REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

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1900.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR HENRY STRONG, Knight, C. J.

The Hon. HENRI ELZÉAR TASCHEREAU J.

" JOHN WELLINGTON GWYNNE J.

" ROBERT SEDGEWICK J.

" GEORGE EDWIN KING J.

" DÉSIRÉ GIROUARD J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Hon. DAVID MILLS, Q.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

THE HON. CHARLES FITZPATRICK, Q.C.

ERRATA AND ADDENDA.

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

Page 109, line 2, for "on" read "in."

Page 299, line 17, for "affect" read "effect.

Page 315, add reference "*Harwood* v. *Griffith*, Q. R. 9. Q. B. 299

Page 334, line 8, for "Penal" read "Oral."

Page 343, line 2, for "respondents" read "appellants."

Page 384, line 20, for "independent" read "respondent."

Page 397, line 2, for "effects" read "affects"

Page 400, add references "Q. R. 16 S. C. 536; 9 Q. B. 243.

Page 485, line 11, after "51" add "42 V." and after "16 add "(D.)"

A TABLE

OF THE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

MARTIN HONAN.....APPELLANT;

AND

THE BAR OF MONTREAL..... .....RESPONDENT.

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*May 23.

*Oct. 24.

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

Prohibition—Advocate—Bar of the Province of Quebec—Discipline—Jurisdiction—Irregular procedure—Domestic tribunal—Powers—Arts. 3504 *et seq. R. S. Q.*—58 *V. c.* 36 *(Que.).*

A writ of prohibition will not lie to prevent the execution of the sentence of an inferior tribunal where there has not been absence or excess of jurisdiction in the exercise of its powers.

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath during the inquiry and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec.

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

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Held, affirming the judgment appealed from (Q. R. 8 Q. B. 26), that the local Council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the Council of the Bar had complete jurisdiction, and further, that the omission to preserve a complete record of the proceedings upon the inquiry held by the council, or to take written notes of the evidence of witnesses adduced, constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), reversing the judgment of the Superior Court, sitting in review, at Montreal and maintaining the judgment of the Superior Court, District of Montreal, which quashed a writ of prohibition sued out by the appellant with costs.

A statement of the case will be found in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

McDougall Q.C. for the appellant. The appellant complains of the sentence of the Council of the Bar:—(1) Because the letter of complaint does not allege any offence that might give the Council of the Bar of Montreal jurisdiction; (2) because no act is alleged which constitutes an offence at law, or under the rules of the Bar of the Province of Quebec; (3) because the Council of the Bar of Montreal could not take action nor give a decision upon that complaint, and appellant was never summoned nor required to answer the charges; (4) because the decision is arbitrary and unjust and contrary to law and to the by-law of the

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Bar of the Province of Quebec; (5) because the decision does not allege any offence that could authorise such sentence; (6) because the complaint is entirely false and had been withdrawn by the complainant; (7) because the decision was *ultra vires* of the powers of the council, and no notes of evidence were taken or transmitted to the General Council; (8) because there is no rule by the General Council of the Bar of the Province of Quebec which classes the acts with which the appellant is reproached in the complaint, as being derogatory to professional honour and dignity; and (9) because the complainant had been given credit for the moneys in question upon his account due for professional services for a much larger amount before the complaint was made.

Prohibition is the appropriate remedy to stay the execution of the sentence; *O'Farrell* v. *Brassard* (1); or for redress of the wrong sustained; *Roberts* v. *Humby* (2); Lloyd on Prohibition, pp. 11, 12 & 13; art. 2329 R. S. Q. Prohibition lies to restrain all courts, whether or not courts of record, from proceeding in matters over which they have no jurisdiction; or having jurisdiction, when the court has attempted to proceed by rules differing from those which ought to be observed; *The Queen* v. *Judicial Committee of Privy Council* (3).

Ex parte Burke (4) establishes that for an error not apparent on the face of the proceedings and without objection as to the jurisdiction, recourse may be had to prohibition for setting aside a judgment of an inferior court. See also *Mayor of London* v. *Cox* (5) at page 241 and cases there cited. The appellant had a right to a regular summons before the tribunal which

(1) 3 Q.L.R. 33; 1 Leg. News 32.
(2) 3 M. & W. 120.
(3) 3 Nev. and P. 15.
(4) 7 L. C. R. 403.
(5) 36 L. J. Ex. 225.

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was to pass judgment on the pretended complaint. The complaint was not made on oath and appellant did not receive a copy. We also refer to arts. 450 and 1031 C. C. P. (1) which apply to this case; art. 3523 R. S. Q. and 58 Vict. ch. 36, sec. 2 (Que.)

Globensky for the respondent. The council had full jurisdiction under art. 3527 R. S. Q., and consequently prohibition cannot lie; *Molson* v. *Lambe* (2); Wood on Prohibition, pp. 141, 147; Shortt on Informations, 771; Spelling on Extraordinary Relief, par. 1760. A writ of prohibition can only issue for excess of jurisdiction; *Re Beaudry* (3); *Laliberté* v. *Fortin* (4).

Since the repeal of arts. 3569-3596, R. S. Q., regulating proceedings before the council (5), there is no necessity for taking notes in writing of the evidence in such cases, nor to take that evidence upon oath. The new regulations do not even give power to administer an oath in such proceedings. The third section of the repealing Act details the new procedure and permits the exercise of wide discretion as to the verification of such charges. The provision for an appeal cannot be construed as requiring either the administration of an oath or written notes of evidence. The state of the statutes leaves this case under the application of the maxim *omnia præsumuntur*, etc.

By the new statute the council has become a domestic tribunal in disciplinary matters and requires no precise form of information or complaint, and may exercise discretion both as to inquiry and sentence to the exclusion of all courts, subject only to the appeal of the General Council of the Bar. Art. 3537, R. S. Q. The by-law in respect to offences against professional honour and dignity clearly covers

(1) Art. 1003 C. P. Q.
(2) 15 Can. S. C. R. 253.
(3) 5 R. L. 223.
(4) Q. R. 2 Q. B. 573.
(5) 58 Vict. ch. 36, sec. 11 (Que.).

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the present case. At most, the manner of procedure can constitute nothing more than an irregularity which affords no ground for prohibition. The appellant did not take these objections before the council but acquiesced in the procedure and continued to acknowledge both the jurisdiction and procedure of the domestic forum in following up his remedy by appeal to the General Council.

The discontinuance by the private prosecutor cannot affect the validity of the sentence. The disciplinary power in the council remained intact and could not be removed by a settlement between the parties. Comparing the arrêt on a similar point referred to by Mellot, Règles de la Profession d'Avocat, no. 499, p. 279. We also refer to the *O'Farrell Case* (1); *Duval* v. *Hébert* (2); *Bergevin* v. *Rouleau* (3); *Simard* v. *Corporation of Montmorency* (4); *Mayor of Sorel* v. *Armstrong* (5).

GIROUARD J.—The Bar of the Province of Quebec constitutes a general corporation having jurisdiction over the whole province and is divided into districts or sections which are local corporations. Thus, the Bar of Montreal forms a section and a separate corporation subject in certain cases to the higher jurisdiction or control of the council of the general corporation, called the General Council of the Bar of the Province of Quebec. Both the general corporation and the corporations of sections may pass by-laws for matters of general interest to their respective bodies and to the members thereof, but the by-laws of a section must not conflict with those of the general council. The general corporation has power to make by-laws

for maintaining the honour and dignity of the bar and discipline among its members,

(1) 3 Q.L.R. 33; 1 Legal News, 32.
(2) 17 L. C. Jur. 229.
(2) 23 L. C. Jur. 179.
(4) 4 Q. L. R. 208; 8 R.L. 546.
(5) 20 L. C. Jur. 171.

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and also

for defining and enumerating the professions, trades, occupations, business or offices incompatible with the dignity of the profession of advocate as well as the offices or charges incompatible with the practice of the profession.

The statute then indicates how the delinquents are to be dealt with. The Revised Statutes of Quebec (Art. 3527), says:

Each council of a section has power:

1. To pronounce, as the importance of the case may require, a censure or reprimand against any member of the section guilty of any breach or discipline, or of any act derogatory to the honour or dignity of the bar, or who is convicted of exercising or of having filled any position or office the occupation of which is incompatible with the profession of advocate, of exercising any calling or trade, of being engaged in any industry, or of carrying on any business, or holding any office inconsistent with the dignity of a member of the bar, or of having infringed the by-laws of the general council or of the council of his section.

2. To deprive such member of the right of voting, and of the right of attending the meetings of the section, for any term, in the discretion of the council, not exceeding five years.

The council of such section may also, according to the gravity of the offence, punish such member by suspending him from his functions for any period whatsoever, in the discretion of the said council, and may deprive him forever of the right of practising his profession.

In default of a by-law of the general council applicable to a particular case, the council of the section decides definitely *to the exclusion of all courts*, subject only to appeal to the general council, whether the act complained of is derogatory to the honour or dignity of the bar, or against the discipline of the members, if the position or office is incompatible with the practice of the profession of advocate, and the calling, trade or industry, business or office is inconsistent with the dignity of the profession.

The Quebec Statute, 58 Vict. ch. 36 (1895), says:

3. Article 3527 of the said statutes is amended:

b. By adding thereto the two following paragraphs:

4. In the exercise of the powers conferred by this article, the councils proceed deliberately and may have recourse to all means they deem expedient to ascertain the facts to be verified, and to allow the accused to defend himself;

5. Every decision of a council of a section, which entails the dismissal, suspension or other punishment of a member of the bar, is subject to appeal to the general council.

This constitution of the Bar of Quebec will be found in the revised statutes of the province, art. 3504 and following, except the last two paragraphs which were enacted in 1895 by 58 Vict. ch. 36.

The mode of procedure to be followed in the trial of the accused was thus materially changed. Under sections 3569 and 3596 R. S. Q. the complaint had to be made under oath, the witnesses sworn (art. 3577), proof taken down in writing (art. 3575), and on appeal the record was transmitted, etc., (art. 3586). All these rules are repealed by 58 Vict. ch. 36. s. 11, and replaced by the section quoted above, which simply provides that the councils *may have recourse to all means they deem expedient to ascertain the facts to be verified.* The appeal to the general council is instituted by a mere letter addressed to the secretary-treasurer of such council containing a copy of the decision, and thereupon it is decided summarily. 58 Vict. ch. 36, s. 3.

It is apparent that the Legislature has armed the councils of the Bar of Quebec with discretionary powers which may inflict serious, if not irreparable, injury upon its members and also to the public. Carré, Lois de la Procédure (3rd ed.), Int. n. 10, says that

> les règles et les formalités de la procédure écartent en général de l'administration de la justice, le désordre, l'arbitraire et la confusion.

The present case is an illustration of this result. The councils of the bar are bound by no rules of procedure, except "to allow the accused to defend himself." He must therefore be summoned to appear and be allowed to defend himself, but how? And what rules will protect his defence? The statute has left all that to the discretion of the tribunal. It is not even necessary that there should be a private information. The

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initiative may be taken by the council or by a member thereof called the *Syndic*.

Clause 2 of 58 Vict. ch. 36 says:

2. Article 3523 of the said statutes, as amended by the same section of the said Act, is further amended by adding thereto the following:

The syndic is specially charged with the supervision of the discipline of the bar. He is bound immediately to denounce to the council of the section any infringement of the by-laws, all conduct of any member derogatory to the honour of the bar, and to submit to it any accusation for similar acts which is handed to him by any person, saving the right of the council to receive the same directly or to take the initiative in the exercise of its disciplinary powers.

The appellant, who is an old practising advocate of the Bar of Montreal, complains of a decision of its council which suspended him during three months, and by writ of prohibition demands that the Bar be prohibited from executing the sentence for, in substance, three reasons, first, because the private complaint does not allege any offence in law or under the by-laws of the Bar that might give jurisdiction to the council of the Bar of Montreal; secondly, because the council did not take any note in writing of the evidence adduced, so as to permit the appellant to have its decision revised and reversed; and thirdly, because the private prosecutor, Labbé, had withdrawn his charge against the appellant.

The two last reasons are unfounded. Notwithstanding the *désistement*, the Bar could proceed with the inquiry in the interest of the profession. All the courts were against the appellant upon this point. The appellant adduced evidence before the local council, but did not request that it should be taken in writing, and it was not so taken. The local council perhaps inferred from his course that he never intended to appeal upon the sufficiency of the evidence, but (if an appeal was contemplated at all), only upon the sufficiency of the charge. In appeal, he found himself

without any proof, and although he offered to summon again his witnesses, his appeal was dismissed summarily by the general council.

The local council should not have taken for granted that the appeal would be limited, and the moment that the sentence pronounced opened the door of the general council they should have seen that it was susceptible of revision. This was undoubtedly a great hardship to the appellant, but it constituted a mere irregularity or illegality in the proceedings which cannot justify the issue of a writ of prohibition. Even the rejection or refusal of legal evidence will not affect the jurisdiction of the tribunal. *Ex parte Higgins* (1); Am. & Eng. Ancy. of Pleading, vo. Prohibition (2 ed.) pp. 1108, 1125, 1126, 1127; see also *Molson* v. *Lambe* (2); *The Governor and Company of Adventurers of England* v. *Joannette* (3); *Mackonochie* v. *Lord Penzance* (4), per Lord Blackburn; *Reid* v. *Graham* (5).

The only question in the case is really that of jurisdiction. The Code of Procedure lays down this principle (art. 1031), which is taken from the English common law:

> Writs of prohibition are addressed to the courts of inferior jurisdiction whenever they exceed their jurisdiction.

See also R. S. Q. art. 2329.

Has the council of the Bar of Montreal exceeded its jurisdiction? Jurisdiction is claimed both under the statute and the by-laws. We have quoted the statutes in full; we will now see what the by-laws provide for. The by-laws of the general council, passed on the 16th September, 1886, sec. II, art. 6, say:

> The following are declared incompatible with the dignity of the legal profession; the carrying on for pecuniary profit of any handicraft, industry, trade or commerce, etc;

(1) 10 Jur. (O.S.) 838.
(2) 15 Can. S. C. R. 253.
(3) 23 Can. S. C. R. 415.
(4) 6 App. Cas. 424.
(5) 25 O. R. 573.

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and art. 7:

The following actions, among others, are derogatory to the honour and dignity of the profession, viz.: par. 6. Any breach of trust (*abus de confiance*) by an advocate to the detriment of client * * par. 11. To unduly withhold the monies, documents and papers of clients.

The complaint made against the appellant reads as follows:

MONTRÉAL, mai 20, 1895.

ARTHUR GLOBENSKY, Ecr.,
Syndic du Barreau de Montréal.

CHER MONSIEUR,—Référant à la plainte qui vous a été faite contre M. Honan, avocat, je prends la liberté de vous exposer les faits:

Dans le mois de décembre dernier, une saisie avant jugement a été émanée par M. Honan contre Baldwin Bros., courtiers de New York, pour la somme d'environ neuf cents piastres, argent qui était dû à la société.

La dite société était Madame Anabella Stein, épouse de Honan, et du soussigné, *mais au fond c'était Honan qui était associé.*

Il apparaît que le juge Mathieu a débouté l'action le 27 ou 28 février dernier.

Etant domicilié à New York à cette date j'ai reçu un message de la part de Honan ainsi conçu:

Judge Mathieu has quashed the seizure *re* Baldwin, send immediately sixty dollars to inscribe case in review, "sure to win;"

Auquel message j'ai fait réponse que je ne voulais pas envoyer ce montant. Il a tant insisté en envoyant d'autres messages, que je lui ai envoyé les soixante dollars par un chèque que vous avez en votre possession.

A mon retour ici, j'ai demandé à M. Honan où il en était dans l'affaire Baldwin, il m'a fait réponse que *la cause était inscrite pour le huit avril.* Après lui avoir demandé plusieurs fois il m'a fait réponse comme auparavant, que la cause était encore remise à une autre date.

Il avait, dans ce temps-là, réglé la cause avec les avocats de la partie adverse, et s'est fait payer ses frais par eux, et plus gardant les soixante dollars que je lui avais remis pour inscrire la cause en révision.

Il était entendu qu'il n'y aurait aucun frais en fait de la saisie et que ces $60 devaient être appliquées pour l'inscription en Cour de Révision seulement *laquelle inscription n'a jamais été faite.*

Je considère que cet argent doit m'être remis et je demande justice.

Votre obt. serviteur,

N. E. LABBÉ.

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On the 26th June, 1895, the Council of the Bar of Montreal, after having heard the parties and their witnesses but without taking any note of the evidence, rendered the following decision :

In re LABBÉ *v.* HONAN.

Les parties comparaissent devant le conseil et plaident leur cause.

Le conseil ayant mûrement délibéré trouve la plainte fondée, déclare le défendeur coupable de conduite dérogatoire à l'honneur professionel et à la dignité du Barreau pour avoir indûment obtenu du plaignant une somme d'argent qu'il retient encore injustement en sa possession, et condamne le dit Martin Honan à la suspension pendant trois mois.

L. E. BERNARD,

Montréal, 9 juin, 1886. *Secrétaire du Barreau.*

The appellant appealed to the General Council, but on the 29th October, 1895, his appeal was summarily dismissed, there being no evidence before the appellate tribunal, which moreover refused to hear the witnesses *de novo* or send the case back to the local council for the purpose of obtaining written evidence, and of allowing the appellant to defend himself. The judgment in appeal reads as follows :

It is decided by the General Council of the Bar that Martin Honan, Esquire, a member of the Bar of the Section of Montreal, who has appealed to this Council from a decision of the Council of his section of the twenty-sixth of June last, suspending him from his functions as an advocate for a period of three months, having failed to show any good or sufficient reason why the said decision should be set aside, his appeal therefrom be rejected.

Quebec, February 26th, 1896.

W. C. LANGUEDOC,

Sec.-Treas. Gen. C.B.P.Q.

Thereupon, the appellant applied for a writ of prohibition to prevent the local council from carrying the sentence into execution.

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The Superior Court (J. Alp. Ouimet J.) quashed the writ of prohibition. The Court of Review (Taschereau, Gill and Mathieu JJ.) reversed this judgment, which was, however, restored by the Court of Appeal (3 to 2), Bossé, Blanchet and Hall JJ.; *contra* Würtele and Ouimet JJ.:

Considérant que le Bref de Prohibition ne peut être adressé à un tribunal inférieur que lorsqu'il agit sans juridiction ou l'excède au cours de ses procédures et que l'on ne peut y recourir uniquement pour faire réformer ses décisions quelqu'erronées qu'elles soient;

Considérant que les faits contenus dans la plainte soumise au Conseil du Barreau de Montréal, savoir: que l'intimé aurait obtenu une somme de soixante piastres pour inscrire en révision un jugement renvoyant une saisie-arrêt que l'intimé avait fait émaner, comme procureur du plaignant, tandis qu'il avait alors lui-même réglé l'affaire avec les avocats de la partie adverse qui lui avait aussi payé ses frais, constitue, *primâ facie*, une faute grave, un abus de confiance regrettable et par conséquent un acte dérogatoire à l'honneur professionel et à la dignité du Barreau, et que même en admettant que l'intimé aurait eu un intérêt dans la procédure en question comme associé du plaignant, sous le nom de son épouse, et avait en outre une réclamation de deux cents piastres à exercer contre le plaignant pour honoraires et déboursés, ces faits ne pouvaient soustraire l'acte reproché à l'intimé au contrôle disciplinaire du conseil de la section à laquelle il appartient d'empêcher cette dernière de procéder sur la plainte qui lui était soumise, la loi lui donne juridiction sur tous les actes professionnels de ses membres sans exception et sans distinction;

Considérant que le Conseil du Barreau de Montréal avait partant juridiction pour entendre et décider cette plainte, et que les allégués qu'il aurait adjugé sans preuve ou contrairement aux faits, et n'aurait pas pris l'enquête par écrit ou par notes (arts. 236, 243, 264, 266 C.P.C.) sont insuffisants pour donner ouverture au Bref de Prohibition;

Considérant que le Conseil du Barreau de Montréal n'a pas non plus excédé sa juridiction;

Cette Cour maintient l'appel, casse et annule le jugement rendu par la Cour de Révision à Montréal le trente et unième jour de mars mil huit cent quatre-vingt dix huit, et confirme celui rendu le seizième jour d'octobre mil huit cent quatre vingt seize par la Cour Supérieure renvoyant le dit Bref de Prohibition.

Mais considérant que l'acte 58 V. ch. 36 a conservé l'appel de la décision d'un conseil de section au Conseil Général de la Province et décrète que les accusés devront avoir une défense entière et complète;

qu'en ne prenant pas même de notes de l'enquête faite devant lui, le Conseil de la section du Barreau de Montréal a fait perdre à l'intimé le bénéfice de cet appel.

Cette Cour ordonne que chaque partie paie ses frais, en Cour Supérieure et en Cour de Révision et devant cette Cour.

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We entirely agree with the Court of Appeal that the Council of the Bar had jurisdiction over the subject matter disclosed in the complaint, not only for the reasons mentioned by the learned judges, but also because the appellant was charged with carrying on trade and commerce. This court is not sitting in appeal from the decision of the Council of the Bar or even on a writ of certiorari, but on a writ of prohibition, and, therefore, we have no power to look into the evidence adduced on the merits, much less to appreciate the same, however favourable it might be to the appellant.

Members of a corporation who submit to extraordinary powers like these enjoyed by the Bar of the Province of Quebec "to the exclusion of all courts," have no reason to expect relief from courts of justice, except when there is absence or excess of jurisdiction. The appeal is therefore dismissed, but without costs, as was done by the Court of Appeal. We would go even further. The wrong inflicted by the Bar of Montreal upon the appellant—in not allowing him to effectively prosecute his appeal—is so serious, so grave in its consequences, that it should be a sufficient reason for the Bar not to carry out the sentence pronounced and we hope that the Bar of Montreal will be satisfied with this recognition of its supreme authority.

Appeal dismissed without costs.

Solicitor for the appellant: *Martin Honan.*

Solicitors for the respondent: *Globensky & Lamarre.*

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*June 2.
*Oct. 24.

PHILIP JAMIESON (PLAINTIFF).....APPELLANT;

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Assignment of lease—Discharge—Abandonment of security.

The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and reconveying the security.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Falconbridge at the trial.

The material facts of this case will be found in the judgment. The appeal involves only a question of law which is indicated in the above note of the decision.

S. H. Blake Q.C. and *Irving* for the appellant. If the mortgagee had power to surrender the mortgage without the lessor's consent it could only be for the *bonâ fide* purpose of carrying out its object and not to get rid of liability.

There could be no further dealing with the lease without the lessor's consent though there might be with the residue of the term. See *Treloar* v. *Bigge* (2); *Williams* v. *Bosanquet* (3); *Eaton* v. *Jacques* (4). *In re Gee* (5).

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

(1) 26 Ont. App. R. 116.
(2) 22 W. R. 843.
(3) 1 Brod. & B. 238.
(4) 2 Doug. 455.
(5) 24 Q. B. D. 65.

Robinson Q.C. and *Johnston* for the respondent.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—The appellant by indenture bearing date the first day of January, 1889, demised the property in question (land and buildings situate in the City of Toronto) to one James Rogers Armstrong, since deceased, for a term of twenty-one years at an annual rental of $1,400. The lease contained a covenant on the part of the lessee that he would not assign the term without the consent in writing of the lessor "*first had and received.*"

Armstrong, the lessee, borrowed money ($4,000), from the respondents to secure which he gave them a mortgage by way of assignment of the residue of the term in the leasehold premises in question. This mortgage bearing date the 22nd of March, 1889, was by indenture and contained the usual proviso for its defeasance, on payment of the mortgage money and interest at the times specified. The consent of the appellant was indorsed on the mortgage and was in the following words :

I Philip Jamieson, the lessor named in the within mortgage do hereby consent to the within mortgage by way of assignment by James Rogers Armstrong to the London and Canadian Loan and Agency Company, Limited.

This memorandum was signed and sealed by the appellant.

Subsequently on the 27th of February, 1891, Armstrong made another mortgage to the respondents in the same terms as the first to secure another loan of $1,600, and a written consent signed and sealed by the appellant in the same terms as the first was also indorsed on this latter instrument.

The respondents having been adjudged liable as assignees of the lease in the covenants contained in

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the lease for the payment of rent and taxes, and Armstrong having died insolvent, were desirous of escaping from the liability imposed upon them by the assignment, and for that purpose were prepared to release their debt and abandon the security, and with that view were about to register the usual statutory discharge in the form prescribed by the Registry Act when the appellant instituted this action claiming a declaration that the respondents could not effectually create such a discharge without the consent of the appellant, and also an injunction restraining them from doing so.

The respondents did not dispute any of the facts alleged by the appellant but in their defence claimed to have the legal right to release the debt and reconvey or revest the estate.

The action was tried before Mr. Justice Falconbridge who decided for the appellant. This judgment was however reversed by a unanimous judgment of the Court of Appeal from which the present appeal has been brought.

No authority in point has been produced, and I have been unable to find any. After some hesitation I have come to the conclusion that the judgment under appeal was right, for the reasons assigned in the judgment of the Chief Justice and of those of Mr. Justice Maclennan and Mr. Justice Moss.

A mortgage was formerly viewed very differently in a court of common law and in a court of equity. The first regarded it as a conveyance of an estate defeasible on the due performance of the condition by payment at the day specified; a court of equity on the other hand considered it to be a mere security for the debt upon payment of which the estate was redeemable at any time before foreclosure though forfeited at law by reason of non-payment according

to the tenor of the proviso. Further, the latter courts considered the estate mortgaged as a mere accessory which upon the payment or release of the debt the mortgagee was bound to reconvey to the mortgagor.

Under the present system of judicature all courts are bound to deal with a mortgage as courts of equity always have dealt with it, as a mere accessory to the debt. So far has this been carried that it has been held that a mere parol assignment of the debt, no mention being made of the mortgage, entitles the assignee to the benefit of the mortgage though that might be a security on lands.

It is to be observed here that the consent of the appellant authorising the assignment of the term indorsed upon the mortgage is not in general terms but refers to the specific mortgage upon which it is indorsed, and must therefore be considered as an assent not only to the expressed covenants and provisions contained in the instrument itself but also to all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed itself. Now it cannot be denied that one of these was that on the payment of the debt, whether *ad diem* or *post diem*, the mortgagee would be bound to reconvey the leaseholds held in security to the mortgagor or as he might appoint. The appellant must therefore be taken to have assented to this. Further just as the estate would have revested by the operation of the condition itself declaring the deed defeasible upon payment at the day, so likewise the mortgage would have been avoided if before the day the mortgagee had released the debt to the mortgagor, or at least a court of equity would in that event have enforced a reconveyance. So in equity, though not in law, would such release after the day fixed for payment have given the mortgagor the right

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to call for a re-assignment of the mortgaged lands Such were beyond all doubt the rights as between mortgagor and mortgagee at all times in courts of equity, and since the Judicature Act in all courts having jurisdiction of the subject matter. These then being the rights between the parties, and the appellant having no right to prescribe to them what their dealings should be respecting the debt as to which they could not be in any way fettered, the respondents were free if they chose to do so to release the debt upon which the mortgagor would have a right to call for a reconveyance. This being so, could it be said that the mortgagee could not reconvey without a new license from the appellant? I think not. It appears rather that the proper construction to put upon the memorandum indorsed upon the deed and signed by the appellant is this; he must be taken to say, I assent to the mortgage being made and to such further dealings with the estate as the law imposes as a consequence of the extinguishment of the mortgage debt. This if correct in point of reasoning must be conclusive.

As to authority the cases which determine that an equitable mortgagee of leaseholds by deposit will not be compelled to take a legal assignment in order to make him liable upon the covenants have little to do with this case. The dictum of Dallas C. J. in *Williams* v. *Bosanquet* (1), so far as it goes is favourable to the respondents. The old cases in Vernon appears to me to be beside the point. The omission in the later editions of Woodfall of the passage supposed to bear upon this question is significant of a change of opinion in the editor which to some extent helps the respondents, but all these authorities bear upon the question of the liability of the mortgagee on the

(1) 1 Brod. & B. 238.

covenants and his right to relief therefrom, and not upon the construction to be given to the lessor's license to assign and the extent to which that license is to be carried which is the point before us on this appeal. I quite admit that equity had no jurisdiction to control the legal right of the lessor to hold a mortgagee bound by covenants running with the land in a lease of which he had taken an assignment. But that is not the point here. What we have to do is to consider and determine not whether acquired legal rights can be controlled or interfered with in equity, but what are the legal and equitable rights of a lessor who has given such a license to assign as that which the appellant signed in the present instance. As to that there can, in my opinion, be only one answer, that given by the Court of Appeal.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kilmer & Irving.*

Solicitors for the respondent: *Arnoldi & Johnston.*

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*Oct. 3.

*Oct. 24.

AMEDÉE LAFRANCE AND ARTHUR LEFEBVRE (PLAINTIFFS) ..... APPELLANTS;

AND

TIBURCE LAFONTAINE (DEFENDANT) ..... RESPONDENT.

AN APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

Estoppel — Acquiescement — Floatable waters — Water power — River improvements—Joint user—Servitude—Arts. 400, 549, 550, 551 *and* 1213 *C. C.*

Where a riparian owner of lands on a lower level had been permitted by the plaintiffs, for a number of years, to take water-power necessary to operate his mill through a flume he had constructed along the river bank partly upon the plaintiffs' land connecting with the plaintiffs' mill-race, subject to the contribution of half the expense of keeping their mill-race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs and their *auteurs* had been parties, the plaintiffs could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race and a portion of the flume had been constructed. *City of Quebec* v. *North Shore Railway Co.* (27 Can. S. C. R. 102) and *La Commune de Berthier* v. *Denis* (27 Can. S. C. R. 147) referred to.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side), affirming the decision of the Court of Review, at Quebec, which had affirmed the judgment of the Superior Court, District of Three Rivers, dismissing the plaintiffs' action with costs.

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

A sufficient statement of the case appears in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

Lafleur Q.C. and *Guillet* for the appellants.

Belcourt Q.C. and *R. S. Cooke* for the respondent.

The judgment of the court was delivered by :

GIROUARD J.—Les appelants demandent, par une action pétitoire, à être déclarés propriétaires d'environ un quart d'arpent carré faisant partie du lot de terre, no. 509 du cadastre de la paroisse de St. Stanislas de la Rivière-des-Envies, comté de Champlain :

Avec de plus, la chute ou pouvoir d'eau qui se trouve en front du dit terrain, dans la dite Rivière-des-Envies et le droit d'en faire refluer l'eau, droits de chaussée et droits rivèrains comprenant chaussée et ses ailes, et droits de vaquer sur les bords de la dite rivière, pour l'entretien, la réparation ou autres fins relatives aux dites chaussée et ailes, canal, et tous droits inhérents à l'exploitation du dit établissement et à l'usage des eaux de la dite Rivière-des-Envies * * * à ce que le dit immeuble soit déclaré libre de toute servitude envers le défendeur ou envers aucun immeuble possédé par ce dernier, sauf les obligations relatives au chemin ou passage communiquant du chemin public au dit immeuble.

Le défendeur ne nie pas aux appelants le droit de propriété de cette partie du lot no. 509, mais il lui nie la propriété exclusive et libre de toute servitude de la chute ou pouvoir d'eau, de la chausée et du canal qui conduisent l'eau nécessaire à l'alimentation du moulin à farine des appelants et des moulins de l'intimé situés à quelques pieds plus bas.

Il est admis que la Rivière-des-Envies est une rivière flottable et comme telle considérée une dépendance du domaine public ; C. C. Art. 400. Les appelants ne peuvent donc pas être propriétaires de la chaussée qui traverse la dite rivière, ni du canal qui, de l'aveu des appelants, est construit partie sur le lit même de la rivière et partie sur le rivage et le terrain

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des appelants. Le plus qu'ils pourraient réclamer serait les améliorations qu'ils ont faites, point sur lequel il n'est pas nécessaire de se prononcer.

Sans vouloir examiner tous les détails de cette affaire, qu'il nous suffise d'attirer l'attention sur un titre antérieur à celui des appelants et consenti par un de leurs auteurs, C. H. Letourneux, connu sous le nom de "quittance partielle," dans lequel il est formellement stipulé :

> Que toutes servitudes concernant les deux moulins érigés sur le dit lot officiel numéro cinq cent neuf dont l'un a été acheté par le dit Chs. H. Letourneux, tel que susdit, seront supportées également, moitié par moitié par le dit C. H. Letourneux et le dit Tiburce Lafontaine.

Toutes les servitudes, dont les appelants désirent se voir libérés, ont été exercées depuis des années ; l'intimé a fait des réparations considérables tant au canal qu'à la chaussée conjointement avec les appelants ou leurs auteurs ; sa jouissance a été complète, sans protestation ni molestation de la part des appelants, à venir jusqu'à ces dernières années où ils diminuèrent la prise d'eau indispensable à ses moulins, en construisant un nouveau moulin à côté de l'ancien, sur leur lot no. 509. L'intimé se plaignit de cet empiètement de ses droits devant la Cour Supérieure de Trois-Rivières (Bourgeois J.), qui condamna les appelants à lui payer $40, à titre de dommages et les dépens :

> Considérant que dans tout le mois d'octobre dernier, les dits défendeurs ont abusivement et en violation des droits du demandeur, obstrué le cours du dit canal, en y pratiquant et maintenant deux barrages de dix-huit à vingt pouces de hauteur, sur la moitié de la largeur du dit canal ;
>
> Considérant que les dits barrages étaient d'injustes entreprises pratiquées par les défendeurs sur la propriété jusque là incontestée du demandeur, et qu'ils ont eu pour effet d'aggraver notablement la servitude de prise d'eau qui a été transférée au dit C. H. Letourneux en vertu de la dite vente du Shérif, etc.

