a record of the transaction. This book in which the grants are entered under the heading "Water Records" is preserved as a public record of such grants in the office of the Assistant Commissioner of Lands and Works in the district in which the water privilege granted is situate. The defendant Martley availed himself of the act by having recorded in the book opened for the purpose in the district in which the streams under consideration in the present case are situate, grants of water privileges made to him for the benefit of his aforementioned location in the Pavilion Creek Valley called the Grange, as follows:

WATER RECORDS.

No. 22.

Octr. 3rd, 1866. John Martley.

The right to the water of the creek crossed by the trail from the 29-mile house Pavilion Mountain to Captain Martley's house at the Grange Pavilion Creek.

A. C. ELLIOTT.

No. 28.

January 4th, 1867.—The right to the water of a creek running from Pavilion Mountain into Pavilion Creek Valley, and running close to Captain Martley's house.

Per A. C. ELLIOTT. T. H. SHERWOOD.

42½

1889

MARTLEY v. CARSON.

Gwynne J.

The first of the above entries relates to a creek now called Gillen's Creek which flows down from a part of the table land north of Martley's location in the valley into and through a portion of the location lying west of his house on the Grange farm until it reaches Pavilion Creek, and the other of the above entries relates to a creek now called Milk Ranch Creek, which also flows down from another part of the table land north of the Martley location, but at some distance east of Gillen's Creek, and flowing through a portion of the Martley location east of the house thereon also falls into Pavilion Creek. This Milk Ranch Creek is supplied at a point above the table land overhanging the easterly section of the Martley location in the valley with the waters of another creek descending from the mountain and called now "Island Creek."

On the 20th January, 1868, the plaintiff Carson acquired, by right of pre-emption under the provisions of the above mentioned Land Ordinance of 1865, 160 acres of land called a ranch situate upon a part of the table land of Pavilion Mountain which overhangs the Martley Valley location; the southerly limit of Carson's ranch constitutes part of the northerly limit of the westerly portion of the Martley location, so that Carson's land or ranch although on a much higher elevation abuts upon the Martley location in the valley, and by reason of its elevation, although it is separated from Pavilion Creek by but a short space across the Martley Valley location which is there narrow, can have no benefit from any water in the Pavilion Creek, nor as it appears from any creek in the neighbourhood, to supply his farm otherwise than by obtaining water to be drawn from the Pavilion Creek at a point high up and at the distance of some miles easterly of his land where the Pavilion Creek descends from the mountain, and before it enters the gorge by which through precipitous

banks it descends into the valley. The most suitable if not the only point in the Pavilion Creek from which water could be drawn to Carson's land appears to be that where the ditch head of the ditch or watercourse hereinbefore mentioned to have been constructed through the lands of the Crown for mining purposes was situate, and as this ditch or watercourse was still open and passed a short distance to the north of Carson's ranch it presented a favourable channel, if not the only one, by which Carson could procure a supply of water which was absolutely necessary for the beneficial enjoyment of his land

The same person who by the Land Ordinance of 1865 was authorized to make grants of and to distribute unoccupied water flowing in all streams, lakes and rivers for agricultural purposes was, as already shown, the person who was also by that act authorized to grant and distribute unoccupied water for mining or any other lawful purpose, namely, the Stipendiary Magistrate in the district in which the water sought to be diverted was situate, acting in his capacity of Assistant Commissioner of Lands and Works.

He was the person who alone was competent to determine whether water required for agricultural purposes or any lawful purpose other than mining, could be spared as unoccupied and should be granted from the waters supplied by the Pavilion Creek to the ditch or watercourse so as aforesaid originally constructed for mining purposes. That was a question with which none but persons engaged or authorized and intending to be engaged in carrying on mining operations had any concern and the Stipendiary Magistrate acting in his capacity of Assistant Commissioner of Lands and Works had, as it appears to me, the fullest authority in the exercise of his sole discretion to determine it.

1889

MARTLEY v. CARSON.

Gwynne J.

Accordingly Carson made application to Mr. Sanders, who as Stipendiary Magistrate, acting as Assistant Commissioner of Lands and Works, had in January, 1868, recorded his pre-emption grant of his land, for a grant of 200 inches of water to be conveyed to his farm though this ditch which in his application he appears to have described as—

> A ditch on Pavilion Mountain coming from a large creek on a mountain to about opposite 26-mile post, said water ditch for farming purposes on my ranch. I wish to record 200 inches of water.

This from the entry made in the record book of grants of water privileges would seem to have been the form of Carson's application. Upon this application Mr. Sanders, as and being then the Stipendiary Magistrate acting as Assistant Commissioner of Lands and Works in the district, entered in the water record book a record of a grant to Carson of 200 inches of water, describing the ditch through which the water is to be conveyed in the above terms as seemingly extracted from Carson's application, and then signed the record thereunder with his own name as stipendiary magistrate; the mining ditch already referred to corresponded with the description of the ditch mentioned in Carson's application through which he desired to get the water required; there was no other ditch of any description then in the neighbourhood, and there never has been entertained any doubt that the said mining ditch was, and alone could be, the ditch referred to in the application of Carson, and in the record of the grant, which latter as certified by a certified copy from the government record in the custody of and under the hand of the Assistant Commissioner of Lands and Works is as follows, under the heading "Water Records":—

1889

MARTLEY v. CARSON.

Gwynne J.

1868, May 16—No. 43.

Robert Carson, Pavilion Mountain, 200 inches to ditch on Pavilion Mountain coming from a large creek on a mountain to about opposite the 26-mile post. Said water ditch for farming purposes on my ranch. I wish to record 200 inches of water.

At the foot of the above record of grant the magistrate signed his name.

E. H. SANDERS S.M.

These letters S. M. meaning stipendiary magistrate.

Now, although the form adopted for recording these water grants might certainly have been more perfect than that which by the record book appears to have been originally made use of we cannot, for imperfections in form, pronounce the record to be void. In a new colony having a very sparse population, and whose officials have had little experience, imperfections of this nature which time and experience remove are very common and should be regarded leniently, and we must be careful not to frustrate manifest intention by too acute verbal criticism. There can be no doubt that the entries made in this book were intended to serve as a record, and the only record, of grants of water intended to have been made by the officer having sole authority under the statute to make them. With respect to this record of Carson's grant, which is more perfect than some others (notably those of the defendant Martley himself in which no quantity is mentioned), if instead of inserting at the foot of the grant of Carson's application in the first person, as made by him, the magistrate had used the third person so as to adapt the phraseology which was suitable in an application to the purpose for which the magistrate was using it, namely, insertion in the record of the grant made by him to Carson, the record would not have been open to the criticism to which it has been subjected; thus—"said water ditch for farming purposes on his ranch," "he wishes to record 200 inches

1889
MARTLEY
v.
CARSON.
Gwynne J.

of water." With a refinement of criticism more specious than sound it has been contended, however, that the record of this water grant (although entered in the book kept for the special purpose of recording water grants, and although by its heading it appears to have been intended to be the record of a grant of 200 inches of water on Pavilion Mountain to Robert Carson, and although it is signed by the stipendiary magistrate, the only officer competent and authorized by the statute to make the grant), is utterly null and void and is in fact an application merely for a water grant by the stipendiary magistrate himself.

Now the ditch or watercourse through which the water was to be conveyed to Carson's farm, as already pointed out, was constructed by or for the government wholly through lands of the Crown and was under the administration and control of the Gold Commissioners prior to the passing of the above Land Ordinance of 1865, and then by section 50 of that act came under the administration and control of the Stipendiary Magistrate of the district acting in his capacity of Assistant Commissioner of Lands and Works. The defendant Martley had not in virtue of his letters patent of February, 1864, any interest whatever in the waters entering and running in the ditch, nor any right in law to the use of, or to obstruct the free and uninterrupted flow of, the water in this artificial watercourse which was by statutory authority under the sole control and administration of the Stipendiary Magistrate of the district acting in his capacity of Assistant Commissioner of Lands and Works. He had no claim or right to compensation for the ditch which had been constructed before he obtained the grant specified in his letters patent. There was no intention to grant to Carson any right to enter upon Martley's or any other person's land for the purpose of making any new chan-

nel by which the water should be conveyed to Carson's farm. There seems therefore to have been no necessity or occasion that Martley or any other person should have had given to them the notice mentioned in the 45th section of the act. But however this may be, and assuming Martley to have been entitled to some compensation by reason of the land granted to him having been, if it was, exposed to damage by reason of dirt taken out of the ditch in the course of any cleaning of it which may have been necessary being thrown upon it, which seems to me to be the utmost he could claim, still the grant to Carson was perfectly good, if not under all at least under some or one of the three sections 44, 47 or 50 of the act; and, moreover, for reasons appearing further on, it is not open to either of the defendants to make any objection to it in the present action.

Carson appears to have proceeded under his grant to perform some work in the ditch so as aforesaid already in existence, whether of the nature of taking dirt out of it and cleaning it, or of laying a flume in it to measure his 200 inches of water at the ditch head or what else does not appear. The greater part of his work would necessarily be in that part of the ditch which passed through lands still belonging to the Crown. When, however, he came to that part of the ditch which was within the bounds of the lands granted to Martley by the letters patent of February 21, 1864, Martley made some objection, the nature of which or the reasons upon which it was founded do not appear. The defendant Martley says that he brought an action of trespass against Carson before Mr. Sanders (who as stipendiary magistrate aforesaid had given to Carson the grant which is as above stated recorded in the record book) and that Mr. Sanders gave judgment in his (Martley's) favour, and suggested an

1889

MARTLEY v. CARSON.

Gwynne J.

arrangement which as he says did take place. This statement cannot be accepted as evidence in the sense in which Mr. Martley plainly intends it to be understood, namely, that Carson's title to the use of the water in the ditch consists solely in a verbal arrangement with him, Martley, as the recognized and only person who was competent to give to Carson a grant of such use as of an easement in and upon his, Martley's, land, and that such right not having been granted by a deed executed by Martley it is void. That an arrangement was made between Martley and Carson there can be no doubt, and that it consisted in Carson paying $100 to Martley and in agreeing that Martley might take 50 inches of water out of the flume Carson was making and laying in the ditch, and that in pursuance of such agreement Martley put into Carson's flume a box to take such 50 inches of water may be admitted, but this admission is susceptible of a very different construction from that part of the transaction as represented by Martley. In 1868 the only character in which Mr. Sanders could have taken cognisance of any complaint made by Martley against Carson was either as a judge of the County Court under the County Court Ordinance of 1867, or as Stipendiary Magistrate acting as Commissioner of Lands and Works under the Land Ordinance of 1865, section 48. Now if Martley's complaint was the subject of county court action, and if, as Martley says, Mr. Sanders gave judgment in his favour, the subject matter of such action as well as the judgment therein could only be proved under the provisions of section 111 of the Imperial statute 9 & 10 Vic. ch. 95, which is incorporated into and made part of the County Court Ordinance of 1867, namely, by copies of the proceedings of the court certified under the seal of the court, and signed and certified by the clerk of the court. In the ab-

sence of such evidence it is impossible to assume that Martley's complaint took the form of an action in the county court. Indeed there is the strongest possible presumption, as it appears to me, not only that it did not assume the form of an action in the county court, but that it was a complaint made under the 47th section of the Land Ordinance of 1865.