Ce jugement fut confirmé en révision, Routhier, Caron et Andrews JJ.

Il fut prouvé, dans cette cause comme dans la présente, que les parties avaient, par plusieurs actes notariés et leur conduite, reconnu l'existence de cette prise d'eau en faveur de l'intimé. *City of Quebec* v. *North Shore Railway Co.* (1); *Commune de Berthier* v. *Denis* (2). Il importe peu d'ailleurs, que l'on appelle ce droit une servitude ou un droit de co-propriété. Les appelants ne peuvent en jouir seuls à l'exclusion de l'intimé. C'est la conclusion à laquelle sont arrivées et la Cour de première instance (Bourgeois J.) et la Cour d'appel (Bossé, Würtèle, Banchet, Hall et Ouimet JJ.), et nous n'avons aucune hésitation à confirmer ce jugement, pour les raisons exprimées plus haut et celles développées au long par M. le juge Blanchet. Il sera cependant permis aux appelants, en rédigeant (*settling*) le jugement, d'avoir une déclaration de cette cour qu'ils sont les propriétaires d'environ un quart d'arpent carré faisant partie du lot no. 509, mais rien de plus. L'appel est rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the appellants: *L. P. Guillet.*

Solicitor for the respondent: *R. S. Cooke.*

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(1) 27 Can. S. C. R. 102. (2) 27 Can. S. C. R. 147.

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*Oct. 24

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

AND

WILLIAM ANDREW YULE AND OTHERS (SUPPLIANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—B. N. A. Act, 1867, *sec.* 111—*Debts of Province of Canada—Deferred liabilities—Toll bridge*—8 *Vict. ch.* 90 *(Can.)—Reversion to Crown—Indemnity—Arbitration and award—Condition precedent—Petition of right—Remedial process.*

A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict. ch. 90), of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award.

Held, affirming the judgment of the Exchequer Court of Canada, (6 Ex. C. R. 103,) that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late Province of Canada coming within the operation of the 111th section of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *The Attorney-General of Canada* v. *The Attorney-General of Ontario*, ([1897] A. C. 199; 25 Can. S. C. R. 434) followed.

Held also, that the arbitration provided for by the third section of the Act, 8 Vict. ch. 90, did not impose the necessity of obtaining

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

an award as a condition precedent but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants claim for compensation under the provisions of that Act, (8 Vict. ch. 90,) was a proper subject for petition of right within the jurisdiction of the Exchequer Court of Canada.

APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the suppliants.

The judgment of the Exchequer Court upon the petition of right held that the suppliants, who are the representatives and assigns of John Yule, the younger, were entitled to recover from Her Majesty, as represented by the Government of Canada, the value of a bridge and its dependencies situated at Chambly, in the Province of Quebec, the value to be ascertained by three referees appointed by the judge. The referees, after hearing the evidence, reported the value to be $36,810.82, and upon their report the court adjudged the amount so found to the suppliants.

The claim arose under a statute of the late Province of Canada, 8 Vict ch. 90, by which John Yule was authorized to build a toll-bridge over the river Richelieu, in the vicinity of Chambly, and also to build a toll-house and turnpike with other dependencies on or near the bridge, and for this purpose he was empowered to take and use the lands on either side of the river upon making compensation to the owners and occupiers. The third section of the statute vested the bridge, etc., in said Yule, his heirs and assigns, for fifty years from the date of its assent, (29th March, 1845,) when it should revert to Her Majesty as a free bridge for public use, and provided that it should then be lawful for the said Yule, his heirs, etc., "to claim and obtain from Her Majesty, her

(1) 6 Ex. C. R. 103.

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heirs and successors, the full and entire value which the same shall, at the end of the said fifty years, bear and be worth exclusive of the value of any toll or privilege, the said value to be ascertained by three arbitrators, one of whom to be named by the Governor of the province for the time being, another by the said John Yule, the younger, his heirs, executors, curators or assigns, and the third by the said two arbitrators."

The Crown did not raise any question on the appeal as to the findings of the referees on the valuation of the property but denied any liability on the part of the Dominion of Canada under the British North America Act, 1867.

Newcombe Q C., Deputy of the Minister of Justice of Canada, for the appellant. The property consists of lands in the Province of Quebec, and passed to that province under sec. 109 B. N. A Act, "subject to any trusts existing in respect thereot and to any interest other than that of the province in the same." Trusts existed at the time the B. N. A. Act was passed and consisted, at least, of the obligation of the province to pay for the bridge upon assuming possession thereof *within* the period of fifty years, and in that case perhaps, the further obligation to hand it over to the inhabitants interested in case they should make the payments stipulated for by the Act (1). There was also the interest of Yule unless terminated by one of the modes authorized by the Act.

The liability on the part of the Crown to discharge any trust existing in respect of lands vested in the province under sec. 109 B. N A. Act, and pay for any interest other than that of the province in the same, are not cast upon the Dominion under section 111, but are chargeable solely against the province to which the lands passed *Attorney-General for Canada* v.

(1) 8 Vict. ch. 90, sec. 3.

Attorney-General for Ontario (1), at pages 210 and 211. See also the observations of Lord Selborne, in *Attorney-General of Ontario* v. *Mercer* (2), at pp. 775 and 776. Even up to the present time the property stands in the Crown subject to a trust or interest in favour of the inhabitants concerned who may at any time acquire the property by paying the statutory valuation. Moreover, the property vested in the Province of Quebec subject to a contractual or legal duty on the part of the province to pay the value thereof, unless it had in the meantime been taken over by the inhabitants, and such contractual or legal duty in itself constituted a trust within the meaning of section 109.

In the circumstances as they have resulted the property itself is liable to make good the compensation by reason of the vendor's lien for the unpaid purchase money. At the time of constructing the bridge the fee simple in the lands occupied by the bridge and its dependencies was vested in Yule, who bore the whole cost of constructing and maintaining the bridge. The statute was not intended to take away this estate or property except upon payment of the statutory valuation. See *Walker* v. *Ware, Hadham and Buntingford Railway Co.* (3), per Romilly M. R. and Arts. 2009 and 2014 C. C.

Section 3 of 8 Vict. ch. 90 provides for compensation from Her Majesty for the value of the property *to be ascertained by three arbitrators*, one named by the Governor of the province, another by Yule, and the third by the two arbitrators. It was in any case intended that no liability should accrue until the ascertainment of the amount by an award obtained in the statutory manner, and thus the very first essential on which alone the liability might arise is wanting,

(1) [1897] A. C. 199. (2) 8 App. Cas. 767.
(3) L. R. 1 Eq. 195.

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and that without any act or default attributable to the Dominion. It is said that the provinces which constituted the late Province of Canada waived arbitration, but no cause of action arising out of that circumstance, or because the provinces declined to appoint an arbitrator, can constitute a debt or liability existing at the union, for such cause of action, if any, arose out of dealings long subsequent to the union, and which could not have been anticipated at that time. The proposition that the Dominion has waived its defence by granting a fiat upon the petition of right is quite untenable. The granting of a fiat does not take away any defence otherwise available. Consequently, as there has been no arbitration or award, no action will lie to recover the compensation money. *Viney* v. *Bignold* (1); *Babbage* v. *Coulburn* (2), (affirmed on appeal); Russell on Awards, (7 ed.) 60 to 63; *Elliott* v. *Royal Exchange Assurance Co.* (3); *Scott* v. *Corporation of Liverpool* (4); *Fox* v. *The Railroad* (5); *Scott* v. *Avery* (6); *Caledonian Insurance Co.* v. *Gilmour* (7) at page 90, per Herschell L. C., and again at page 95, per Watson L. J.

The statute has given the right and provided the remedy, and no other remedy can be invoked. *Murray* v. *Dawson* (8); *Hepburn* v. *Township of Orford et al.* (9); *Vestry of St. Pancras* v. *Batterbury* (10); *Berkeley* v. *Elderkin* (11); *Mayor of Montreal* v. *Drummond* (12). When a new statute prescribes a particular remedy no other can be taken. *Stevens* v. *Evans* (13) at page 1157; *Doe d. Bishop of Rochester* v. *Bridges* (14) at p. 859, per

(1) 20 Q. B. D. 172.
(2) 9 Q. B. D. 235.
(3) L. R. 2 Ex. 237.
(4) 3 DeG. & J. 334.
(5) 3 Wall. Jr. 243.
(6) 5 H. L. Cas. 811.
(7) [1893] A. C. 85.
(8) 17 U. C. C. P. 588.
(9) 19 O. R. 585.
(10) 2 C. B. N. S. 477.
(11) 1 E. & B. 805.
(12) 1 App. Cas. 384.
(13) 2 Burr. 1152.
(14) 1 B. & Ad. 847.

Lord Tenderden, and see reference to general doctrine in *Underhill* v. *Ellicombe* (1), per Erle J. in *Stevens* v. *Jeacocke* (2), at p. 741.

The word "debt" in sec. 112 B. N. A. Act, must be intended to include "debts and liabilities" under section 111 so far as Ontario and Quebec are concerned, and upon the construction of sections 109 to 112 inclusively, and having regard to sections 117, 120 and 142, it was not intended that Ontario should incur any liability in respect to unpaid purchase money of lands in Quebec becoming the sole property of Quebec at the Union. If that be so, the present claim is not included in section 111. For the award under sec. 142 see Sessional Papers of Canada, 1871, no. 21. Neither section 111 nor any other provision of the B. N. A. Act makes the Dominion directly responsible. The Dominion is only liable for such payments of this kind as are assumed by the Dominion. See sec. 120. The Dominion did not assume this payment or any obligation therefor.

Her Majesty has not taken possession of nor accepted the bridge or any of its dependencies but, on the contrary, the suppliants have remained in possession up to the present time, although their statutory authority expired on 29th March, 1895, and they cannot maintain this action while remaining in possession of the property and exacting tolls.

The Exchequer Court had no jurisdiction as the claim does not arise under any law of Canada within the meaning of section 16 (*b*) of the Exchequer Court Act.

Lafleur Q.C. and *Sinclair* for the respondents. The obligation here is not a conditional one, but an obligation with a term, *debitum in præsenti solvendum in futuro*, at the date of Confederation, and clearly was

(1) McCle. & Yo. 450. (2) 11 Q. B. 731.

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made a liability imposed upon the Dominion by the 111th section of the B. N. A. Act, and the date on which payment would become due, viz., the expiration of the term of the franchise, was absolutely certain, being fixed by statute. This is more evidently within that clause of the B. N. A. Act than the claim for payment of the increased annuities to the Indians in the cases of *The Attorney General of Canada* v. *The Attorney General of Ontario* (1), which depended upon an uncertain event. Section 109 can have no possible application to the present case. The lands there referred to are those belonging to the several provinces at the time of the union, and these words apply only to ungranted lands.

We refer to *The Fisheries Case* (2), at pages 514 and 515. It is manifest that during the term of fifty years the Yules were absolute owners of the property and could have dealt with it as proprietors subject to the defeasance of their title at the expiration of the charter. They have in fact been regarded as owners of the fee and have been taxed as such; *Yule* v. *Corporation of Chambly* (3). There was no trust existing in respect of this land chargeable to the Province of Quebec, under section 109 of the B. N. A. Act. The amount to be paid to the Yules as representing the value of the bridge and dependencies is in no sense a payment to be made out of the lands. The lands vested in the Crown before the payment of the indemnity was exigible, and the suppliants have only a bare claim for compensation which can in no sense be said to be a lien or privilege on the land. The Crown was under no legal or contractual duty to pay the Yules out of the beneficial estate of the bridge or its proceeds. There was to be simply a personal payment by the Crown to the Yules.

(1) [1897] A. C. 199; 25 Can. S. C. R 434.

(2) 26 Can. S. C. R. 444.

(3) 2 Stephens Dig. 122.

The jurisdiction of the Exchequer Court is complete as the present claim arises both under a law of the old Province of Canada and under the 111th section of the B. N. A. Act, which is undoubtedly a "Law of Canada."

The Legislature did not make reference to arbitration a condition precedent to the right of action. There was not at the time any court having jurisdiction by petition of right or otherwise to hear and determine claims against the Crown, and the proceeding prescribed by the statute for determining the value of the bridge and its dependencies was not one that could have been invoked without the Crown's consent. There could not have been any intention to exclude ordinary legal remedies and procedure which were not then in existence. The statute first creates the right and then provides a mode of ascertaining the amount of the claim, indicating a special mode of proof, but making no conditions precedent to the assertion and exercise of the right. When the Exchequer Court Act came in force all the old remedies were superseded and a new mode of enforcing the claim became available.

The obligation is severable from the provision for reference to arbitration. *Ulrich* v. *National Insurance Co.* (1); *Collins* v. *Locke* (2); *Dawson* v. *Fitzgerald* (3). If reference to arbitration is insisted upon as a condition precedent to the action, the liability to pay must be taken to be admitted and all other defences abandoned. *Hughes* v. *Hand-in-Hand Ins. Co.* (4); *Goldstone* v. *Osborn* (5). But there has been a complete waiver of the right to arbitrate. The suppliants, before proceeding, requested the Dominion Government to appoint arbitrators. That request was thereupon communicated to the Provinces of Ontario and

(1) 42 U. C. Q. B. 141; 4 Ont. App. R. 84.
(2) 4 App. Cas. 674.
(3) 1 Ex. D. 257.
(4) 7 O. R. 615.
(5) 2 C. & P. 550.

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Quebec and, in accordance with the express wish of both provinces, arbitrators were not named but the suppliants were invited to urge their claim by a petition of right and the Crown, deferring to the wishes of the provinces, granted its fiat and abstained from appointing an arbitrator.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are of opinion that the judgment of the Exchequer Court is entirely right and that the appeal fails.

The suppliant's title is not disputed, nor has the amount found by the referee been made a subject of appeal; on the contrary we find in the record a statement that

> the appellant does not in this appeal raise a question as to the valuation of the property as found by the referees.

The first question raised by the appeal is whether or not this claim is a liability of the late Province of Canada coming within section 111 of the British North America Act. The object of that section was to give the creditors of the old Province of Canada an ascertained debtor against whom they might seek the recovery of their debts without being compelled to await the result of the arbitration provided by the statute for the apportionment of such liabilities. It is impossible to conceive a clearer case for the application of that section than the present. By the third section of the Act, 8 Vict. ch. 90, under which the bridge was built, it is enacted that at the end of fifty years from the passing of the Act (the 29th March, 1845) the bridge, toll-house, turnpike and dependencies, and the ascents and approaches thereto, should be vested in Her Majesty, Her heirs and successors, and be free for public use, and it then proceeds to provide for compensation in the following terms:

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The Chief Justice.

And it shall then be lawful for the said John Yule, the younger, his heirs, executors, curators and assigns, to claim and obtain from Her Majesty, Her heirs and succcessors, the full and entire value which the same shall at the end of the said fifty years bear and be worth, exclusive of the value of any toll or privilege; the said value to be ascertained by three arbritrators, one of whom to be named by the governor of the province for the time being, another by the said John Yule, the younger, his heirs, executors, curators or assigns, and the third by the said two arbitrators.

No mention is made of any charge or lien upon, or right of retention of, the property itself, nor was there any need for any since the builder of the bridge, John Yule, and his representatives had the best security which could have been assured to them, the declared statutory liability of the Crown. That it was not a presently payable liability at the date of the passing of the British North America Act can make no difference since the case of the *Attorney General of Canada* v. *The Attorney General of Ontario* (1) determines that contingent and deferred as well as present liabilities come within the 111th section. Had the amount of the valuation been made a charge on the property itself there might be some ground for saying that the Province of Quebec took the bridge at the time at which the statute vested it in the Crown *cum onere* but as I have said, there can be no pretence for this as is shown by the case in the Judicial Committee, already cited, relating to the Indian annuities. The liability was purely and simply a debt of the late Province of Canada imposed at Confederation on the Dominion.

Then it is said that the ascertainment of the amount by arbitration was a condition precedent to any right of the suppliant to recover payment. I had occasion to say at the argument that after the correspondence which we find printed in the case between the

(1) [1897] A. C. 199.

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executive officers of the Dominion and the two provinces, this objection seems a harsh proceeding on the part of the Dominion Government. That Government has really no interest in the question since under the British North America Act it is to be recouped by the provinces for any advance which it may have to make to pay this claim, and the provinces upon whom or upon one of whom this liability must ultimately fall insist upon a proceeding in this form by petition of right and object to a reference to arbitration. I am of opinion, however, that apart from any consent the objection is not maintainable. As the learned judge of the Exchequer Court has pointed out, at the time of the passing of the Act, 8 Vict. ch. 90, there was in Canada no procedure by which the Crown could without its consent be sued. In neither of the divisions of Upper and Lower Canada into which the Province of Canada was practically divided for judicial purposes could the remedy by petition of right be resorted to. The preliminary steps indispensable for obtaining the royal sign manual to the requisite indorsement of a petition of right could not be taken here. The remedy of the subject in this form whether in the provinces or in the Dominion, as is well known, now depends altogether on legislation since Confederation. Therefore it is reasonable to infer that the provision about arbitration contained in the third section of 8 Vict. ch. 90, is not to be considered as imposed by way of condition precedent but merely to afford the party in whose favour it was manifestly introduced a remedy for the recovery of the value of the bridge, and the only remedy which up to the date of Confederation he had. Then it is not without significance that the arbitration is not in terms made a condition precedent but according to the plain import of the words added as a remedial proceeding. Further, this is not a proceed-

ing to enforce the original liability but a liability imposed upon the Crown as representing the Dominion by a subsequent statute, the British North America Act. That it is a debt of Canada within the meaning of that expression in the Exchequer Court Act there cannot be a doubt, if I am right in holding that it comes within the 111th section of the British North America Act. Upon this point I agree with and adopt the observations of the learned judge of the Court of Exchequer.

On the whole we are of opinion that the claim of the suppliant is in all respects a valid, legal and subsisting claim which is a proper subject of a petition of right within the jurisdiction of the Exchequer Court, and that after the correspondence between the Dominion and the provinces which has been made part of the record, and after the Act of the Dominion in assenting to the petition of right, the objection that the suppliant's only remedy is by arbitration is one without any foundation and ought not to have been insisted on.

The appeal is dismissed with costs.

*Appeal dismissed with costs.**

Solicitor for the Attorney-General of Canada: *E. L. Newcombe.*

Solicitor for the respondents: *R. V. Sinclair.*

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*The Judicial Committee of the Privy Council refused leave to appeal from the judgment in this case.

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*Oct. 5, 6.

*Oct. 24.

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

AND

FERDINAND POIRIER AND EDWARD HART, EXECUTORS OF GEORGE J. NEVILLE (DECEASED) (SUPPLIANTS)..... } RESPONDENTS.

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

Landlord and tenant—Conditions of lease—Construction of deed—Practice —Objections first taken on appeal.

Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained.

Where a written lease of lands provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming, (to the extent of $6,942 and costs,) the judgment of the Superior Court, District of Quebec, which had awarded to the suppliants, upon their petition of right, the sum of $7,742 for damages and their costs.

A statement of the questions at issue on the appeal appears in the judgment reported.

Duffy Q.C. and *Cannon Q.C.* for the appellant.

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

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Gwynne J.

Fitzpatrick Q.C. and *Maréchal* for the respondents.

The judgment of the court was delivered by:

GWYNNE J.—This is a petition of right wherein the petitioner claims indemnity from the Government of the Province of Quebec under the terms and provisions of a clause in a lease set out in the petition of right and which the petitioner alleges was executed by the Provincial Government through the intervention of a Mr. Nantel, the Commissioner of Public Works in the Province of Quebec, upon and bearing date the second day of March, 1892. To this petition of right the Government of the province plead by way of defence.

1. The general issue.

2. That in the said lease upon which the petition of right is based it is expressly stipulated that the lessee shall not transfer his right to the lease or sublet the premises in whole or in part without the express consent in writing of the lessor, and that no such consent was ever given by the defendant or by any person for that purpose duly authorized.

3. That by the said lease the lessee is obliged to make certain repairs at the earliest possible time at his own expense, &c., &c.

5. That by the said lease the sole amount which the lessee could demand in case of dispossession before the expiration of the term was, &c., &c. (*not material to be now set forth.*)

6. That the petitioners cannot claim any such indemnity from the defendant because of their eviction, that indemnity being satisfied and extinguished by the value of the repairs which remained unexecuted by the lessees at the time of their eviction.

Issue being joined on these pleas the case was brought down for trial and the petitioners produced

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the lease under which they claimed and which was set out in the petition of right and it appeared to be in notarial form as between the Government of the Province of Quebec represented by William Alphonse Nantel in his capacity of Commissioner of Public Works, lessors, &c.

The defendants did not in the Superior Court, nor until the case was brought by appeal into this court, make any objection whatever to the validity of the lease, but the case was tried upon the issues joined on the other pleas upon all of which the defendants rested their contestation, and they produced a notarial instrument by which they contended that the government of the province had determined the lease by reason of a breach having been committed by the lessees having sublet divers parcels of the premises without consent in writing, contrary to the provisions of the lease in that behalf, and that therefore, as they have contended and still do contend, the lessees have lost all claim to the indemnity guaranteed by the lease in case of dispossession before the expiration of the lease. This instrument contained an express recognition of the lease as valid. The defendants now in this court, while insisting upon all their pleas upon the record, (which not only admit the due execution of the lease, but rely upon it as a good and valid lease, of the terms and provisions of which they claim the benefit,) nevertheless insist that the lease never had any validity whatever for the reason that it was not countersigned by the Commissioner's own secretary which they contend is a statutory prerequisite to the validity of a lease to be binding on the Government. Thus, while the validity of the lease was never questioned during any stage of the progress of the case to judgment in the Superior Court, nor at all as already observed until the judgment

pronounced in the case was brought into this court upon appeal, they ask this court to nullify the judgment rendered upon the issues joined on the pleas of the defendant admitting and relying upon the validity of the lease.

Under these circumstances we do not think the court is required to entertain an objection never made during the progress of the case to judgment in the courts below. We think we are therefore quite justified in holding that the objection now made for the first time in appeal before this court is for the reasons above given altogether too late and cannot be entertained.

Proceeding then to the contention that the clause in the lease prohibiting the execution of any sublease without the consent in writing specified in the lease, and without dealing with a question which was argued as to the sufficiency of the proof offered of such a consent having been given, which consisted of secondary evidence only, we find that the clause in the lease as to indemnity expressly provides that

if the lessor should dispossess the lessee before the expiration of this present lease, the lessee shall have the right to an indemnity equal:

1. To the cost of the improvements made as aforesaid to the said premises by the lessee, deducting an amount proportionate to the time that the lessee shall have occupied the said premises;

2. To the damages which the said lessees may suffer by eviction before the expiration of the lease.

Now in this guarantee clause the right to indemnity upon eviction before the expiration of the term is not qualified by any condition affecting the right to indemnify in case the eviction should be for a breach of any of the conditions or covenants in the lease on the lessees' part to be observed and kept. If the lessors evict the lessee the right to indemnity *eo instanti* arises. Now the lessors could not evict the lessees before the expiration of the lease except because

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of some breach by the lessees of some condition or covenant in the lease to be observed and performed by them; it cannot therefore be contended that the lessees lose their right to indemnity if the eviction should be for cause, since the eviction could not take place except for such cause, and it is upon the actual occurrence of dispossession by the lessor that the right to indemnity arises under the express terms of the lease.

Now as to the amount of such indemnity. I think we may take the evidence to establish that the lessees expended $2,500 of the $2,885 named in the lease upon the works required to be done by the estimate of Mr. Raza, and that they expended a much larger sum on other repairs than those required by Raza. This $2,500 had to be, and no doubt was, expended with promptitude, as the lessees' profits absolutely depended upon the premises (which were in a delapidated condition) being made tenantable. We may allow perhaps six months for the making of them, and during that period the lessees would have no profit; indeed calculating the utmost value per annum of the premises to the lessees after the completion of the improvements and deducting therefrom $2,500 expended in improvements, and $160 per annum for the taxes and the $500 per annum, we have the condition of the matter at the expiration of four years when the lessees were evicted, as follows:

Monies expended in improvements, by way of rent in advance.....		$2,500 00
Rent and taxes per annum $660 x 4...		2,640 00
Total disbursements		$5,140 00
Receipts, first *half* year.....	$ 880 00	
Second, third and fourth years at $1,760.00 x 3.....	5,280 00	
	$6,160 00	

or receipts in excess of disbursements at the expiration of the fourth year amounting to $1,020 only. Until the fourth year therefore the lessees derived no profit whatever from the premises leased; for the remaining five years of the lease the profits of the lessees calculated on the above basis would be precisely $1,100 per annum x 5 years = $5,500.00 to which must I think reasonably be added a sum to cover interest upon the investment of those profits from time to time as they accrued, which may be, I think, stated at $700.00, or in the whole $6,200.00. I cannot see that the lessees can be entitled to any more. The outlay of the $2,500 was required to be expended to create the profits, and I cannot see any pretence of right that the lessees can have to any proportion of the balance of $385 which they covenanted to expend but did not expend upon the particular improvements required by Raza's estimate.

I would vary the judgment in favour of the respondents by reducing it to $6,200 for which judgment should be entered for them on the petition of right with interest from date of judgment in the Superior Court with costs, and then dismiss the appeal, and I see no reason why the dismissal should not be also with costs, for the defence insisted on was under the circumstances a very *unjust* one.

Appeal dismissed with costs.

Solicitor for the appellant: *H. Thos. Duffy.*

Solicitor for the respondents: *L. T. Maréchal.*

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*Oct. 10.

*Oct. 24.

HER MAJESTY THE QUEEN (DEFENDANT) ..... } APPELLANT;

AND

DAME EMILY GRENIER (SUPPLIANT) ..... } RESPONDENT,

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway—Injury to employee—Lord Campbell's Act—Act 1056 *C. C—Exoneration from liability—R. S. C. c.* 38 *s.* 50.

Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. *Robinson* v. *Canadian Pacific Railway Co.* ([1892] A. C. 481) distinguished.

A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths* v. *Earl Dudley* (9 Q. B. D. 357) followed.

In sec. 50 of the Government Railways Act (R. S. C. ch. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. *Grand Trunk Railway Co.* v. *Vogel* (11 Can. S. C. R. 612) disapproved.

An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution a rule of the Association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant.

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

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Held, reversing the judgment of the Exchequer Court (6 Can. Ex. C. R. 276) that the rule of the association was an answer to an action by his widow under Art. 1056 C. C. to recover compensation for his death.

The doctrine of common employment does not prevail in the Province of Quebec. *The Queen* v. *Filion* (24 Can. S. C. R. 482) followed.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

The suppliant, Emily Grenier, brings this action on behalf of herself and her infant children to recover damages for the death of her husband, Xavier Letellier, who was employed in his lifetime as fireman upon the Intercolonial Railway, and who was killed in an accident on the 2nd of May, 1898, that happened on that railway.

The action is based in the first place on clause (*c*) of the 16th section of The Exchequer Court Act which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine, amongst other things, 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. The suppliant further relies on Article 1056 of the Civil Code of Lower Canada, which provides that "in all cases where a person injured by the commission of an offence or a quasi offence dies in consequence, without having obtained indemnity or satisfaction his consort and his ascendant and descendant relations have a right but only within a year after his death to recover from the person who committed the offence or quasi offence, or his representatives, all damages occasioned by such death."

In addition to the fact that the deceased and those through whose negligence he lost his life were fellow-

(1) 6 Can. Ex. C. R. 276.

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servants in the employ of the Crown, the admissions of the parties shows that he was at the time of his death a member of an association known as the Intercolonial Railway Employees' Relief and Assurance Association, which is composed of the employees of Her Majesty in the railway service and to which they make certain contributions, and from the funds of which certain allowances in accordance with the rules and regulations thereof are made to the members of the association in the case of accident or illness, or to their families in case of death. To the funds of this association the Government of Canada contributes six thousand dollars annually, in consideration of which it was made a rule of the association that the Government should be relieved of all claims for compensation for injuries to or for the death of any member of the association. All permanent male employees of the railway are members of the association and contribute to its funds as an incident of their employment, and without any option or choice on their part; and the fees and assessments payable by them are deducted on the pay-roll from the amounts due to them for salary or wages. The object of the association is to provide relief to members while suffering through illness or bodily injury, and in case of death to provide a sum of money for the benefit of the family or relatives of deceased members. With reference to the insurance against death or total disablement there are three classes of members. In Class A the member when totally disabled, or his heirs or assigns in case of death, are entitled to one thousand dollars; in Class B to five hundred dollars; and in Class C to two hundred and fifty dollars. Upon the death or total disablement of a member every surviving members pays an assessment proportionate to the amount of his insurance. Those in Class A pay four times as much

as, and those in Class B twice as much as those in Class C. In this way the amount to be raised is divided among and borne by the surviving members, and it is provided that the insurance money collected from death or total disability levies or assessments shall be paid to the person totally disabled or to the person named by the deceased member. If no person is named it is to be paid to his widow, and if there is no widow, to the executors or administrators of the deceased member. Letellier belonged to Class C. He had received a copy of the constitution, rules and regulations of the association,, and had signed the certificate of membership in force at his death, directing all insurance money accruing thereon to be paid to his wife. It was admitted that he was aware of the rules and regulations mentioned, but it was claimed that the admission was made through inadvertence. Receipts for copies of the constitution, rules and regulations of the association signed by the deceased were produced. It also appeared that the suppliant, Emily Grenier, had been paid the sum of two hundred and fifty dollars, to which under her husband's certificate of membership and the rules and regulations of the association she became at his death entitled; and it was contended for the Crown that in view of these facts the petition could not be maintained.

To this contention two replies were made. In the first in support of the petition reliance was placed, as has been stated, upon Article 1056 of the Civil Code of Lower Canada, and the case of *Robinson* v. *The Canadian Pacific Railway Co.* (1), as showing that the suppliants have an independent and not a representative right of action, which was maintainable, as the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries. And it was argued that

(1) [1892] A. C. 481.

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this right is one which as against the suppliant the deceased could not discharge the Crown unless in his lifetime he obtained such indemnity or satisfaction; that he could not agree with the Crown in advance that it should be relieved from any such action by his widow and children.

Then in the second place it was said in support of the petition that any agreement to relieve the Crown from all claim for compensation for injury or death where the same arises from the negligence of a servant of the Crown would be bad under the 50th section of the Government Railway Act, and could not be invoked by the Crown in answer to the petition. That section, so far as it is material to the present case, provides that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister."

The judgment of the Exchequer Court was based on the grounds that Art. 1056 C. C. gave a new cause of action to the widow which could not be affected by anything done by deceased in his lifetime, and if it could, that sec. 50 of The Government Railways Act precluded the defence founded on the rules of the insurance association of which deceased was a member. The Crown appealed.

Fitzpatrick Q.C. Solicitor General for Canada, and *Lafontaine Q.C.* for the appellant. Independently of statute the Crown is not liable for tortious acts of its officers or servants; *Canterbury* v. *The Attorney General* (1); *Tobin* v. *The Queen* (2); *Feather* v. *The Queen* (3) at page 295. The Petitions of Right Act did not alter the law in this respect; *The Queen* v. *McLeod* (4); *The*

(1) 1 Ph. 306.
(2) 16 C. B. N. S. 310.
(3) 6 B. & S. 257.
(4) 8 Can. S. C. R. 1.

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Queen v. *McFarlane* [1); *City of Quebec* v. *The Queen* (2), at 423 *per* Strong C. J. The 16th section of the Act 50 & 51 Vict. ch. 16, did not create any liability where none formerly existed. Whatever was the intention of section 16, it must receive a uniform construction all over the Dominion; it was intended to operate in each part of Canada in precisely the same way and with precisely the same effect. Hence it is quite immaterial to consider the provisions of Article 1056 of the Civil Code of Quebec. The Judicial Committee seem to have considered, in the case of *Robinson* v. *The Canadian Pacific Railway Co.* (3), that in the Province of Quebec, the relatives of deceased have an independent and not a representative right. There is, therefore, no uniformity of provincial legislation to which the Dominion statute can reasonably be held to have had reference, and it becomes necessary, if the Dominion statute be held to have imposed a new liability, to determine, irrespective of the various provincial enactments, what is the nature of the claim arising out of death to which the Act refers, who may be the claimants, and what is to be the measure of damages. The determination of these questions, whatever it may be, must exclude claims in respect of which the deceased, had he survived, could have maintained no action.

Article 1056 of the Civil Code does not apply to the Crown. *Exchange Bank* v. *The Queen* (4); *Maritime Bank* v. *The Queen* (5) and authorities there cited; Chitty's Prerogatives of the Crown, 4 *et seq.*, and 25; *Attorney General* v. *Black* (6).

In all cases where the greater rights and prerogatives of the Crown come in question recourse must be

(1) 7 Can. S. C. R. 216.
(2) 24 Can. S. C. R. 420.
(3) [1892] A. C. 481.
(4) 11 App. Cas. 157.
(5) 17 Can. S. C. R. 657.
(6) Stu. K. B. 324.

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had to the public law of the empire as that alone by which such rights and prerogatives can be determined. *Attorney General* v. *Black* (1).

In *Monk* v. *Ouimet* (2), Dorion C.J. enunciated the rule that when the colony passed under the dominion of the Crown of England the maintenance of the civil law then in existence as guaranteed by treaty or altered by competent authority were in force and binding on the Crown except where the higher prerogatives are affected. The result will be the same if the principles of the French common law be held to apply. Burlamaqui, "Principes du Droit de la Nature et des Gens," vol. 4, 98 *et seq.* Vattel's Law Nations, Chitty's translation, 15 and 16.

Section 50 of the Government Railway Act (3) does not affect the right of the Crown to stipulate with its employees nor apply to relations between the Crown and its servants. That section does not, by its own terms and the context, extend beyond the case of carriage of goods by passengers.

The suppliant accepted the amount of the insurance upon the life of deceased, payable by the association, and is consequently estopped from setting up any claim inconsistent with these rules and regulations, and from maintaining this action.

The suppliant can have no right of action if the deceased himself never had such right, and any defence which would have been available against the deceased, had he survived, may be set up in this action. Such is the established rule in actions under Lord Campbell's Act. Addison on Torts, (8 ed.), 604 *et seq.*; *Griffiths* v. *The Earl of Dudley* (4). The deceased was a member of the Intercolonial Railway Employees' Relief and Assurance Association, and, in consider-

(1) Stu. K. B. 324.
(2) 19 L. C. Jur. 71.
(3) R. S. C. ch. 38.
(4) 9 Q. B. D. 357.

ation of an annual contribution, the Government was relieved of all claims for compensation for injury or death of any member. These rules were in force at the time of the accident and throughout the whole period of the employment of the deceased, and the contribution by the Crown had continued during the whole period. These facts constitute an agreement by the deceased with the Government by which he accepted the contribution and the advantages to which he might be entitled under the rules of the association in lieu of any claim for damages. He would, therefore, have been precluded from maintaining this action had he survived, and the suppliant is likewise precluded. As to the construction of this section reliance is placed upon the reasoning of Mr. Justice Strong in *Grand Trunk Railway Co.* v. *Vogel* (1), at pages 625 *et seq.* See also *Robertson* v. *Grand Trunk Railway Co.* (2), at pages 615 *et seq.*, and the *Glengoil Steamship Co.* v. *Pilkington* (3).

If the Crown be held bound by art. 1056 C. C., the arrangement between the Government, the association and the deceased constituted indemnity or satisfaction in the lifetime of the deceased within the meaning of that article; otherwise the case must be regarded as one in which the deceased never had any claim and therefore never could have obtained indemnity or satisfaction, in which case the article does not confer any cause of action upon the suppliant. See *Bourgeault* v. *Grand Trunk Railway Co.* (4).

The negligence causing the accident was that of the fellow servants of the deceased, and occurred in the course of their common employment, and on that account the Crown is not responsible.

(1) 11 Can. S. C. R. 612.
(2) 24 Can. S. C. R. 611.
(3) 28 Can. S. C R. 146.
(4) M. L. R. 5 S. C. 249

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Hogg Q.C. for the respondent. The action arose under arts. 1054 and 1056 C. C., and the Exchequer Court had jurisdiction to hear and determine the case under 50 & 51 Vict. ch. 16, sec. 16. Both the Supreme and the Exchequer Courts have applied the principle of the employer's responsibility for the acts of his overseers to Her Majesty in relation with Government employees as well as the maxim "*respondeat superior.*" *The Queen* v. *Martin* (1), per Patterson J. at page 250; *The Queen* v. *Filion* (2), per Gwynne J. at page 483; *The City of Quebec* v. *The Queen* (3).

The doctrine of common employment is no defence in the Province of Quebec; *Bélanger* v. *Riopel* (4); *Dupont* v. *Quebec Steamship Co.* (5); *The Queen* v. *Filion* (2).

Her Majesty cannot be relieved of any responsibility by any notice, condition or declaration; R. S. C. ch. 38, sec. 50; nor by contract even if there had been one. In the present instance, the right of action by the suppliant did not arise as a representative of her deceased husband, but is specially given to her independently, on account of his death, by Art. 1056 C. C., as there had been no indemnity or satisfaction to deceased in his lifetime. This was the ruling in *Robinson* v. *Canadian Pacific Railway Co.* (6). and in *Robertson* v. *Grand Trunk Railway Co.* (7), there was an express contract between the parties. See also *Grand Trunk Railway Co.* v. *Vogel* (8); *Lavoie* v. *The Queen* (9); *Farmer* v. *Grand Trunk Railway Co.* (10) per MacMahon J. at page 307, and Art. 1676 C. C. Contracts against such liability are against public policy;

(1) 20 Can. S. C. R. 240.
(2) 24 Can. S. C. R. 482.
(3) 24 Can. S. C. R. 420.
(4) M. L. R. 3 S. C. 198, 258.
(5) Q. R. 11 S. C. 188.
(6) [1892] A.C. 481.
(7) 24 Can. S. C. R. 611.
(8) 11 Can. S. C. R. 612.
(9) 3 Ex. C. R. 96.
(10) 21 O. R. 299.

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The Chief Justice.

Roach v. *Grand Trunk Railway Co.* (1). The decision of this court in the *Vogel Case* (2) is binding; see *Ross* v. *The Queen* (3), referring to *The Queen* v. *McGreevy* (4).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are all of opinion that this appeal must be allowed. The Crown has admitted that the suppliant's husband lost his life by the negligence of persons in the employ of the Crown upon the Intercolonial Railway. This court has already held that the law of Quebec from which we must take our rule of decision in this case does not recognise the defence of common employment which prevails in English law. There is no use in referring to authorities on this point as we are bound by our previous decisions regarding it. *The Queen* v. *Filion* (5). Therefore unless the suppliant's husband had so contracted with the Crown as to relieve it from responsibility for his death by reason of the negligence of the servants of the Crown the judgment in favour of the suppliant now under appeal ought to be maintained.

That a workman may so contract with his employer as to exonerate the latter from liability for negligence for which the former would otherwise be entitled to recover damages cannot be disputed. Further that such a renunciation would be a sufficient answer to an action under Lord Campbell's Act is conclusively settled by authority. *Griffiths* v. *Earl of Dudley* (6). That the action given by Art. 1056 C. C. is merely an embodiment in the Civil Code, of the action which had previously been given by a statute of Canada re-enacting Lord Campbell's Act is too plain to require

(1) Q. R. 4 S. C. 392.
(2) 11 Can. S. C. R. 612.
(3) 25 Can. S. C. R. 564.
(4) 18 Can. S. C. R. 371.
(5) 24 Can. S. C. R. 482.
(6) 9 Q. B. D. 357.

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any demonstration and nothing in the judgment of the judicial committee in *Robinson* v. *Canadian Pacific Railway Co.* (1) controverts this proposition. It would follow therefore that the suppliant's husband by becoming a member of the Intercolonial Railway Relief and Assurance Association and thereby assenting to its rules and to the arrangement by which the Crown contributed $6,000 annually to the funds of the association, in consideration of which the association on behalf of its members renounced all claims against the Crown which might arise from the injury or death of any of its members, constituted a complete answer to the suppliant's petition. It must be acknowledged that if the deceased would, if he had survived, have had no claim for damages against the Crown, the suppliant can have none provided we are right in assuming this to be a proceeding to be governed by the law applicable to actions under "Lord Campbell's Act."

The Exchequer Court judge has, however, held that section 50 of the Government Railways Act is an answer to the defence founded on the agreement with the association.

That section is as follows:

Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the minister; nor shall any officer, employee or servant be relieved from liability by any notice, condition or declaration, if the damage arises from his negligence or omission.

The learned judge of the Exchequer Court relies upon the case of the *Grand Trunk Railway Co. of Canada* v. *Vogel* (2) as placing a construction upon this section conclusive in favour of the suppliant. *Vogel's Case* (2) was an action against the railway company for

(1) [1892] A. C. 481. (2) 11 Can. S. C. R. 612.

damages caused by the negligence of the servants of the company in their capacity as common carriers of horses, and it was held that a clause in the Railway Act in similar terms to this did away with the effect of an agreement which the owner of the horses had signed and by which he had renounced his right to claim compensation for damages caused by the negligence of the servants of the company. For the reasons I gave in *Vogel's Case* (1) I am of opinion that a wrong construction of the clause in question in that case prevailed by the majority of a single voice. The terms of the clause in question in the Railway Acts were taken from the English Carriers Acts and were intended only to preclude the right of carriers by unilateral notices, declarations or conditions to which the owners of goods had not become expressly parties to exclude their liability as carriers. And it was not meant to apply to contracts entered into between the railway carrier and the persons whose goods were carried. It certainly had not in the Railway Acts any application to the case of passengers or employees but was restricted to the case of goods traffic.

Since the case of *Robertson* v. *The Grand Trunk Ry. Co.* (2) it would seem that *Vogel's Case* (1) can scarcely be considered as a binding authority; at all events I should not hesitate to reconsider it if a similar question arose.

There would seem to be good grounds for saying that as the clause in the Railway Act from which this section 50 of the Government Railways Act is borrowed, applied only to responsibility incurred in the carriage of goods, this section must also be so restricted. Be that as it may, however, I am of opinion that this, not being a case in its facts similar to *Vogel's Case* (1), we are free to construe section 50 inde-

(1) 11 Can. S. C. R. 612. (2) 24 Can. S. C. R. 611.

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pendently of its authority and so doing I can come to no other conclusion than that these words "notice, condition or declaration" do not include a contract or agreement by which a servant employed on the railway has renounced his right to claim damages from the Crown in the event of injury from the negligence of his fellow servants. I need not repeat the reasoning I used in *Vogel's Case* (1); shortly it is that the words "notice" and "declaration" can only apply to the unilateral act of the party giving the notice or making the declaration, and the meaning of the word "condition" by itself of doubtful import is determined to refer only to a unilateral proceeding by the words which immediately precede and follow it. This and the history of the legislation as regards common carriers in which these words were first used convince me that they do not apply in a case like the present. I would also refer to the late case of *Glengoil Steamship Co.* v. *Pilkington* (2), decided in this court in my absence, but in which I entirely agree.

The appeal must be allowed and the petition of right dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *S. C. Riou.*

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(1) 11 Can. S. C. R. 612. (2) 28 Can. S. C. R. 146.

JAMES LUMBERS (DEFENDANT).....APPELLANT;

AND

THE GOLD MEDAL FURNITURE MANUFACTURING COMPANY (PLAINTIFF).....RESPONDENT.

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*June 5, 6.

*Oct. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Quiet enjoyment.

A lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice."

Held, reversing the judgment of the Court of Appeal (26 Ont. App. R. 78), and that of Rose J. at the trial (29 O. R. 75), that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate.

Held, further. that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming by an equal division of opinion the judgment of Mr. Justice Rose at the trial (2) in favour of the plaintiff.

The following are the material facts of the case as stated by Mr. Justice Osler, in giving judgment in the Court of Appeal.

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

(1) 26 Ont. App. R. 78. (2) 29 O. R. 75.

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The plaintiffs on the 12th November, 1896, leased from the defendant certain flats or rooms in a large factory building for the term of three years and two months from the 1st December, 1896. Their lease is expressed to be made in pursuance of the Act respecting short forms of leases, and contains the usual covenant for quiet enjoyment and also the following proviso:

"Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice, or a bonus of $350."

It was very much to the defendant's interest that he should entirely get rid of the factory, which was a *damnosa hereditas*, although as regards the parts leased to the plaintiffs there is no doubt that the rent was a profitable one.

In December of the same year, 1896, the defendant was negotiating an arrangement with a person named Gardner, and, on the 31st of that month, having as he thought brought it to a conclusion, except that it was not finally reduced to writing, he gave the plaintiffs the following notice:—"As I have disposed of my interests in the factory premises I beg to notify you that you will be required to vacate that portion of the premises occupied by your firm on or before the 1st of July, 1897."

In point of fact the agreement the parties were negotiating was not finally settled and signed until the 11th January, 1897. As then signed it was, however, one similar to that which defendant supposed he had secured on the 31st December, though with some unimportant variations in the terms. In substance it provided that Gardner was to manage the factory for a year (apparently without any direct compensation), until the 1st January, 1898. Defendant

was to advance $1,000 for repairs and improvements to be expended by Gardner under his directions. Gardner was to use every effort to get tenants at the highest rents. These rents were to be paid to and to be the defendant's property. The leases were to be in his name and the tenants his tenants. If at any time during the year the income exceeded the expenditure, Gardner had the right to require Lumbers to grant him a sub-lease of the factory for the residue of the term, less one day, for which Lumbers himself held it. And if on the 1st of January, 1898, the same state of affairs existed and from the nature of the existing tenancies it should appear probable that it would continue for three months longer, Lumbers had the right to require Gardner, and the latter was bound, to accept a similar lease, and he was also to have the option, at any time during the currency of the proposed tenancy, to purchase the lease from the Land Security Company to his lessor.

Some time during the month of January, 1897, the plaintiffs consulted their solicitor to know if it would be wise for them to remain and let the defendant prove his sale, and were advised not to do so lest they might be sued for damages. Then they applied to defendant to know if they might be permitted to move at any time, as the six months would expire at a very inconvenient time for them, and they addressed Gardner on the same subject, who wished them to move at once. Lumbers, at their instance, wrote the letter of the 22nd January, 1897. "In reference to the notice I gave you to vacate on the 30th June next, I understand you wished me to state that in the event of your wishing to move previous to the time stated that you may be relieved of the liability to pay rent after the premises are vacated, to which proposition I reply that when I disposed

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of the premises I had the option to, and that I availed myself of the former course and gave you the six months' notice, and my settlement with Mr. Gardner, to whom I sold the property, was completed with the calculation that you would remain in possession and pay me the rent of same for the six months. However," etc.,—and then the defendant goes on to say that they may vacate the premises at the end of any month, giving one month's notice and paying rent up to the date of leaving.

To this the plaintiffs, who had in the meantime consulted their solicitor, as above stated, replied on the 29th January:—"In reply to your two notices, December 30th and January 22nd, would say it is very inconvenient for us to move at present as our stock is very large, and as June is our busy month and we could not move. However, we have no option in the matter as you say you have sold property, so we hereby notify you that we will vacate our present premises the end of February, 1897, under protest, as we can find no sale registered."

Plaintiffs finished moving into other premises on the 28th February, 1897, and on the following day their solicitor wrote to defendant claiming damages for loss sustained by fraudulent misrepresentations, stating that it had recently come to their knowledge that no sale or disposition had in reality been made by him, and that he had deceived the plaintiffs by representing that it had and had caused them to surrender their lease and move out at great loss to themselves.

On the 3rd of March this action was commenced. It was launched and tried out as an action of deceit, but the learned trial judge, while not expressly deciding that it was not maintainable on that ground, held that the plaintiffs were entitled to recover as for a

breach of the covenant for quiet enjoyment and gave judgment on that ground, with leave to the plaintiffs to amend their statement of claim.

Watson Q.C. for the appellant. There was no misrepresentation entitling plaintiff to damages. *Derry* v. *Peek* (1). No action lies for innocent misrepresentation. *Cowling* v. *Dickson* (2); *White* v. *Sage* (3); *Glasier* v. *Rolls* (4).

The agreement was a disposition of the property under the provision in the lease. *Elston* v. *Schilling* (5); *Hill* v. *Sumner* (6); *Kennedy* v. *City of Toronto* (7).

S. H. Blake Q.C. for the respondent. An action lies for non-performance of a legal obligation even in the absence of fraud. *Polhill* v. *Walter* (8); *Low* v. *Bouverie* (9). Moncrief on Fraud and Misrepresentation, p. 137. Physical interference with the lessor's possession is not necessary to authorize an action for breach of covenant for quiet enjoyment. *Edge* v. *Boileau* (10).

The agreement for sale was not a "disposition" of the property under the lease as no interest was parted with. See *Astley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (11).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The judgment delivered by Mr. Justice Osler, in the Court of Appeal, is prefaced with a statement of the facts which is quite sufficient for the purposes of the present appeal.

I am of opinion that there was no actionable misrepresentation. So far from it I incline to think that

(1) 14 App. Cas. 337.
(2) 45 U. C. Q. B. 94.
(3) 19 Ont. App. R. 135.
(4) 42 Ch. D. 436.
(5) 42 N. Y. 79.
(6) 132 U. S. R. 118.
(7) 12 O. R. 211.
(8) 3 B. & Ad. 114.
(9) [1891] 3 Ch. 82.
(10) 16 Q. B. D. 117.
(11) 2 DeG. & J. 453.

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the appellant was strictly accurate in stating in the letter of the 31st December, 1896, that "he had disposed of his interests in the factory premises." At that time he had according to the evidence entered into an agreement for the sale to Gardner, which though not reduced to writing and therefore not enforceable by action as between the parties by reason of non-compliance with the Statute of Frauds, was notwithstanding a completed and concluded contract. This agreement, with a few alterations of a non-essential character, was afterwards embodied in the written instrument of the 11th of January, 1897, signed by the parties. If, on the 31st of December, 1896, there was a concluded agreement, though one resting in parol only, I think it entitled the appellant to give the notice which he had the power of giving under the proviso in the lease to the respondents.

The agreement was clearly a disposition of the property; it was in terms and in substance and reality a sale of the whole leasehold interest which he had in the factory of which the respondents' premises formed part. That it was not binding between the parties by reason of the Statute of Frauds did not, in my judgment, make the appellant guilty of fraud or false representation, or what may be called a constructive eviction of his lessee, when he denominated it a "disposition." The appellant wrote this letter himself and he cannot be supposed to have had knowledge of the technical or legal effect of his agreement, or of the provisions of the Statute of Frauds; he believed he had sold his leasehold interest in the property and in good faith gave the notice. Moreover, the agreement constituted a contract, although being within the fourth section of the Statute of Frauds it could not be enforced as such in an action brought by either of the parties to it until it was put into writing. The

statute does not say that the contract by parol shall be void, but that "no action shall be brought" to enforce it, without writing. The writing is not required as one of the solemnities of the contract but merely as evidence against the other party to it, and the writing sufficient to prove it may be signed after the agreement is made at any time before action brought. *Lucas* v. *Dixon* (1); *Maddison* v. *Alderson* (2), per Lord Blackburn. I am not prepared to say that any writing was necessary to enable the appellant to prove the existence of this agreement in such an action as the present for purposes having nothing to do with the enforcement of the contract, but altogether collateral to it. Certainly the words of the 4th section of the statute do not require a writing for such a purpose as this.

Then if this is not sufficient I entirely agree in the opinions of the trial judge as to fraud, and those of Mr. Justice Osler and Mr. Justice Maclennan in the Court of Appeal. I fail to see that it was open to the learned Chief Justice to place his judgment on the grounds he has rested it on in the present state of the record by which the respondent's action is under the amendment directed at the trial, one for breach of covenant for quiet enjoyment, and not as originally one for fraudulent misrepresentation. But assuming the respondents to be still entitled even against the finding of the trial judge and after having accepted the amendment to fall back on their original complaint, I am clear that there was here no fraudulent misrepresentation entitling the respondents to damages.

The representation was made in good faith with reasonable grounds for believing it and making it, it was certainly not false, to the knowledge of the appel-

(1) 22 Q. B. D. 357. (2) 8 App. Cas. 467 at p. 488.

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lant, which alone would be enough to entitle it to be characterised as innocent. Moreover, it was not acted upon by the respondents in such a way as to entitle them to maintain an action even if it had been false and fraudulent. As Mr. Justice Osler has shown, the appellant's assertion that he had disposed of the property was really not the cause of the abandonment of possession by the respondents. The possession was surrendered under an agreement between the respondents and the appellant, by which for a valuable consideration the respondents gave up the lease. It could not therefore have been said that the immediate cause of the respondents' going out of possession was the appellant's statement. In every action of this kind it is essential to show that the representation of the defendant was one which he knew to be false, and moreover was one *dans locum injuriæ*. In making out these essentials the respondents utterly failed. The learned judge who tried the case without a jury thus found, as he states in his judgment:

> I do not however find that the defendant intentionally, wilfully or maliciously misled the plaintiff. I think he was acting upon what he believed to be his rights, and was acting in good faith in the sense of doing what he did to advance his own interests in accordance with what he believed to be his rights under the proviso. I therefore cannot find any false and fraudulent representation to the plaintiff.

I think this finding was entirely correct upon the evidence.

Then to turn to the other causes of action under the amendment of the complaint permitted by the learned judge, viz., that converting the action for fraudulent misrepresentation into one for breach of the covenant for quiet enjoyment. The learned trial judge proceeded exclusively upon this. Mr. Justice Maclennan's judgment shows, I think, by unanswerable reasoning the fallacy of the original judgment. In

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my view there was no eviction or disturbance here, for the reason that the appellant was justified in giving the notice, as I have before stated, upon the other branch of the case. It cannot be said that any decided case has ever gone to the extent to which the learned trial judge went in holding the letter of the 31st December, 1896, a breach of the covenant in question. The most that can be said of it, even if we hold it to have been unwarranted by the facts, is that it was premature, as having been eleven days too soon. Could it be said, as is well put by Mr. Justice Maclennan, that the covenant was broken by a lessor who having a right to put an end to the term gave a notice a single day too late which led to the tenant evacuating the premises. I should like to see a case so deciding before I acted on any such proposition. In my view there was no eviction in any view of the case; the respondents chose to act upon the notice and they cannot now complain or call that an eviction or disturbance of possession in which they acquiesced. Moreover, as Mr. Justice Osler demonstrates, the surrender of possession here is to be ascribed to an agreement for which the respondents received valuable consideration and in respect of which they cannot put the appellant back in his original position, and do not indeed offer or pretend to be able to do so; therefore it is perfectly justifiable to say that the respondents acquiesced in what they now call wrongful eviction. The action in either aspect of it wholly fails.

The appeal must be allowed and the action dismissed with costs to the appellant in this court as well as in the other courts.

Appeal allowed with costs.

Solicitors for the appellant: *Watson, Smoke & Masten.*

Solicitors for the respondent: *Pinkerton & Cooke.*

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*June 6, 7.
*Oct. 24.

JOHN PURDOM (DEFENDANT).....APPELLANT;

AND

JOHN A. ROBINSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Right of way—Easement—User.

A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purposes in respect to any other property.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Meredith J. at the trial in favour of the plaintiff.

The appeal involved the decision of the single question of law stated in the above head-note. The facts giving rise to the litigation are fully set out in the judgment of the court.

Purdom for the appellant referred to *Parker* v. *Elliott* (2); *Gage* v. *Bates* (3); *Attorney General* v. *Perry* (4); *Powers* v. *Bathurst* (5). Hall on the Sea Shore. (2 ed.) pp. 156-184

Glenn for the respondent cited *Ackroyd* v. *Smith* (6); *Skull* v. *Glenister* (7); *Telfer* v. *Jacobs* (8); Dillon on Municipal Corporations (4 ed.) p. 751.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The respondent, who is the plaintiff in the action, is seized in fee of part of lot no.

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

(1) 26 Ont. App. R. 95.
(2) 1 U. C. C. P. 470.
(3) 7 U. C. C. P. 116.
(4) 15 U. C. C. P. 329.
(5) 49 L. J. Ch. 294.
(6) 10 C. B. 164.
(7) 16 C. B. N. S. 81.
(8) 16 O. R. 35.

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1 in the first concession of the Township of Yarmouth, fronting on Lake Erie. This lot extends to the water's edge. The original grant from the Crown of lots nos. 1 and 2, in the first concession, and of lot no. 1, in the second concession of Yarmouth, made on the 19th of September, 1804, to John Bostwick, thus described the lands granted:

Commencing in front upon Lake Erie, in the limit between the Township of Yarmouth and Southwold at the south-west corner of the said lot no. 1, in the first concession. Then north one hundred and fifty-nine chains more or less, to the allowance for road between the second and third concession, then east 25 chains 53 links more or less, to the limit between lots 1 and 2, then south 80 chains more or less, to the rear of the first concession, then east 25 chains 53 links to the limit between lots Nos. 2 and 3, then south to Lake Erie, then westerly along the water's edge to the place of beginning, containing 600 acres, more or less, with allowance for road.

Upon part of lot no. 1, upon which there is now the village of Port Stanley, the respondent has laid out ranges of village lots which are shown upon a registered plan (no. 177) which has been put in evidence. These lots do not extend to the waters of the lake, though they front in that direction; between them and the water's edge there is now a strip of beach. At the time of the original grant by the Crown this beach did not exist. The lakeward boundary was then a bluff or cliff, the foot of which was washed by the waters of the lake. This appears from the map of the original survey produced from the Crown Lands Office, from which it also appears that there was no allowance for road between the southern boundary of the lot and the water. Until recently this bluff descending to the water's edge remained as the southern limit of the lot, but within a few years the beach already mentioned has been formed by a sort of accretion partly by the subsidence of the lake and partly by the crumbling away of the cliff or bank.

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One of the ranges of village lots laid out by the respondent consists of seven lots numbered from the east, commencing at the boundary line between township lots nos. 1 and 2. Some distance to the east of township lot no. 1, and upon township lot no. 2, a range of building lots have been laid out on township lot no. 2. These front towards the lake, and there are some fifteen or twenty cottages adapted for summer residences erected upon them. This locality is known as Orchard Beach. The appellant is the owner of one of these Orchard Beach residences, and has for a number of years occupied it during the summer months. A convenient way for the Orchard Beach residents to reach the village of Port Stanley, the railway station and steamboat wharf, is to pass along the beach in front of the respondent's lots westerly until Main street in the village is reached. In the summer of 1897, the appellant and his family were in the habit of making use of the beach in front of the respondent's property in the manner and for the purposes mentioned, and being warned to desist did not do so, but persisted in using and claimed the right to use the beach as a way to and from the premises of the appellant at Orchard Beach.

This action was thereupon brought on the 10th of August, 1897, alleging that the appellant had trespassed on the respondent's property, and claiming that there was no right of way along the beach or across the respondent's property, and that the appellant be enjoined from committing such trespasses in the future.

The appellant in his statement of defence relied upon a right to use the beach as a public way under some general right the nature of which he does not exactly define, but which he states as a right in the public so to use the beach, and for boating and bath-

ing purposes also. Further, it is alleged that there was a prescriptive right acquired to the public by long user. Then the claim is set up to a way across and along the beach under a title which the appellant acquired on the 14th of August, 1897, four days after the commencement of the action, to the east half of lot no. 3 in the range of lots belonging to the respondent laid out on township lot no. 1, as shown by plan no. 177 before referred to The whole of lot no. 3 had been sold and conveyed by the respondent to one Frederick Henry, in April, 1897. The conveyance to Henry contained a grant of a right of way to be used as appurtenant to the granted lot no. 3; this grant was as follows:

Together with the sole right to erect and use upon the said beach in front of lot no. 3, a private bath and boat house, and the right to use the beach in front of lots 1 to 7, inclusive on said plan for right of way, bathing, boating and all other pastimes in common with the owner and owners of said property as shown in said plan, their tenants and guests residing on said property, reserving to each owner of the said lots 1 to 7 to erect a private bath or boat house on the beach in front of their respective lots, and together with the full right and liberty for the party of the second part, his tenants, servants and guests in common with the other owners of the property mentioned in said plan, to use all the rights of way shown on said plan, and a right of way along said beach from east to west, reserving to John A. Robinson the right to erect fences with gates across said right of way on beach to prevent the public entering thereon.

This title is set up in the statement of defence, but the appellant does not counter-claim for any relief or declaration of right founded on it.

The action came on for trial before Mr. Justice Meredith, when evidence was given by both parties. The learned judge at the conclusion of the arguments delivered judgment in favour of the respondent, holding that the defence failed on all the points set up, and directed a decree to be entered declaring that the appellant had no right of way across that part of lot

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no. 1 owned by the respondent otherwise than under the right he might have (if any) under the conveyance from Henry, of the east half of lot no. 3 on plan no. 177, and restraining the appellant from using the way in question except under such right as he might have under the conveyance mentioned.

Against this judgment the appellant appealed to the Court of Appeal which unanimously dismissed the appeal for the reasons given in the judgment of the court delivered by Mr. Justice Moss, which are in all respects identical with those upon which the learned trial judge based his judgment.

The appellant has now appealed to this court.

I cannot refrain from saying that it is greatly to be regretted that any appeal should lie on such a trifling matter from the unanimous judgment of the Court of Appeal constituted by four judges, affirming a previous judgment.

The claim to a public right of way along the beach paramount to the rights of the Crown and its grantee is manifestly unsustainable. The grant by the Crown of township lot no. 1 to John Bostwick, the respondent's predecessor in title, made in 1804, makes the waters of Lake Erie the southern boundary of the land granted and the original survey in the Crown Lands Office shows that there was no reservation of any road or public way along the front of the lot. At the time of the grant the lakeward boundary was the bluff or cliff descending almost perpendicularly to the water, so that the state of the land patented was such that there could be no road or passage along the front In this state the land remained for many years but lately by gradual accretion or by the recession of the waters of the lake the beach in question has been formed. The land thus formed became in law the property of the owner of the adjoining land. *Foster* v. *Wright*

(1), judgment of Lindley J. and cases there cited. That the public had no rights across this newly formed beach superior to those of the Crown or those claiming under it is so well established by authority as not to admit of dispute. *Blundell* v. *Catterall* (2); *Attorney General* v. *Chambers* (3).

The claim to a prescriptive right of user on the part of the general public wholly fails on the evidence for it appears that the beach had not been in existence and consequently there could have been no user for a time sufficiently long to confer such a title; moreover the fact of general user of the beach as a highway since it has in fact existed is controverted by the witnesses called for the respondent.

The appellant does not in his pleading set up any dedication by the respondent of a highway along the beach though that claim was put forward both in the Court of Appeal and in the argument at this bar. There is, however, no foundation in fact for such a claim. The only evidence in support of it was that a plank walk had been laid down along the beach by the Municipal Council. This, however, is shown by evidence to have been done by the permission of the respondent and subject to his express reservation of all his rights of property.

There only remains to be considered the extent of the appellant's rights under the conveyance from Henry which was taken by him after the institution of the action and manifestly with a view of supporting his original claim to use the beach as a highway in going to the village from and returning to his house at Orchard Beach on township lot no. 2. That the appellant did not circumscribe his claims under the deed from Henry to such a user as was incidental

(1) 4 C. P. D. 438. (2) 5 B. & Ald. 268.
(3) 4 DeG. M. & G. 206.

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to his enjoyment as the owner of the east half of lot no. 3 in plan 177, but claimed it as sufficiently extensive to cover for the future similar trespasses to those which he had committed on the respondent's property before the commencement of the action is made manifest by his own admissions in the witness box contained in the following extract from his deposition:

Mr. Donohue—Q. You bought this land in August? A. Yes.

Q. And you remained during that whole season? A. Yes.

Q. Living on lot no. 2? A. Yes, and walked over the sidewalk.

Q. And continued all that summer to walk over the sidewalk? A. Yes.

Q. Without any reference whatever to using it for the purposes of lot 3 on the plan?

His Lordship—He had no title to lot 3 on the plan.

Mr. Donohue—To witness—Q. Since buying the property you have been walking on the beach just the same as you walked before? A. Yes.

Q. And your using the beach had no reference to your owning lot 3? A. Not at all.

Q. It was in order to get back and forward to the place that you lived your trespassing? A. I did not take any notice of the trespassing.

Q. This alleged trespass consisted in your going from the place you were living on lot 2 to Main street? A. Yes; on Sunday morning.

Q. And having no reference to lot 3? A. Exactly.

Such a contention having regard to the state of the law as established by incontrovertible authorities cannot be maintained.

The easement granted to Henry, (and in which the appellant may possibly be entitled to participate as a sub-purchaser from Henry of a portion of the land to which that easement was attached (1),) was in express terms limited to the purposes of lot no. 3. What rights the appellant actually acquired to the enjoyment of this easement as purchaser of part of lot 3 is not a question calling for decision in this action and

(1) *Newcomen* v. *Coulson*, 5 Ch. D. 141, judgment of Jessel M. R.

the learned trial judge has very correctly refused to deal with it and has expressly excepted it in the decree. The question is whether the acquisition of any easement expressly made incidental to the enjoyment of lot no. 3 in plan 177 can be held to confer any rights on the appellant as the owner of a house at Orchard Beach. It manifestly never was in the contemplation of the respondent to confer any such rights on Henry, the appellant's grantor, and the appellant could derive from Henry no greater rights than the latter had which were limited to the purposes of lot no. 3.

That a right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property is shown by many reported cases of which two cited by the respondent may be particularly referred to as establishing the proposition. In *Skull* v. *Glenister* (1) this was one of the questions decided and Erle C.J. says:

> This right of way was appurtenant to the land demised by the Wheelers to the defendants. The defendants are therefore bound to make use of this way for purposes exclusively connected with their holding of these demised premises.

In *Ackroyd* v. *Smith* (1) which may be consided the leading case on the point, the question was raised distinctly on demurrer whether the defendant could under a grant of a right of way as incidental to the enjoyment of a particular close make use of this way for his own purposes irrespective altogether of its use in respect of the dominant tenement to which it was originally made appurtenant. The defendant there claimed as an assignee of the right of way from the original grantee. It was held first that the road was granted only for purposes connected with the occupa-

(1) 16 C. B. N. S. 81. (2) 10 C. B. 164.