There is no evidence of the committal by Carson of any act over which the county court could have assumed cognizance. That whatever Carson did was in assertion of a right claimed by him under the water grant in his favour recorded by the Stipendiary Magistrate acting as Assistant Commissioner of Lands and Works, and that such act was done in the ditch or watercourse so as aforesaid constructed, there is not raised any doubt. That this ditch was by the Land Ordinance of 1865 under the control and administration of the Stipendiary Magistrate of the district acting as Assistant Commissioner of Lands and Works there can, I think, be no doubt; that it was in the assertion of his right to make the grant to Carson under the Land Ordinance that Sanders acted when he made and recorded the grant to Carson there can be no doubt. The assertion by Carson of his right and title under the water grant to the enjoyment of the easement he was claiming in the ditch or watercourse, and Martley's assertion on the contrary of sole title in himself to grant the easement as being one to be enjoyed on land of which he claimed to be seized in fee, if such a claim had been asserted by him, must of necessity have raised a question of title to the land in which Carson was asserting his claim to an easement under his water grant so as to have excluded the jurisdiction of the County Court, if Martley had asserted in the County Court a right to interfere with Carson's proceedings upon such ground; whereas Martley may

1889
MARTLEY
v.
CARSON.
Gwynne J.

have deemed himself to be, whether in point of law he was or not under the circumstances is immaterial, entitled to compensation under the Land Ordinance Act before Carson should interfere with that portion of the ditch which passed through the land granted to Martley by the description contained in his letters patent of February, 1864; and in truth and in fact he would, I apprehend, have been entitled to compensation if, as possibly may have been the case, any dirt which in cleaning the ditch it may have been necessary to remove had been, or had to be, thrown upon Martley's land. That would have been a matter over which Mr. Sanders as the Stipendiary Magistrate who had made the water grant to Carson had undoubted jurisdiction, and he might have suggested to the parties that they had better come to an agreement as to compensation. What may have been actually passing in his mind it is difficult after the lapse of twenty years now to determine. The fact that the arrangement which was made was verbal was quite consistent with its having been made under the 48th section of the Land Ordinance of 1865, whereas it is quite inconsistent with its having been intended to be, as is now contended, an imperfect grant of an easement over Martley's land made by him to Carson. There is, therefore, in my opinion, the very strongest possible presumption that the arrangement was, and was intended to be, an arrangement under the 48th section of the Land Ordinance. There can be no doubt that the intention of the parties was that the arrangement should be an honest, perfect and effectual one for both parties to it. At the time of its having been entered into Carson had his water grant recorded entitling him to 200 inches of water to be taken from the Pavilion Creek by a flume to be laid by Carson in the ditch so constructed as aforesaid. If the lands through which the ditch was

1889

MARTLEY v. CARSON.

Gwynne J.

constructed were all of them still Crown lands there was no person to be compensated under the statute before the grant should be acted upon and the water taken. If, however, there was any person whose lands through which the water should be so conducted to Carson's farm would be wasted or damaged thereby Carson's grant although made to him would, by a provision in the statute, be of no avail to him as to such lands until he should make an arrangement with such person as to compensation. Carson was claiming the benefit of his grant and was proceeding to avail himself of it, under the impression no doubt that as the ditch was constructed in manner aforesaid, and as he had a grant under the statute and recorded by the Assistant Commissioner of Lands and Works, the officer of the government having control of all public lands and works and the making of water grants under the statute, there was no person to be compensated for his laying his flume in the ditch and doing any necessary repairs in it to enable him to do so. Martley, however, (whether or not under an erroneous impression as to his rights, does not now matter) objected to Carson's interfering in any manner with that part of the ditch where it lay through his land, and Carson (whether under any obligation or not so to do) agreed to pay Martley and did in fact pay him $100 and agreed also to let him have fifty inches of water from his, Carson's, flume and thereupon proceeded under his water grant to do all work necessary to the laying of his flume from the ditch head at the Pavilion Creek to his farm at a cost of $1,500, as he says, and suffered and permitted Martley to put a box into his flume to take the 50 inches of water at a place where the ditch and flume therein crossed the Island Creek. Now as this arrangement could only be good and effectual by regarding it as one made under the Land Ordinance

1889

MARTLEY v. CARSON.

Gwynne J.

by way of compensation to Martley thereunder it must be so regarded; and Carson's grant of the 200 inches of water made to him by the Assistant Commissioner of Lands and Works became thereby absolutely indefeasible as against Martley and all persons claiming under him the land granted by the letters patent of February, 1864, who cannot now be permitted to call in question Carson's right to the benefit of the water grant made to him under the statute for any real or supposed defect either in form or substance. Martley having, under the arrangement made by him with Carson, put a box into Carson's flume so as to draw off his 50 inches of water differences arose in 1870 between them as to the use made by each of the water during 1869, which was a dry season; each party seemingly complaining of the other having done damage by a use of the water contrary to the arrangement. Now these differences had plainly no relation whatever to any question as to the terms upon which Carson should acquire, or had acquired, a grant of any easement from Martley. Neither Carson nor Martley can be assumed to have contemplated submitting any such question to arbitration, nor in point of fact was any such arbitrated upon; but differences as to any damage which either may have sustained, or may have supposed that he had sustained, in the dry season of 1869 by a greater use of the water than was in accordance with the arrangement, treating it as one made under the Land Ordinance as above suggested, and for the purpose of regulating in future the use of the water under the arrangement so as to prevent the recurrence of such differences, were matters which well and reasonably might have been submitted by both parties to arbitration and by a parol submission; and this is what, judging from the award, appears to have been done. The award was produced in evidence

at the trial but is not in the appeal case as an exhibit; it is however quoted in full in the judgment of the full court on the appeal to it from the judgment of the learned Chief Justice who tried the case. It is as follows and is dated the 2nd June, 1870:

We have been appointed arbitrators in a cause between Captain Martley and Robert Carson respecting the right to water in a certain ditch passing through Captain Martley's farm on Pavilion Mountain and damages that either may have sustained by the loss of water for irrigation in the year 1869. We find that neither is entitled to damages. That while Captain Martley has a sufficient supply of water in the two creeks passing into his farm he shall not be entitled to any water from Carson's ditch, but in case of scarcity Captain Martley shall be entitled to half the water in Carson's ditch, the half not to exceed in any case fifty inches and he will be entitled to get this for use on his farm round his house, and to take it out of the ditch where it joins the Island Creek. Captain Martley may use these fifty inches on Pavilion Mountain if he chooses.

Signed, GEORGE A. KELLEY.
JOSEPH L. SMITH.
J. S. SWART.

In the above award it is to be observed that the ditch is called Carson's ditch, and what the award recognizes Martley to be entitled to is 50 inches of water from Carson's ditch (not that Carson is entitled to any water from a ditch of Martley). Indeed it appears that from the time of the water grant to Carson the ditch through which the water was conveyed to his farm became known, not only popularly throughout the country, as Carson's ditch, but that it was also recognized as such by the Assistant Commissioner of Lands and Works in other grants of water made and recorded by him. In the water record book a grant is recorded on the 16th May, 1870, as having been made in favour of one William Sampson of a right to 200 inches of water from a large creek supplying Carson's ditch.

Upon the 10th of August, 1870, two months after the above award was made, the mortgagees in the herein-

1889
MARTLEY
v.
CARSON.
Gwynne J.

before mentioned mortgage executed by Martley sold and conveyed the land therein comprised, under the power of sale therein contained, to one Beaven in fee, and upon the 27th of the same month of August Martley, by a deed of grant and confirmation reciting that sale, granted, confirmed and assured the land to Beaven in fee by the description contained in the letters patent to Martley of 7th February, 1864.

Now, bearing in mind the facts that the ditch head of this ditch (now called Carson's ditch) was situate on the lands of the Crown about one mile or one mile and a quarter above the land granted to Martley, and that the ditch was dug for that distance from its ditch head before it entered that part of the Crown lands which, subsequently to the construction of the ditch, was granted to Martley; and that Martley had never acquired any water grant whatever under the Land Ordinance, it follows, in my opinion, that he never had at any time a legal right to draw water from that ditch on to his land; but however this may be, if he ever had any such right in virtue of his letters patent such right absolutely ceased and determined, if not on the 10th August. 1870, at least upon the execution by him of the deed of the 27th August, 1870, to Beaven; so that after that date he could have had no claim whatever or pretense of claim to draw off water from the Carson ditch where it crossed Island Creek or any other point unless under Carson's recorded water grant, and the agreement for compensation made with Carson and the award. He did, however, draw off his 50 inches of water out of the Carson ditch at the place specified in the award, namely, where it crossed Island Creek, continuously until 1878, when, as he says himself, he told Carson that he would be content with 30 inches, and that Carson accordingly put in a 30-inch box through which Martley received water until the diffi-

culty arose which was the cause of this action having been commenced on the 7th July, 1884. We have thus arrived at the conclusion, which I confess appears to me to be incontrovertible, that as during all this period from the 27th August, 1870, to the occurrence of the difficulty which was the cause of the commencement of this action on the 7th July, 1884, a period of fourteen years, Martley had no legal right whatever entitling him to draw water from the Carson ditch unless in virtue of Carson's water grant and his agreement with Martley for compensation and the award, it must be presumed that the water was taken under this the only title which Martley had and could assert, and that in this action he must be concluded from disputing a title the benefit of which he has so long enjoyed. It seems, therefore, to me to be clear that as against him, and Clark also as claiming under him the land granted by the letters patent of February, 1864, Carson's right to draw his 200 inches of water from Pavilion Creek under his grant is indisputable, and any interference by Martley or Clark with such right constitutes an actionable wrong to Carson entitling him to recover satisfaction for such damage as he may have sustained which is reasonably attributable to such interference.

1889
MARTLEY
v.
CARSON.
Gwynne J.

Now as to the defendant Clark he obtained no title to any land until the 9th July, 1875, when he had recorded a pre-emption title to 320 acres of land on the Pavilion Mountain, bounded on the north-west by Sampson's farm and on the south-east by Beaven's land; this latter land is that conveyed to Beaven by Martley. This land so pre-empted by Clark is, equally as is Carson's, situate on the table land north of Martley's location in the valley, but through it flows Milk Ranch Creek, which upon Clark's farm is joined by Island Creek and

1889

MARTLEY v. CARSON.