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tion of the land conveyed and therefore could only be used as connected with that land. It was, however, further determined that even if the original grantee did acquire under the grant a more extensive right, a personal right to use the way irrespective of the land granted, that was a mere personal license which could not be granted or assigned over by the original licensee since there is not known to the law such an interest in land as an easement in gross. The case of *Lawton* v. *Ward* (1) shows that the restriction of an easement to the purposes for which it is originally granted is no new law but is an old and well established rule of the law of property. See also Gale on Easements, 7th ed. p. 470.

These authorities are decisive in the respondent's favour. To apply them here we must hold that the original easement granted to Henry was limited to the purposes of the land as an incident to which it was an appurtenance and that the appellant can have no rights greater than those of this grantor. Further, even if there were any colour or pretence for saying that Henry acquired a personal right to the free use of the beach for all purposes and irrespective altogether of lot no 3, he could not grant over or assign that right to the appellant.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Parke, Purdom & Purdom*

Solicitors for the respondent: *James W. Glenn.*

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(1) 1 Ld. Ray. 75.

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF)..... } APPELLANT;

AND

THE CITY OF QUEBEC (DEFENDANT)..RESPONDENT.

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*May 16.
*June 5.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (PLAINTIFF) ..... } APPELLANT;

AND

THE CITY OF QUEBEC (DEFENDANT)..RESPONDENT.

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

Municipal corporation—Railways—Taxation—By-laws—Construction of statute—Voluntary payment—Action en répétition—29 V. c. 57, s. 21 (Can.)—29 & 30 V. c. 57 (Can.)

The statute, 29 Vict. ch. 57, (Can.), consolidating and amending the Acts and Ordinances incorporating the City of Quebec, by sub-section 4 of section 21, authorises the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation."

Held, that the general words of the statute quoted are sufficiently comprehensive to authorise the imposition of a business tax upon railway companies; and, further that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute.

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

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Held, per Strong C.J., that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality.

Judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 246) affirmed.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada, appeal side (1), reversing the decisions of the Superior Court, District of Quebec, and dismissing the respective actions with costs.

The Act consolidating the statutes respecting the incorporation of the City of Quebec (2) by its twenty-first section empowers the city council to levy taxes on persons and companies exercising a number of trades, occupations and callings which are specially enumerated in the fourth sub-section of the section referred to, and also, "generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain" whether thereinbefore enumerated or not, which might at the time of the passing of the Act or thereafter "be carried on, exercised or in operation in the city; on all persons by whom the same are or may be carried on, exercised or put in operation therein either on their own account or as agents for others, and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." The city council passed a by-law under the provisions of the Act imposing taxes upon the various callings therein enumerated, and also, in general terms, using the phraseology of the Act as quoted, on all trades, manufactures, occupations, business, arts and professions which then or thereafter might be carried on or exercised in the city. At that time there were no railways within the city limits, but the Grand Trunk Railway Company occupied

(1) Q. R. 8 Q. B. 246. (2) 29 Vict. ch. 57 (Can.)

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within the city certain wharves and premises for the purpose of receiving and delivering freight, issuing passenger tickets and receiving and delivering baggage, and the Canadian Pacific Railway Company subsequently entered the city and carried on business there in the usual manner. Although railway companies were not mentioned in the by-law, the companies were, from the time they commenced to do business in the city, included in the assessment rolls as liable for the business tax imposed by the by-law and, upon the advice of counsel, the companies paid the taxes so imposed for a number of years. They now seek to recover the taxes so paid as moneys illegally collected by the city and paid by them under misapprehension and without cause.

The companies respectively recovered judgments against the city in the Superior Court, but these judgments were reversed upon appeal by the Court of Queen's Bench, and the present appeals ask for the restoration of the judgments rendered in the trial court.

The appeals were heard together by consent of parties.

Stuart Q.C. for the appellants. The statute, 29 Vict. ch. 57, does not authorise the imposition of any tax on railway companies, which are not to be found in the enumeration of sub-section 4 of sec. 21, nor can they be included, by any sound rule of interpretation, in the general expressions which follow such enumeration. None of the subsequent statutes amending the above or ratifying what was done under it, conferred this power.

Even if the City of Quebec had had the power, it did not in the by-law impose a business tax on the railway companies neither of which were then being operated within the city limits. A municipality

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cannot tax a specific business, nor any class of citizens in any but express language, clearly designating it. Words of general purport will not suffice. See Cooley on Taxation, pp. 387 and 574, as to municipal powers to tax; *Acer* v. *DeMontigny* (1); *McManamy* v. *City of Sherbrooke* (2).

The payment to the city treasurer was made through error and was not due. The case is stronger than *condictio indebiti*, it is *condictio sine causâ*. The assessments were not only voidable, they were radically and absolutely null and void. On the appellants right to recover, see arts. 1047, 1140 C. C.; arts. 1235, 1376 C. N.; 4 Aubry & Rau, pp. 727, 739 (442, 442 *bis*); Pothier, Obligations, n. 42; *Leprohon* v. *Le Maire, etc., de Montréal* (3); *Les Ursulines des Trois Rivières* v. *Commissaires d'Ecoles de la Rivière du Loup* (4); *Baylis* v. *Mayor, etc., of Montreal* (5); *Rohdt* v. *Gagnon* (6); *City of Montreal* v. *Walker* (7); *Corporation of Quebec* v. *Caron* (8); *Dubois* v. *Corporation d'Acton-Vale* (9); *Bell Telephone Co.* v. *Town of Summerlea* (10).

Sir A. P. Pelletier Q.C. for the respondent. The omission of any specific reference to railway companies in the statutes, as well as in the by-law may be accounted for by the fact, well known to all parties, that there were then no railways entering the city, but the general words used both in the statutes and in the by-law are wide enough to include companies carrying on the business of railway carriers, and contain no exceptions in their favour The statutes passed by the old Province of Canada, are clearly *intra vires* and sufficient to authorise the "business tax" levied and the by-law validly imposes the tax by using the

(1) M. L. R. 5 S. C. 117.
(2) 19 R. L. 423.
(3) 2 L. C. R. 180.
(4) 3 Q. L. R. 323.
(5) 23 L. C. Jur. 301.
(6) 11 Legal News, 186.
(7) M. L. R. 1 Q. B. 469.
(8) 10 L. C. Jur. 317.
(9) 2 R. L. 565.
(10) Q. R. 15 S. C. 64.

general terms of the Act, verbatim. The railway companies suffered no injustice. The same business tax is imposed upon all other traders, who might complain if the appellants were not taxed. The appellants have no right to exemption or discrimination in their favour. As to the payment, it was voluntarily made with full knowledge of the facts and there was no mistake of law. The evidence shows that both appellants paid the tax because their legal advisers had certified it as correct according to the by-law and the law authorising it and considered the tax legally imposed and due. The action *en répétition* lies only in case of payment *sine causâ*. Pothier (ed. Bugnet) vol. 5, nn. 142, 157; *Bain* v. *City of Montreal* (1); *Grantham* v. *City of Toronto* (2); Beach on Corporations, nos. 230, 231, 234, 235, 1190, 1191, 1636; Dillon on Corporations, nos. 940-947; *Lee* v. *Templeton* (3); Rolland de Villargues, Rép. Jur., vo. "*Répétition de l'indu*," no. 54; 20 Laurent, no. 353.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are all of opinion that there is no error in the judgment of the Court of Queen's Bench, and that this appeal must be dismissed.

The general words of the 4th subsection of section 21 of 29 Vict. cap. 57 are sufficiently comprehensive to authorise the city to impose the tax known as "the business tax" upon railway companies, although such companies are not specifically mentioned in the enactment.

The French version of the Act is as follows:

Et généralement sur tous commerces, manufactures, occupations, affaires, arts, professions, ou moyens de profit ou de subsistance, qu'ils soient énumérés ci-dessus ou non, qui sont maintenant ou qui seront

(1) 8 Can. S. C. R. 266. (2) 3 U. C. Q. B. 212.
(3) 13 Gray (Mass.) 476.

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par la suite faits, exercés ou en opération dans la dite cité, pour eux-mêmes ou comme agents pour d'autres, et sur toutes personnes par qui ils peuvent être ou seront faits, exercés ou mis en opération dans la dite cité au taux de trentes piastres par cheque quatre cents piastres de la valeur annuellement cotisée du local occupé par toute telle personne ou société de personnes pour les fins sus-mentionées, et à raison du même taux pour chaque somme plus grande ou plus petite de la valeur estimée comme sus-dit. Pourvu que nulle personne ou société de personnes ne sera sujette à la taxe ci-dessus spécifiée pour une occupation ou affaire déjà assujétie à la taxation en vertu de présent règlement, ou pour ou à raison de laquelle la dite personne ou société de personnes est déjà spécialement taxée ou cotisée en vertu de ce règlement.

These general words are manifestly not intended to be interpreted narrowly, and on the principle of the maxim "*noscitur a sociis*" restricted to trades, occupations and business analogous to such as are specifically mentioned. The words "*qu'ils soient énumérés ci-dessus ou non*" indicate this very plainly. The object was to make the law as comprehensive as possible so as to include any business or occupation which might thereafter be established in the City of Quebec, though at the date of the statute unknown there or indeed not followed anywhere. So soon as a new business was established in the city then the power to tax it was to apply. The law would otherwise have been grossly unfair, for its effect would have been to exempt persons and companies carrying on a new line of business not expressly mentioned and whose introduction could not have been foreseen. At the time the Act was passed, in 1866, there was no railway company carrying on business in the City of Quebec.

Then it is further objected that the by-law No. 200 passed on the 27th March, 1867, was illegal by reason of the generality of its terms which are an exact transcript of those of the statute. It would be sufficient to say in answer to this that if the statute authorised the city to tax railway companies by the general terms

used, the city council sufficiently exercised that power when by the same general words they imposed the tax.

However that may be, the amending Act 29 & 30 Vict. cap. 57, although it leaves the question of the interpretation of the original statute just as it was, and does not furnish any assistance in determining whether railway corporations were included in its general terms; does certainly remove any objection to the by-law founded on the generality of the terms in which it was expressed.

The question therefore is just reduced to the single one whether railway companies were included in the general terms of section 2 of the Act of 1866. As already stated we think they were so included.

Speaking for myself alone I am further of opinion that even if the points on the construction of the statute and as to the validity of the by-law were to be decided favourably to the appellant we should still have no alternative but to dismiss the appeal inasmuch as the payments of the taxes of which *répétition* is sought by this action were purely voluntary, made as appears from the depositions in the record with a full knowledge of the state of the law and of all the facts. According to my view of the law money so paid for taxes or assessments to municipal corporations cannot be recovered back.

The appeal is dismissed with costs.

NOTE.—This judgment also applies to the similar appeal in the case of The Grand Trunk Railway Co v. City of Quebec.

Appeals dismissed with costs.

Solicitors for the appellants: *Caron, Pentland & Stuart.*

Solicitors for the respondent: *Pelletier & Chouinard.*

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*June 2, 5.

*Oct. 24.

COCKBURN & SONS (PLAINTIFFS) .....APPELLANTS

AND

THE IMPERIAL LUMBER COMPANY, LIMITED (DEFENDANT)..... } RESPONDENT.

AN APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Rivers and streams—Floatable waters—Construction of statute—"The Saw-logs Driving Act"—R. S. O. (1887) *ch.* 121—*Arbitration—Action upon award—River improvements—Detention of logs—Damages.*

When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbitration under the Saw-logs Driving Act to determine the amount of his damages for such detention and is not restricted to the remedy provided by sec. 3 of that Act, namely, removing the obstruction. Judgment of the Court of Appeal (26 Ont. App. R. 19) reversed.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing the judgment of the High Court of Justice, (Rose J.) and dismissing the plaintiffs' action in so far as it was based upon the award in question in the suit.

The action was brought to recover $1,376 damages and costs awarded to them in an arbitration under the provisions of "The Saw-logs Driving Act," R. S. O. (1887) ch. 121, occasioned by alleged wrongful and unnecessary detention of their saw-logs on the drive in Deer Creek, District of Nipissing, during the season of spring freshets in 1896. The circumstances of the case and questions at issue on the appeal are stated in the judgments now reported.

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

(2) 26 Ont. App. R. 19.

Gamble and *Dunn* for the appellants. This was a public stream and respondents could not interfere with the right appellants' had to float their logs down it. See *Caldwell* v. *McLaren* (1); *Davis* v. *Winslow* (2); *Bearce* v. *Dudley* (3).

The new remedy given by sec. 3 does not take away any existing previously, but is only additional. Hardcastle on Statutes (2 ed.) pp. 324 *et seq.*

As to the meaning of "detention" see *Crandell* v. *Mooney* (4).

Aylesworth Q C. for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons given by Mr. Justice King in his written opinion which I have read.

TASCHEREAU J.—I concur in the reasons of my brothers Gwynne and King.

GWYNNE J.—By chapter 121 R. S. O. 1887 intituled "An Act respecting the Driving of Saw-logs and other Timber on Lakes, Rivers, Creeks and Streams," it is enacted in sec. 3, that

any person putting or causing to be put into any water in the province, logs for the purpose of floating the same in, upon or down such water, shall make adequate provision and put on a sufficient force of men to break, and shall make all reasonable endeavours to break, jams of such logs and clear the same from the banks and shores of such water with reasonable dispatch and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs or unnecessarily obstruct the floating or navigation of such water.

Then sec. 4 enacts that

in case of the neglect of any person to comply with the provisions of the preceding section it shall be lawful for any other person or persons

(1) 9 App. Cas. 392.
(2) 51 Me. 264.
(3) 88 Me. 410.
(4) 23 U. C. C. P. 212.

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desiring to float, run or drive logs in, upon or down such water, and whose logs would be thereby obstructed, to cause such jams to be broken and such logs to be cleared from the banks and shores of such water and to be floated, run and driven in, upon and down such water.

Then secs. 5, 6, 7, 8, 9, 10, 11 and 12 provide for cases of logs of several different owners becoming intermixed so as not to be capable of being conveniently separated, and enact that the several owners shall respectively put on a fair proportion of men to break the jams, and that if any should fail to do so the other or others may supply such deficiency and take and retain possession of logs of the one in default to meet the cost of the supplying of such deficiency and provide how the logs so taken possession of may be dealt with. Then sec. 13 enacts that:

If it be determined by arbitration as hereinafter provided for, that any person *acting under the assumed authority of this Act* has without just cause taken possession of or detained, or caused to be taken possession of or detained, logs of another person or has after offer of security which the arbitrators may think should have been accepted, detained such logs, or has through want of reasonable care left logs of another person on the banks or shores or has taken logs of another person beyond the place of their original destination, contrary to the provisions of sections 5, 8 or 11, then such first mentioned person shall pay to such last mentioned person such damages as the arbitrators may determine.

Then sec. 16 enacts that:

All claims, disputes and differences arising under this Act shall be determined by arbitration as hereinafter provided and not by action.

Then sec 17 provides for the appointment of arbitrators, by enacting that

the person claiming that another person has not complied with the provisions of this Act, or, claiming payment of any charges or expenses under this Act, or claiming a lien on any logs, *or* claiming damages under sec. 13, shall give to such other person notice in writing stating the substance of the claims made and appointing an arbitrator and calling upon the other person to appoint an arbitrator within ten days after the service of the notice, &c., &c.

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Then sec. 19 enacts that:

The parties may agree that the arbitration shall be by one arbitrator * * or may apply to the judge (of the County Court) or stipendiary magistrate to appoint one.

Then sec. 20 enacts that:

The person on whom a claim is made and notice of arbitration served may at any time before the arbitration is entered upon, or with leave of the arbitrators during the arbitration, give the claimant notice in writing by way of counter-claim, stating the substance of any claim arising under this Act, which such person may have against the claimant, and such counter-claim, unless barred under sec. 27, shall be determined in the arbitration, and an award made with respect thereto.

The limitation of claims prescribed by this sec. 27 is that all claims shall be made by a notice in writing under sec. 17, and within one year after the same have arisen, or otherwise they shall be barred.

Then sec. 25 enacts that the award of the arbitrators or of a sole arbitrator, as the case may be, shall be final and binding upon the parties.

In the spring of 1896 the appellants and respondents respectively had logs being driven down a river in the District of Nipissing, in the Province of Ontario, called Deer Creek, in the following order, namely, the respondents had one drive in front and another in the rear of the drive of the appellants. The logs of the appellants' drive became so intermixed with the logs in the front drive of the respondents that the parties, both assuming to act under the above statute, took measures which resulted in a fracas between the respective parties and their men, and in the detention, as the appellants contend, of a large portion of their logs so that they could not descend the river during the spring freshet, but had to remain therein until the autumn freshet. Upon the 27th June, 1896, the appellants caused a notice to be served upon the respondents in the form required by the statute, to the effect that the appellants claimed from the respondents the

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sum of five thousand and eleven dollars, being the amount of loss sustained by the appellants in consequence of the detention by the respondents of logs of the appellants in Deer Creek during the months of April and May then last past, and they notified the respondents that they had appointed one John Bourke as their arbitrator, and called upon the respondents to appoint an arbitrator on their behalf within ten days after the service of the said notice upon them. The respondents, in compliance with this notice which was served upon them, caused to be served upon the appellants a notice dated the 3rd of July, 1896, to the effect that they had appointed one Alexander Hamilton as their arbitrator to act with John Bourke as the appellants' arbitrator in respect of the appellants' claim; and further, that the respondents counter-claimed from the appellants the sum of four hundred and seventy-four dollars and fifty-three cents, being for a fair proportion of the charges and expenses of breaking the jams and clearing, floating, running, driving, separating, booming and keeping possession of their logs which delayed and hindered the floating of the company's logs down Deer Creek during the driving season of 1896, and which were intermixed therewith. And the appellants were by the said notice required to take notice

that such logs are now lying at the mouth of Deer Creek between the Veuve River and dam no. 1 upon Deer Creek, and that the company claims to take and keep possession of so much of such logs as may be reasonably necessary to satisfy the amount of such proportion of charges, and if satisfactory security be given for the amount of such proportion of charges and expenses possession of the logs will be given up; and further that the company claims from you the sum of ten thousand dollars being the amount of damages and loss sustained by the company in consequence of the detention by you of its logs in Deer Creek during the driving season of 1896, and the further sum of twelve hundred and fifty-one dollars, twenty-five cents loss the company has sustained by reason of your having taken possession of the

company's logs and having carried them past their place of destination and retained possession thereof.

Afterwards the parties agreed together to substitute John Alphonse Valin, Esquire, Judge of the District Court of the District of Nipissing, as sole arbitrator in the place and stead of the said arbitrators, and they signed and set their respective seals to an agreement to that effect, dated the 24th of July, 1896. On the opening of the arbitration before Judge Valin on the 8th August following a note was taken down and recorded by the said judge in the arbitration proceedings that the agreement and intent of the parties was that Judge Valin was agreed upon and accepted by both parties as sole arbitrator under sec 19 of the said ch. 121 R. S. O, 1887. This was apparently done to avoid any misconception as to the intent of the parties which might possibly arise upon construction of the terms of the sealed instrument of the 24th July. Judge Valin accordingly proceeded with the arbitration and no objection appears to have been made before him by or on behalf of either of the parties that any of the evidence offered by the other related to a claim such as that now pleaded by the defendants or to any matter not included within the scope of a reference under the statute, and Judge Valin accordingly made his award in the premises and thereby did award, adjudge and finally determine as follows:

1. That the said Imperial Lumber Company is not entitled to compensation for loss (if any) suffered by said company through its logs being taken past their place of destination by reason of the act or neglect of the said Cockburn & Sons.

2. That the said Imperial Lumber Company and the said Cockburn & Sons are not entitled to any charge or expense or compensation for work done by either party on the other's logs.

3. That the said Cockburn & Sons have sustained damages by reason of the detention of their logs on Deer Creek during the driving season of 1896 by the acts and neglect of the said Imperial Lumber Com-

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pany to the extent of $1,376, and that the said Imperial Lumber Company is therefore indebted to the said Cockburn & Sons in the sum of $1,376 which said sum I hereby direct the said Imperial Lumber Company to pay to the said Cockburn & Sons at their office at Sturgeon Falls, in the District of Nipissing, on or before the first day October, 1896.

4. That the said Imperial Lumber Company shall pay to the said Cockburn & Sons, at their said office at Sturgeon Falls, on or before the first day of October, 1896, their costs of and incidental to the submission to arbitration and of the arbitration or reference and of this my award.

The above amount not having been paid this action is brought upon the award to recover the amounts thereby awarded, and the only defence to the action which is at all material to be noticed upon this appeal is contained in the following paragraph in the defendants' statement of defence:

15. The defendant company denies that the said Joseph Alphonse Valin made any such award of and concerning the said matters as is alleged in the statement of claim, and the defendant company further charges that in the sum of $1,376 mentioned in the said alleged award the said Joseph Valin has included a substantial amount in respect of the delay claimed by the plaintiffs to have been occasioned to them in getting their logs down the said stream by reason of logs of the defendant company being ahead of the plaintiffs' logs in the said stream, and thereby keeping back or hindering the running and driving of the plaintiffs' logs down the said creek, and the defendant company charges that no such claim could arise or be made the subject of arbitration under the said Saw-logs Driving Act, and that no such claim was in fact included in the matters intended to be referred to the said Joseph Alphonse Valin.

At the trial it was expressly admitted by the defendants' counsel that this was the sole matter in difference between the parties. Now the whole burthen of establishing the truth of this defence rested upon the defendants, and the sole evidence adduced by them in support of their allegation was that of the arbitrator whom the defendants called and the whole of whose evidence upon the subject appears to have been as

follows. He was asked by the defendants' counsel whether evidence had been given by the plaintiffs in the arbitration before him

that the Lumber Company by having their logs ahead of the plaintiffs in the stream were delaying them. Is that it?

To which he answered:

No, not in that way, the statements made by the witnesses were to this effect, that Doctor Warren (the manager of the defendant company) was not able with his jackladder to take in the logs fast enough to clear the channel and to delay Cockburn's logs as long as possible, that is one of them.

The learned counsel put this further question:

Perhaps (he said) we can get at the matter in this way, if you can tell me (without telling me any of your reasons) how the award was made up?

To this he answered as follows:

The amount of the award was made up by twenty-two days of delay at 40 men a day on the average, that was accepted by counsel on both sides, that there would be an average of 40 men for every day, at $1.45 per day.

The above is substantially the whole of the evidence upon which the defendants rested for proof of their contention, and that evidence appears to fall far short of establishing the truth of their defence, namely, that part of the damages awarded was for damage occasioned to the plaintiffs by the mere circumstance that the defendants had a drive of logs ahead of the logs of the plaintiffs whose logs were thereby necessarily delayed in floating down the stream without any default of the defendants. The evidence of the arbitrator, on the contrary, appears to me to establish that the plaintiffs made no claim upon any such ground as that now contended for by the defendants, but that the delay complained of by the plaintiffs was occasioned by the acts, default and neglect of the defendants in the manner in which they assumed to exercise the rights which they claimed to be vested in them by the statute, after

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the occurrence of the jams which would seem to have been constantly taking place, and that it was for such damages so occasioned which the arbitrator called damages for general detention as distinguished from damages occasioned by a special detention of some logs under a false claim by the defendants of a right of lien under the statute. We have not before us the evidence of all the circumstances attending the occurrence of the several jams and of the several acts of the parties in attempting to extricate the logs from them, nor of the duration of the jams and of the efforts of the parties to extricate the logs as the arbitrator had, but there was shown at the trial, and presumably by the defendants themselves, extracts from the evidence given at the arbitration by the manager of the defendant company from which it is apparent that the intermixing of the logs of the respective parties in their course down the river, and the efforts of both parties to extricate them, took place constantly during a long period of time until on the 30th or 31st May the difficulties which had arisen and the conflicts and collisions between the parties and their servants in respect thereof culminated in this, that according to the evidence of the manager of the Imperial Lumber Company, he assumed a right to prevent all the plaintiffs' logs which were then above a dam in the river from entering a sluice gate therein, whereby logs descended the dam by putting a large boom across the head of the sluice gate and locking it there, and prevented the plaintiffs' men from removing the boom and so actually detained all of the logs of the plaintiffs above the dam for some days, and gave the plaintiffs notice that the defendants claimed the right to retain in their custody all of the logs of the plaintiffs so detained above the dam for a lien thereon under the statute; and we see further by the defendants' notice

of the 3rd of July, 1896, that they then claimed to have in their custody certain of the plaintiffs' logs which had floated down the dam, and which were then said to be in the river between its mouth into Veuve River and the dam which they claimed to hold for a lien thereon under the statute. The learned trial judge found as a fact upon the material before him that the general detention and detention under alleged lien (of which the arbitrator in his evidence had spoken), were both during the months of April and May, and that what was done on the 1st of June was but a continuation of the assertion of the right of lien which the defendants had made, and that the arbitrator had acted clearly within the scope of a reference as provided for by the statute, and accordingly he rendered judgment for the plaintiffs for the amount of the award, with interest and costs. The Court of Appeal for Ontario reversed this judgment and dismissed the action upon the award with costs, from which judgment the plaintiffs have appealed to this court.

Now it is to be observed that in the defendants' statement of defence, paragraph 15, and in all the courts below and in this court, the whole ground of defence to the action on the award relied on by the defendants was an allegation that the arbitrator in his award had allowed to the plaintiffs damages for delay in getting their logs down the stream, which delay was occasioned by the mere fact of defendants' logs being ahead of those of the plaintiffs, which latter were thus necessarily delayed. In my opinion the defendants have wholly failed to establish this their contention.

Although we have not before us all the evidence which the arbitrator had before him, we have enough, I think, to show that all the claims, disputes and dif-

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ferences which appear to have been numerous between the parties while their logs were floating down the stream, and the claims made by the plaintiffs before the arbitrator, were in respect of damages suffered by the plaintiffs by reason of the manner in which the defendants assumed to act in their assertion of the authority of the statute, all of which claims, disputes and differences were claims, disputes and differences under the statute within the meaning of section 16, and so were recoverable by arbitration and an award under the statute. The arbitrator, in his evidence in the action, said that the plaintiffs had presented no claim before him for damages by delay occasioned by the cause as pleaded by the defendants, and as throughout the action was contended by them. The fact that the defendants never during the progress of the arbitration nor until an award was made against them claimed that any such or any claim outside of the scope of an arbitration under the statute was presented before the arbitrator by the plaintiffs, seems to afford confirmation of this evidence of the arbitrator if any confirmation was necessary, and the general detention spoken of by the arbitrator is susceptible of an intelligible meaning by reference to the numerous detentions claimed to have arisen during the progress of the logs down the stream from the manner in which the defendants assumed to act in assertion of authority under the statute, without attributing it to mere delay from the clause pleaded by the defendants and relied upon by them. I can see nothing in the evidence to support a contention that the arbitrator allowed, or that the plaintiffs claimed before him, damages for any delay so occasioned, and the defendants having failed to establish the only defence offered by them to the validity of the award the appeal must be allowed with costs and the judgment of the plaintiffs for the

full amount of the award and interest and costs, be restored.

KING J.—The action was brought by the present appellants to recover a sum of $1,376 awarded in an arbitration under the provisions of the "Saw-logs Driving Act" (R. S. O. [1887], c. 121.) The appeal is from a judgment of the Court of Appeal reversing a judgment of Rose J. who had maintained the action. The substantial question arises upon the construction of the Act, the material clauses of which are the following:

Sec. 3. Any person putting or causing to be put into any water in this province logs for the purpose of floating the same in, upon or down such water, shall make adequate provisions and put on a sufficient force of men to break, and shall make all reasonable endavours to break, jams of such logs, and clear the same from the banks and shores of such waters with reasonable despatch, and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs, or unnecessarily obstruct the floating or navigation of such water.

Sec. 4. In case of the neglect of any person to comply with the provisions of the preceding section, it shall be lawful for any other person or persons desiring to float, run or drive logs in, upon or down such water, and whose logs would be thereby obstructed, to cause such jams to be broken, and such logs to be cleared from the banks and shores of such water and to be floated, run and driven in, upon and down such water.

Sec. 5. The person or persons causing such jams to be broken, or such logs to be cleared, floated, run or driven pursuant to the last preceding section shall do the same with reasonable economy and despatch, and shall take reasonable care not to leave logs on the bank or shores, and shall have a lien upon the logs in the jam, or so cleared, floated, run or driven for the reasonable charges and expenses of breaking the jams, and the clearing, floating, running, driving, booming and keeping possession of such logs and may take and keep possession of such logs or so much thereof as may be reasonably necessary to satisfy the amount of such charges and expenses pending the decision by arbitration as hereinafter provided for. The person taking possession of logs under this section shall use all reasonable care not to take such logs beyond the place of their original desti-

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nation, if known, but may securely boom and keep possession of the same at or above such place. The owner or person controlling such logs, if known, shall be forthwith notified of their whereabouts and, if satisfactory security be given for the amount of such charges and expenses, possession of the logs shall be given up.

Then follow analogous provisions for the driving in common of logs which have become so intermixed that they cannot be conveniently separated, and for the separation of intermixed logs which are capable of being so separated. (secs. 6-11.)

Section 13 provides for the case where persons assuming to exercise the authority given by the Act, act irregularly or in excess of such authority. It provides that:

If it be determined by arbitration, as hereinafter provided for, that any person acting under the assumed authority of this Act has, without just cause, taken possession of, or detained, or caused to be taken possession of or detained, logs of another person, or has, after offer of security which the arbitrators may think should have been accepted, detained such logs, or has, through want of reasonable care, left logs of another person on the banks or shores, or has taken logs of another person beyond the place of their original destination contrary to the provisions of sections 5, 8 or 11, then such first mentioned person shall pay to such last mentioned person such damages as the arbitrators may determine.

Sec. 16 declares that:

All claims, disputes and differences arising under this Act shall be determined by arbitration as hereinafter provided, and not by action.

And then sec. 17 provides that:

The person claiming that another person has not complied with the provisions of this Act, or claiming payment of any charges or expenses under this Act, or claiming a lien upon any logs, or claiming damages under section 13, shall give to such other person notice in writing stating the substance of the claims made and appointing an arbitrator and calling upon such other person to appoint an arbitrator within ten days after the service of the notice.

Provision is then made for appointment of a second arbitrator in case the person notified does not appoint,

and also, (in either event), for the appointment of a third arbitrator.

Sec. 19 provides that the parties may agree that a single arbitrator may determine the matter. And sec. 20 provides for a counterclaim by the person on whom the original claim was made.

The plaintiffs and defendants were the owners of timber limits on a stream called Deer Creek, in the District of Nipissing, and in the spring of 1896 were engaged in driving saw-logs down it. Disputes arose between them in carrying on their respective driving operations, and notices of claim and counterclaim were given under the arbitration provisions of the Act. The plaintiffs claimed $5,011.25 as being the amount of loss sustained in consequence of the detention by defendants of the logs in Deer Creek during the months of April and May, and notified defendants of the arbitrator appointed by them, and requested them to appoint an arbitrator. The defendants thereupon notified plaintiff that they had appointed a certain person to act as arbitrator in respect of the claim served by plaintiff, and gave notice of counterclaim under the three heads of proportion of expenses for driving intermixed logs—damages for detention of defendants' logs by plaintiffs and damages sustained for carrying defendants' logs past their place of destination.

A third arbitrator was appointed, but subsequently the parties agreed that Mr. Valin, the judge of the District Court of Nipissing, should be the sole arbitrator.

The arbitrator, after hearing the parties, adjudged that

the said Cockburn has sustained damages by reason of the detention of their logs in Deer Creek during the driving season of 1896 by the act and neglect of the Imperial Lumber Company to the extent of $1,376,

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and awarded that this sum be paid by defendants to the plaintiffs in respect thereof.

The arbitrator was examined at the trial and stated that, of the $1,376, the sum of $1,276 was for the unreasonable detention of plaintiff's logs, and the balance for their illegal detention under a claim of lien.

The question in the case arises upon the inclusion of the former sum. It is held by the Court of Appeal that the only consequence of a non-compliance with the provisions of sec. 3 of the Act is that the person injuriously affected may resort to the remedies given to him by the 4th and 5th sections and break the jam or obstruction at the ultimate expense of the neglecting or offending party.

Section 3, already cited, imposes upon persons using streams for the purpose of floating logs a positive obligation (apart from any concurrence or mutual act of others using the water) to take reasonable steps to prevent an accumulation of his logs from unnecessarily delaying or hindering other persons in like use of the water. Unless an intention to the contrary appears it would *primâ facie* follow that a legal right existed in one whose logs had been unnecessarily delayed or hindered to complain of breach of such obligation. It is said that the contrary intention appears in the provision of the next section (5), whereby "in case of the neglect of any person to comply with the provisions of the preceding section" it shall be lawful for such other person to break the jam himself, and charge the wrongdoer with the cost. But by section 17 (as we shall presently see) the like phraseology is employed to describe a ground of complaint giving a right to an arbitration under the Act:

> The person claiming that another person *had not complied with the provisions of this Act* * * * shall give to such other person notice

in writing stating the substance of the claims made and appointing an arbitrator, &c.

Sec. 16 declares that all claims, disputes, and differences arising under the Act shall be determined by arbitration, and not by action.

A claim that a person has not complied with the provisions of the Act is a claim, dispute or difference arising under the Act within the meaning of sec. 16, because by sec. 17 this is explicitly and in terms made a ground for instituting arbitration proceedings.

Four classes of claims are specified in sec. 17, as furnishing ground for instituting proceedings in arbitration. (1) That of a person claiming that another person has not complied with the provisions of the Act; (2) That of a person claiming payment of any charges or expenses under the Act; (3) That of a person claiming a lien upon any logs; (4) That of a person claiming damages under sec. 13.

Of these, the second and third are in support and enforcement of the rights deprived from the exercise of the special remedial provisions of secs. 4, 5, 7, 8, 10, 11. The fourth is the relief of the person against whom the special remedial provisions have been used, and is directed against the abuse of an assumed authority under the Act, or its irregular exercise.

The second, third and fourth mentioned claims substantially cover all matters arising out of the exercise of the special powers, and the first mentioned claim, viz.: "That another person has not complied with the provisions of the Act" is fairly to be held to refer to a non-compliance separate from the special remedial provisions. The most sensible and simplest construction is that they relate, at least, to non-compliance with the direct and positive obligation which is imposed, or declared, by section 3.

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The Court of Appeal was of opinion that from the fact that the right to recover damages is mentioned in sec. 13, and not mentioned in terms in sec. 3, it may reasonably be inferred that the intention of the Legislature was that the penalty for default should be solely the breaking of the jam at the cost of the person whose logs formed it.

But it does not seem reasonable thus to infer that what would obviously, under some circumstances likely to happen, be no adequate remedy, or no remedy at all, is to be assumed as intended by the Legislature to be the only remedy. The judgment appealed from gives no satisfactory meaning to the first clause of sec. 17.

As to the form of the notice, the substance being within the scope of the Act, it is sufficient if the parties have not been misled by any defect of form. This is not alleged, and that they have not been misled is manifest from what took place before the arbitrator where both parties were represented by counsel. Both parties in their notices used the word detention as applicable, amongst other things, to a state of holding back or necessary delay occasioned by obstruction.

In the views here expressed the judgment of the Court of Appeal should be reversed and the original judgment of Mr. Justice Rose restored.

GIROUARD J. also concurred in the opinions of GWYNNE and KING JJ.

Appeal allowed with costs.

Solicitors for the appellants: *Dunn & Boultbee.*

Solicitors for the respondent: *Barwick, Aylesworth & Wright.*

THE HOME LIFE ASSOCIATION OF CANADA (DEFENDANT)..... } APPELLANT;

AND

ELEANOR MARION RANDALL (PLAINTIFF)..... } RESPONDENT.

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*Oct. 27.

*Nov. 29.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action—Condition precedent—Allegation of performance—Burden of proof—Waiver—Insurance policy.

Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Chief Justice Armour at the trial in favour of the plaintiff.

The facts of the case are fully set out in the judgment of the court.

Osler Q.C. and *Hoskin Q.C.* for the appellant.

Watson Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The respondent is the widow of Andrew Blackston Randall.

On the 20th of October, 1896, the appellants issued a policy duly executed under the corporate seal of the appellants and under the hand of their president and managing director assuring the life of the respondent's husband for the sum of $2,000 to be paid in case of death to the respondent if she should survive, and otherwise to the personal representatives of the assured.

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

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The contract of insurance entered into by the appellants is set forth in the body of the policy as follows:

In consideration of the written and printed application for this policy by Andrew Blackston Randall, of Grimsby, Province of Ontario, in the Dominion of Canada, and the answers and statements made by and on behalf of the applicant herein, which form a part of this contract, and the agreement on the part of the said applicant to accept the conditions and rules indorsed hereon and the conditions contained herein as a part of this contract between said association and himself, hereby constitutes the said applicant a benefit member of said association, *and agrees in ninety days after there shall have been furnished to said association satisfactory proof of a valid claim under this contract, consequent upon the death of said member from any cause within the meaning of this contract, to pay out of the death fund of the association,* and out of any money realised from premium calls to be made for that purpose, to Eleanor Marion Randall (wife) if living, otherwise to the executors or administrators of said member, the sum of two thousand dollars.

A number of conditions were indorsed on the policy two of which must be specially referred to The 13th condition was in these words.

An action to enforce the obligations of a policy may be validly taken in any court of competent jurisdiction in the province wherein the policy holder resides, or last resided before his decease, but no action, suit or claim shall be taken, brought or made upon any policy after the expiration of one year from the death of such member, without reference to the time of furnishing proofs of death, and such lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding.

The 19th condition was as follows:

Death of the person insured from consumption, bronchitis, or any chronic pulmonary affection or from cancer, within one year from the date of the policy issued to the assured, or from the date of any revival of such policy, is a risk not contemplated or covered by the contract in such policy, and in such event the association shall have the right to cancel such policy and to return to the legal representative, or payee designated in such policy, the sum of all payments made thereon on account of Mortuary and Reserve Funds, which sum shall be accepted in full and complete settlement of all liability of said association under the contract contained in such policy.

The sum of $28.85 was duly paid by the assured to the appellants by way of premiums, or as it is called

in the rules of the appellant association, on account of "Mortuary and Reserve Funds," being all that was due on that account according to the terms of the policy up to the date of the death of the assured.

The assured, Andrew Blackston Randall, died on the 16th of July, 1897.

The 14th condition indorsed on the policy embodies the requirements as to proofs of death and is thus expressed:

14. (26) Before the payment of this policy, after the death of the member, proofs of death must be furnished, properly verified by statutory declaration on blanks furnished by the association for the purpose, and shall include: (1) A statement by the claimant or claimants. (2) A statement from each physician who attended deceased within three years before death. (3) A statement from a responsible householder who knew deceased. (4) A statement from the undertaker. (5) A statement from the clergyman where one officiates. (6) A copy of the verdict and of the evidence upon which it is based, duly certified wherever an inquest has been held. Also a certified copy, under seal of the proper court, of the letters of administration of the estate of the deceased, if he should die intestate, or of letters probate should he die leaving a will, or of letters of guardianship, or other instruments by virtue of or under which the claimant claims to be entitled, and such other reasonable proof as may be required by the association, and tender to the association of this policy at its head office with a proper release hereon indorsed of all claims hereunder, executed by the party entitled to receive the benefit thereof, or satisfactory proof of the loss or destruction of this policy, accompanied by a release duly executed by the person or persons entitled as aforesaid.

On the 7th of August, 1897, less than a month after the death of the assured, the respondent furnished and delivered to the appellants as proof of loss, five papers.

The first of these papers was a statutory declaration by the respondent herself made on the 4th of August, 1897, in which after describing herself as the widow of the assured and stating the death of her husband, she in the third paragaph thus states the cause of death:

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I was in constant attendance upon my said deceased husband, for several days before his death, and the said deceased did not die by his own hand but death was caused by phlebitis and tubercolosis caused by an attack of pneumonia as I am informed by his medical attendant and verily believe.

The second of these proofs was the statutory declaration of Dr. Milward, a physician and surgeon practising in the Village of Grimsby (where the assured lived and died) and who had been the medical attendant of the deceased in his last illness — who declares as follows:

(1) I was personally acquainted with the said Andrew Blackston Randall of the said Village of Grimsby, who was seen and attended in his last illness by me for the period of three and a half months preceding the sixteenth day of July, 1897, when he died at the said Village of Grimsby.

(2) I saw the said deceased Andrew Blackston Randall after his death and he did not die by his own hands but that death was caused I have no doubt by tuberculosis caused by an attack of pneumonia, in January last, 1897, and death hastened by phlebitis the large veins of both lower limbs being badly affected.

There was also included in the proofs the declaration of Rev. John Muir, a minister of the Presbyterian Church of Canada, who assisted at the funeral of the deceased and who identified him as the person assured in the policy.

James C. Martell, the undertaker, who conducted the funeral of the deceased also makes a declaration in which he states the death and funeral, and that he had read the declarations of Mrs. Randall and Dr. Millward and believes them to "contain a true statement of the facts."

Samuel E. Mabey, a householder in the Village of Grimsby, states in his declaration that he had known deceased for thirty years, and that he had read the declaration of Dr. Millward and believed the said declaration to contain a true statement of the facts and of the cause of the death of the assured, and that

he had also read the declaration of the respondent which he believed also to contain a true statement of facts.

No proofs of loss other than those stated were ever presented to the appellants by the respondent or by any one on her behalf.

The appellants refusing to pay the amount of the insurance money and disputing their liability to do so, the respondent on the 11th of December, 1897, brought her action on the policy to recover the amount insured. In the statement of claim the respondent states the terms of the policy to have been to pay "in ninety days after there should have been furnished to the defendants proof of a claim under the contract contained in such policy consequent upon the death of the said Andrew Blackston Randall." The statement of claim then proceeds to allege the death of the assured, at the date already mentioned, and then the fourth paragraph alleges compliance with all conditions as well that relating to proofs of loss as others in the following terms:

The plaintiff duly furnished the defendants proof of the death of her said husband and of a claim under the said contract and policy on the 7th day of August, 1897, and all conditions were performed, all things happened and all times elapsed necessary to entitle the plaintiff to a performance by the defendants of their said agreement and to be paid the said sum of $2,000, yet the defendants have not paid the same or any part thereof.

By the statement of defence the appellants in the second paragraph put the respondent to proof of the allegations of the statement of claim. This second paragraph is as follows:

The defendants admit the allegations contained in paragraph 1 of the plaintiff's statement of claim, but deny the allegations contained in the other paragraphs thereof and put the plaintiff to the strict proof thereof.

The defence further set up amongst other defences that the assured had died of consumption, and that

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therefore under the 19th condition no cause of action arose.

Issue was joined by the respondent on this defence.

A few days after the respondent's action was commenced the appellants instituted a cross action to have the policy delivered up to be cancelled, and had delivered their statement of claim when an order was made by the Master in Chambers consolidating the two actions.

The trial took place before the Chief Justice of the Queen's Bench Division at St. Catharines, on the 30th of May, 1898, without a jury, when judgment was pronounced for the respondent for the amount sued for, without costs.

From this judgment there was an appeal to the Court of Appeal, by which court the judgment was affirmed, the learned judges all concurring in the decision.

The learned Chief Justice of the Queen's Bench Division, who presided at the trial, seems to have considered that the burden of proof in respect of all the issues raised by the pleadings was on the appellants. This view appears also to have been taken by some of the learned judges in the Court of Appeal. The Chief Justice of Ontario, however, expressed a clear opinion that there was an issue raising the question as to the sufficiency of the proofs of loss but that the appellants have waived their defence under it. The learned Chief Justice in his judgment thus expresses himself:

> It was not in my opinion a matter of defence that satisfactory proofs of a valid claim were not presented, but it was something to be proved by the plaintiff before any liability attached ; but if the company were willing to waive that requirement, it was open, and I think creditable to them to do so, for it is a very harsh condition to insert in a policy of insurance intended as a provision for the family of the party assuring.

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If I could see that the defence referred to had been in fact waived I might agree to this, but as I shall more fully state hereafter I fail to see any waiver which would support the view of the Chief Justice.

Mr. Justice Maclennan's judgment proceeded upon the omission of the appellants to set up in their statement of defence any objection to the non-delivery of sufficient proofs of loss. In this I entirely differ from him. Mr. Justice Maclennan however did not think there was any waiver at the trial, for he distinctly says the contrary;

> In this case the point was raised for the first time on the argument before the learned Chief Justice at the conclusion of the evidence, and I think he very properly gave no effect to it.

Mr. Justice Osler treats the case as though the only question raised at the trial was that upon the evidence as to the actual cause of death.

Upon the record before the learned trial judge it was clearly an issue whether ninety days before the commencement of the action the respondent had furnished to the appellants "satisfactory proof of a valid claim under the contract."

The course of pleading has now very much departed from the old forms of common law pleadings; substantially however the rules remain the same. *Probata secundum allegata* is just as much the rule as it ever was. There can be no doubt upon the plain words of the policy that delivery of proofs of a valid cause of death was an essential condition precedent which it was incumbent on the plaintiff in the action to establish both in pleading and in proof, and it was incumbent on her to shew that she had ninety days before action furnished the required proof. This requirement as to pleading was sufficiently complied with by the allegation contained in the 4th section of her pleading that she had duly furnished to the defendants proof of

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the death of her husband and of a claim under the contract and policy and by the further general allegation that all conditions were performed, all things happened and all times elapsed necessary to entitle the plaintiff to be paid the sum assured.

Indeed without any reference at all to the furnishing of proofs of loss, the general mode of pleading would have been sufficient, and if it had been adopted the respondent would nevertheless have had to make out her case by proof of the performance of the conditions. Under the old rule of pleading which prevailed before the Common Law Procedure Act, specific allegations of performance of conditions precedent were required. This was altered by that Act which permitted a general allegation of performance to be substituted for the former more precise mode of pleading. And this, as I understand, must still remain the law for under the Ontario Judicature Act there has been no alteration in the rules of pleading as there has been in England where it is not now required to allege even in general terms any performance of conditions precedent, such an allegation being implied. English Order 19 Rule 14; Odgers on Pleading (3 ed.) p. 81; Bullen & Leake (5 ed.) p. 188. The rule however remains as it always was, that performance of conditions precedent to the defendants' liability must be proved by the plaintiff.

There is not now nor was there ever any rule requiring the defendant to set up a non-performance of conditions precedent.

It is plain, therefore, that at the trial supposing there to have been no consent or waiver or "putting aside" of a most substantial defence on the part of the appellants they were entitled to insist (as they did in fact insist) that the respondent should prove that ninety days before action brought she had delivered proofs

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of a valid claim under the policy. The appellants by their pleading in defence sufficiently put this question in issue by the second paragraph denying the allegations of the respondent and putting her to "strict proof thereof." Even if there had not been this denial but the appellant had allowed the averment to pass *sub silentio* the respondent would still have been obliged to establish that she duly furnished proofs of loss for the rules under the Ontario Judicature Act, in this respect again differing from the English Act (Order 19, Rule 13; Odgers on Pleading, (3 ed.) p. 131,) provide that all allegations not specifically admitted shall be taken as denied. (Con. Rule 272.)

Then, how did the respondent perform this obligation which was thus cast upon her? She proved that she had furnished proofs of loss showing the death of the assured but proofs which upon their face necessarily defeated her action inasmuch as they showed that the deceased had died within nine months from the date of the policy from consumption, a case in which the 19th condition expressly provides the appellants shall not be liable, the words of that condition being that "death from consumption within one year from the date of the policy * * is a risk not contemplated or covered by the contract in such policy."

The question of waiver is next to be considered. The improbability of any such concession to the respondent in an action so stoutly contested as this has been is very considerable when we recall a few dates which shew that this was not a mere dilatory defence which could have been avoided by dismissing the action, paying costs and delivering new proofs of loss. The assured died on the 16th of July, 1897, the trial took place on the 30th of May, 1898; had the

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action then been dismissed and new proof immediately furnished, no cause of action would have arisen until the 28th of August, 1898. Then an action brought at that date would have been too late for it would have been barred by the 13th condition which expressly provides

> that no action, suit or claim shall be taken, brought or made upon any policy after the expiration of one year from the death of such member without reference to the time of furnishing proofs of death, and such lapse of time shall be conclusive to bar any recovery hereon.

It thus appears that the defence alleged to have been waived was one going to the root of the action, one which must have been conclusive if any conditions stipulated for by assurance companies can be binding on those who contract with them.

Then if there was any effective waiver it must, in the face of the positive denials of the counsel for the appellants who at this bar most strenuously disclaimed ever having had any intention of abandoning the defence, be shewn from something appearing on the face of the printed record before us. It was manifestly not conceded by counsel for the appellants in the Court of Appeal that there had been any waiver or we should not find two of the learned judges there dealing with the point, whilst one of them (Mr. Justice Maclennan) expressly says the point was raised at the trial for the first time at the conclusion of the evidence. In order to ascertain the true state of facts as to the waiver we have most carefully scrutinised the report contained in the printed case of what took place at the trial, but we find nothing indicating that counsel for the appellants agreed to anything or said anything which could be considered as an abandonment of the defence in question.

At the conclusion of the evidence the learned Chief Justice addressing counsel said: "What do you say

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as to the defence you have made out, Mr. Osler?" The learned counsel answers: "We say, my lord, that under the terms of the policy it is not a covenant to pay at death but a covenant upon proof of a valid claim under this contract consequent upon death within the meaning of this contract."

This I construe as counsel before us contended it should be construed as expressly insisting upon the defence.

Then again the counsel repeats: "I say our contract is not at large, death and then a condition, but our contract is a payment under the circumstances covered by the contract." Further Mr. Osler is reported as again urging the same defence in these words; "We submit that everything shews that the suggested kick —no such thing is proved—is a mere afterthought, a mere method by which they seek to avoid the condition of the policy upon which we rest, made out in fact by their own proofs. They are bound to give us the proofs and bound to give us the true proofs; they cannot be heard to say 'These are not the true proofs,' so we submit our case under the policy and under the contract is made out."

On the whole it does not appear that there was any waiver but so far from it that the defence was insisted upon by counsel but overruled by the learned Chief Justice though for what reason does not distinctly appear. This seems to have been the view of Mr. Justice Maclennan and we think it entirely right.

Had we been of a different opinion as regards the point already considered it is not probable that we could have affirmed the judgment under appeal. It is true that the question as to the cause of death is entirely one of fact and that there was contradictory expert evidence but having regard to the deliberate statement in the declaration of the medical attendant,

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the absence of any attempt to explain and correct this until the trial, and other surrounding circumstances, we are all of opinion that it would have been very difficult to come to any other conclusion than one at variance with the finding of the learned Chief Justice. And we should not have been precluded from entering upon an examination of the evidence upon this head by the rule that a second court of appeal will not interfere with the concurrent finding of two preceding courts on a question of fact, a rule well established and often acted upon here as well as in the Privy Council, and also in some late cases in the Supreme Court of the United States (1).

In order to apply the rule referred to it must appear however that the question of evidence has undergone consideration in both the court of first instance and the first court of appeal. That does not appear to have been the case since the learned judges of the Court of Appeal did not deal with the question of evidence but decided on other grounds. We are therefore in the position as regards this question of a first court of appeal and as the court was in the case of *Jones* v. *Hough* (2) which authority establishes generally the right of an appellant if the question is open to have the evidence taken on a trial without a jury reviewed on appeal.

If it all depended on the credit to be given to witnesses I should be of the same opinion as Mr. Justice Osler, but it is not a case altogether dependent on such consideration, but rather on the inferences to be drawn from surrounding facts not disputed and from documents, in other words a question of circum-

(1) See cases collected, Holmsted & Langton's Judicature Act, 2 ed. pp. 46, 47, 48; also *Stuart* v. *Hayden*, 169 U. S. R. 1; *Dravo* v. *Fabel*, 132 U. S. R. 487; *Baker* v. *Cummings*, 169 U. S. R. 189; *Towson* v. *Moore*, 173 U. S. R. 17.

(2) 5 Ex. Div. 115 in app.

stantial evidence complicated with the opinions of experts. Although all my learned brothers agree on this view, we decide the appeal upon the first point. The judgment must be reversed and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Hoskin, Ogden & Hoskin.*

Solicitor for the respondent: *E. A. Lancaster.*

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FRANK MADDEN (DEFENDANT).....APPELLANT;

AND

CHARLES CONNELL (PLAINTIFF).....RESPONDENT.

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*Oct. 24.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining claim—Invalid location—Location in foreign territory.

If the initial post of a mining claim is in the United States territory the claim is utterly void.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the plaintiff.

The parties are respectively locators of mineral claims in the West Kootenay District, B.C. which overlap, and the action was brought to determine the title to the ground covered by each claim.

The defendant was the first locator, but it was proved and conceded that the initial post of his claim was south of the boundary between British Columbia and United States and so within the territory of the latter. The courts below held that this made the location invalid.

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

(1) 6 B. C. Rep. 531.

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MADDEN v. CONNELL.

Robinson Q.C. for the appellant.

A. F. May for the respondent.

The judgment of the court was delivered by:

The Chief Justice.

THE CHIEF JUSTICE (Oral).—We are all of opinion that it is impossible to get over the fact that the initial post on appellant's claim was south of the boundary. Two courts in British Columbia have so decided, which alone would be sufficient, but beyond that the fact is not only clear on the evidence, but is conceded by the appellant. The necessary consequence is that his claim is utterly void. As Mr. Justice Martin says, in giving judgment for the Supreme Court of British Columbia, the position is the same as if there had never been such a claim

The appeal must be dismissed with costs.

Appeal dssmissed with costs.

Solicitor for the appellant: *John Stillwell Clute jr.*

Solicitor for the respondant: *P. McLaren Forin.*

1899

*Oct. 24.

*Nov. 7.

WILLIAM DAVID WOOD (PLAINTIFF)..APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Railway company—Grass on siding.

For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment.

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

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THE CANADIAN PACIFIC RAILWAY COMPANY.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the defendant.

The plaintiff, an employee of the defendant company, while engaged in coupling and uncoupling cars, attempted to step from between two cars when the train backed up, but his feet became entangled in the long grass and weeds which had grown over the roadbed and he was struck by the train and seriously injured. In an action against the company for damages a verdict was entered for the defendant contrary to the findings of the jury, and this verdict was sustained by the full court. The plaintiff then appealed to this court.

Joseph Martin Q.C. for the appellant, referred to *Webster* v. *Foley* (2); *Penny* v. *Wimbledon Urban District Council* (3); *Groves* v. *Wimborne* (4).

Nesbitt Q.C. for the respondent, cited *Johnson* v. *Lindsay & Co.* (5); *Williams* v. *Bartling* (6); *Williams* v. *Birmingham Battery & Metal Co.* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an action to recover damages for an injury to the appellant, the plaintiff in the action, caused as it is alleged by the respondents' negligence.

The respondents in their defence deny the negligence imputed to them, and also set up that if the appellant was injured by the negligence of any one it was by that of a fellow servant of the appellant, in the same employment.

The action was tried before Mr. Justice Irving and a special jury.

(1) 6 B. C. Rep. 561.
(2) 21 Can. S. C. R. 580.
(3) [1899] 2 Q. B. 72.
(4) [1898] 2 Q. B. 402.
(5) [1891] A. C. 371.
(6) 29 Can. S. C. R. 548.
(7) [1899] 2 Q. B. 338.

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The evidence given at the trial has not been printed and we have not been furnished with a copy of it by the appellant, as it was suggested at the hearing of the appeal that we should be. It appears, however, from the factum of both parties that the only neglect of duty imputed to the respondents was that set forth in the statement of claim, namely, "having the track in a dangerous condition from the growth of long grass and weeds" in which the appellant's foot became entangled and so led to the accident. The learned judge left several questions to the jury, who found that there was negligence on the part of the respondents, and assessed the damages at $6,500. Notwithstanding this finding, and upon the evidence which he was entitled to consider, the judge entered the judgment for the respondents. Upon appeal to the Supreme Court *en banc* this judgment was affirmed.

Although the point does not seem to have been taken either at the trial or on the appeal, it appears to us that there was no evidence of negligence upon which the jury could have reasonably found for the appellant. It was the duty of the judge to determine whether there was any evidence of negligence proper to be submitted to the jury. This involves the consideration of matters of fact, and in determining it judges are to bring to bear their common experience of such matters as jurors have to do in questions of fact left to their decision. This is so well settled by the highest authority that there can be no question of the correctness of the principle. *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (4); *Flannery* v. *Waterford and Limerick Railway Co.* (2). It is not of course every omission to do something which would have avoided an accident which constitutes negligence in law. In order that a duty should be imposed upon a

(1) 3 App. Cas. 1155. (2) Ir. Rep. 11 C. L. 30.

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person the neglect of which constitutes an actionable wrong, it must be apparent that the want of care or attention is reasonably likely to endanger the safety of others. It is not sufficient that the omission did in fact cause an accident, if it was not to some extent obvious that such a consequence was likely to result from it.

This is, it is true, to a great extent a question of degree but still it is one which it is held must be dealt with by the judge in deciding the preliminary question whether there is any evidence proper to be left to the jury. *Crafter* v. *The Metropolitan Railway Co.* (1), was a case in which this rule was acted upon, and so far as I can judge from the meagre report of the case of *Smithwhite* v. *Moore* (2) it was also there applied by Mr. Justice Phillimore. Can it then be said in the present case that the permitting grass and weeds to grow on the side track was so obviously likely to result in danger to the respondents' employees that it constituted negligence? In point of fact no doubt we must assume that the accident to the appellant resulted from such growth but that, as has been said, is not conclusive. The brass facings on the stairs in the case of *Crafter* v. *The Railway Co.* (1) led to the accident in question there, but it was not held to establish negligence, nor was the broken pane of glass in the action which came before Phillimore J. I am of opinion that in the present case the not keeping down the natural growth of weeds and grass was not such an omission as could reasonably have been foreseen to be likely to endanger the safety of the railway servants working upon the track.

Upon the other point also, that of common employment, upon which the court below proceeded, the judgment is, we think, in all respects right. The

(1) L. R. 1 C. P. 300. (2) 14 Times L. R. 461.

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duty of keeping the line of railway and the side tracks in proper order was delegated to the respondents' road-master and section foreman who were shown to be properly qualified, and if there was any failure to perform a duty which the respondents owed to the appellant, it was they who were guilty of it, and as they were for the purposes of the defence of common employment fellow servants of the appellant, the action fails.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Martin & Deacon.*

Solicitors for the respondent: *Davis, Marshall & Macneill.*

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*Oct. 26, 27.

*Nov. 29.

THE DOMINION CONSTRUCTION COMPANY (DEFENDANT) ..... } APPELLANT;

AND

GOOD & CO (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract — Construction of railway — Certificate of engineer—Condition precedent.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the party named as arbiter proved to be, in fact, the engineer of the other party to the contract.

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

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THE DOMINION CONSTRUCTION CO. v. GOOD & CO.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J. at the trial in favour of the plaintiffs

The facts of the case are thus stated by Mr. Justice Osler in the Court of Appeal.

The defendants, the Toronto, Hamilton and Buffalo Railway Company, were incorporated some years prior to the year 1889, for the purpose of constructing a railway, part of the main line of which was from Brantford to Welland, passing through the City of Hamilton. Soon afterwards a construction company, incorporated in the State of Illinois under the name of J. N. Young & Co., was organized for the purpose of building the road, one J. N. Young being the chief promoter of the concern.

J. N. Young & Co. became the owners of, or took up the greater part of, the stock of the railway company, putting up the 10 per cent required to be paid before its organization, and they created the local board of directors, qualifying the individuals who composed it by giving them the necessary shares.

They then entered into a contract, on the 2nd June, 1891, with the railway company through the medium of this board of directors for the construction of the line of railway or part of it. Into the particulars of this contract it is not necessary to enter, inasmuch as the financial operations of that corporation being unsuccessful they were unable to carry it out, and thereupon Young procured a new company, the defendants the Dominion Construction Company, to be incorporated under the laws of New Jersey, which acquired the rights and interests of the old one under their contract with the railway company, and succeeded in building the line. The new company, on

(1) 26 Ont. App. R. 133, sub nom. *Good* v. *Toronto, Hamilton and Buffalo Railway Co.*

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the 4th of September, 1894, entered into a contract with the railway company, the directors of which stood in the same position towards them as they did to the former, by which for a bulk sum of $35,000 per mile they agreed to survey, locate and construct the railway company's line of railway and telegraph from its present terminus east of Brantford to and through the City of Hamilton to a connection with the Canada Southern Railway at or near Welland, and form a connection with that railway at Hamilton to Toronto. They also agreed to construct a second main track between the latter points, if required, at a bulk sum of $20,000 per mile. The railway was to be constructed on such line as the chief engineer of the railway company should locate and adopt, and in accordance with the specifications attached to and forming part of the contract. The provisions of the contract for securing payment of the contract price need not be referred to further than to say that the whole of the assets of the railway company of every kind then owned or thereafter to be acquired were pledged and to be secured for that purpose in the manner set forth in this contract. It was stipulated that the railway company should appoint a chief engineer who should have entire charge of the engineering department of the railway company. His decision upon all questions that might arise in connection with the contract as to its true meaning and intent so far as the work of construction was concerned was to be final and binding on all parties, and his salary and compensation were to be paid by the construction company. It was provided that the construction company should have the right by its president, general manager, or any director, to be present at any directors' meeting of the railway company, and to discuss any resolution or motion before the meeting.

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On the 10th of July, 1895, the contract between the Dominion Construction Company and Good & Co, the plaintiffs, out of which the present litigation arises, was entered into. By it Good & Co. covenanted to build the eastern branch of the railway, viz., that part of the line between Hamilton and Welland, and to complete it "to the satisfaction and acceptance of the chief engineer of the Toronto, Hamilton and Buffalo Railway Co." The company covenanted to pay them for the work in accordance with the scheduled prices specified in the contract. Progress estimates, "to be judged of by the said chief engineer," were to be presented at the end of each month, and 90 per cent thereof to be paid by the 20th of the following month. "And when all the work embraced in this contract is fully completed agreeably to the specifications and in accordance with the direction, and to the satisfaction and acceptance, of the said chief engineer, there shall be a final estimate made of the character, quality and value of the work according to the terms of this agreement, when the balance appearing due to Good & Co., shall be paid to them within thirty days thereafter upon their giving a release in full to the company of all claims arising in any manner out of the agreement, and upon their procuring and delivering to the company full releases from mechanics, material men, etc., for work done and materials supplied under the contract." The procuring of such releases was to be a condition precedent to the right of Good & Co., to payment.

Good & Co. agreed not to sublet or transfer the contract or any part of it without the written consent of the chief engineer. By a further clause it was provided that the decision of the chief engineer was to be final and conclusive in any dispute which might arise between the parties relative to or touching the agree-

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ment, each party reserving any right of action by virtue of the covenants, so that the decision of the chief engineer should be in the nature of an award, and final and conclusive.

The plaintiffs proceeded with their contract, and it was, within what may be called a reasonably short time after the date fixed for its completion, finished to the satisfaction and acceptance of the chief engineer of the railway company. The plaintiffs were by consent relieved of some part of the work of ballasting the line, and no question arises about that. The road was also accepted by the engineer as completed as between the construction company and the railway. But when it came to the question of procuring the final estimate required by the plaintiffs' contract, difficulties arose respecting the classification of certain portions of the work which the plaintiffs contended should be classified as loose rock, for which the engineer was prepared to allow no more than 98 M cubic yards, while the plaintiffs claimed 150 M. The difference between the two figures the engineer thought should be classified as earth excavation only, although in his original estimate for the purpose of the contract he had put the whole at the large figure which the plaintiffs asserted had been found as a matter of actual work on the ground as shown on the progress estimates to be nearly right. There were also differences between the parties as to the plaintiffs' claim for extras, and in respect of a claim for what is described in the specifications as the "force" account—differences which by the terms of the contract were doubtless required to be decided by the engineer, but which the parties endeavoured, but without success, to settle between themselves after the contract had been completed and the works accepted by him.

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On the 17th of March, 1896, the engineer gave the plaintiffs a qualified or conditional final estimate as to quantities and character of the work, but not "moneyed out," and upon the understanding, as he stated in his letter accompanying it, "that an amicable settlement is made between Good & Co. and the construction company upon items under consideration," *i.e.*, the extras and force account. It was not intended as a final estimate upon which the plaintiffs could obtain judgment, and on their part they were not prepared to accept it because of the alleged improper classification. With regard to this classification the plaintiffs' contention was that the chief engineer had never, by actual inspection of the ground while the work was being proceeded with, acquired a knowledge of the ground and of the character of the work, which justified him in making, in the final estimate, so radical a change in the classification which had from time to time been made in respect of it in the progress estimates based on the reports of the sub-engineers who saw the work while it was being done.

It appeared that not long after the plaintiffs had commenced their work on the contract they were informed, as they said, by the engineer, but which he denied, that he was "interested" in the contract, in what way they did not know, but they assumed in the profits. They did not, however, object to his acting, and they received some seven progress estimates certified by him. It was proved that he was not in fact so interested, and that he was not a member of the construction company. During the attempt at a settlement, and while the plaintiffs were endeavouring without success to obtain the final estimate, they were also complaining that Wingate, the engineer, owing to his long connection with Young, was not in a position to deal fairly with them.

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It may be noticed here that the plaintiffs sublet several portions of the works they had contracted to execute. There was no written consent on the part of the railway company's engineer to their doing so, but he was aware that it was done either at the time or shortly afterwards, and no objection was ever made by him. These contracts required that a final estimate should likewise be obtained by the sub-contractors from the railway company's engineer. These he refused to give at the instance of Young, acting on behalf of the Dominion Construction Company.

At the trial before Armour C.J. judgment was given against all the defendants except the railway company. This judgment was affirmed by the Court of Appeal, but varied by a direction that as against Wingate, the engineer, the action should be dismissed, but without costs.

D'Arcy Tate for the appellant.

Aylesworth Q.C. for the respondents.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—At the conclusion of the argument of the counsel for the appellant I was of opinion that the judgment of the Court of Appeal was right and the appeal ought to be dismissed.

Mr. Wingate was certainly in such a position, and his conduct was such, that the learned Chief Justice was, on the evidence, entirely right in absolving the contractors Good & Co. from the necessity of obtaining his certificate. The authorities on this head are so numerous and so conclusive as to make it unnecessary to refer to them after the references already made in the judgment of the Court of Appeal. The Court of Appeal have treated Mr. Wingate with great leniency in dismissing the action against him without costs. I

should have preferred to have retained him as a defendant and have ordered him to pay costs as Chief Justice Armour's judgment did, but this is a mere matter of costs, and the respondents have not asked by way of cross-appeal to have the order varied.