Gwynne J.

flows down the crest of the mountain across Martley's grange from and to the east of his house into Pavilion Creek. Through the westerly part of Clark's pre-emption land there flows another small stream into Gillen's Creek where it flows through Martley's location in the valley. Clark would seem to have found these streams so flowing through his land to be insufficient for his farming purposes, in consequence probably of Martley having claimed to have acquired by his hereinbefore mentioned water records of 3rd October, 1866, and the 4th January, 1867, a right to have the uninterrupted flow of all the water in these streams down from the mountain into and upon the location in the valley, a claim which I presume was founded upon the last sentence in the 48th section of the Land Ordinance of 1875, which is a repetition of the last sentence of the 30th section of the Land Ordinance of 1870, which seems to enact that no person shall have exclusive right to the waters of a natural stream, even though running through his land, unless under a water grant recorded under the act. Clark therefore applied under this Land Ordinance of 1875 for a grant of water from Pavilion Creek which is recorded on December 14, 1876, as granted to him in these words:—

T. C. Clark, Pavilion, 200 inches of water from Pavilion Creek 20 yards below Carson's ditch for irrigating purposes on Clark's ranch, Pavilion Mountain.

This grant, it will be observed, as did that to Sampson in 1870, mentions Carson's ditch as one recognized, by the authorities alone having authority to make water grants, as belonging to Carson, and this in so very marked manner as to make the reference to the Carson ditch form such an essential part of the grant to Clark by defining the precise point from which he is permitted to take the water granted to him as to seem to attach to his grant a necessary obligation upon

1889

MARTLEY v. CARSON.

Gwynne J.

him to recognize the Carson grant as one with which he cannot interfere, for he is permitted only to take the water at a point "20 yards below Carson's ditch." Under this water grant Clark made a ditch from the Pavilion Creek placing his ditch head as directed in his grant at a point 20 yards below the ditch head of Carson's ditch. The ditch so constructed by Clark is a little to the south of and nearly parallel for some distance with Carson's ditch; it runs first through the lands of the Crown, then through Beaven's land formerly belonging to Martley, and then takes a southerly course and crosses Island Creek some distance south of the point where Carson's ditch crosses that creek, then it crosses Milk Ranch Creek in Clark's pre-emption lot through which it passes and discharges its waste water into the small stream which falls into Gillen's Creek, and so through Martley's location in the valley into Pavilion Creek. Through this ditch Clark from the time of its construction has conveyed, and at the time of the commencement of this action did convey, and still conveys the waters which he takes from Pavilion Creek to his said pre-emption lot, as the only course by which water can be conveyed from Pavilion Creek to his said lot. Now it is obvious that Clark can claim a right to water running in this ditch only in virtue of the same title as that under which Carson claims, namely, a grant under the Land Ordinance, and it appears to me the reference to "Carson's Ditch" in the record of Clark's water grant so imports into this latter a recognition of Carson's grant as to conclude Clark from disputing its validity, even if it was open to impeachment for any cause, which for the reasons already given in discussing Martley's case I think it is not. If, however, either Carson or Clark should wilfully waste any of the water acquired under the grant to either the case is brought within the 55th section of the Land Ordinance of 1875, which enacts that:

1889

MARTLEY
v.
CARSON.

Gwynne J.

Any owner of any ditch or water privilege who shall wilfully waste any quantity of water heretofore or hereafter acquired by record or otherwise by diverting any more of it from its natural course, through any ditch or otherwise, than the quantity actually required by him for irrigation or any other purpose, shall be punished by a fine not exceeding one hundred dollars for each such offence to be recovered before a justice of the peace, stipendiary magistrate, or commissioner in a summary manner, and in default of payment by distress, or by imprisonment for any period not exceeding six months.

Now upon the 7th July, 1884, this action was commenced and the pleader in the statement of claim filed on behalf of Carson (I omit all reference to Eholt for the present) asserts title under his water grant of the 16th May, 1868. He inaccurately avers that in 1867 Carson made the ditch which, as already stated, was some years previously constructed by, or by authority of, the government for mining purposes; he then sets out the award made in 1870 in the arbitration between Carson and Martley, and avers that Martley never had obtained any water grant recorded in his favour entitling him to take water from Pavilion Creek and insists that by reason of his not having done so he could acquire no interest under the award. This contention was presumably based upon the construction put by the pleader upon the 30th section of the Land Ordinance of 1870, which became law upon the 1st of June, 1870, the day before the making of the award, and which is repeated in the 48th section of the Land Ordinance of 1875 and is still in force, to the effect apparently that no person can have exclusive right to the waters, even of a natural stream running by or through his land, except under a water grant recorded under the act. The statement then avers the cause of action as follows:—

In and during the month of June, 1884, and thenceforth until the commencement of this suit the defendant, John Martley, by his agents, servants or workmen, and the defendant Clark obstructed the said ditch of the plaintiff and diverted large quantities of the water

1889

MARTLEY v. CARSON.

Gwynne J.

thereof away from the said land of the plaintiff by placing a box in the bed of the said ditch about three-quarters of a mile up the said ditch, and by there making and maintaining a cutting in the said ditch and drawing off large quantities of the water thereof through the said cutting back into Pavilion Creek, and the defendants by force and violence prevented the plaintiffs from repairing such ditch; that the defendants thereby diminished the quantity of water which flowed down the said ditch and deprived the plaintiffs of the flow of water therein to which they were entitled as aforesaid.

The plaintiffs claimed $8,000 and an injunction and such further and other relief as the nature of the case might require. The defendant Martley in his defence and counter-claim denied that Carson had ever in point of fact obtained any right to 200 inches of water from Pavilion Creek, or that the waters of that creek were at any time unoccupied. He denied that Carson ever got the written authority of the Stipendiary Magistrate of the district to divert any of the water of the said creek, and that Carson did post or give notices to the effect mentioned in the 45th section of the Land Ordinance of 1865.

Under this averment is sought to be raised the contention that a right, if any could be obtained by Carson, to the use upon his farm of any water from Pavilion Creek could only be obtained under the 44th section of the Land Ordinance of 1865, and that it is necessary for a person claiming such a right to be prepared during all time with evidence of the fact that the notices mentioned in the 45th section were given before the leave to take the water was given by the Assistant Commissioner; but for the reasons already given the 45th section is merely directory; and moreover it is not, in my opinion, necessary for Carson to rest upon the 44th section to maintain his water grant recorded as it has been; but assuming him to be obliged to rest on the 44th section alone it is, in my judgment, impossible that it could be

1889

MARTLEY v. CARSON.

Gwynne J.

expected, or that it could have been intended by the statute, that a person who had obtained from the duly authorized ministerial officer of the government named in the statute permission to take to his farm a supply of water from a stream should during all time and after enjoying the benefit of such permission, it may be for 15 years as here, be required to prove that such notices were given before he could succeed in an action then brought for an interruption and encroachment upon his right. The case has been compared to that of a person justifying or claiming under a judgment of a court of inferior jurisdiction, in which case it has been held to be necessary upon all such occasions for such person to plead and prove all matters necessary to show his case to have come within the jurisdiction of the inferior court upon whose judgment he relies. That was an old rule of pleading merely which owed its existence to another rule adopted by the superior courts to govern their own procedure, namely, that they would not take judicial notice of the jurisdiction of inferior courts, and that therefore, if a judgment of such a tribunal was relied upon, it was necessary for the party relying on it to plead and prove that the case came within the jurisdiction of the inferior tribunal. But between such a case and the present there is no analogy. Here no claim is made under the judgment of a court of inferior jurisdiction or anything analogous thereto. The present is the case of a grant made by the ministerial officer of the government authorized by statute to make the grant, which grant when made and recorded cannot be questioned upon an allegation that notices which he was directed to see had been given before he should make and record the grant had not been given. To such a case the old rule of pleading mentioned has no application. Martley then avers that the waters of the Pavilion Creek

naturally flow through his land; he avers that in the month of August, 1884, he duly obtained the right to divert and use 200 inches of water of the said creek; he says that Carson and he verbally agreed in the year 1868, that in consideration of Carson paying him one hundred dollars he, Carson, should have the right to use that part of the ditch running through his, Martley's, land subject to Martley's right to use the first fifty inches of water running through it to be taken for use whenever he, Martley, required it, and that it was in consequence of a breach of this agreement by Carson that the arbitration mentioned in the statement of claim was had; he avers that at the time of filing his statement by way of defence he has been in undisputed possession of so much of the waters of Pavilion Creek as is necessary for farming purposes and the use of the said ditch for over twenty years then last past; he denies that he ever acted in concert with the defendant Clark as in the statement of claim is alleged, and he avers that in so far as he is concerned the alleged trespasses and grievances in the statement of claim mentioned consisted in the exercise by him of his right to the said water and to the use of the ditch, placing a box therein to take 50 inches of water therefrom and taking it for use upon his farm and not otherwise; and he denies that he directly or indirectly prevented the repairing of the ditch, and he denies the use of force and violence, and he denies that either of the plaintiffs has been deprived by him of any water to which he is entitled or that either of them has sustained any damage; and he makes a counter-claim for damages alleged to have been sustained under the averments following: He says that he is possessed of a farm known as the Grange, and that in the months of June, July and August in the year 1884 the plaintiffs wrongfully di-

1889
MARTLEY
v.
CARSON.
Gwynne J.

verted and deprived him of the use of the said water whereby his crops became poor; that the plaintiffs broke the box through which he, Martley, took the water, and that he incurred a great expense in endeavouring to prevent the plaintiff's abstracting the water. It is to be observed as to this defence and counter-claim:

1st. Upon the averment that at the time of the water grant the waters of Pavilion Creek from which the water was granted to him were not unoccupied has been founded the argument that the Land Ordinance as regards water grants was not intended to apply to any one but a riparian proprietor, an argument which, upon reflection, appears to be suicidal. The contention is that as by the common law of England every riparian proprietor is entitled to the flow of the waters of every stream running along or through his property in its natural course without interruption, therefore the waters of no stream upon any part of which there is a riparian proprietor can be said to be unoccupied. If this be so then as a matter of course when there are two or more riparian proprietors upon any stream, as according to the argument none of the waters of that stream can be said to be unoccupied, no riparian proprietor can claim to have or can have any exclusive use of any part of the waters of that stream taken from it in the lands of another riparian proprietor granted to him under the Land Ordinance, any more than a stranger not a riparian proprietor could; for by the Land Ordinance it is only unoccupied water which can be granted under its provisions to any one; and so the Land Ordinance, so far as water grants are concerned, becomes nugatory and inoperative.

The term "unoccupied," in my judgment, on the contrary plainly means what the terms "unrecorded and

unappropriated" mean in the Land Ordinances of 1870 and 1875, and the term "unoccupied water" in the Gold Fields Act, and so read the Land Ordinance becomes, what it was intended to be, sensible and operative.