Under the judgment as it stands nothing is said about releases, and as the provision in the contract requiring them seems to be only by way of a condition precedent to obtaining a certificate, and as there is now to be no certificate, there is strictly no reason why there should be any direction respecting them. The appellants may, however, if they elect so to do, have an inquiry as to whether there are any mechanics' liens or other charges affecting the monies payable under the contract. In all other respects the original judgment as varied by the Court of Appeal will stand. Subject to such variation, if the appellants elect to take the direction for an inquiry, the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Carscallen & Cahill.*

Solicitor for the respondents: *S. F. Washington.*

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*Nov. 7.

*Nov. 29.

SIMEON JONES ..... APPELLANT;

AND

THE CITY OF SAINT JOHN..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal assessment—Domicile—Change of domicile—Intention—59 V. c. 61 (N. B.)

By the St. John City Assessment Act (59 Vict. ch. 61) sec. 2 "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession, within the City of Saint John, shall be deemed * * an inhabitant and resident of the said city."

J. carried on business in St. John as a brewer up to 1893 when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bonâ fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile and that in St. John had been abandoned within the meaning of the Act.

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

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APPEAL from a judgment of the Supreme Court of New Brunswick discharging a rule nisi for certiorari to quash an assessment against the appellant.

The only question raised on this appeal was whether or not the appellant, Jones, had abandoned his domicile in St. John by acquiring one in New York, and consequently whether or not he was liable to be personally assessed in the former city. The facts upon which the decision of the question depended are sufficiently stated in the above note and fully set out in the judgment of the court on this appeal.

Currey Q.C. for the appellant.

C. J. Coster for the respondent.

The judgment of the court was delivered by :

KING J.—The question in this case is whether or not the appellant was an inhabitant of the City of St. John, N.B,, in the year 1897, within the meaning of the Act of Assembly, 59 Vict. ch. 61, sec. 2 The section is as follows :

(114.) For the purposes of assessment, any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession within the City of Saint John, shall be deemed and taken to be and is hereby declared to be an inhabitant and resident of the said city, any law to the contrary notwithstanding, and any person assessed as such inhabitant and resident shall be deemed and taken so to be, unless upon appeal to the Common Council, such person shall have been found to have been within the said city for a temporary purpose unconnected with business and shall have proved to the satisfaction of the Common Council that he possesses, or has acquired, a home or domicile at some other place designated by him, and that he has not during the year for which said assessment was made, had any office or place of business, or any occupation, employment or profession, within the City of Saint John, or carried on any business therein ; provided that any person whose actual home or domicile is out of the city, shall not be assessed on a poll tax within the city ; provided also that any person temporarily employed in the city as a labourer or

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journeyman mechanic, whose home or domicile is out of the city shall not be assessed as a resident.

In the year 1897, Mr. Jones having been assessed as an inhabitant in respect of personal property of the assessed value of $150,000, appealed to the Common Council, as provided by the Act, claiming that he was a resident of the City of New York, and not of St. John. The appeal was dismissed, and Mr. Jones then applied to the Supreme Court of New Brunswick for a certiorari to bring up the assessment against him with the view of quashing it. The present appeal is from a judgment dismissing such application.

It appears that Mr. Jones was born in York County, N.B., about the year 1829, and when twenty-two years of age moved to St. John, where he lived and carried on the business of a brewer for upwards of forty years. During the latter part of this period he had business transactions in New York, chiefly in the buying and selling of stocks, bonds and other securities on his own behalf, and in 1892 he contemplated retiring from his business in St. John and going to New York to live and engage more actively in the business he had been carrying on there.

In pursuance of this intention he leased the brewery to three of his sons, and in 1893 sold it to them. At this time Mr. Jones was a widower, his wife having died five years previously, and he so continues. His family then consisted of six sons and two daughters, all unmarried, and residing with him, or at school.

In 1893 he conveyed the house in which he resided and the furniture to those of his children who were of age, in trust for all the children. This was done in pursuance of an expressed intention to quit St. John as a place of residence and to live permanently, or for an indefinite time, in New York. He accordingly left St. John and went to New York, where he has lived,

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in the main, ever since, and where he has carried on his entire business. In New York he did not maintain a house, but lived in a single room in the Plaza Hotel, and paid for the room only when he occupied it. He was accustomed to spend the Christmas holidays with his children in St. John, and also was accustomed, in the summer season, to spend several months with them, usually leaving New York about the middle of June and returning about the middle of September. On the occasions of his return to St. John he lived with his unmarried children in the house already referred to. In 1897, the time spent in St. John amounted to thirteen or fourteen weeks. At this time two of his sons were married and lived in houses of their own, in St. John, and the elder daughter was married and lived in Scotland. The other children were living in the original family residence or were at school. From the testimony of Mr. Jones and his son Keltie, before the appeals committee of the Common Council, it appears that the St. John establishment was maintained partly by the members of the family residing in it who were carrying on business for themselves in St. John, and partly through gifts of money by Mr. Jones.

When he left St. John in 1893, he was a director of the Bank of New Brunswick, a local institution, and continued such until his resignation in February, 1898. On his visits to St. John he regularly attended the board meetings, but the business of the board formed no part of his object in visiting the place. In 1897 the number of these attendances was thirty-one, the allowance for which was $4 for each meeting.

He has never been personally taxed in any way in New York, and has taken no part in its municipal affairs.

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In his examination before the committee of the Common Council, Mr. Jones was questioned by the respondent as to his intentions, and he testified that since leaving in 1893, he always had the settled intention of not again returning to St. John to reside, and that his intention was to remain in New York indefinitely, although prior to 1898 (at which time he was giving his evidence) he had thought that he might yield to pressure from his daughter in Scotland and go there when he should close up his business, but that he had since abandoned the idea.

In *Thorndike* v. *Boston* (1), a case, like this, of municipal domicil for taxation purposes, Shaw C.J. says:

> The questions of residence, inhabitancy or domicile,—for although not in all respects precisely the same, they are nearly so and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances; but, from the whole taken together, it must be determined in each particular case. It is a maxim, that every man must have a domicile somewhere; and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and, *vice versâ*, by acquiring a new domicile, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question.

And in *Lyman* v. *Fiske* (2), the same learned judge says:

> It is manifest that it (habitancy) embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case, the mere declaration of the party made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale.

While the circumstance is not conclusive, it is held in *Platt* v. *Attorney General of New South Wales* (3) that:

(1) 1 Met. 242. (2) 17 Pick. 231.
(3) 3 App. Cas. 336.

It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up.

As to inferences from the mode of living, Lord Chelmsford in *Moorehouse* v. *Lord* (1) says:

In a question of change of domicile, the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired.

And in *Guier* v. *O'Daniel* (2) it is said:

The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicile.

In *Aikman* v. *Aikman* (3), Lord Wensleydale says:

I do not say that in order to obtain a domicile in a country, a man must necessarily have a house of his own and reside in it. Circumstances may be so strong as to shew a fixed purpose of abandoning his own country and making his home in another, and to shew also the accomplishment of that object, though he lives in inns or temporary lodgings, but such cases are rare.

And in the same case Lord Cranworth says:

I will not say in point of law that a person may not acquire a domicile by residence at a hotel; but it can rarely happen, as a matter of fact, that such residence is intended to be of a permanent character.

It is however to be borne in mind that in recent times a practice of living in hotels has become more common than formerly, especially upon this continent.

In *Udny* v. *Udny* (4), Lord Westbury says on the general subject:

Domicile of choice is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.

There must be therefore, as so frequently expressed, both the fact of residence, and the intention to so reside for an unlimited time. The fact and the intention must concur, and both, therefore, are relevant facts to be proved by appropriate evidence.

(1) 10 H. L. Cas. 272.
(2) 1 Binn. 349 note.
(3) 3 Macq. H. L. 854.
(4) L. R. 1 H. L. Sc. 441.

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King J.

In *Thorndike* v. *Boston* (1), already referred to, the plaintiff had gone from Boston to Scotland and the following direction was held to be correct:

That if the jury were satisfied that the plaintiff went abroad, not for the mere purpose of travelling, or for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live in the event of his return to the United States, then he ceased to be an inhabitant of Boston liable to taxation.

The circumstances chiefly militating against the acquisition of a domicile in New York by Mr. Jones, are two, his mode of living there, and the facts in connection with the maintenance of the family home in St. John. The materiality of these circumstances lies in their bearing upon the question of his intention to make a permanent, or indefinitely continuing, home in New York.

As to the first two things are to be taken into account, the continuance of the hotel life for a period covering five years, and the fact that Mr. Jones was a widower. And as to the second, the facts are to be regarded in the light of Mr. Jones's open and avowed purpose to divest himself of all proprietary interest in the house at St. John and its furnishings, and fall short of proving that he maintained the establishment.

The case presented upon the evidence is similar to that instanced by Chief Justice Shaw, of Massachusetts, in *Lyman* v. *Fiske* (2), where in a case of nicely balanced circumstances the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, was considered to be sufficient to turn the scale. Here we have explicit and repeated declarations of Mr. Jones, before the making of the assessment in question, which can leave no reasonable doubt as to his inten-

(1) 1 Met. 242. (2) 17 Pick. 231.

tion to abandon St. John as a place of residence and to make his home in New York (irrespective of whether he succeeded in the eye of the law in accomplishing it). His entire good faith in making the declaration has not been, and can not well be, impugned. We have therefore the fact of a long continued actual residence in New York as his chief place of abode, coupled with an avowed and *bonâ fide* intention to make it his home permanently, or, at least, for an indefinite time, and his fixed determination not to return to St. John to reside. There was, consequently, the acquisition of a new home or domicile, and the abandonment of the former one within the meaning of the Act.

As to Mr. Jones's attendance at the meetings of the Board of Directors of the Bank of New Brunswick, in 1897, while temporarily sojourning in St. John, this seems to be relied on merely as a circumstance tending to shew that there had really been no change of domicile. As such it is without real significance.

The result is that the appeal is to be allowed, the order appealed from set aside and a ru e to be entered in the court below granting the writ of certiorari.

Appeal allowed with costs.

Solicitor for the appellant: *L. A. Currey.*

Solicitor for the respondent: *C. J. Coster.*

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*Nov. 6, 7.

*Nov. 29.

JOHN R. HANDLEY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES ARCHIBALD (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Partition of land—Tenants in common—Statute of limitations—Possession.

Under the Nova Scotia Statute of Limitations (R. S. N. S. (5 ser.) ch. 112) a possession of land in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute it to the person having title.

Possession by a series of persons during the period will bar the title though some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 1) affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the defendants.

To an action by the plaintiff, Charles Archibald, for partition of lands in Cape Breton, three of the defendants pleaded the following defence among others:

" 2. As to the said first and second paragraphs, these defendants say that by deed dated the 4th day of December, 1839, and recorded in the Registry of Deeds for the County of Richmond, the said land and premises were

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

(1) 32 N. S. Rep. 1.

conveyed to said Charles D. Archibald and George Handley, both since deceased, by Felix Calvert Ladbroke and John Wright, trustees of the said General Mining Association, Limited. That George Handley, upon the execution of said deed took possession of said lands and has continued in undisputed and exclusive possession of said lands thence until the time of his death, and from the date of his death until the commencement of this action the defendants herein, or some of them, as the heirs of said George Handley, continued in such undisputed and exclusive possession and plaintiff's claim to said lands and premises, or to the moiety or any part thereof, if he has any, which defendants do not admit is barred by the Statute of Limitations, chapter 112 of the Revised Statutes of Nova Scotia, fifth series, intituled 'Of the Limitation of Actions.'"

The action was tried out on this defence which was established in the opinion of Mr. Justice Henry, the trial judge, and judgment entered for the defendants thereon. This judgment was reversed by the full court and an order made for partition of the lands.

The evidence given on the issue above stated is fully set out in the judgment of His Lordship the Chief Justice.

Harrington Q.C. for the appellant. Neither the respondent nor any one through whom he claims, has ever been in possession, either actively or constructively, of any part of this property.

The distinction drawn by Mr. Justice Gwynne in *McConaghy* v. *Denmark* (1) at page 632, has been disregarded by the majority of the court below, and the two cases mentioned have been confounded. They required the defendant to make out the same case against the plaintiff, as if he himself were bringing

(1) 4 Can. S. C. R. 609.

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ejectment against the tenants whom he put in possession.

The Statute of Limitations (1) began to run as against respondent in 1861, when Charles D. Archibald was last in Nova Scotia. It has retroactive operation, and makes the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from 1886, the time of the passing of the statute. See *Culley* v. *Doe d. Taylerson* (2); *Doe d. Holt* v. *Horrocks* (3); *O'Sullivan* v. *McSwiney* (4).

The recovery in ejectment, in 1868, by George Handley and Charles Archibald, is irrelevant. John R. Handley, one of the present defendants, was a part owner along with his father, George Handley, of the land in dispute, but he was not a party to the ejectment suit and consequently it could not affect his rights. The lands cannot be identified from the descriptions given, and a recovery in ejectment (even if of the very land in dispute) is not equivalent to possession in Archibald. It is merely a declaration that the plaintiffs are entitled to the possession and enabled them to enforce such right by taking possession.

As to estoppel, the parties here are not the same as in the Exchequer Court, nor is the present action brought with respect to the same subject matter; Taylor on Evidence, sec. 1695; and the point decided in the Exchequer Court has nothing to do with the issue in the present action. No question of title was raised there, but the point decided was as to shares in a sum of money paid into court as compensation for land expropriated. See *Smith* v. *Royston* (5);

(1) R. S. N. S. (5 ser.) ch. 112, secs. 9 & 17.
(2) 11 Ad. & E. 1008.
(3) 1 Car. & Kir. 566.
(4) Longf. & T. 111.
(5) 8 M. & W. 381.

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Hunter v. *Birney* (1); *Outram* v. *Morewood* (2). In the Exchequer Court action the present defendants did not appear. *Howlett* v. *Tarte* (3). A judgment by default cannot work an estoppel. *Attorney-General* v. *Eriché* (4); per Lord Hobhouse at page 523. See also *The Duchess of Kingston's Case*, (5) where it is laid down that in order to establish the plea of *res judicata*, the court, whose judgment is invoked, must have had jurisdiction and have given judgment directly upon the matter in question, but that if the matter came collaterally into question in the first court, or were only incidentally cognizable by it, or merely to be inferred, the judgment is not conclusive.

Newcombe Q.C., (*Kenney* with him), for the respondent. The plaintiff shows a good paper title to the interest of C. D. Archibald as tenant in common of the lands in question. The burden is on the defendants to establish that the Statute of Limitations is a bar to this title. They defend as to the whole of the land. If they intend to claim part only they should have limited their defence in the manner prescribed by the rules.

John R. Handley had no possession upon which to found the defence of the Statute of Limitations He was only two or three times at the place in all these years, and never lived there. He never received any rents or profits for the use of the land from any person. The possession by the tenant Matheson enured to the benefit of George T. Handley's heirs, not to the benefit of John R. Handley.

The proceedings in ejectment, in 1866, and judgment in 1868 in favour of C. D. Archibald and George Handley, for the recovery of the lands for which partition is sought herein, constitute an acknowledge-

(1) 27 Gr. 204.
(2) 3 East 346.
(3) 9 W. R. 868.
(4) [1893] A. C. 518.
(5) 2 Sm. L. C. 10 ed. 713.

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ment of C. D. Archibald's title. The declaration was an admission of the joint title of the plaintiffs, and the solicitor who signed it was the agent of both, to make it and to receive it; *Goode* v. *Job* (1). But even an unsigned acknowledgement may interrupt the operation of the statute; *Phillipson* v. *Gibbon* (2); and Handley could not have joined Archibald as plaintiff without his consent. See also *Dixon* v. *Gayfere* (3).

The ejectment proceedings are proof of a resumption of possession, and that there was, at that time, no dispossession of C. D. Archibald or discontinuance of possession by him. Handley could not say that he was in possession for his own benefit after joining Archibald as plaintiff. See also *McKeen* v. *McKay* (1).

Chap. 12, Nova Scotia Statutes, 1866, assimilates the law to that of England with regard to limitations of real actions, and sec. 9 makes the possession of tenants in common separate. Therefore, unless George Handley had a title to the common lands in 1866 by adverse possession, it was still open to C. D. Archibald to bring his action any time before 1871. No such title had been acquired in 1866; Handley had not been in possession; and, moreover, C. D. Archibald was under the disability of absence from the province down to 1861. C. D. Archibald's right of action therefore accrued in 1871. He was then under the same disability of absence from the province, which continued until his death between 1871 and 1875, when the right of action passed to his heirs, who would have ten years from his death within which to bring their action. R. S. N. S. (5 ser.) ch. 113, sec. 10. But the heirs were under the same disability, themselves, at this time as sec. 18 of the Imperial Act is omitted from the Nova Scotia Act, as well as sec. 34 of that

(1) 28 L. J. Q. B. 1.
(2) 6 Ch. App. 428.
(3) 17 Beav. 421.
(1) Russ. Eq. Dec. (N. S.) 121.

Act, barring the title of the person out of possession after the expiration of the statutory period. The disability of the heirs, tacked to the disability of the deceased, brings us down to the spring of 1877, and this action was begun in 1896, within the period of twenty years after the disability had ceased and their right of action first accrued.

Receipt of half of the award for the land expropriated by Archibald prevented the bar of the statute, and the decree of the Exchequer Court is a judgment *in rem* and also estops the defendants from setting up the Statute of Limitations as a defence to this action.

This is not an action for the recovery, but for the division of land, and therefore the Statute of Limitations does not apply.

THE CHIEF JUSTICE.—This appeal entirely fails. The Statute of Limitations is sufficiently pleaded by the second paragraph of the statement of defence. This mode of pleading is considered sufficient to entitle a defendant to set up the Statute of Limitations in an action for the recovery of real property in England (1); and I see no reason why it should not also suffice in Nova Scotia. Moreover, no objection as to the sufficiency of the pleading appears to have been raised either at the trial or on appeal to the Supreme Court, *in banc*, and under these circumstances I would not in any case at this stage give effect to such a point.

I assume in the appellant's favour, without meaning to decide it, that the Statute of Limitations is a good defence to an action for partition.

The question of the disabilities of Charles Dickson Archibald and his co-heirs need not in the view I take be considered, and we are therefore relieved

(1) See Bullen & Leake's Precedents, 5 ed. 1897, p. 921; Odgers on Pleadings, 3 ed. p. 200.

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from pronouncing any opinion on the important question alluded to in the argument regarding the effect of the Nova Scotia Statute of Limitations (R. S. N. S. 5 Ser. ch. 112), in the case of a succession of disabilities, the 19th section of that Act providing for the case of disabilities not being accompanied by any such provision as that contained in the 18th section of the English statute 3 & 4 Wm. 4 ch. 27, enacting that there shall be no succession of disabilities.

Nor is it requisite to adjudicate upon the effect of the omission from the statute governing this case, of any re-enactment of the 34th section of the English Act by which it is declared that at the end of the period of limitation the right of the party out of possession shall be extinguished.

Further upon the English and Irish authorities we may take it as established law that the 17th section of the statute has a retrospective application, that is to say, that it applies to non-adverse possession by one tenant in common to the exclusion of the co-tenants before the passing of the Act.

I merely refer to all these points which underwent more or less discussion at the argument to shew that they have not been overlooked but are considered irrelevant in the view now taken of the case.

This action was commenced in August, 1896. In 1868 there was a judgment in an action brought for the recovery of the land in question by Charles Dickson Archibald and George Handley against one Morrison whose defence was limited to a certain part of the lands. The entry of the judgment, however, appears to be general, but whether it is so or not makes no difference. It is clear that if Charles Dickson Archibald had at the date this judgment was signed on the 3rd July, 1868, actually entered into possession of any part of these lands, no one else being

then in actual possession of the residue, his entry and possession would be referred to his then existing title as a tenant in common with George Handley. The recovery in ejectment therefore conferred a right of entry, and the time from which to compute the running of the statute is therefore subject to what is said hereafter to be taken to be July, 1868. Whatever doubts there may have been having regard to the language of the Act, when the statute 3 & 4 Wm. 4 was first passed, it is now elementary law that the statute does not run against a party out of possession unless there is a person in possession; *Smith* v. *Lloyd* (1); *McDonnell* v. *McKinty* (2); and further, if there has been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity in such case the bar of the statute is complete, but if there has been any interval between the possession of such persons then inasmuch as during that interval the law refers the possession to the real owner having title, the benefit of the former possession of a precedent wrongdoer is lost to a trespasser who subsequently enters, in whose favour the statute consequently runs only from the date of his own entry. *The Trustees Agency Co.* v. *Short* (3). And this rule is not affected by the old common law principle that in case of disseisin there could be no remitter without actual entry inasmuch as the statute does not deal with feudal possession or seisin but with actual or constructive statutory possession as distinguished from seisin.

Then what we are called upon to do here is to apply the statute to the undisputed facts as they appear in the record before us. In doing this it may be premised that the onus of proving that the possession has been

(1) 9 Ex. 562.
(2) 10 Ir. L. R. 514.
(3) 13 App. Cas. 793.

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such as to entitle them to the bar of the statute, is upon the appellants who have pleaded the defence.

There can be no question upon the concessions and admissions of the parties that George Handley senior, and Charles Dickson Archibald, were originally tenants in common of the land in question, and whatever their rights as between themselves and as affected by the statute of limitations might have been before 1868, as to which it is not material to inquire, Charles Dickson Archibald must be considered as having acquired a new right of entry on the 3rd of July, 1868, from which time at the earliest the statute could have begun to run against him. It is therefore incumbent upon the appellants to make out that for twenty years subsequently to that date Charles Dickson Archibald (who is said to have died in 1875) and his heirs at law were continuously out of possession, whilst the defendants who plead the statute either by themselves or those claiming under them, or those whose possession they were entitled to join to their own, were in continuous possession. Then what are the facts relating to this possession which we find in evidence? In 1868 George Handley, the younger, was in possession, and he died in that year, upon which his father, George Handley, senior, the co-owner with George Dickson Archibald, of the property, is said to have taken possession. In 1870, George Handley, the father, died intestate, leaving as his co-heirs at law his sons John R. Handley and William Handley, and the children of his two daughters Mary VanBuskirk and Theresa Jane Hay. The appellant, John R. Handley, does not pretend ever to have been in actual occupation of the property himself; the most that he can claim is that he was after his father's death in constructive possession by his tenant, one Matheson, who left in 1881, after, as John R. Handley says, having

been in possession for ten years. In giving this evidence dates are loosely referred to, and there is no pretence of stating with accuracy the exact date of the lease for three years to Matheson, and the exact date at which the latter gave up his overholden possession. The party who relies solely on his own testimony to establish his case cannot complain if he is held strictly to what he says in reference to the dates. He says:

My father who died in 1870, occupied after George's death.

Then he adds:

After my father's death I gave Matheson a lease of the place for three years. My mother and sister were aware that I had taken control of the property. I continued to look after the place up to the present time. Matheson remained there about ten years paying rent; $100 expended on the property. When Matheson left in April, 1881, he gave the keys under my instructions to my brother William who has since till now lived in the house. I don't know that Matheson gave the keys to my brother William—William pays no rent—I just allow him to occupy.

This being the testimony of the appellant himself we must assume he states the facts in his own favour as strongly as the truth justifies.

Then on his own shewing there has been no such possession as is required to warrant the bar of the statute in his favour. First, there must have been an interval between the death of George, the father, in 1870, and the entry of Matheson as a tenant under the appellant John R. Handley, for Matheson after a holding of ten years gave up possession in 1881; his occupation must have commenced in 1871, and there was therefore a gap or interval between the father's death and Matheson's possession of one year or thereabouts during which no one was in possession, and whereupon the possession would have been attributed by the law to the parties having title, namely the co-heirs of Charles Dickson Archibald and the co-heirs of John R. Handley.

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Then the new date for the running of the statute would have been fixed on Matheson's entry in 1871. Is it then shewn that the appellant had twenty years possession from that date, the spring of 1871? The answer must be certainly in the negative. William Handley who was one of the co-heirs of his father and who is a defendant in the present action, is said by the appellant to have been in possession from the date of Matheson's departure until action brought; he had of course an interest in the land as one of the co-heirs of his father; his possession did not under the present law enure to the benefit of his co-heirs, and upon the evidence it is impossible to attribute it to any holding or tenancy under the appellant John R. Handley. The latter says first that the keys were given up by Matheson to William, afterwards he says he does not know whether Matheson did give William the keys or not. There is therefore nothing in this shewing privity between William and the appellant John R. Handley. Then he says William paid no rent, "I just allow him to occupy." This does not prove that William is a tenant under John R. Handley. We must therefore attribute William's possession to his own title as one of the co-heirs, and this being so there has been no possession which would entitle either the appellant John R. Handley or the VanBuskirks who alone have pleaded the statute to the benefit of that defence. The defendant William Handley has not set up the statute nor relied on it as a defence.

I forbear from saying anything about the evidence as to the area of possession inasmuch as in the view I take it is not necessary to refer to it.

I think the Exchequer proceedings have no bearing on the case. The money which represented the land taken by the Crown by way of expropriation, was not received until after this action was brought, and if a

title had then accrued under the statute, a subsequent entry or receipt of profits (and the receipt of the money could have no greater effect than this) would not revive the statute-barred title if one there had been.

The appellants are entitled to an account of and allowance for the improvements made by them or any of them, but if they insist on such an account they must also themselves account for the rents and profits received by them or for an occupation rent and that at the improved value. The case for an account of the improvements is made by the added defence, and it is also claimed in the appellant's factum. The law on this head appears clear. An action cannot be maintained by one tenant in common against another for the value of improvements alone. But in a partition action in equity such an allowance was always made. *Pascoe* v. *Swan* (1); *Gibbons* v. *Snape* (2); *Crowther* v. *Crowther* (3); *Teasdale* v. *Sanderson* (4); *Griffies* v. *Griffies* (5).

The judgment must be varied accordingly if the parties elect to take the account. This however cannot be permitted to affect the costs. The whole contention has been upon the Statute of Limitations and upon that the appellants fail and must pay the costs. Therefore subject to the variation indicated (if insisted on) the appeal is dismissed with costs.

GWYNNE J.—This is an action instituted under the provisions of ch. 122 of the Revised Statutes of Nova Scotia, 5th series, for partition of an estate called the St. Peter's estate, situate in Cape Breton, whereof one Charles D. Archibald and one George Handley, in their lifetime, now deceased, were seized in fee, in equal

(1) 27 Beav. 508.
(2) 1 DeG. J. & S. 621.
(3) 23 Beav. 305.
(4) 33 Beav. 534.
(5) 8 L. T. N. S. 758.

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moities as tenants in common, the plaintiff claiming that the moiety whereof Charles D. Archibald in his lifetime was seized is now vested in the plaintiff, and that the moiety whereof the said George Handley was seized is vested in the defendants as his heirs at law. By the said ch. 122 it is enacted that a petition for partition shall be filed in the same manner as a declaration in ordinary cases, and that the defendants may plead thereto either separately or jointly

any matter tending to show that the petitioner ought not to have partition either in whole or in part and the replication and further proceedings shall be conducted as in other actions until issue is joined which shall be tried as in other actions.

And it is thereby further enacted that if a defendant shall make default in appearing and answering the petition

a rule that partition shall be made shall pass, but the court shall have the same right of setting aside defaults and of granting new trials as in other cases.

Now to the petition in this case all the defendants except John R. Handley and George E. VanBuskirk have suffered judgment to be entered against them for default, and the said John R. Handley who is one of the children and one of the heirs at law of the said George Handley and George E. VanBuskirk who is a son of a deceased sister of the said John R. Handley have joined in pleading the defence following:

These defendants say that by deed dated the 4th day of December, 1839, and recorded in the Registry of Deeds for the County of Richmond, the said lands and premises were conveyed to said Charles D. Archibald and George Handley, both since deceased, by Felix Culvert Sudbroke and John Wright, trustees of the said General Mining Association, Limited; *that George Handley upon the execution of the said deed took possession of said lands and has continued in undisputed and exclusive possession of said lands thence until the time of his death, and from the date of his death until the commencement of this action the defendants herein or some of them as the heirs of the said George Handley continued in such undisputed and exclusive possession,*

and they conclude this plea by insisting that by reason of the matters alleged therein the plaintiff's claim to the said lands and to the moiety or any part thereof is barred by the Statute of Limitations. The plaintiff joined issue upon the above plea and put the defendants pleading that defence upon the proof of the matters as therein pleaded, and the question is: Have they succeeded in establishing the truth of the plea? the only evidence in support of which was given by John R. Handley himself upon two occasions.

1st. In 1894 upon an information which had been filed in the Exchequer Court by the Dominion Government against the now plaintiff and defendants and others, such others being persons who claimed title adversely to the now plaintiff and defendants, for the purpose of determining the right and title of the Dominion Government to a piece of the said lands whereof the said Charles D. Archibald and George Handley in their lifetime were seized in fee as tenants in common and which had been in December, 1875, entered upon and taken by the Dominion Government for the enlargement of the St. Peter's Canal in Cape Breton and for the purpose also of determining what amount should be paid by the Government for the piece of land so taken, and to whom and in what proportions the same should be paid, the evidence given upon inquiries made by order of the Exchequer Court in the matter of the said information having by consent of the parties been taken and read as evidence in the present suit; and secondly, upon the oral examination of the said John R. Handley upon the issue joined between him and the plaintiff in the present suit.

In his evidence in the proceedings in the Exchequer Court taken in 1894 he stated that his brother George in 1840 settled where the land which was taken by the Government in 1875 for canal purposes was situate;

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that he carried on there a country store and ship-building business continuously from 1840 until some time in 1868 when he went to the West Indies where he died in that year; that he had a dwelling house, barn and store and a field of about four acres enclosed round the store and house which he occupied in addition to the 2½ acres which was taken for the enlargement of the canal in 1875. He also said that another brother (the defendant to this suit, named William) had in George T. Handley's lifetime a store on the piece taken by the Government in 1875, and that after the death of his brother George T. he continued in occupation thereof until the piece was taken by the Government in 1875, and that William also in 1872 or or 1873 erected another store on a site where his brother George T. Handley in his lifetime had a store which had been burned down. He further said that on the death of his brother George T., one Matheson who had been his brother George's clerk and who had been left in possession by George when he went to the West Indies continued in occupation of the premises which had been occupied by George in his lifetime; that he, John R. Handley was his brother George's administrator, and that Matheson occupied under him from 1868 to 1878; and he said finally that his father died in 1870 intestate.

In his evidence upon the trial of the issue in the present case he gave evidence to the like effect with the following differences however. He said that

his father who died in 1870 occupied the property after George's death.

The only evidence which he gave of the fact or of the nature of such occupation was that he said

his father lived in Halifax and went down nearly every summer.

He said further that after his father's death he gave

Matheson a lease of the place for three years—but that Matheson remained there for ten years—that

he made his first agreement with Matheson intending to act as George's administrator which he was.

He said further that Matheson left in 1881 and that when he left he, John R. Handley, told him to give the keys to William Handley.

Here it may be observed that in his evidence in the proceedings upon the information in the Exchequer Court there is no mention made of their having been more than one agreement between John R. Handley and Matheson for the occupation of any part of the premises by the latter, nor of there having been any agreement or lease for three years, but John R. Handley then stated that after the death of his brother George, his clerk Matheson occupied the premises which George in his lifetime had occupied until 1878 under lease from him, John R. Handley, who was his brother George's administrator. Then as to his having directed Matheson to give the keys to William when leaving, that is wholly irrelevant for there is no evidence that they were so delivered. The only evidence of William having ever had possession of any part of the premises in question is that of the defendant Van-Bruskirk who said that he

saw William in possession of the house and property the winter before last,

that was the winter of 1896 and 1897, and the house and property alluded to, plainly to the house and property which George T. Handley had occupied in his lifetime, but there is no evidence whatever as to the time when William did enter upon such possession nor how long he continued therein. It may be true that William did at some time or other enter into possession of some part of the premises in question which might have matured into a title in himself in fee in the part

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so possessed by him by virtue of the Statute of Limitations, but there is no evidence upon such a point even if it were admissible under the issue joined, and we have evidence upon the record that William has suffered interlocutory judgment to go against him by default in the present suit. John R. Handley in his evidence given at the trial of this case also said that one R. G. Morrison, (but when he did not say,) disputed one of the boundary lines of the premises in question and erected a building thereon and was ejected under a suit brought by Archibald and Handley. The record in that suit has been produced in evidence and thereby it appears that on the 23rd day of August, 1866, Charles D. Archibald and George Handley as plaintiffs in an action of ejectment theretofore brought by them in the Supreme Court of Nova Scotia recovered a judgment against Roderick G. Morrison, the defendant in the said action for his withholding from the said plaintiffs therein the possession of the lands covered by a description specially set out in the declaration filed in the said action which description included within its bounds the whole of the lands aforesaid whereof the said Charles D. Archibald and George Handley were seized in fee as tenants in common and to recover possession of which from the said Roderick G. Morrison they brought their action.

The Nova Scotia Statute of Limitations which adopted the provisions of the Imperial Statute, 3 & 4 Wm. IV, ch. 27, was passed in 1866 and is now ch. 112 of the Revised Statutes of Nova Scotia, 5th series; and the 17th section of that Act is taken verbatim from the 12th section of 3 & 4 Wm. IV, ch. 27. Now by that Act to enable one tenant in common to divest his co-tenant in common of the latter's share of the estate held in common, he must be in actual pos-

session or receipt of the entirety or more than his own undivided share of the lands held in common, or of the profits or rent issuing therefrom either for his own benefit or for the benefit of some other person than his co-tenant in common. Thus if A. and B. be seised of an estate in fee as tenants in common in equal moieties, and A. enters upon and takes possession of a part or the rents and profits issuing therefrom, B.'s right to his undivided moiety in the residue remains undisturbed. *Murphy* v. *Murphy* (1).

Now there is not a particle of evidence that either the co-tenant, George Handley, in his life time, or any person as his heir at law or as one of such heirs or otherwise was since his death in possession of any part of the lands held by the common title, outside of the 6½ acres of which George T. Handley died possessed in 1868. No rents or profits of any kind whatever appear to have ever issued out of such lands outside of the said 6½ acres, and as to them the evidence is that George T. Handley was the person in possession of them from his entry in 1840 until his death in 1868, it may have been with his father's consent, but in the absence of any written title from his father, and drawing the proper inference from the facts stated in evidence, plainly for his own use and benefit and sufficient to make his possession such a one as would in progress of time mature into a title in him in fee by virtue of the Statute of Limitations. There is no evidence whatever that George's possession was merely that of the father who never appears to have interfered in the premises, or to have gone near them from Halifax, where he lived, more than "*nearly every summer*," and then probably to pay a visit to his son George, who was living there and carrying on the business there of a country store, and shipbuilding for his own benefit.

(1) 15 Ir. L. R. (N. S.) 205.

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The evidence certainly shows nothing to the contrary. John R. Handley's interference with these 6½ acres upon his brother George's death in 1868, (to draw a proper inference from his own evidence), is, I think to be attributed to his assuming to act as his brother George's representative, in which character also Matheson's possession of what George T., in his lifetime had occupied, less the 2½ acres taken for the canal in 1875, under John R. Handley until 1878, must I think be regarded.

This is the view which I take of the evidence apart from consideration of the action of ejectment brought against Morrison wherein judgment was recovered against him in August, 1866. That judgment however is, in my opinion, conclusive that the plea of John R. Handley and George E. VanBuskirk cannot be maintained for the foundation upon which the superstructure of a title by the Statute of Limitations is erected falling, the whole superstructure evidently falls to the ground. Upon the pleadings in that action it appears upon record that Charles D. Archibald and George Handley declared against Roderick G. Morrison as a person charged by them to be in possession of the whole of the lands in question in the present suit, and with withholding such possession from them, and that they claimed to be entitled to recover such possession and evict Morrison therefrom, and did by the judgment of the court recover judgment to that effect. The significance of that judgment in the present case is this that the heirs at law of George Handley cannot be permitted now to allege and contend that the admission on record made by both of the tenants in common joining in the said action that Roderick G. Morrison was in possession of the whole of the premises in question, and was withholding possession from the plaintiffs who

claimed title thereto, and the judgment in the said action for the recovery of possession by the plaintiffs and the eviction of Morrison therefrom were altogether erroneous, and that in point of fact George Handley, one of the said plaintiffs, was himself then in actual possession of the whole of the said lands and premises for his own benefit to the complete exclusion of the co-tenant in common, and was then acquiring in himself an absolute title in fee simple in the premises in absolute defeasance of the title of his co-tenant.

There is no evidence whatever of an entry upon, or possession taken of, any part of the premises in question by George Handley, or indeed by any person whomsoever since the recovery of the judgment for the eviction of Morrison in August, 1866, upon which any title, as acquired by the statute, could be pleaded. Now the plea which has been pleaded, and which if not proved must wholly fail, is one of an absolute indefeas.ble estate in fee simple in the moiety admitted to have been formerly vested in Charles D. Archibald, but now alleged to be vested in the heirs at law of George Handley, deceased, of whom the defendant John R. Handley is one, in virtue of the Statute of Limitations having operated as is alleged upon an actual, undisputed, possession of the whole of the estate held in common, taken as is alleged by the co-tenant in common, George Handley, in 1839, and the constant continuance of that possession by the said George Handley until his death, which occurred in 1870, and the continuance of such possession in his heirs upon and ever since his death, until the commencement of this suit. That the defendants have failed to establish the truth of this plea, must in my opinion be held upon the same principle that the defendants in *McConaghy* v. *Denmark* (1) failed to establish their plea of *liberum tenementum*.

(1) 4 Can. S. C. R. 609.

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In that case to an action of trespass *quare clausum fregit* the defendants pleaded *liberum tenementum* in themselves by title derived from M. & L. McConaghy. Having failed to prove a paper title they insisted upon what they contended shewed continual visible possession by themselves and those with whom they claimed to be in privity for a period exceeding twenty years, but it was held that they could not succeed because the evidence failed to show a continuance of possession by persons holding in privity with each other for the necessary period, namely, for such a period as would entitle a plaintiff to recover in an action of ejectment under the provisions of the Statute of Limitations. There the difference is pointed out between the title of a person defending his possession in an action of ejectment and of a person bringing an action of ejectment to recover possession of land the title to which was acquired only by force of the Statute of Limitations. Now in a special plea of title as in the present case where the pleading defendants have assumed the burthen of proving title as pleaded, if they fail in any particular they must fail altogether, for the plaintiff has proved priority of estate with Charles D. Archibald, whose title is admitted on the record unless it has been extinguished and transferred to his co-tenant in common and his heirs in severalty by the title as pleaded. The pleading defendants have in my opinion for the reasons given wholly failed to establish their plea, and the appeal therefore in my opinion must be dismissed with costs.

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

Appeal dismissed with costs.

Solicitor for the appellants: *C. P. Fullerton.*

Solicitor for the respondent: *Joseph A. Gillies.*

THE PROVINCE OF QUEBEC.. .....APPELLANT; 1898

AND *Oct. 7.

THE DOMINION OF CANADA.....RESPONDENT.

IN THE MATTER OF

THE ARBITRATION BETWEEN THE DOMINION OF CANADA AND THE PROVINCES OF ONTARIO AND QUEBEC.

In re INDIAN CLAIMS.

ON APPEAL FROM AN AWARD OF THE ARBITRATORS.

Treaties with Indians—Contingent annuities—B. N. A. Act. (1867) *sec.* 112—*Debts of late Province of Canada—Res judicata.*

The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late Province of Canada mentioned in the 112th section of the British North America Act, 1867.

Held, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *The Attorney-General of Canada* v. *The Attorney-General of Ontario* ([1897] A. C. 199), and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities.

APPEAL on behalf of the Province of Quebec from the award of the Arbitrators made on the 7th of January, 1898, in the matter arising out of the Huron and Superior Treaties with the Ojibeway Indians

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

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maintaining the claim of the Dominion of Canada against the Provinces of Ontario and Quebec conjointly for $95,200, arrears of augmented annuities, with interest to 31st December, 1892, under the said treaties from the year 1867 to the year 1873, and the further sum of $389,106 80, amount of increased annnuities over the fixed annuities, with interest to 31st December, 1892, paid by the Dominion to the said Indians since the year 1874.

The arbitrators found "that in ascertaining and determining the debt of the Province of Canada mentioned in the 112th section of the British North America Act, 1867, the contingent obligation devolving upon the Dominion of Canada to pay the increased annuities mentioned in the Robinson Treaties of the 7th and 9th of September, 1850, and any increased annuities which have become due to the Indians since the 1st day of July, 1867, up to and including the 31st day of December, 1892, shall be taken into account and included in such debt."

Trenholme Q.C. for the appellant. No such award ought to have been made against the Province of Quebec, which ought not to bear any part of the increased annuities in question.

In the former appeals before this Court and the Privy Council (1) the question was whether or not Ontario took the lands acquired from the Indians under the Robinson Treaties subject to a trust or interest in favour of the Indians which imposed on Ontario alone the payment of the annuities. See remarks by Lord Watson, in delivering the judgment of the Privy Council, at pages 208-211. The fact that the Dominion claimed against Ontario alone in the previous case, and now claims against both Quebec and Ontario,

(1) *The Attorney-General of Canada* v. *The Attorney-General of Ontario*; (1897) A. C. 199; 25 Can. S. C. R. 434.

shews that the present case is not *res adjudicata* in this matter against Quebec. The previous case was expressly confined to the question of trust or interest in the lands, and the question of the joint liability of Quebec was not argued before the arbitrators, but was reserved for future action by the Dominion. The treaty provided that the Government which was to pay the increased annuities would only be liable to do so from time to time in the event of its receiving increased revenues from the lands. Quebec is now asked to pay increased annuities without receiving any revenue whatsoever, and the position is that the greater the revenue to Ontario the greater is the loss to Quebec. This may continue for an indefinite time and to an indefinite amount. Quebec does not and cannot fall under the conditions of the treaty which imposed the increased annuities, and there was no intention or assent on the part of Quebec at confederation to being placed in that position.

It is consistent with section 91 of The B. N. A. Act that such a contingent and uncertain liability connected with the Indians fell upon the Dominion at confederation, and did not go to increase the surplus debt existing at confederation to be borne by these provinces. Section 111 of the B. N. A. Act in declaring that Canada should be liable, not simply for the "debts," but for the "debts and liabilities" of each province existing at the union had for its object and effect the imposing of such obligations upon the Dominion, and when by sections 112, 114 and 115 the word "debt" alone without "liabilities" is used in dealing with the subject of the public debt something different and more restricted is meant than by the use of the more comprehensive terms "debts and liabilities" in section 111. The term "and liabilities"

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added after the word "debts" means something and adds something, and should be so interpreted.

The surplus debt which Ontario and Quebec jointly assumed by section 112, is the surplus debt in actual existence at the time of the confederation, not something that may or may not arise in future out of transactions which the provinces previously entered into. See remarks by Mr. Justice Gwynne in the former case (1) at pages 520 and 523. As a matter of law the liability to pay these increased annuities for the years since Confederation was not a debt of the Province of Canada at that time. *Pothier*, Obligations No. 218. The award of 1870 dealt with the whole subject and does not support or contemplate imposing such a burthen on Quebec. So far as Quebec's liability for these annuities is concerned, it does not go beyond the inclusion in the debt of the late Province of Canada of the capitalized annuities granted for the Indian lands.

Hogg Q.C. for the respondent, was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—(Oral.) The arbitrators came to a proper conclusion as to the point which is now raised and their award ought not to be interfered with, more especially as in the judgment of the Privy Council in the case of *The Attorney-General for the Dominion of Canada* v. *The Attorney-General for Ontario* (2), their Lordships, though not expressly deciding the question, may, from their interlocutory observations during the course of the argument, be presumed to have had under consideration contingent annuities as well as those presently payable.

We must dismiss the appeal.

(1) 25 Can. S. C. R. 434. (2) [1897] A. C. 199.

GIROUARD J. stated that he did not take part in the judgment as there was a majority without him.

(His Lordship having formerly acted as counsel for the Province of Quebec, sat only by consent of the parties at the hearing of this appeal in order to form a quorum.)

Appeal dismissed.

Solicitor for the appellant: *N. W. Trenholme.*

Solicitor for the respondent: *W. D. Hogg.*

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THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

In re INDIAN CLAIMS.

THE TOWN OF RICHMOND (PLAINTIFF)..... } APPELLANT;

AND

JOSEPH L. LAFONTAINE AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

1899

*Oct. 11.

*Nov. 29.

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

Municipal corporation—Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 *C. C.*

A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it would, under the circumstances, be inequitable to rescind the contract.

Held further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default.

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

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THE TOWN OF RICHMOND v. LAFONTAINE.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Court of Review, at Montreal, which reversed the decision of the Superior Court, District of Saint Francis, in favour of the plaintiff.

The action was brought in 1892 for the annulment of a contract made in 1881 between the parties in relation to the construction of a system of waterworks in the Town of Richmond and prayed for the forfeiture of the works in default of their removal within ninety days and for $5,000 damages.

The circumstances under which the action was taken were as follows: In 1881 a contract was entered into between the plaintiff and the defendants by which the latter undertook to construct a system of waterworks and to furnish the Town of Richmond with a supply of water on certain conditions during a terms of years. This contract did not define any particular method of construction and there were no plans or specifications, but it was provided that the system of waterworks should be constructed within a specified time to the satisfaction of the appellant, and that, on default of the contractors to remedy defects within thirty days after notice, there should be a forfeiture of the works to the corporation or, at the option of the corporation, that the contractors might, on repayment of whatever money they might have received from the corporation, remove the works.

On the expiration of the time limited for the completion of the works in July, 1883, the works being still incomplete, the appellant served a written protest upon the contractors complaining of the imperfect, incomplete and unsatisfactory condition of the works in a general way and without specifying wherein any of the defects might consist but, notwithstanding the

protest, the appellants made use of the works for about nine years before commencing the action. The plaintiff complained in the action that the works had not been constructed in conformity with the contract and had not been completed in a satisfactory manner, that there was not a sufficient supply of good water provided, that the pressure was insufficient and that the contractors had failed to remedy the defects within the thirty days allowed by the contract after the signification of the protest. No special notice was given before the institution of the action.

By the judgment of the trial court the contract was resiliated and the works ordered to be removed. On appeal to the Court of Review the trial court judgment was reversed and the present appeal has been taken from the judgment of the Court of Queen's Bench affirming the judgment of the Court of Review.

H. B. Brown Q.C and *Lawrence*, for the appellant, cited *Brown* v. *Allan* (1); arts. 1065, 1067 C. C.; *Three Towns Banking Co.* v. *Maddever* (2).

Panneton Q.C. and *Belcourt Q.C.*, for the respondents, cited *Filiatrault* v. *Goldie* (3); *Prouty* v. *Stone* (4); *Bartley* v. *Breakey* (5); *Waterous* v. *Morrow* (6); Art. 1067 C. C.; 24 Demolombe, no. 491; 16 Laurent, no. 235.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of the opinion that this appeal must be dismissed. It would not be just and equitable now to rescind this contract after some fifteen years enjoyment by the appellant of the respondents' works and when the respondents can no longer be put

(1) Ramsay App. Cas. 144; Cass. Dig. (2 ed.) 146.
(2) 27 Ch. D. 523.
(3) Q. R. 2 Q B. 368.
(4) 18 R. L. 284.
(5) 11 Q. L. R. 1; 19 R. L. 556.
(6) Cass. Dig (2 ed.) 138.

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The Chief Justice.

in their original position. The respondents ought to have been put *en demeure*. It is impossible now after the long delay which has occurred since the protest of the 10th July, 1883, to give any effect to that act. It must by the subsequent acceptance and use of the waterworks by the appellant be deemed to have been waived.

I agree in the judgment of the Chief Justice of the Court of Appeal that the appellant should have given the notice required by the contract.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lawrence & Morris.*

Solicitors for the respondents: *Panneton & Leblanc.*

GEORGE S. BINGHAM AND ARTHUR J. SEGUIN (DEFENDANTS) ..... } APPELLANTS;

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*Oct. 25.
*Nov. 29.

AND

PETER McMURRAY (PLAINTIFF).....RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of patent—Future improvements.

By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent and paid a portion of the purchase, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account.

Held, reversing the judgment of the Court of Appeal, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that as the evidence showed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover.

Held further, Gwynne J. dissenting, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use.

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

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BINGHAM v. MCMURRAY.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Mr. Justice Ferguson at the trial in favour of the plaintiff.

The material facts are sufficiently indicated in the above note and fully stated in the judgment of Mr. Justice Gwynne.

Nesbitt Q.C. and *Biggar* for the appellants. The contract could only be satisfied by giving defendant a patent of the very article specified; even if something better is given it will not be sufficient. *Leigh* v. *Lillie* (1); Leake on Contracts (3 ed.) pp. 710 *et seq.* *Bowes* v. *Shand* (2).

Raymond for the respondent referred to *Carter* v. *Scargill* (3); *Vermilyea* v. *Canniff* (4).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Gwynne so far as relates to the principal action as to which the appeal must be allowed and the action dismissed with costs.

As regards the counter claim by which the appellants seek to recover the $750 paid when the Canadian patent was assigned to them, I am of opinion that the amount so paid cannot be treated as money had and received by the respondent to the use of the appellants, inasmuch as the appellants accepted the patent and must be considered to have waived all objections to it, as they have taken the benefit of it, have worked it for their own profit, and have sold rights under it. The counterclaim was therefore properly dismissed and the judgment appealed against must stand to that extent. In other respects the appeal must be allowed with costs.

(1) 30 L. J. (Ex.) 25.
(2) 2 App. Cas. 455.
(3) L. R. 10 Q. B. 564.
(4) 12 O. R. 164.

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BINGHAM v. MCMURRAY.

Taschereau J.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs, and the action dismissed with costs On the counter-claim, I am of opinion that the appeal should be dismissed.

GWYNNE J.—This is an appeal by the defendants from a judgment recovered against them by the plaintiff upon an agreement stated in his statement of claim, in virtue of which and of the alleged fulfilment by him of all the conditions which by the agreement were to be performed by him, he claims payment by the defendants of the sum of $2,250. To this action the defendants pleaded a general denial of the material allegations in the statement of claim and thereby cast upon the plaintiff the burthen of proving the fulfilment of all the conditions precedent to be performed to entitle him as averred to the payment of the said sum of $2,225, and they also counter-claimed for a sum of $750. To this counter-claim it is unnecessary at present to allude while I deal with the plaintiff's claim to recover the sum of $2,250, which claim raises just two questions—the first being as to the construction of the agreement, and the second, whether the plaintiff has shown the fulfilment by him of his part of the agreement, upon the fulfilment of which alone he could under the terms of the agreement become entitled to recover the sum demanded.

The agreement, as pointed out by Mr. Justice Moss in delivering the judgment of the Court of Appeal for Ontario, is certainly not drawn with that accuracy of expression which is usual in agreements for the sale of patent rights for inventions such as are in question. The agreement is plainly the work of an inexperienced draftsman, but nevertheless we can, I think, very clearly determine what is the true construction of the contract of the parties. The agreement bears date the

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7th day of July, 1897, and in its first sentence it recites that the plaintiff

> has applied *for a patent* and is the owner and *inventor of the same* for an acetylene gas machine for the Dominion of Canada for which a caveat has been granted.

This certainly is a very ill constructed sentence, and construed literally it contains a very inaccurate statement, for in point of fact the instrument itself further on shows that the plaintiff was not, nor did he claim to be, the inventor of an acetylene gas machine, nor had he applied for a patent for any such machine, nor filed a caveat specifying therein that he had invented such a machine. Acetylene gas machines were well known machines already in use as was well known to the plaintiff who in his caveat says:

> What I claim as my invention is *in* acetylene gas generators. 1st. The regulator F, with valve K operated by the spring X and catch N, acting automatically with the rise and fall of gas in the cap C, thus supplying just the right amount of water necessary to give a steady and practically uniform supply of gas.
>
> 2nd. The ball-cock V operating the lever V, and valve V, which shuts off the spray of water from the holes M, in combination with the regulator F, as above described.
>
> 3rd. The shaker F operated by the axis P, by partially revolving the lid D.
>
> 4th. The pail D in combination with the lid D having the receptacle D and elastic tube M, the pail D being easily removable as specified.

The caveat specifying these particulars as being the invention of the plaintiff was filed in the patent office in Ottawa on the 21st of June, 1897, and reference to it in the agreement of the 7th July, 1897, is plainly made, as it appears to me, for the purpose of identifying the invention in respect of which the parties were dealing; and its operation and effect, as it appears to me, was to incorporate into the agreement the description which was in the caveat of the invention which the plaintiff claimed the right to have secured

to him by letters patent, and for which the agreement recites that the plaintiff had "applied for a patent." The filing of the caveat, in which the plaintiff's invention is set out at length and is claimed in precisely the same terms as would have been used in an application for letters patent for the invention, seems to have been deemed sufficient to justify the allegation that the plaintiff had applied for letters patent for that invention, and not unreasonably so as it appears to me; for there can be no doubt that what the parties were dealing with each other about, was the invention as so described by the plaintiff himself, and in an agreement for the purchase and sale of an invention which the vendor claimed to be patentable, it was natural and indeed necessary for the security of the purchasers that the agreement should contain a description of the invention.

The agreement proceeds to recite that negotiations had taken place *for the absolute sale* by the plaintiff to the defendants, "*of the said patent*" which words must be construed to mean "of letters patent for said invention when issued and the agreement further proceeds to recite, that the plaintiff had agreed to sell the defendants all his (the plaintiff's)

right, title and interest in the said patent not only for Canada but for all foreign countries as well.

This recital appears clearly to indicate that what the parties had in contemplation was the sale by the plaintiff and the purchase by the defendants of all the right, title and interest of the plaintiff *in and to the said invention*, and in all letters patent to be issued therefor, when the same should be issued, and the witness part of the agreement is in precise conformity with such construction, for by the agreement it is expressly witnessed that the party of the first part (the

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plaintiff) agrees to sell to the parties of the second part (the defendants)

the patent to manufacture said machine and all *improvements* and *patents* for such machine that he may hereafter make in connection with the same for $3,000 payable as follows, viz., by defendants promissory note for $750 payable within ten days after the issue of the letters patent for Canada for said machine, and the assignment to the said parties of the second part of the same, and the balance (or the $2,250 now claimed) within two months after the issuance of *letters patent for the said patent* for the United States of America and the assignment thereof.

And by the said agreement the plaintiff covenanted with the defendants, *to obtain the said patent* to be issued for Canada and the United States of America, and to absolutely assign and set over the same to them, and that he will further assign to the defendants "*all interest in the said patent for every and all foreign countries.*" And the plaintiff by the said instrument did also *absolutely assign and transfer and set over unto the defendants*, "*all his interest in and to the said invention*," and did *thereby absolutely give* to the defendants

full authority to proceed and procure the said patent for Canada and the United States, in the event of the default of the plaintiff to *procure the same* within a reasonable time,

and the plaintiff by the said instrument authorized the defendants themselves "*to at once proceed to manufacture and sell the said machine.*"

The inaptness of these words "*the said machines*" has already been noticed. The plaintiff did not claim to be the inventor of an acetylene gas machine, nor of any machine, but merely of what he claimed to be certain new and useful improvements in acetylene gas generators, as specially claimed and described in the caveat of the 21st June, 1897. The words "the said machine" when used in the agreement must be construed as "*the said invention.*"

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Now from the above extracts from the said agreement it is, I think, abundantly clear that the subject matter of sale by the plaintiff and of purchase by the defendants was—the whole right, title and interest of the plaintiff in and to all and singular the several particulars described in the caveat as being the invention of the plaintiff, including his right to have letters patent issued securing the benefit of such invention, and also the letters patent themselves when issued therefor in Canada and the United States respectively which letters patent the plaintiff covenanted to obtain and assign to the defendants, and also the monopoly of the benefit to be derived from use of the *said invention* which letters patent *therefor* granted in Canada and the United States respectively would secure. Upon the instant of the instrument of the 6th July, 1897, having been executed by the parties thereto the plaintiff parted with and vested in the defendants all right, title and interest of every description whatever of the plaintiff in his said invention according to his own description thereof as contained in the caveat and incorporated into the instrument of 7th July, 1897. The defendants *eo instanti* became the sole owners of *that invention* and of all benefit to be derived *therefrom* and of all letters patent to be issued, when issued, for *that invention*, and the defendants being such absolute owners of the said invention, and having been expressly authorised by their instrument of purchase thereof *immediately* to proceed to manufacture and sell acetylene gas machines with the plaintiff's invention applied thereto, before letters patent *therefor* should be obtained, and the plaintiff having expressly covenanted with the defendants that he would obtain "said patent," which here must be construed "*letters patent for said invention*," to be issued for Canada and the United States respectively for which

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when issued and assigned to them the defendants agreed to pay $750 for the Canada letters patent, and $2,250 for the United States letters patent when issued and assigned, it appears to me to be quite clear that the plaintiff did not retain in himself any right to make any alterations whatever in the said invention so transferred without the express consent and permission of the transferees, so that even assuming that inventors of patentable inventions who file a caveat in the Canada Patent Office describing their invention as in the caveat filed by the plaintiff on 21st June, 1897, might afterwards while still the owner of such invention and before obtaining letters patent therefor in Canada make alterations in their invention for the purpose of perfecting it still the plaintiff could retain no such right after transferring to the defendants *absolutely all the plaintiff's right, title and interest in and to the said invention*, but this matter although it seems to have occupied considerable attention at the trial seems to be quite irrelevant to the question which arises in this action and which relates wholly to the United States letters patent, the burthen of the issue resting wholly on the plaintiff to prove that the United States letters patent which he has obtained and the assignment of which he has tendered to the defendants, but which they refuse to accept as a fulfilment of the plaintiff's contract with them, do secure to the defendants the monopoly of the benefit of the precise invention as contracted for and purported to be transferred to the defendants by the instrument of July 7th, 1897

The true construction of the words in that instrument whereby the plaintiff agrees to sell and sells to the defendants besides *the said invention* of the plaintiff and the letters patent to be issued *therefor* "all im-"provements and patents for such machine that he

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" may *hereafter* make in connection with the same" is that if "*hereafter*" that is, *after the then completed absolute transfer to the defendants of the plaintiffs said invention, and after the issue of letters patent therefor* the right to the absolute benefit of which was transferred to the defendants by the instrument of the 7th July, 1897, he the plaintiff should make any further improvements in the said invention so the property of the defendants, when the same should be patented such improvements in the patented invention and all letters patented therefor should be the property of the defendants. It is to be construed I think as a clause not a whit more clumsily framed than other clauses in the instrument, its purpose being to supply the place of a clause usually inserted in an instrument executed for the sale and purchase of patent rights within the meaning of sec. 9 of the Patent Act, ch. 61, R. S. C., its object and effect being to prevent an inventor of patentable inventions who sells his inventions from depriving his vendor of the benefit of his purchase by claiming to his own use the benefit of any further patentable improvements which he might make in the invention so sold and which might have the effect of depriving the vendee of the original invention of the benefit of his purchase thereof.

In fine the true construction of the instrument of the 7th July, 1897, being, as in my opinion it is, that the plaintiff thereby sold and the defendants bought absolutely the whole of the plaintiff's right, title and interest in and to what the plaintiff then claimed to be his invention in its entirety as then in existence and as shown to the defendants and as described in the caveat which by reference thereto in the instrument became incorporated therein, the negotiations between the plaintiff and defendants referred to in the instrument which resulted in the

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contract of sale and purchase set out in the instrument related to nothing else whatever, and if the plaintiff has failed for any reason (it matters not what) to obtain letters patent to issue for the United States which upon assignment to the defendants would secure to them the monopoly of the benefit of the whole of such matters so represented by the plaintiff to be his invention within the United States during the period prescribed by the patent laws of the United States, then he has failed to fulfil the conditions the fulfilment of which alone would entitle him to recover the sum of $2,250 demanded in the present action, and that the letters patent procured to be issued by the plaintiff for the United States and the assignment thereof tendered to the defendants do not secure to them such monopoly does not admit of a doubt for in those letters patent it appears that all that the plaintiff claimed as his invention and which he desired to have secured by the United States letters patent and all that was secured to him by those letters patent was:—

In an acetylene gas generator, a gasometer and a generator with a lid D secured by slideable catches C, a ball-cock V being secured to the under side of said lid, to raise the rubber tipped piston B, to shut the water off from the spray holes, m, when the pail, D, is full of water in combination with the regulater F having valve K, spring X and arm or lever Y, substantially as and for the purpose specified.

These letters patent as proved by the plaintiff's own expert witness cover nothing more than a specific device for regulating the flow of water into the generator combined with a device for preventing an overflow of the water. It is not denied, indeed it is admitted by the plaintiff, that the whole of the device as appearing in the description of the plaintiff's invention in the caveat for agitating and breaking the lumps of carbide placed on the permanently fixed screen through which an axis was passed vertically, which being moved in the manner described in the

caveat, certain catches, clamps or teeth were set in motion whereby the lumps of carbide placed on the permanently fixed screen in the generator were in a most effective manner broken and the greatest possible proportion of surface of carbide was exposed to the action of the water, is wholly omitted. Now this device I think the evidence establishes to have been the essential element of the plaintiff's invention as described in the caveat and constituted the chief value in the opinion of the defendants and those upon whose advice they were purchasing of what the plaintiff claimed as his invention, as shown to the defendants, and the most important part of the subject matters in respect of which all the negotiations mentioned in the instrument of the 7th July, 1897, which resulted in the contract contained in that instrument took place and which formed the essential motive which induced the defendants to enter into that contract.

The plaintiff's sole explanation of this part not having been covered by the United States letters patent, is that subsequently to the sale of his invention to the defendants by the instrument of the 7th July, 1897, he substituted for the device for breaking the lumps of carbide as described in his caveat filed at Ottawa, a tilting grate which appears in truth to be nothing else than the most common kind of grate in ordinary use in coal burning stoves, for removing the ashes. To any one who observes the construction and operation of such grate it is quite apparent that there is no novelty in it whatever, and therefore that it is not a patentable device at all. The plaintiff however suggests that it is applied by him to acetylene gas machines as an equivalent for the very effective device for breaking the lumps of carbide, as originally designed by the plaintiff and described in the caveat filed in the Ottawa patent office. That is to say, he contends that

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the substitution of a non-patentable device, and which therefore every one may use, is an equivalent for a device which he sold to the defendants as a patentable device of his own invention, and for securing to the defendants the monopoly of the benefit of the use of which throughout the United States he covenanted with the defendants to procure letters patent to issue for the United States and to assign such letters patent to them. Now the plaintiff's own expert witness tells us that the United States letters patent do not cover the device which the plaintiff claims to be a substituted equivalent for the original device omitted, because of the fact that there was no novelty in such substituted device, and it was therefore not capable of being secured by letters patent. But in fact there arises no question as to the substitutionary equivalents; what the plaintiff designates under that term is, as plainly appears, nothing else than an attempt by one of two contracting parties to alter the terms of a completed contract signed and sealed to the prejudice of the other, without the consent of such other. It thus conclusively, I think, appears that the letters patent which the plaintiff has procured in the United States, and the assignment thereof tendered to the defendants, do not secure to the defendants the monopoly of the use of what the plaintiff sold to the defendants as his invention, and are not such letters patent as the plaintiff by the instrument of the 7th July, 1897, covenanted with the defendants to procure and to assign to them. This appeal, therefore, should in my opinion be allowed with costs, and the plaintiff's action should be dismissed with costs.

Now as to the counterclaim which is to recover $750 paid by the defendants to the plaintiff upon the assignment by the latter of certain letters patent issued in Canada, which sum the defendants claim a right

to recover upon the allegation that since the payment of that sum to the plaintiff they have learned that the Canada letters patent so assigned to them do not secure the rights which the plaintiff by his agreement of 7th July, 1897, covenanted that they should secure. It certainly appears by the evidence adduced in relation to the plaintiff's claim in the action that the defendants might have refused to accept the Canadian letters patent, and to pay the $750 equally, as they have refused to accept the United States letters patent, and to pay $2,250 claimed in the action, for the former letters patent no more fulfil the obligation of the plaintiff involved in his covenant contained in the instrument of July 7th, 1897, than do the latter, but the defendants paid the $750 in the erroneous belief that the Canadian letters patent did secure to the defendants in Canada the benefit of the device which as the invention of the plaintiff they had contracted for. It appears also that after such payment they purchased from the plaintiff his patent rights over three counties in Ontario which he had reserved by the agreement of the 7th July, 1897, but notwithstanding these circumstances the defendants are I think entitled to be reimbursed by the plaintiff in respect of their being paid the $750 in the erroneous belief that the Canada letters patent had secured to them what they had purchased and what the plaintiff covenanted they should secure to the defendants whereas it appears that they do nothing of the kind, and in my opinion the claim of the defendants is sufficiently stated in their counter-claim to entitle them to recover thereunder the redress to which they are entitled; however as my learned brothers are of opinion that under the counter-claim as framed the defendants cannot recover, the judgment of the counter claim remains undisturbed.

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SEDGEWICK J.—I am of opinion that the appeal should be allowed with costs and the cross-appeal dismissed.

KING J.—I am of the same opinion but think the respondent should be allowed his costs on the cross-appeal.

Appeal allowed with costs and cross-appeal dismissed.

Solicitors for the appellants : *Biggar & McBrayne.*

Solicitors for the respondent : *Raymond & Cohoe.*

THE REVEREND JOSHUA P LEWIS AND FREDERICK JOHN STEWART, TRUSTEES OF THE ESTATE OF CHARLES MOORE (DECEASED), (PLAINTIFFS)..... } APPELLANTS;

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*May 30.
*Oct. 24.

AND

THOMAS ALLISON AND ANNIE F. ALLISON (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OP APPEAL FOR ONTARIO.

Trustees—Powers—Party wall—Tenants in common.

M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall.

Held, reversing the judgment of the Court of Appeal, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shown that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries would be a breach of trust and conseqently void.

Held, that upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common.

APPEAL from the judgment of the Court of Appeal for Ontario, which reversed the judgment of the trial

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

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court, Falconbridge J., and dismissed the plaintiffs' action with costs.

A statement of the case appears in the judgment reported.

Shepley Q.C. for the appellants.

G. G. Mills for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—In 1876 the late Mr. Charles Moore was the owner of three warehouses situate on the south side of Wellington (formerly Market) street, in the City of Toronto, respectively numbered as five, seven and nine. The warehouses numbers five and seven, which alone are in question in this litigation, were adjoining buildings having a party wall between them *i.e.*, a wall on which both the warehouses numbers five and seven, were dependent for support.