2ndly. It is not true that the Pavilion Creek naturally flows through or along the land of the defendant Martley at any place which is material to the consideration of the points in difference in this action, although it is true that the creek runs along, and is the southern boundary of, his pre-emption location in the valley at the foot of the mountain called the Grange Farm; but this is wholly immaterial to the present case, for none of the waters so flowing in the creek have been interfered with, nor does Martley complain that it has been, nor does he pretend that he could make use of the water in the creek, as it flows through the valley, for irrigation upon his Grange Farm, or that he has been prevented from so doing by any act of Carson's; all that he claims is a right to draw off water from the ditch called Carson's ditch by a box therein to his Grange Farm in the valley, and the obstruction complained of by him is the alleged removal by Carson of a box in his ditch which Martley had at the place where it was directed by the award to be kept, namely, where Carson's ditch crosses the Island Creek.

3rdly. As to the allegation that in the month of August, 1884, Martley obtained a right to divert and use 200 inches of the water of the said creek to be recorded as granted to him. This allegation, although it is quite immaterial and irrelevant in the present case, because the right, if acquired, was acquired subsequently to the commencement of this suit, was not proved in the sense of showing that any right was acquired under the grant, or if acquired had been inter-

1889

MARTLEY v. CARSON.

Gwynne J.

fered with. This grant, although recorded, does not indicate any point in the Pavilion Creek from which the water is authorized to be drawn, and having been made under the provisions of the Land Ordinance of 1875 was of no avail to the grantee until he should construct a ditch for conveying the water to the place authorized by the grant, and it is not alleged or pretended that any such ditch was ever constructed or that Carson interfered with any right acquired under the grant.

4thly. As to the setting upan undisputed possession of so much of the water of Pavilion Creek as is necessary for farming purposes, and the use of the ditch (the Carson ditch) for upwards of twenty years next before the defence pleaded, it is utterly inconceivable how this allegation, which is so singularly rash and recklessly inaccurate, should have been pleaded and relied upon, or that being so relied upon it should have escaped notice in the court below and at the trial.

As already shown Martley had never, prior to August, 1884, recorded any grant authorizing him to divert any water from Pavilion Creek by the Carson ditch or otherwise, and since the 27th August, 1870, at any rate, he had no pretense of claim to the waters of the creek in its natural flow along the boundary of the land granted by the letters patent of February, 1864, through which the ditch passed; nor had he any right to divert any of the waters of the creek through the Carson ditch or otherwise, or to have or take any water running through that ditch otherwise than in virtue of Carson's water grant, the agreement with him and the award; and as to that agreement, as also already shown, it had no rationally conceivable *raison d'être* whatever, unless it was by way of compensation to Martley (whether entitled to it or not) to terminate all possible right of objection upon his part to Carson

availing himself of his water grant through the ditch in question, and to render it perfect and indefeasible as against Martley and all persons claiming or to claim under him the land granted by the letters patent of February, 1864; and his counter-claim is only for damage alleged to have been done to the Grange Farm in the valley by reason of the want of water which could be conveyed to it from Carson's ditch only through the box which Martley was permitted to have there and, ever since the 27th August, 1870, had there by no title whatever that can be shown or suggested unless under Carson's water grant, the agreement with him and the award; which title after having enjoyed the benefit of it for fifteen years Martley has now by this defence and counter-claim utterly repudiated.

Clark in his defence and counter-claim, while he admits the water grant made to him which was recorded in his favour on the 14th December, 1876, and his construction thereunder of the ditch in the plaintiffs' statement of claim in that behalf mentioned, pleads by way of counter-claim that the estate which Martley acquired by the letters patent of February, 1864, and which was vested in Beaven as hereinbefore stated, is now held by Clark under an agreement with Beaven; this agreement appears in evidence to have been entered into on the 8th January, 1883, whereby Beaven agreed upon payment of a sum of money therein mentioned by three annual instalments on the 1st days of December, 1883-4-5, to sell the said land to Clark. He then avers that at the times thereinafter mentioned he was and still is entitled to the flow of Pavilion Creek for nearly one mile and one-half along the eastern boundary of the said land, and that the plaintiff Carson in and during the month of June, 1884, and thenceforth until the commencement of this action obstructed Pavilion Creek and diverted large quantities

1889

MARTLEY v. CARSON.

Gwynne J.

of the waters thereof away from the said land by placing and keeping earth and stone in the bed of the said stream, and by placing a box as in plaintiffs' statement of claim is alleged (that is to say, as there alleged, "in the ditch of the plaintiff Robert Carson a measuring box capable of carrying 200 inches of water,") and there making and maintaining a cutting in the bank of the said stream, and taking the waters of the stream through the box and carrying the same through the ditch leading therefrom to Carson's land; and he further avers that Carson thereby diminished the quantity, and at times completely arrested the waters which flowed down the stream and deprived him, Clark, of the flow of water to which he was entitled as aforesaid; and he avers that the plaintiff Carson has continued such obstruction as aforesaid up to the present time, and he prays a declaration of the court to be made in this cause that he is entitled to the flow of the waters of the said stream, and that the plaintiff Carson may be restrained by injunction from in any manner obstructing or diverting the water of the said stream and from in any manner interfering with his, Clark's, said rights.

The obstruction above complained of, it will be observed, is in that portion of the creek which is situate in the Crown lands about a mile (as appears by the evidence) above the land granted to Martley by the letters patent of February, 1864, and it consisted in making a dam of some kind in the stream to divert water into Carson's ditch for the purpose of enabling him to take his 200 inches of water granted to him. The 55th section of the Land Ordinance of 1875, under which alone Clark by his water grant of December 14, 1876, obtained any right affecting the waters of the stream, provided abundant means to enable him to divert the waters of the stream

1889

MARTLEY v. CARSON.

Gwynne J.

from the place without any interference with the means necessary to be employed by Carson to enable him to enjoy the benefit of the water granted to him, namely, by constructing a dam or breakwater below Carson's ditch to retain the waters crossing Carson's dam, which it is quite possible may for a short time in a dry season necessarily keep back all the water flowing down the stream until sufficient is obtained to supply his 200 inches. This 55th section of the Land Ordinance of 1875 provides that—

> No owner of any first record to any ditch or water right shall have any right to interfere with or prevent the construction of any dams, breakwaters, or other improvements made or hereafter to be made for the purpose of saving or economising the water of any creek, lake or water-course of any kind, provided that the construction or use of such dam or breakwater does not nor will divert such water from its proper channel at the point or place where such owner takes the water used by him into his ditch or channel. Provided also that the construction and use of such dam or breakwater shall not injure the source from which such water is taken or the property of any person by backing water, flooding or otherwise; provided also that all disputes arising upon any matter or thing in this clause contained shall be decided in a summary manner before any justices of the peace, stipendiary magistrate or commissioner who shall have free power to make such decision as shall seem to him just and equitable.

By this statute ample means are provided to enable Clark to enjoy the full benefit of all the water of the river he was entitled to divert and the most speedy and effectual redress for any infringement of such, his rights. But what Clark asserts is, and this is his sole contention, that he is entitled to the natural flow of all the water in Pavilion Creek in virtue of his agreement of January, 1883, made with Beaven for the purchase of the land granted to Martley by the letters patent of 4th February, 1864, and that Carson had no right whatever to any of the waters of the stream to be taken through his ditch as claimed by him, and that under the above assertion of title what he seeks to obtain plainly

1889

MARTLEY v. CARSON.

Gwynne J.

appears to be, not that the waters of the Pavilion Creek may be suffered to flow in their natural course down the steep mountain gorge by which it descends along the land which Clark has agreed to purchase from Beaven into the valley at the foot of the mountain where the stream flows along Martley's pre-emption called the Grange farm, but to prevent Carson from taking his 200 inches of water or any water through his ditch head situate 20 yards higher up the creek than that of Clark, in order that Clark may obtain and through his ditch take the whole of the waters of the creek to his pre-emption land, and may be able to discharge as much as he pleases, or as may be agreed upon between him and Martley, down Milk Ranch Creek into the Grange Farm. Clark's defence and counter-claim, however, establish that Clark's complaint against Carson is not of any waste by him of the waters of the creek in excess of what he is entitled to, (in which case the 55th section of the act of 1875 would afford a most complete, prompt and effectual remedy), but an absolute denial that Carson has any right to divert any water by his ditch, and that all that is complained of by Clark is Carson's taking through his ditch head in the manner stated in his statement of claim the 200 inches claimed by him under his water grant, and that this diversion of the waters of Pavilion Creek by Carson is what has caused to Clark the damage of which he complains; so that if Carson's right to draw 200 inches of water from the creek under his water grant be established the establishment of such right, while entitling Carson to recover for any damage which may have been sustained by him by reason of Clark's interference with such right, also displaces wholly Clark's counter-claim which rests solely upon the success of his contention that Carson is not entitled to divert any of the waters of the creek

and that he, Clark, is entitled to the whole of the water flowing in it; and thus all necessity will be removed of endeavouring to ascertain from the evidence, which I confess seems, to my mind, very imperfect and confused, where or how precisely it is contended that the damage of which Clark complains could have been and was occasioned.

We find then the position of the parties as contended by the defendants to be this, that while Clark has two streams flowing through his pre-emption land and a water grant under the Land Ordinance of 1875 authorizing him to take and by which he takes 200 inches of water from the Pavilion Creek to the same land, and while Martley has the same two streams and another flowing down from the mountain to his Grange Farm besides the Pavilion Creek which flows along the whole length of that pre-emption location, and the plaintiff Carson has no means of irrigating his location unless by water taken under his water grant from Pavilion Creek at the point where his ditch head is 20 yards above the head of Clark's ditch, he, Carson, is not to be permitted to take any of such water, but that all the waters of the Pavilion Creek are to be applied to the exclusive use of Martley and Clark, upon the principle, no doubt, that to him alone who hath shall be given, and this is contended to be the true intent and meaning of the land ordinances of British Columbia passed by the legislature by way of invitation and inducement to persons to come into the province and settle upon the said table lands in the mountains who, without water provided by statute for irrigation purposes, have no possible means of procuring water for such purpose, and upon this construction of the said acts or ordinances a decree has been made adjudging the defendants to be entitled to the natural flow of the waters of

1889
MARTLEY
v.
CARSON.
Gwynne J.

Pavilion Creek as claimed by them and restraining the plaintiff Carson by perpetual injunction from interrupting or interfering with the flow of the waters of the said stream, and from permitting the same to continue unrestored and from permitting to continue on his land any ditch, dyke or watercourse whereby the waters of the stream may be wholly or partially diverted or interfered with so as to infringe upon the said rights of the defendants; and that he should also pay the defendant Martley $200 as herein aforesaid and the defendant Clark $500.

This judgment and decree cannot for the reasons already given be, in my opinion, sustained. On the contrary I am of opinion that the plaintiff Carson is clearly entitled to recover in this action, and that every principle of law and equity requires that judgment should be rendered in his favour for such damage as he may have sustained which can be reasonably attributed to any acts or act of the defendants or of either of them.

The sole question which now remains is to determine the amount of such damage. Now as to Clark his conduct has been, in my opinion, most wanton, vexatious and selfish. So far as I can collect from the evidence as appearing on the appeal case it appears that early in May, 1884, Carson proceeded to clean the ditch of which he had been in possession for fifteen years, claiming under his water grant of May 1868; about the 7th of that month he had completed such work as may have been necessary to enable him to draw off water from Pavilion Creek to his farm through his ditch under his grant; at first the water ran freely; in a day and a half it stopped; upon the 9th he went up to his ditch head and found it obstructed, and the water in the creek flowing down to Clark's ditch head; he removed the obstruction and let the water again into his ditch; again the obstruction was repeated, and

again he repaired it; afterwards he found a box let into his ditch by which all water coming into the ditch was let back again into the creek, thus again supplying Clark's ditch; subsequently he found another box put into his ditch at a point further from the ditch head by which the water was taken direct into Clark's ditch; these boxes Carson removed, but all his efforts to obtain water were fruitless for his ditch was again opened by Clark in different places so that the water was taken into Clark's ditch; at last as a final effort Carson put a new flume into his ditch head on the 12th June, 1884; upon this occasion Martley and Clark went up to the ditch head where Carson was at work, and Clark claimed the ditch and all the water in it to be his, and insisted that Carson had no right whatever to any of the water, and he again drew off the water into his ditch by openings made by him in different places in the Carson ditch; and in fine the result is that during the whole period in which the water was a necessity to Carson he was deprived of all benefit from his ditch, and of the water which in virtue of his grant of May, 1868, he claimed title to, and notwithstanding Clark, who beyond all doubt did or caused to be done the acts above mentioned, makes a counter-claim for damages said to have been caused by Carson's fruitless endeavours to repair, and prevent the full force and effect of, the injury done to him by Clark's acts. Carson is in my opinion entitled to recover from Clark substantial damages, and the only danger, I think, is lest a keen sense of Clark's wanton and selfish conduct should induce a judgment which might be excessive. It is difficult to make a just estimate of what loss Carson may have sustained from the want of water in the season of 1884, which is said to have been very dry. Its excessive dryness made the water a greater necessity,

1889

MARTLEY v. CARSON.

Gwynne J.

but at the same time it increases the difficulty of determining what might have been the result upon Carson's farm if the water he was entitled to draw from Pavilion Creek had not been cut off. I think that a judgment in Carson's favour for $600 against Clark, and dismissing his counter-claim with costs will not be excessive, and will at the same time afford reasonable compensation to Carson for what he may have suffered from Clark's conduct. Then as to Martley, he says that he never did any of the acts complained of as having been done by Clark; that he did nothing whatever in concert with Clark, and that in fact he did nothing at all but put into the ditch where it crossed Island Creek a box to draw off from the ditch 50 inches of water in the place and stead of a box which Carson had removed. If this be so he should not of course be held responsible for Clark's acts.

Why he should act in concert with Clark unless they had come to an agreement that they should divide between them the waters of Pavilion Creek it is difficult to conceive. If Clark should succeed in his contention that the ditch called Carson's ditch and all the water therein belonged to him, Clark, as his absolute property, and that Carson had no right to have had any water conveyed thereby to his farm, Martley's claim to 50 inches drawn from the ditch would be utterly gone also unless he should make an agreement for it with Clark. Martley's interest, in truth, depended on his maintaining as against Clark the Carson water grant and the agreement with him, in the sense hereinbefore pointed out to have been its reasonable construction, and the award, for it is plain that his assertion of title to the ditch and the water therein in himself could never be supported, as the only foundation of any title, if any he ever had, in the

ditch was claimed in virtue of his estate in the land granted to him by the letters patent of February, 1864, and since August, 1870, that title was vested in Beaven, and in 1884 was claimed by Clark to be in him under his agreement of February, 1883, with Beaven. Martley, therefore, if not claiming the 50 inches of water from Carson's ditch under Carson and his water grant, could have no means whatever of obtaining any water to be diverted from Pavilion Creek into his Grange Farm unless through Clark's ditch by arrangement with him or by means of a ditch to be constructed by himself under a water grant to be obtained by him under the Land Ordinance of 1875. I find a difficulty upon the evidence, in the absence of any agreement between Martley and Clark for a partition between themselves of the waters of Pavilion Creek above the gorge by which it descends into the valley, to find Martley to have been a party with Clark in the committal by him of the injurious acts which Clark undoubtedly committed, although he was present on one occasion with Clark when the latter asserted title in himself in the Carson ditch and the waters therein, and that Carson had no interest whatever therein and committed acts which could only be justified by his succeeding in maintaining such his assertion of title to be well founded. What appears most singular in the case is, that while Clark asserts title in himself in the ditch and the water therein in virtue of the title of Beaven, the owner of the land granted to Martley by the letters patent of February, 1864, and that Carson has no right to any of such water, Martley also asserts the title to be in himself, and that Carson never had any title save under him and by an agreement which, being verbal, he contends is valueless, and it is in virtue of this absolute right claimed to be in himself that Martley justifies

1889
MARTLEY
v.
CARSON.
Gwynne J.

putting into the ditch at the Island creek the box which he admits he did put in in June, 1884.

A letter of the 13th May, 1884, from Carson to Martley, and a letter of the 19th May from Martley to Carson, and a notice of the 30th May from Martley to Carson were produced at the trial but are not in the appeal case before us. If we had them they would probably throw some light upon what Martley did. He says that up to the receipt by him of Carson's letter of the 13th May it was a matter of indifference to him whether Clark had a sufficient supply of water or not, but that from the receipt of that letter he let Clark have all the advantage he could—that is to say by his box in the Carson ditch. That letter I understand contained an objection made by Carson to Martley letting Clark, in addition to the streams on his, Clark's, own farm, have the water taken from his, Carson's, ditch by Martley's box, insisting that under the award Martley had only a right to draw it for his own use.

I collect also from the short notes of evidence before us that Martley's letter of the 19th May conveyed notice to Carson that he would terminate after the 1st June what he considered to be Carson's title to have any water from the Carson ditch, namely, his, Martley's, verbal permission to take the water from his ditch. I gather also from the notes of evidence that some time in the month of June Martley's supply of water from the Carson ditch at the crossing of Island creek was cut off, and Martley admits that he opened the Carson ditch and put in another box capable of taking 50 inches of water in lieu of the one so removed; and although this act in itself would be open to the construction that it was done in assertion of a right acquired under Carson in virtue of his water grant, the agreement and award, Martley admits on the record that it was not done upon any such ground but was

done under a claim of absolute right and title in himself wholly independently of Carson whose right and title he utterly denies and repudiates.

Now if it clearly appeared that Carson's reason for removing the box which had been in his ditch at Island Creek was Martley's sharing with Clark the water so drawn off, and if Martley had replaced that box by putting in the one which he admits having put in, in assertion of a right to do so in virtue of Carson's water grant, his agreement and award, the case would have been very different and he might have some show of justice in support of his claim; but instead of so doing (in accordance, as it appears to me, with his true position and his interests) he asserts title in himself to all the water in the ditch to the exclusion of Carson, and denies and repudiates the title under which Carson had enjoyed the ditch for 15 years, and under which alone Martley himself could substantiate any claim to the 50 inches of water. This assertion of title in himself and repudiation of Carson's appears to have been made before Carson removed the box which Martley replaced, and was naturally calculated to irritate Carson and to invite his interference in assertion of his title; and now Martley puts upon the record that absolute assertion of the title in himself.

This his contention of title being incapable of being sustained judgment must be against him upon that point carrying all costs; and as the evidence does not, I think, sufficiently bring home to Martley complicity with Clark in the committal of the wrongful acts which he committed the ends of justice will, I think, be obtained by rendering judgment in favour of Carson against Martley for $10 and dismissing his counterclaim with costs.

As to Eholt he failed to show any water grant; he might therefore have been non-suited and as the whole

1889
MARTLEY
v.
CARSON.
Gwynne J.

matter in dispute was in reality as to Carson's title to the ditch and his 200 inches of water under his water grant, and the consequences resulting from its being or not being established, I think it will be sufficient simply to dismiss Eholt's claim with such costs to be paid by him as either of the defendants may have been, if either of them was, put to solely attributable to Eholt being a plaintiff, in excess of the costs occasioned by and having relation to the contention between Carson and the defendants. Our judgment therefore, in my opinion, must be to vary the judgment as above, and to dismiss the appeals of the defendants with costs to be paid to the plaintiff Carson.

*Appeal dismissed with costs.**

Solicitors for appellant Martley: *Davie & Pooley.*

Solicitor for appellant Clark: *Charles Wilson.*

Solicitors for respondents: *Drake, Jackson & Helmcken.*

---

* An appeal from this judgment to the Judicial Committee of the Privy Council was dismissed without consideration of the merits of the case on it appearing that the appellant Clark had parted with his interest in the property.

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA (CONTESTANTS)..... APPELLANTS;

AND

THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK (CLAIMING TO REPRESENT HER MAJESTY THE QUEEN) (DEMANDANT)..... RESPONDENT.

1888
*Oct. 22.
1889
*April 30.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Prerogative—Exercise of by local government—Provincial rights.

The government of each province of Canada represents The Queen in the exercise of her prerogative as to all matters affecting the rights of the province. *The Queen* v. *The Bank of Nova Scotia* (11 Can. S. C. R. 1) followed. Gwynne J. dissenting.

Under s. 79 of the Bank Act (R.S.C. c. 120) the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau JJ. dissenting. But see the present Bank Act (53 V. c. 31 s. 53) passed since this decision.

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

The Maritime Bank was insolvent and the government of New Brunswick was a creditor. The questions presented to the court by the special case were:—

"1. Is the Provincial Government entitled to payment in full by preference over the note-holders of the said bank?

"2. If not, is the Provincial Government entitled to payment in full over the other depositors and simple contract creditors of the bank?"

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

(1) 27 N. B. Rep. 379.

1888

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

The Supreme Court of New Brunswick decided both these questions in favour of the government and the liquidators appealed to this court.

The preference indicated by the first question is now settled by the Bank Act, 53 Vic. ch. 31, sec. 53, which makes the outstanding notes the first charge on the assets of an insolvent bank, claims of the Dominion Government the second charge and claims of the Government of a province the third charge. In the case of *The Maritime Bank* v. *The Queen* (1), the Supreme Court of Canada held that the Bank Act then in force, R. S. C. ch. 120, did not give the note-holders a lien in priority to the Crown.

The only substantial question raised by this appeal is: Does the provincial government represent the Queen so as to entitle it to priority of payment in full over other creditors of the bank?

A. A. Stockton and *Palmer* for the appellants. The provincial government does not represent Her Majesty in the exercise of prerogative rights since confederation. Todd on Parliamentary Government in England (2); Cox on the Institution of English Governments (3).

Prerogative cannot be created by statute. Watson's Constitution of Canada (4).

The learned counsel referred also to the following authorities: *Mercer* v. *Atty. Gen. of Ontario* (5); *United States* v. *State Bank of North Carolina* (6); *United States* v. *Bryan* (7); *Lenoir* v. *Ritchie* (8); *Exchange Bank* v. *The Queen* (9).

Blair, Atty. Gen. of New Brunswick, and *Barker* Q. C., for the respondent cited *Théberge* v. *Landry* (10);

(1) 17 Can. S. C. R. 657.
(2) 2 ed. vol. 1 p. 383.
(3) P. 592.
(4) P. 104.
(5) 5 Can. S. C. R. 538.
(6) 6 Peters 29.
(7) 9 Cranch 374.
(8) 3 Can. S. C. R. 575.
(9) 11 App. Cas. 157.
(10) 2 App. Cas. 102.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Strong J.

The Queen v. *Bank of Nova Scotia* (1); *Sloman* v. *The Governor of New Zealand* (2).

STRONG J.—This case raises the same question as to priority which was raised in the *The Maritime Bank* v. *The Queen* (3) and also another question. As to priority I refer, as in the former case, to *The Queen* v. *The Bank of Nova Scotia* (1). As to the second question, the right of a province to exercise and enjoy this prerogative of the Crown, I adhere to what I said during the argument, that there can be no doubt that the provinces have this right. I think the appeal should be wholly dismissed.

FOURNIER J.—The questions raised on this appeal are as follows:

1. Is the provincial government entitled to payment in full by preference over the note-holders of the said bank?

2. If not, is the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank?

On the first I am of opinion that the appeal should be allowed, and on the second that it should be dismissed.

I fully concur in the reasons given by Mr. Justice Patterson in support of his conclusion. No costs should be given to either party.

TASCHEREAU J.—As I have said in the preceding case I do not see it possible, in view of the wording of the Interpretation Act, to construe the Banking Act as excluding Her Majesty's prerogative rights. I think that the Crown has priority over the note-holders.

The appeal on this point should be dismissed.

As to the question whether the provincial government is entitled to preference over the other creditors

(1) 11 Can. S. C. R. 1. (2) 1 C. P. D. 563.
(3) 17 Can. S.C.R. 657.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Taschereau J.

of the bank I would also dismiss the appeal and answer this question in the affirmative as it has been in the court below. In my opinion under the B.N.A. Act the executive power in the provinces is, as a general rule, vested with the same rights and privileges in the administration of the functions, powers and duties thereto assigned under this act as are attached to analogous functions, powers and duties of the executive authority in England. Such was my opinion when, twelve years ago in the Superior Court at Montreal, I determined *Church* v. *Middlemiss* (1) and the appellant has failed to change my views on the question, though I admit now that in order to reach this conclusion it is not necessary to hold, as I did in that case, that Her Majesty forms part of the provincial executive authority.

GWYNNE J.—I am of the opinion that the appeal in this case should be allowed, and that both of the questions submitted in it should be answered in the negative as well for the reasons given by me in the case of *The Liquidators of the same Bank* v. *The Queen* (2) as for other reasons. If for the reasons therein given by me the prerogative privilege insisted on does not exist in the interest of the Dominion Government, it cannot in my opinion exist for the benefit of the governments of any of the provinces of the Dominion. However properly by reason of the nature of the constitution given to the Dominion debts due to the Dominion Government may be regarded as debts due to Her Majesty, I can see nothing in the constitution of the provinces of the Dominion which makes debts due to the provincial governments to be, or which requires them to be regarded as being, debts due to Her Majesty, and certainly there is nothing in my opinion which, assuming

(1) 21 L.C. Jur. 319. (2) 17 Can. S.C.R. 657.

them to be debts due to Her Majesty, attaches to them the application of the royal prerogative of priority in payment.

There is a very distinctly marked difference between the constitution given by the British North America Act to the Dominion of Canada, and that given to the several provinces of the Dominion. As to the constitution of the Parliament of the Dominion the act expressly declares that the Parliament shall consist of "The Queen—an Upper House called the Senate—and the House of Commons," (1) and the Executive Government and authority of and over Canada—that is the Dominion—is declared to continue and be vested in the Queen. The intent of these provisions in my opinion was, and their effect also was, to constitute the Dominion of Canada an integral, and subject only to the provisions of the British North America Act an independent, portion of the British Empire of which the Queen is the executive head and of whose Parliament Her Majesty is an integral and independent part equally as she is, and in the same sense as she is, of the Parliament of the United Kingdom. How different are the terms of the act which define the constitution of the provinces of the Dominion.

In the first place, the Lieutenant-Governor of the several provinces is no longer appointed by Her Majesty but by the Governor General in Council and he holds office during the pleasure of the Governor General, subject to this qualification that he shall not be removable within five years from his appointment except for cause assigned which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter, if the Parliament is

(1) Sec. 17 B.N.A. Act.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

then sitting, and if not, then within one week after the commencement of the next session of the Parliament. Secondly, the legislatures of the provinces are made to consist of "the Lieutenant-Governor and one House styled the Legislative Assembly of Ontario" in the province of Ontario; and in the other provinces of "the Lieutenant-Governor and two houses styled the Legislative Council and the Legislative Assembly." To the passing of acts by these legislatures Her Majesty is no party, nor is her name necessary to be used as assenting thereto.

While as to the Dominion of Canada the constitutional charter expressly provides that (1):

> It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws (1), &c.

The provision as to the provinces is that:

> In each province "the Legislature," that is to say, in Ontario, "The Lieutenant-Governor and Legislative Assembly of Ontario," and in the other provinces, "The Lieutenant-Governor, the Legislative Council and Legislative Assembly," "may make laws, &c."

And whereas with respect to the Dominion it is enacted that, when a bill passed by the Houses of the parliament is presented to the Governor General for the Queen's assent, he shall declare either that he assents in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure, the provision made in respect of the provinces is that, when the bill passed by the Houses of the legislature of a province is presented to the Lieutenant-Governor for the Governor General's assent, he shall declare that he assents thereto in the Governor General's name, or that he withholds the Governor General's assent, or that he reserves the bill for the signification of the Governor General's

(1) Sec. 91 B.N.A. Act.

pleasure, and power is given to the Governor General of the Dominion in Council to disallow any act within one year after a certified copy of the act assented to by the Lieutenant-Governor shall have been transmitted to the Governor General by the Lieutenant-Governor upon whom is imposed the duty of transmitting to the Dominion Government certified copies of all bills assented to by him. It thus appears that Her Majesty's name is not necessary to be inserted in any act of the provincial legislatures, nor is her assent to such acts made necessary. True it is that the legislature of the province of Quebec in passing acts makes use of the form following:—

Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows.

Or in other words supplying for the word "Legislature" the several parts of which by the British North America Act it is composed, the form would read thus:—

Her Majesty, by and with the advice and consent of the Lieutenant-Governor, the Legislative Council and Legislative Assembly of Quebec, enacts as follows.

And the Legislature of Ontario makes use of the form following:—

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows.

Thus omitting the "Lieutenant-Governor," who by the British North America Act is expressly declared to be a part of the "Legislature."

This use of Her Majesty's name is not required by the British North America Act; as being but matter of form it may be immaterial, but it certainly is not at all necessary to the validity of the acts of the provincial legislatures which would be quite valid and in perfect conformity with the British North America Act, if in all the provinces of the Dominion, whose

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

legislatures have two houses, the form used should be the same as that in use in the provinces of Nova Scotia and New Brunswick viz.:—

Be it enacted by the Lieutenant-Governor, the Legislative Council and Assembly as follows :—

And in those provinces whose legislatures consist of but one House :

Be it enacted by the Lieutenant-Governor and Legislative Assembly of,

Or if the form following which would apply to all the Provinces should be that used :

The Legislature of the Province of enacts, &c., &c.

Then upon the provinces is conferred the peculiarly democratic privilege, which is qualified only by the veto power vested in the Dominion Government, of amending from time to time, notwithstanding anything in the British North America Act, the constitution of the provinces except as regards the office of Lieutenant-Governor.

It cannot be contended that this royal prerogative right which is invoked, and which may be exercised always to the prejudice and sometimes it may be to the ruin of all the private creditors of a bankrupt corporation, is a necessary incident to these provincial governments, for it surely cannot be argued with any show of reason that this royal prerogative is necessary to the healthy working of governments which partake so much of the democratic element as these provincial constitutions do. To my mind it seems to involve a singular inconsistency that this prerogative right which in its nature is so injurious to the public and is asserted as an ancient common law incident to royalty should be claimed by governments of modern creation and of so democratic a character as are the governments of the provinces of this Dominion.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

The provincial legislatures have under the British North America Act, unquestionably in my opinion, without any consent of Her Majesty, undoubted power to make all debts due to the provincial governments respectively to be due and payable to, and recoverable by and in the name of, the person for the time being filling the office of Provincial Treasurer or Attorney-General, or the Lieutenant-Governor or any other officer of the provincial government; but inasmuch as Her Majesty is not by the British North America Act, as for the reasons above given I am of opinion that she is not, a party to the passing of any act of the provincial legislatures constituted as they are by the British North America Act, if debts due to the several provincial governments should be regarded as debts due to Her Majesty to which the royal prerogative relied upon necessarily attaches, as is contended, the effect would be that it would be impossible for the provincial legislatures ever to pass such an act as I have suggested, upon the principle upon which the province of New Brunswick now rests its claim for priority in payment of the debts due to it over all the other creditors of this insolvent bank, namely, that the rights of the Crown cannot be affected otherwise than by an express provision contained in an act of parliament to which Her Majesty is a party. If we should so hold we should, in my opinion, without any power or authority so to do, be crippling in a very marked manner the power of the provincial legislatures over a matter which, in my opinion, is beyond all doubt placed under their jurisdiction and control. I can, therefore, as I have already said, see nothing in the British North America Act which requires that debts due to the several provinces should be regarded as debts due to Her Majesty, but much which, as it appears to me, leads to the contrary conclusion, and as the

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

only object to be gained by regarding such debts to be debts due to Her Majesty would seem to be to lay a foundation for the introduction into the constitution of the provinces of this Dominion of a vexatious and obnoxious privilege not introduced by the terms of the British North America Act—wholly unsuited to the constitution of the provinces—unjust to their inhabitants and repugnant to the spirit of the age—we are, in my opinion, justified in arriving at the conclusion that debts due to the several provinces of this Dominion are not debts due to Her Majesty, and that therefore the prerogative relied upon cannot be invoked and exercised by or on behalf of the government of any of those provinces.

Assuming, however, debts due to the several provincial governments to be debts due to Her Majesty, the prerogative privilege relied upon is not, in my opinion, attached to them. It is contended by the province of New Brunswick that the prerogative relied upon is attached to, and can be exercised by, its government in respect of debts due it, although the prerogative privilege should not be attached to, or be exercisable in respect of, debts due to either of the provinces of Quebec or Ontario or even in respect of debts due to the Dominion Government. This point of vantage asserted on behalf of the Government of the province of New Brunswick is claimed under sec. 64 of the British North America Act but that section has, in reality, no bearing whatever, in my opinion, upon the point under consideration.

As the old province of Canada was by the British North America Act divided into two provinces of the Dominion of Canada as constituted by that act, namely, the provinces of Quebec and Ontario, sec. 63 of the act provides for the formation of the Executive Council, that is to say of the executive authority, of

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

those provinces, by declaring of what officers of the provincial governments those councils shall be composed. The provinces of New Brunswick and Nova Scotia as they respectively existed prior to the passing of the British North America Act had executive councils composed of certain officers of the goverments of those respective provinces. The limits of the provinces of New Brunswick and Nova Scotia, as provinces of the Dominion of Canada as constituted by the British North America Act, were declared to be the same as the limits of the old provinces of New Brunswick and Nova Scotia respectively had been; it was necessary in like manner to provide for the constitution or composition of the executive authority, that is to say of the executive councils, of those provinces as constituted provinces of the Dominion under the British North America Act, and for this purpose sec. 64 was inserted in the act the sole object and effect of which is to enact that until a different provision shall be made by the new provinces respectively as constituted under the act, the persons who constituted the executive councils of the old provinces of Nova Scotia respectively, shall continue to be the executive authority of the new provinces of New Brunswick and Nova Scotia as constituted under the act, but subject to the provisions of the act; thus placing the executive authority of all the provinces upon a precisely similar footing. The section is supplemental simply to sec. 63 and not, as was contended, to sec. 65 with the subject of which sec. 64 has no relation whatever.

It is impossible to contend that by reason of anything contained in the British North America Act the constitution given to any one of the provinces of Quebec, Ontario, New Brunswick, or Nova Scotia is in any respect different from that given to any of the others, or that such an incongruity exists in the act as that

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Gwynne J.

one of the provinces constituted by it a province of the Dominion of Canada can exercise a prerogative of the crown which cannot equally be exercised by all of the provinces of the Dominion, and as already shown in the case of *The Liquidators of this Bank* v. *the Queen* (1) in the claim of the Dominion Government, the prerogative relied upon does not exist in, and cannot be asserted in the interest of, either of the provinces of Quebec or Ontario, it is impossible that it can consistently be recognized as capable of being asserted in the interest of the province of New Brunswick. Having regard to the nature of the new constitutions given by the British North America Act to the several provinces of the Dominion the only conclusion which, in my opinion, for the reasons I have given, is warranted is that the application of the prerogative relied upon to the case of debts due to any of the provincial governments is necessarily excluded.

PATTERSON J.—The debt in question is for a deposit in the bank of $35,000 of the public moneys of the province of New Brunswick. The questions for the opinion of the court are:—

1. Is the provincial government entitled to payment in full by preference over the note-holders of the said bank?

2. If not, is the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank?

The first question is answered in the negative, contrary to the opinion of the court below, by what I have said in the appeal of the present appellants against the Queen (1) respecting the claim made in that case on the part of the Crown for priority over the note-holders.

The second question divides itself into two: First, the right of the Crown to priority; secondly, the right of the provincial government to claim that priority in the name of the Crown or by virtue of the prerogative.

(1) 17 Can. S. C. R. 657.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK.

Patterson J.

On both of these branches of the question I agree with the court below.

The general right of the Crown has been affirmed in this court in *The Queen* v. *The Bank of Nova Scotia* (1) on grounds which, in my judgment, apply to the provincial governments as well as to that of the Dominion, and there is nothing in the Bank Act (2), which act was not in question in the case referred to, or in the Winding-Up Act (3), to limit the right in respect of such assets of the bank as may remain after all outstanding notes are paid.

On the question of the right of the provincial government to exercise the prerogative in question I cannot add anything by way of argument or illustration to what has been said in the court below by the Chief Justice and by Mr. Justice Fraser.

I agree, as I have said, in the conclusion arrived at. It is, in my opinion, borne out by the cases referred to and by the spirit and tenor of the British North America Act, and is in accord with the views which prevail in the bulk of the decisions under the statute although all the opinions expressed, particularly in the earlier cases, may not have been in harmony.

I shall not attempt to make an independent examination of the cases, and shall merely add that the same apprehension of the status of the provinces on which the judgment proceeds will be found evidenced in the two recent decisions of the Judicial Committee, and in the language of the judgments delivered by Lord Watson, in *The St. Catharines Milling Co.* v. *The Queen* (4) and *The Attorney-General of British Columbia* v. *The Attorney-General of Canada* (5); not that these cases bear directly on the point in hand; they are

(1) 11 Can. S. C. R. 1.
(2) R. S. C. ch. 120.
(3) R. S. C. ch. 127.
(4) 14 App. Cas. 46.
(5) 14 App. Cas. 295.

1889

THE LIQUIDATORS OF THE MARITIME BANK OF THE DOMINION OF CANADA v. THE RECEIVER-GENERAL OF THE PROVINCE OF NEW BRUNSWICK

Patterson J.

merely instances of late utterances where provincial governments are spoken of in the same terms as the Dominion Government as representing the Queen.

I have already quoted the questions proposed in the special case for the opinion of the court.

At the argument in the court below the case was amended by agreement by stating that the Dominion Government was a simple contract creditor of the bank. That fact does not strike me as of any importance. The circumstance that the same debtor, whether an individual or a corporation, may owe for moneys belonging to the Imperial Government and to one or more colonies or provinces cannot possibly derogate from the rights which the Imperial Government or any one of the colonies or provinces would have if it were the sole public creditor. The very case existed in *Re Oriental Bank Corporation* (1) in which the motion was on behalf of the Treasury, and on behalf of the premier and treasurer of the Colony of Victoria, and the law officers for the Crown colonies of Ceylon, the Mauritius and Natal.

On the first question I am of opinion that the appeal should be allowed, although if the second had been the only question my opinion would be that it should be dismissed.

I would give no costs of appeal to either party, the liquidators of course having their costs out of the estate.

**Appeal allowed without costs as to priority over note-holders, and dismissed without costs as to priority over other creditors.*

Solicitor for appellants : *A. A. Stockton.*

Solicitor for respondent : *A. G. Blair.*

(1) 28 Ch. D. 643.

* An appeal was taken to the Judicial Committee of the Privy Council from that portion of the judgment which affirms the right of the province to represent the Queen and the decision of the Supreme Court was affirmed. 8 Times L. R. 677.

SIMON JAMES DAWSON.....APPELLANT; 1891

AND *Nov. 6.

JEAN BAPTISTE ONÉSIME DUMONT..RESPONDENT

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

Appeal—Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C.S.L.C. ch. 83 s. 44.—Parties to suit.

In an action brought in 1866 for the sum of $800 and interest at 12½ per cent against two brothers S. J. D. and W. McD. D. being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. J. D. at Three Rivers, the other defendant W. McD. D. then residing in the state of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874 when judgment was taken and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by S. J. D., saying: "Be so good as to file an appearance in the case to which the enclosed has reference, &c." and also prescription, ratification and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of $2,000.

Held, 1st. That as the judgment obtained against the appellant in March, 1874, on the appearance filed by the respondent, exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable.

2nd. That there was no evidence of authority given to the respondent or of ratification by appellant of respondent's act, and therefore the petition in disavowal should be maintained.

3rd. Following *McDonald* v. *Dawson* (11 Q. L. R. 181) that the only prescription available against a petition in disavowal is that of thirty years.

---

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

1891

DAWSON v. DUMONT.

4. That where a petition in disavowal has been served on all parties to the suit and is only contested by the attorney, whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court at Three Rivers, dismissing the petition in disavowal taken by W. McD. Dawson against J. B. O. Dumont, the respondent.

In 1866 an action was instituted by the tutor of Miss McDonald against the two brothers Simon J. Dawson and William McD. Dawson the present appellant. The action was for the recovery of the amount of a promissory note for $800, with interest at 12½ per cent dated on the 27th February, 1862, and payable on the 25th June of same year.

Simon J. Dawson was served with the summons at his domicile at Three Rivers on the 11th October, 1866, but W. McD. Dawson, the other defendant, alleged that the summons was never served upon him and that at that time, from 1864 to 1868, he had no residence in Three Rivers, but was residing in New York.

The summons was entered in court in 1866, and no other proceedings were taken until 1874, when the pupil, having become of age, was substituted to her tutor by *reprise d'instance*, and a judgment by default was entered against both Simon J. Dawson and W. McD. Dawson. It was only after this judgment that W. McD. Dawson was made aware of it by an execution issued against his goods and chattels.

Thereupon the W. McD. Dawson made oppositions to the judgment obtained against him; these oppositions were rejected except the last, which was maintained by a judgment of the Supreme Court of Canada (1) render-

(1) Cassels's Dig. 322.

1891

DAWSON v. DUMONT.

ed on the 12th January, 1885, and all proceedings in the cause and on the writ of execution were stayed until the decision of the Superior Court on the petition in disavowal was obtained. At the trial of the petition in disavowal, the following letter was produced as evidence of the authority of the respondent to appear for W. McD. Dawson:—

"THREE RIVERS.

"MY DEAR SIR,—Be so good as to file an appearance in the case to which the enclosed has reference. The matter is arranged for the present, but as I may not get to Three Rivers before the 25th so as to see Mr. McDougall, it is necessary in the meantime to file an appearance, so as to prevent judgment going by default.

"I have been busy for some days past with Chaudière matters, but I hope to get to Three Rivers to-morrow or Thursday evening.

"Truly yours,

"S. J. DAWSON."

By the return of the bailiff on the writ of summons it appeared that only one copy of the summons was served upon Simon J. Dawson at his domicile at Three Rivers. The petition in disavowal having been dismissed by the Superior Court, the judgment was confirmed by the Court of Queen's Bench for Lower Canada (appeal side).

After the hearing of the case in the Court of Queen's Bench and before judgment W. McD. Dawson died, and S. J. Dawson, the present appellant, having obtained leave to accept the estate under benefit of inventory, was allowed to take the present appeal, reserving to the respondent any rights they might have acquired under certain proceedings theretofore taken.

The principal questions which arose on the present appeal were:—

1st. Was the case appealable?

1891

DAWSON v. DUMONT.

2nd. Has W. McD. Dawson ever been duly served with the original summons?

3rd. Has Mr. Dumont ever been authorized to appear for W. McD. Dawson?

4th. Can the appellant succeed in the present appeal inasmuch as all the interested parties are not represented, the writ of appeal having been served only on the respondent?

Irvine Q.C. and *Robertson* for appellant.

McLean for respondent.

Sir W. J. RITCHIE C.J.—This is an appeal from a judgment dismissing the petition in disavowal of Mr. Wm. McD. Dawson against Mr. Dumont, the respondent, who appeared for him in a suit brought against his brother and himself in the Superior Court at Three Rivers and in which a judgment was obtained in 1874.

Now it is not pretended that the respondent had any other authority than the letter which was addressed to Mr. Dumont by Mr. S. J. Dawson on the 22nd October, 1866, which is as follows:—

THREE RIVERS.

MY DEAR SIR,—

Be so good as to file an appearance in the case to which the enclosed has reference. The matter is arranged for the present, but as I may not get to Three Rivers before the 25th, so as to see Mr. McDougall, it is necessary in the meantime to file an appearance, so as to prevent judgment going by default.

I have been busy for some days past with Chaudière matters, but hope to get to Three Rivers to-morrow or Thursday morning.

Truly yours,

S. J. DAWSON.

Now it is possible, inasmuch as he does not express it in so many words, that Mr. Dumont might have considered and no doubt did consider that the letter gave him authority to appear for the two defendants, but even supposing it did give him authority, and that Mr.

1891

DAWSON v. DUMONT.

Ritchie C.J.

S. J. Dawson had given it in so many words, that would not get us a step further in the case, for we would then have to ask: Where does it appear that Mr. Dawson got the authority to name an attorney for his brother? There is no evidence whatever of record; on the contrary the evidence is to the effect that he had not such authority. I cannot conceive how the courts below came to the conclusion that there was evidence that Mr. Dumont was authorized to appear in this matter.

Now the moment we have come to that conclusion the next question is whether there is any evidence of ratification by Mr. W. McD. Dawson. The only fact relied on is the evidence showing that when Mr. McD. Dawson came to discover years after, and to his great surprise, that an execution had been taken out against him, he naturally went to inquire about this at the office of the prothonotary with Mr. Dumont. Now there is not a tittle of evidence that Mr. Dawson said to Mr. Dumont on that occasion either impliedly or expressly: "You were right to appear but you should have pleaded," or that he ever gave his assent to what had been done. In my opinion it was natural for him to go and look after the judgment which so seriously affected his interests, yet we are asked to infer that he ratified the act which at that very time he was repudiating in every way he could.

As to the question of jurisdiction I cannot see how the objection can be urged if we had jurisdiction in the cases between the same parties that have already been decided by this court.

Under these circumstances I am of opinion that the appeal should be allowed with costs.

STRONG J.—I think it quite clear that there was no original authority given to Mr. Dumont, though Mr

1891

DAWSON v. DUMONT.

Strong J.

Dumont supposed that he was properly authorized by the letter of the 23rd October, written by Mr. Simon J. Dawson at Quebec. This letter on its face is general in its terms, authorizing Mr. Dumont

> To file an appearance in the case to which the inclosed has reference. The matter is arranged for the present, but as I may not get to Three Rivers before the 25th, so as to see Mr. McDougall, it is necessary in the meantime to file an appearance, so as to prevent judgment going by default.

Now construing the words in their ordinary meaning, and setting aside the relation of brother existing between the two defendants, it would only refer to an appearance for the party who sent the writ, and wrote and signed the letter, and there is no evidence that he either pretended to be or was authorized by his brother the defendant William McD. Dawson to write the letter. But granting that in so many words Mr. Simon J. Dawson had written, authorizing Mr. Dumont to appear for both defendants, where did Mr. Simon J. Dawson get authority to do that? Where is there the evidence of record that Mr. William McD. Dawson had authorized his brother to retain the services of an attorney for him? Are we to say that the mere relationship existing between the two parties is enough? Surely not. There was therefore originally no authority to enter appearance for William McD. Dawson.

Then as regards ratification, we must expect Mr. Dumont would put the case as strongly in his favour as he possibly could and what does he say as to any subsequent recognition and confirmation of his authority by Mr. William McD. Dawson? At p. 84 of the case we find the following evidence :—

> I cannot say positively if William McDonnell Dawson, one of the defendants, had any knowledge of the appearance I filed in the case, but I know that in 1874 he was aware of it, having had occasion to speak of it to him, and having gone with him to the prothonotary's

office of the Superior Court at Three Rivers to examine the record in the case. Before that date I do not remember that I spoke of it.

There could be no ratification in this, for how can Mr. William McD. Dawson be held to have then ratified the act of Mr. Dumont when we know from the record that at that very time he was opposing the judgment? The conversation might have been and probably was a series of objections on the part of Mr. William McD. Dawson. Therefore, so far as that goes there is no ratification. So that there is nothing of record by which it is proved or from which we can infer as a fact that the respondent was ever authorized to represent Mr. William McD. Dawson, or that the latter in any manner ratified his unauthorized proceedings. That being so, upon the merits the judgment appealed from was wrong exactly upon the ground taken by Mr. Justice Tessier in the Court of Queen's Bench that Mr. William McD. Dawson was never served with a copy of the summons nor authorized Mr. Dumont to appear for him.

As to the question of jurisdiction—that question is concluded by the decisions of this court upon contestations of oppositions. I can draw no distinction between an opposition and a petition for disavowal. This is really a judgment in a judicial proceeding in which the question has been finally decided by the highest court of final resort in the province of Quebec, and the matter in controversy involves a sum of over $2,000, the amount fixed by the statute, so that the appeal is competent within the exact words of the statute.

Then as to the question of law which has been raised, viz., that of prescription, it was determined by the judgment of the majority of this court in the former case of *Dawson* v. *McDonald* (1), that under the Code

(1) 11 Q. L. R. 181.

1891

DAWSON v. DUMONT.

Strong J.

of Civil Procedure and the ordinance of 1667 there is no other prescription or limitation to a petition for a disavowal than that of 30 years and I am bound to follow that decision.

There remains but the objection taken by the respondent's counsel that all the parties are not before this court on the present appeal. This is removed by what has been suggested by my brother Taschereau during the argument.

FOURNIER J. concurred in the observations of Strong J.

TASCHEREAU J.—No direct relief is asked against the original plaintiffs. All that is now asked is that a judgment may be pronounced which may be an element in attacking the judgment which they still have in their favour. Then it appears also that this petition was served on all the parties, and if they chose not to contest it, but elected to allow the point to be decided upon a contestation between the appellant and the respondent, they are not now in a position to complain because they were not served with a notice of appeal. For these reasons the judgment of the Court of Appeal should be reversed, and a judgment entered in the Superior Court declaring the disavowal valid with costs in all courts.

PATTERSON J.—The other members of the court being clear that we have jurisdiction I shall only say that I have not considered the point sufficiently to assent, but will not enter a dissent.

I think the real question is: Was Mr. Dumont authorized to appear for both defendants? I am scarcely prepared to say upon the evidence we have that he was. I am not prepared to hold that an appearance

authorized by one brother, a co-defendant, is authority to appear for both. Whether the judgment obtained on the subsequent opposition does not put an end to the objection I have some doubt.

1891
DAWSON
v.
DUMONT.
Patterson J.

Appeal allowed with costs.

Solicitor for appellant: *A. Robertson.*

Solicitor for respondent: *L. D. Paquin.*

INDEX.

security he stated that he had given security to the amount of one thousand dollars for each respondent, "in all two thousand dollars" duly deposited with the prothonotary as required by statute. The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the judges, and acknowledged the receipt of $2,000, without stating that $1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa. *Held*, 1st. That personal service of an election petition at Ottawa without an order of the court is a good service under section 10 of the Controverted Elections Act. 2nd. That there being at the time of the presentation of the petition security to the amount of $1,000 for the costs for each respondent the security given was sufficient. Sec. 8 and sec. 9, subsec. "*e*" ch. 9 R. S. C. 3rd. That the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment. Sec. 9 subsec. "*g*" ch. 9 R. S. C. QUEEN'S COUNTY AND PRINCE COUNTY (P.E.I.) ELECTION CASES — — — — 26

4——*Election petition—Re-service of—Order granting extension of time—Preliminary objections—R. S. C. c 9 s. 10—Description of petitioner.*] On the 15th of April, 1891, the petitioner omitted to serve on the appellant with the election petition in this case a copy of the deposit receipt, but on the 20th of April applied to a judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario, was made and the petition was re-served accordingly with all the other papers prescribed by the statute. Before the order extending the time had been drawn up the respondent had filed preliminary objections, and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the Court of Appeal, or a judge thereof, to extend the time for service of the petition beyond the five days prescribed by the act. *Held*, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service. R. S. C. c. 9 s. 10.—The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township. *Held*, affirming the judgment of the court below, that the petition should not be dismissed for the want of a more particular description of the petitioner. GLENGARRY ELECTION CASE — — — — — 38

5——*Election petition—Status of petitioner—Onus probandi.*] The petition was served upon the appellant on the 12th of May, 1891, and on the 16th May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. On Appeal to the Supreme Court. *Held*, reversing the judgment of the court below (Gwynne J. dissenting), that the onus was on the petitioners to prove their status as voters. *The Stanstead Case* (20 Can. S. C. R. 12) followed. BELLECHASSE ELECTION CASE — — — — 181

6——*Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months' limit. R. S. C. c. 9 ss. 14 and 32.*] On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and attend to the case in which his presence was necessary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election trial" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained. *Held*, reversing the judgment of the court below, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of Parliament and, therefore, in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. R. S. C. c 9 s. 32. LAPRAIRIE ELECTION CASE — — 185

7——*Election petition—Preliminary objections—Deposit of security—R. S. C. c. 9 s. 9 (f).*] The preliminary objection in the case was that the security and deposit receipt were illegal, null and void, the written receipt signed by the prothonotary of the court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of $1,000 in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of $1,000.

INSURANCE, FIRE—*Policy—Description of premises—Reference to plan—Variance—Falsa demonstratio non nocet—Canvasser—Agency.*] An insurance policy described the goods insured as stock, consisting of dry goods, &c., while contained in that one and a half story frame building occupied as a store house, said building shown on plan on back of application as " feed house " situate attached to wood-shed of assured's dwelling-house. The plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked " feed house," did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation " feed house." The goods insured were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the said premises, as well as misdescription of the building containing the goods insured. In an action on the policy it appeared that a barrel of oil was in the building marked " feed house " at the time of the fire. The jury found a verdict for the plaintiff and a non-suit, moved for pursuant to leave reserved, was refused by the full court. *Held*, that the non-suit was rightly refused ; that it was evident that the building in which the goods were stored was that intended to be described in the policy ; that the building marked " feed house " being detached from that in which the goods were was a suitable place for storing oil, which, therefore, was not a breach of the condition ; that the case was a proper one for the application of the maxim *falsa demonstratio non nocet*, but if not the matter was one for the jury who had pronounced upon it.—*Held* further, that the canvasser who secured the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts. Guardian Ins. Co. *v.* Connely — — — 208

INSURANCE, LIFE—*Accident insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.*] An accident policy issued by the appellants, was payable in case, *inter alia*, " the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, &c., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death." The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury ; and failure to give such immediate written notice, shall invalidate all claims under the policy. On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah and within four or five days the wound which appeared at first to be a slight one was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipt of proofs of death which where subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. At the trial there was conflicting evidence as to whether the erysipelas resulted solely from the wound but the court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court : *Held*, reversing the judgment of the court below, Fournier and Patterson JJ. dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.—Per Strong, Fournier and Patterson JJ., that the external injury was the proximate or sole cause of death within the meaning of the policy. Accident Insurance Company of North America *v.* Young — — — — — 280