On the 18th of April, 1876, Mr. Moore executed a deed by way of a marriage settlement on his daughter Lilias Graham Moore (now Mrs. Warren), whereby he conveyed to Frederick John Stewart and John Edward Rose, warehouse number 5, by a description which gave a frontage of twenty-five feet (not adding the words more or less), along Wellington street westerly from the point of commencement, which point of commencement is fixed at a distance of seventy-eight feet (not adding the words more or less), from the north-east angle of Wellington and Yonge streets, thence south eighty-eight feet more or less, thence easterly twenty-five feet (not saying more or less), thence north eighty-eight feet more or less. It is to be remarked that whilst in the description the words "more or less" are used in connection with the easterly and westerly boundaries, there are no such words of extension added to the northerly and southerly boun-

daries. If the description had stopped here the trustees of the settlement would obviously have been entitled to but twenty-five feet on Wellington street, neither more nor less. The description by metes and bounds is however supplemented by the following words "said property being known as the warehouse No. 5 Wellington street west." Therefore any extension which the trustees could rightfully claim under the description, beyond a frontage of twenty-five feet, must depend altogether on these added words. Under the trusts of the settlement (which took effect a short time afterwards on the marriage of Mr. and Mrs. Warren), the trustees had amongst other things power to sell the settled property.

By his will dated in May, 1876, Mr. Moore devised all his real estate to his executors, Berry Moore, James Moore and the plaintiffs in the present action, who are now the surviving executors, upon certain trusts therein declared, one of which was a trust to sell. The testator died in August, 1876.

In March, 1883, the trustees under the settlement agreed to sell the settled property, warehouse No. 5, to the respondent Thomas Alison, for $9,500, and by an indenture dated the 22nd day of March, 1883, they conveyed the property to the respondent, Thomas Alison, in fee, by a description which was an exact transcript of that by which it had been conveyed to them in the deed of settlement. $6,000 of the purchase money was to remain on mortgage, but before executing the mortgage deed the respondent, Thomas Alison, raised a question as to the sufficiency of the description which he contended should be in accordance with a survey he had procured to be made by certain named surveyors who had as the result of their survey prepared what Mr. Alison claimed to be the correct description, and a draft deed was accordingly pre-

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pared to which the surviving executors were parties, and by which it was proposed they should convey (by way of confirmation) to Mr. Alison, by a description of the land taken from the survey mentioned. This draft deed, however, coming to the hands of Mr. Justice Rose, who as one of the vendors, was of course concerned in seeing that the sale was properly carried out, he (as might have been expected) not being willing that the executors should commit a breach of trust to which he would have appeared to have been a consenting party, altered the description of the parcels so that this deed of confirmation when executed contained the following description :

> And all and singular, the interest, estate and demand of the said Charles Moore, or any other interest which they can convey in and to all and singular the lands and premises upon which the said store No. 5 is situate, whether the same be twenty-five feet in width, or more or less,

this being a description which rendered the deed one which the executors might safely execute, and moreover one accurately carrying out the evident intention of the settler, which was that the whole of the warehouse No. 5 should pass without any limitation arising from the description by metes and bounds, or from want of the words "more or less." I should have said that this last deed which was executed on the 31st of March, 1883, contained a recital of the description furnished by Mr. Alison's surveyors, which as a good deal of importance has been attached to it, I will give in full; it is as follows :

> And whereas it appears from a survey of the said property made the 8th day of March, A.D. 1883, by Unwin Browne & Sankey, provincial land surveyors, of the said City of Toronto, for said Alison, and the said Alison claims the fact to be, that the correct description of the land upon which the same warehouse stands is as follows, namely :
>
> All and singular that certain parcel or tract of land and premises containing by admeasurement 2,386 square feet, more or less, being

composed of a part of town lot no. 2, on the south side of Market (now Wellington) street, in the City of Toronto, aforesaid; commencing at a point on the southern limit of Market (now Wellington) street west, distant 77 feet 8 inches, measured westerly along said limit of said street from the western limit of Yonge street, said point being the intersection of the eastern face of brick wall of warehouse no. 5 Wellington street west with the said limit of Wellington west, thence south 74 degrees west along said last mentioned limit 26 feet 7 inches to the western face of a brick wall of said warehouse, thence south 16 degrees east along last mentioned face of brick wall 89 feet 8½ inches to the northern boundary of lot deeded to Hugh Carfrae, or 120 feet less than the southern boundary of said lot, thence north 74 degrees east along last mentioned boundary 26 feet 7 inches to the eastern face of first mentioned brick wall, thence north 16 degrees west along said face of last mentioned brick wall, 89 feet 8½ inches, more or less, to the point of commencement.

The purchase was then completed by the payment of the cash portion of the purchase money a mortgage being given for the unpaid residue. This mortgage contained a description not following the deed of settlement but embracing the description prepared by the surveyors and carrying the western boundary of the mortgaged property to the west face of the west wall of warehouse number 5.

Subsequently, and in 1894, this mortgage was paid off and a transfer of it taken to the respondent Mrs. Alison, the wife of the purchaser Thomas Alison.

The respondents claiming title to the whole of the west wall of no. 5 that is to the whole of the wall between no. 5 and no. 7 upon which both warehouses depended for support, the appellants who were the surviving executors and trustees under the will of Charles Moore brought the present action claiming a declaration that the wall between warehouses nos. 5 and 7 was a party wall, alleging that the appellants and respondents are the owners of the land on which the wall is erected as tenants in common and that the defendants should be restrained from interfering with

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the use and enjoyment by the appellants of the said wall as a party wall.

The respondents set up several defences the principal of which were founded on the deed of the 31st of March, 1883, and on the mortgage given by Alison which had been paid off by and transferred to his wife.

The action was tried before Mr. Justice Falconbridge who pronounced a decree declaring the appellants and respondents to be tenants in common of the wall and of the land upon which it is erected and enjoining the respondents from interfering with the use and enjoyment of the wall by the appellants as a party wall.

From this judgment the respondents appealed to the Court of Appeal when that court (the Chief Justice dissenting) allowed the appeal and dismissed the action with costs.

I will in the first place dispose of the pretentions of Mrs. Alison as mortgagee to some superior right, as a purchaser for valuable consideration without notice, by saying that this respondent is not in a position to say she had no notice of the equities and titles which may bind her husband since these appear on the registered title. Further Mrs. Alison is not a purchaser without notice inasmuch as the rights which the appellants claim to have declared are all based on the title deeds under which she claims. Mrs. Alison must therefore be deemed to have constructive notice, (apart altogether from registration,) of everything which appears on the face of the title deeds under which she claims.

One observation may be made which applies to both sets of trustees—those of the settlement as well as those under the will—namely that they were bound by the trusts declared in the instruments under which

they respectively derived their powers, the marriage settlement and the will, in each of which there was contained a power of sale, no power of gratuitous disposition being, however, conferred either in the one or the other instrument. Consequently any voluntary conveyance of land by the executors in augmentation of what the testator had conveyed to his daughter's trustees for the purpose of the settlement would be a breach of trust and void, and the court is bound to regard it as such in any declaration of title which it may make.

The description contained in the deed of settlement was manifestly intended to include the whole of warehouse no. 5, and no technical argument derived from cases showing that a description by metes and bounds ought to control it and limit the property conveyed to the twenty-five feet frontage ought to be allowed to prevail; all the surrounding circumstances show that what the settlor intended to give to his daughter was just that which was described in the trust deed, neither more nor less, and this composed the whole of warehouse no. 5. The description of the parcels granted contained in the deed of the 31st of March, 1883 (I do not mean the description in the recital but that in the granting part), carries this into effect in plainer and more precise language, but it does not add in the least to the property which passed under the deed of 1876 by its own force.

The recourse to surveyors and to descriptions prepared by them was therefore wholly inadmissible. All that was intended by the settlor to pass to his daughter's trustees was ascertainable from the settlement deed itself—it was warehouse no. 5—then if it was so ascertainable there was no necessity for any survey or additional description by surveyors; if on the other hand the description prepared by the

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latter contained more than the trust deed, any voluntary conveyance by the executors according to its terms would have been a breach of trust and void. It was quite legitimate for the executors to render the description clearer, as they have done by executing the deed of 31st March, but if they had exceeded this and attempted to convey gratuitously and without consideration any part of the land which had passed to them under the will, their conveyance would have been in violation of their trust and absolutely void. That the executors did not so exceed their powers I think clear.

The recital of the survey and the description consequent thereon had not the effect of making the land so described the subject of the grant. As a rule all recitals in an indenture must be taken to be true and to be treated as a statement binding all parties who execute the deed. But the recital here is not that, in fact, the true description was that prepared by Unwin & Co., but merely the fact that Unwin & Co. had made a survey for Alison, and that Alison claimed the fact to be that their description was a correct one.

This is very far from being a statement in recital of the absolute fact that the description was a correct one. The whole contention is too clear for argument, and the answer given to it by Mr. Justice Falconbridge is right and conclusive. The question therefore is just the same as if it had arisen immediately after the execution of the deed of settlement between Mr. Moore himself and his daughter's trustees, and is confined strictly to the construction of the description in that deed.

We are then brought to this: What is included in the description "Warehouse No. 5, Wellington street west"? The measurements and boundaries stated in the paper prepared by the respondents' surveyors was

manifestly not the proper legal description of this building if the whole of the western wall was not according to proper legal construction included in the denomination of warehouse no. 5. Whether the whole of this western wall ought to be so included is a legal question, and the very question in dispute in this action, and this the surveyors improperly assumed in the respondents' favour.

Then what were the rights of the respective parties, Mr. Moore and his daughter's trustees, immediately after the marriage? The trustees became the owners of warehouse no. 5 by that bare description, and Mr. Moore remained the owner of warehouse no. 7, and the wall which was common to the two houses could, up to the time of the separation of the two properties, be no more said to belong to and be part of no. 5 than it could be said to belong to and be part of no. 7 This it must be remembered is no question of easements; what we have to adjudicate upon is the right to the land on which this party wall is built. The appellants if they had chosen might have claimed that the wall on the separation of the properties vested in the respective owners in severalty each for one half of the wall divided laterally, or they might have claimed easements, but the only right insisted on by the appellants is that they should be declared tenants in common of the wall and the land on which it stands.

In the case of *Watson* v. *Gray* (1) Fry J. makes the following observations:

> The words party wall may be used in four different senses. First, as meaning a wall of which the two adjoining owners are tenants in common, as in *Wiltshire* v. *Sidford* (2), and in *Cubitt* v. *Porter* (3), and that is possibly the primary meaning of the phrase. Secondly, as meaning a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts* v. *Hawkins* (4).

(1) 14 Ch. D. 192.
(2) 1 Man. & R. 404.
(3) 8 B. & C. 257.
(4) 5 Taunt. 20.

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Thirdly, as meaning a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; and fourthly, as meaning a wall divided longitudinally into two moieties each moiety being subject to a cross easement in favour of the owner of the other moiety.

Can it be said that the learned trial judge was wrong in ascribing to this wall the character of a party wall according to the first of these definitions given by Fry J.? I think not. The wall had been used by Mr. Moore for the purposes of both no. 5 and no. 7; it was as much part of the one building as of the other. In saying this I am not losing sight of the fact that no. 5 had been built some time before no. 7, and that this wall had originally wholly belonged to no. 5. What we have to consider, however, is the state of the two tenements 5 and 7 at the date of the settlement, when beyond doubt this wall was common to both buildings. Then as it would be a most unreasonable presumption to make to hold that it was intended to convey any part of no. 7, we must necessarily conclude that it was intended that after the severance of the title the wall should be still used for the common purposes of both the warehouses which *primâ facie* would make the owners tenants in common.

This seems to have been the opinion of Mr. Justice Bayley who in *Wiltshire* v. *Sidford* (1) thus expresses himself:

> Where the builder of two houses grants off one it is more reasonable to presume he grants the whole wall in undivided moieties than that he should leave either party the power of cutting the wall in half.

The presumption of a tenancy in common of a party wall is certainly the proper conclusion where the origin of the party wall cannot be ascertained, but this is not that case for we have full information as to the construction of the wall.

(1) 1 Man & R. 404.

If the wall belongs to the owners of no. 5 and no. 7 as tenants in common, either party may be entitled to a partition of the wall (1); and that partition may be made either free from or subject to mutual easements for support.

Had the appellants claimed that this was a party wall in which the adjoining owners had several rights with reciprocal easements according to the fourth head of Mr. Justice Fry's classification there would have been a question as to the right to easements which does not here arise. For this reason all the argument in the respondents' factum about the applicability of the principle of *Wheeldon* v. *Burrowes* (2) is irrelevant. Further, even if *Wheeldon* v. *Burrowes* (2) did apply it would not be conclusive against the presumed retention of an easement by the settlor, Mr. Moore, in respect of no. 7. In giving the judgment of the Court of Appeal in *Wheeldon* v. *Burrows* (2), Thesiger J. expressly excepts easements of necessity such as were considered to have been reserved in *Richards* v. *Rose* (3), which he recognises as good law. The Lord Justice there says:

> Two houses had existed for some time each supporting the other. Is there anything unreasonable—is there not on the contrary something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes with the right of support from that adjoining house should also give to that adjoining house a reciprocal right of support from his own?

In *Suffield* v. *Brown* (4), Lord Westbury's judgment, which is the fountain head of all this doctrine against the presumed reservation of easements, contains the following passage:

> It is true that there may be two tenements, as for example, two adjoining houses so constructed as to be mutually subservient and

(1) See *Mayfair Property Co.* v. *Johnston* [1894] 1 Ch. 508.
(2) 12 Ch. D. 31.
(3) 9 Ex. 218.
(4) 4 DeG. J. & S. 185.

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to depend on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour; in which case the alienation of one house by the owner of both would not estop him from claiming in respect of the house he retains, that support from the house sold which is at the same time afforded in return by the former to the latter tenement, which was the case of *Richards* v. *Rose* (1).

Therefore even if this has been the case in which the appellants were claiming an easement for support for no. 7, instead of as it is a claim to the land itself, nothing in *Wheeldon* v. *Burrowes* (2), would have operated against the presumed reservation of such an easement.

Were it open to us to do so I should have been prepared to have made a slight alteration in the original judgment by inserting a declaration as to easements in case of a partition of the wall. This however has not been asked for by the appellants, and probably they can safely rely on the protection of their rights in this respect in any judgment for partition which may hereafter be obtained.

The result is that the appeal must be allowed with costs to the appellants in this court and in the Court of Appeal, and the judgment pronounced by Mr. Justice Falconbridge must be restored.

Appeal allowed with costs.

Solicitors for appellants: *Maclaren, Macdonald, Shepley & Middleton.*

Solicitors for respondents. *Mills, Mills & Hales.*

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(1) 9 Ex. 218.

(2) 12 Ch. D. 31.

WILLIAM S. TUCKER (DEFENDANT)...APPELLANT; 1899

AND *Oct. 27.

WILLIAM YOUNG AND JOHN W. YOUNG (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Case originating in County Court—Transfer to High Court.

There is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred by order to the High Court of Justice in which all subsequent proceedings were carried on.

Per Gwynne J. contra. Where the cause is transferred because the pleas ousted the County Court of jurisdiction an appeal lies.

Leave to appeal cannot be granted under 60 & 61 V. c. 34 s. 1 (*e*), in a case not appealable under the general provisions of R. S. C. ch. 135.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the ruling of the Drainage Referee who dismissed the plaintiff's action.

The action was begun by a writ issued out of the County Court of the County of Lambton to recover damages for injury to plaintiffs land by water brought upon it from drains constructed by defendant on his own land. Defendant pleaded, *inter alia*, want of jurisdiction in the court and, as soon as issue was joined, the cause was transferred to the High Court of Justice by order of the County Court Judge exercising the jurisdiction of a local Judge of the High Court. The order of transfer states that the jurisdiction of the County Court was properly and *bonâ fide* brought in question.

At the trial a reference was ordered to the Drainage Referee who held that plaintiff had no cause of action, which holding was reversed by the Court of Appeal on appeal from his report.

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

(1) 26 Ont. App. R. 162.

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On the appeal to the Supreme Court coming on for hearing, counsel for respondent moved to quash for want of jurisdiction, claiming that the action did not originate in a Superior Court.

Aylesworth Q.C. for the motion.

Riddell Q.C. contra, argued that the case did originate in a Superior Court, but if not, that leave to appeal should be granted under 60 & 61 Vict. ch. 34, sec. 1 (*e*).

THE CHIEF JUSTICE (oral).—Section 24 (*a*) of the Supreme and Exchequer Courts Act gives jurisdiction to this court to entertain appeals "from all final judgments of the highest court of final resort * * * in cases in which the court of original jurisdiction is a Superior Court." And section 28 gives jurisdiction in appeals from final judgments "in actions, suits, &c., originally instituted in a Superior Court of the Province of Quebec, or originally instituted in a Superior Court in any of the Provinces of Canada other than the Province of Quebec."

As we have no jurisdiction unless the case in appeal originated in the Superior Court, how can we entertain this appeal? The institution of a suit is the writ bringing the defendant into court, and the writ in this case issued out of a county court. This objection cannot be got over by saying that some subsequent proceeding in the cause was equivalent to what the Act requires. The appeal must be quashed.

TASCHEREAU J.—I am also of opinion that the appeal must be quashed as the case did not originate in a Superior Court.

As to the motion for special leave to appeal under subsec. (*e*), sec. 1 of 60 & 61 V. c. 34, it clearly cannot be granted. That enactment merely gives us the right to grant special leave in that class of cases which were previously appealable, but which are by that Act. 60 &

61 Vict. ch 34, decreed not to be thereafter appealable *de plano*, and this is not a case of that class.

GWYNNE J. (dissenting.)—I agree with Mr. Justice Osler that this case must be regarded as having originated in a Superior Court within the meaning of the section of the Act regulating appeals to this court from the judgments of a Superior Court. True it is that the plaintiff had commenced an action in the County Court of the County of Lambton to which the defendant pleaded pleas which ousted all jurisdiction of the County Court, whereupon all proceedings then had in the County Court were, by reason of the absence of jurisdiction in the County Court to entertain the matter, transferred to the High Court of Justice as the only court having jurisdiction in the matter under the provisions of section one hundred and eighty-six, R. S. O. (1897) ch. 51. Now it is from a judgment of the Court of Appeal for Ontario, pronounced in appeal from a judgment of the High Court of Justice in Ontario, that the present appeal is taken, and such appeal is from the judgment of the highest court of appeal in Ontario in a case in which the High Court of Justice, being a superior court, alone had original jurisdiction. That is a point which, as it appears to me, is concluded by the transfer of the case from the County Court for want of jurisdiction to entertain it. The appeal, therefore, in my opinion, lies, and the motion to quash should be dismissed with costs.

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

Appeal quashed with costs.

Solicitor for the appellant: *A. Weir.*

Solicitors for the respondents: *Kittermaster & Gurd.*

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*Mar. 17.
**May 31,
June 1.
**Oct. 24.

JOHN FARQUHARSON (PLAINTIFF).....APPELLANT;

AND

THE IMPERIAL OIL COMPANY (DEFENDANT) ..... RESPONDENT.

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

Appeal—Divisional court judgment—Appeal direct—R. S. C. c. 135, s. 26 s.s. 3—Appeal from order in chambers—Rivers and streams—Driving logs—Obstruction—Dam—R. S. O. (1887) c. 120, ss. 1 and 5.

Held, per Strong C.J. and Gwynne J., (Taschereau and Sedgewick JJ. contra,) that under sec. 26, subsec. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is no right of appeal to the Court of Appeal.

By R. S. O. (1887) ch. 120, sec. 1, all persons are prohibited from preventing the passage of saw-logs and other timber down a river, creek or stream by felling trees or placing any other obstruction in or across the same.

Held, reversing the judgment of the Queen's Bench Division (29 O. R. 206), that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act.

APPEAL from a decision of the Queen's Bench Division of the High Court of Justice (1) affirming the judgment of Boyd C. at the trial.

R. S. O. (1887) ch. 120, sec. 1 contains the following provision:

"All persons shall, subject to the provisions in this Act contained, have, and are hereby declared always

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

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

(1) 29 O. R. 206.

to have had, during the spring, summer and autumn freshets, the right to, and may float and transmit saw-logs and all other timber of every kind, and all rafts and crafts, down all rivers, creeks and streams; and no person shall by felling trees or placing any other obstruction in or across any such river, creek or stream, prevent the passage thereof."

The defendant maintained two dams on Bear Creek, in the County of Lambton, Ont., for using water in its business of refining oil. The dams diminished the water in the creek so as to injure plaintiff who was accustomed to use it for floating his logs down. The question for decision on this appeal was whether or not the dams constituted an obstruction under the above section and entitled plaintiff to maintain an action for damages against the company for the loss suffered by hindrance to his business.

The Chancellor who tried the case held, that the dams were not an obstruction under the Act, and his judgment was confirmed by the Divisional Court.

The appellants applied to the Registrar, sitting as a Judge in Chambers, for an order granting leave to appeal direct from the latter judgment which was refused. On appeal to Mr. Justice Gwynne in Chambers the order was granted.

His Lordship's judgment on said appeal was as follows:

GWYNNE J.—This is an appeal from the decision of the Registrar in Chambers upon a motion made by the plaintiff for leave to appeal, and for approval of the bond in appeal. The learned registrar refused the motion partly on the ground that in his judgment this court has no jurisdiction to entertain the appeal under the circumstances appearing, and further that if it has

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such jurisdiction, it ought not to be exercised in the present case.

By the Supreme Court Act, 38 Vict. ch. 11, sec. 17, it is enacted as follows:

> Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest court of final resort whether such court be a court of appeal or of original jurisdiction, now or hereafter established in any province of Canada in cases in which the court of original jurisdiction is a Superior Court. Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars, and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases and cases of mandamus, habeas corpus or municipal by-laws, as hereinafter provided.

In view of this section in connection with sections 11 and 23 it was by a judgment of this court rendered on the 16th of April, 1879, in *Danjou* v. *Marquis* (1), held by the court, Fournier and Henry JJ. dissenting, that the appeal given in cases of mandamus under sec. 23, is restricted to decisions of the highest court of final resort in the province, and that an appeal did not lie from any court in the Province of Quebec but the Court of Queen's Bench, and consequently the appeal which was from the judgment of the Superior Court of the District of Rimouski was quashed.

The learned registrar was of opinion that the case now under consideration was concluded by the judgment in the above case.

By an Act passed on the 15th May, 1879, intituled "An Act further to amend the Supreme and Exchequer Courts Act," 42 Vict. ch. 39, it was enacted in sec. 5 as follows:

> Except as hereinafter provided for no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in

(1) 3 Can. S. C. R. 251.

the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding may or may not have been a proper subject of appeal to such highest court of last resort.

The exception provided for in this section 5 is thus stated in sec. 6 :

An appeal shall lie to the said Supreme Court by leave of the said last mentioned court or a judge thereof from any decree, decretal order, or order made or pronounced by a superior court of equity or made or pronounced by any equity judge or by any superior court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity, and from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court without any intermediate appeal being had to any intermediate court of appeal in the the province.

By the Ontario Judicature Act of 1881, 44 Vict. ch. 5, the several Superior Courts then in existence in Ontario were consolidated together under the name of the Supreme Court of Judicature for Ontario, which court was declared to consist of two permanent divisions, one of which, consisting of the Courts of Queen's Bench, Chancery and Common Pleas, to be called "The High Court of Justice for Ontario," and that the Court of Appeal should constitute the other division, which court the Act declared should continue to have all the jurisdiction which the said court theretofore had save as varied by the Act. The Act then provided for appeals from the divisional courts to the Court of Appeal. This Act assumed to control the jurisdiction of the Supreme Court of Canada by the following section no. 43 :

43. No appeal shall lie to the Supreme Court of Canada without the special leave of such court or of the Court of Appeal unless the title to real estate or some interest therein, or the validity of a patent is affected ; or unless the matter in controversy on the appeal exceeds the sum or value of $1,000, exclusive of costs or unless the matter in

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question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

In *Clarkson* v. *Ryan* (1), and in other cases, this court held this section to be simply nugatory as being *ultra vires* of the provincial legislature to enact. Then by the Ontario Statute, 58 Vict. ch. 13, it was enacted in sec. 2 that there should be no more than one appeal in the Province of Ontario from any judgment or order made in any action or matter save only at the instance of the Crown in a case in which the Crown is concerned, and save in certain other cases in the Act specified.

By sec. 10 it was enacted that:

> The Queen's Bench, Chancery and Common Pleas Divisions of the High Court shall not sit or give judgments as such divisions (except for the purposes of the Criminal Code, 1892,) and there shall not be divisional courts of any of the said divisions; but the divisional courts shall be divisional courts of the High Court without reference to the said divisions.

And these Divisional Courts were made Courts of Appeal as well as courts of original jurisdiction by sec. 11 which enacted that

> an appeal shall lie to a divisional court of the High Court instead of as heretofore provided by any statute or rule of court.

Here follow twelve enumerated cases including item 3:

> From any judgment or order of a judge of the High Court in court.

Then by sec. 13 it was among other things enacted in sub-sec. 2:

> In case after this Act goes into effect a party appeals to a divisional court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said divisional court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the divisional court.

(1) 17 Can. S. C. R. 251.

Then the jurisdiction of the Court of Appeal was retained by sec. 14 which enacted that :—

Subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order or decision of the High Court, whether the judgment, order or decision was that of a divisional court or of a judge in court, and including cases tried with a jury, where the appellant complains of the judgment and asks in the alternative for a new trial.

The secs. 11, 13 and 14 of this Act appear also in identical language in secs. 71, 72 and 73 of the Judicature Act of 1895, passed on the same day as 58 Vict. ch. 12.

Now by 59 Vict. ch. 18, sub-sec. 3 of above sec. 73, identical with sec. 14 of 58 Vict. ch. 13, was amended so as to read as follows:

Except where an appeal lies under the preceding clause from a divisional court to the Court of Appeal, an appeal shall not lie from a judgment or order of a divisional court pronounced on an appeal in a cause or matter in the High Court to such divisional court except by special leave first obtained on application to such divisional court or to the Court of Appeal or to a judge thereof.

Then all of the above sections with the above amendment as made by 59 Vict. ch. 18 are consolidated as secs. 75, 76 and 77 of the Judicature Act R. S. O. (1897) ch. 51, and as so consolidated the result as it appears to me is this.

By sec. 75 appellate jurisdiction is given to divisional courts in the following cases:

1. From any judgment or order of a judge of the Hight Court in court, whether at the trial or otherwise.

2. From the Master in Ordinary.

3. From County Courts.

4. From Surrogate Courts,

and in five other enumerated cases.

By sec. 76 the jurisdiction of the Court of Appeal is retained subject to the exceptions and provisions in the Act mentioned,

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from every judgment, order or decision of the High Court whether the judgment, order or decision was that of a Divisonal Court or of a judge in court, including cases tried with a jury where the appellant complains of the judgment and asks for a new trial.

Now the present case is that of an action brought by the plaintiff in the High Court of Justice for Ontario in which action judgment was rendered against the plaintiff, and his action was dismissed by a judge of the High Court in court. It was a case, therefore, in which the Court of Appeal and a divisional court of the High Court had co-ordinate appellate jurisdiction. The plaintiff elected to appeal from the judgment of a judge of the High Court in court pronounced in an action commenced in the High Court, to a divisional court, which court dismissed his appeal and affirmed the judgment of the High Court dismissing the action; the case therefore comes within the second sub-section of sec. 77 of ch. 51 R. S O. (1897).

58 Vict. ch. 13 was passed as its title shows for the purpose of diminishing appeals in the Ontario Courts and the first sub-sec. of sec. 13 of that Act, and the first sub-sec. of sec. 73 of 58 Vict. ch. 12, which are identical, are consolidated as sec. 74 of R. S. O. (1897), ch. 51, which enacts as follows:

> There shall not be more than one appeal in this province from any judgment or order made in any action or matter, save only at the instance of the Crown in a case in which the Crown is concerned; and save in certain other cases hereinafter specified.

Then sec. 75 prescribes the cases in which the divisional courts shall have appellate jurisdiction, that is to say, in ten enumerated cases, the first of which is the present case, namely from a judgment pronounced in an action pending in the High Court by a judge of that court in court. The other nine cases are cases in which no direct or co-ordinate appeal is given.

to the Court of Appeal, and in which therefore a party desiring to appeal has no choice as to which court he should appeal, namely, whether to the Court of Appeal or to a Divisional Court, but must appeal to a Divisional Court if he appeals at all. Then sec. 76 defines the jurisdiction of the Court of Appeals and gives it, subject to the exceptions and conditions contained in the Act, appellate jurisdiction

> from every judgment, order or decision of the High Court whether the judgment, order or decision was that of a divisional court or of a judge in court, and including cases tried with a jury where the appellant complains of the judgment and asks in the alternative for a new trial.

This section, therefore, gives to the Court of Appeal co-ordinate jurisdiction in appeal with the divisional courts, over judgments coming within item no. 1 of sec. 75, and absolute jurisdiction in appeal from all judgments pronounced by a divisional court in appeal in the nine other items enumerated in sec. 75.

Then in sub-section 2 of sec. 77 is stated the first exception subject to which jurisdiction is given by the Court of Appeal by sec. 76, and this exception, in my opinion, is absolute and imperative, and itself is subject to no qualification whatever, and its effect is that a party appealing to a divisional court instead of to the Court of Appeal in a case in which he might have appealed direct to the Court of Appeal (as is the present case) shall have no appeal whatever to the Court of Appeal from the judgment of the divisional court, the tribunal in appeal of his own selection. In such a case the judgment of the divisional court in appeal, is absolutely final and conclusive and is the judgment of the only court of final resort which under the circumstances had jurisdiction within the Province of Ontario in the particular case in which such judgment was rendered, save only that in such

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a case any other party to the action or matter so appealed to a divisional court then the appellant therein shall have an appeal to the Court of Appeal from the judgment of the divisional court in appeal, such "other party" is the only person to whom any appeal to the Court of Appeal is given in the case put in sub-section 2

Sub-section 2 of sec. 77 having thus provided absolutely for the case of a party appealing to a divisional court in a case in which instead of so appealing he might have appealed to the Court of Appeal, the sub-sec. 3 of the sec. 77 states the second exception to which the jurisdiction given to the Court of Appeal by sec. 76 is subjected, namely, that with the exception of the appeal given by sub-sec. 2 to a party other than the appellant to a divisional court in the case there put there shall be no appeal to the Court of Appeal from any judgment whatever of a divisional court of the High Court in appeal without leave first obtained either from the divisional court pronouncing the judgment in appeal, or from the Court of Appeal or a judge thereof, and so no appeal to the Court of Appeal without special leave first so obtained, even in cases of appeal enumerated in sec. 75 in which subordinate and not co-ordinate jurisdiction in appeal is given to divisional courts.

Sub-sec. 3 of the sec. 77 does not profess to give an appeal in a case not already provided for, but to prescribe limitations within which the right of appeal to the Court of Appeal already given by the Act shall be exercised. That sub-section cannot, in my opinion be construed as giving by implication a further appeal to the Court of Appeal from the judgment of a divisional court in appeal to a person who, having had the right to elect to which court as a court of final resort he should appeal, namely, to the Court ot Appeal or to a

divisional court, had selected the latter, and in which case the immediately preceding sub-section 2 had unequivocally declared that such person should have no further appeal. Upon the whole therefore, the jurisdiction of the Court of Appeal as prescribed by sec. 76 is qualified by these exceptions and provisions, namely, that in a case wherein co-ordinate jurisdiction in appeal is given to divisional courts and to the Court of Appeal, and a party thereto having the option to appeal to either elects to appeal to a divisional court there shall no appeal lie from the judgment of such divisional court in appeal save at the suit of some other party than the appellant to the action or matter so appealed, and that with the exception of the appeal so given to such other party, there shall be no appeal to the Court of Appeal from any judgment of a divisional court in appeal in any matter wherein appellate jurisdiction is given to divisional courts by sec. 75 " except by special leave first obtained," &c., &c.

In short sub-sec 2 provides for cases in which the appellate jurisdiction of divisional courts is co-ordinate with the jurisdiction of the Court of Appeal, and sub-sec. 3 for cases in which the jurisdiction of divisional courts in appeal is subordinate.

The plaintiff in the action, however, who had so appealed to the divisional court applied to a judge of the Court of Appeal for leave to appeal to that court from the judgment of the divisional court in appeal; that learned judge refused to grant such leave for the reason that in his opinion the judgment of the divisional court in appeal was quite right and the Court of Appeal refused to interfere with such judgment of the learned judge upon the ground as is said, that the granting leave to appeal was wholly a discretionary matter and that the court would not interfere in a matter in which a learned judge had proceeded in the

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exercise of his discretion. In the view which I have taken as already explained, neither the learned judge to whom the application was made nor the Court of Appeal had jurisdiction to grant to the plaintiff any further appeal in the case. The plaintiff now appeals to this court upon the ground, first, that the judgment of the divisional court in appeal was, under the circumstances of this case, a final judgment rendered by a court of final resort in the Province of Ontario having jurisdiction in the case within the meaning of the Revised Statutes of Canada, ch. 135, sec. 24, s.s. *a*, and secondly, that at any rate an appeal lies to this court under sec. 26, ss. 3 of said ch. 135.

In my opinion the contention of the plaintiff is well founded and an appeal lies in the present case under both of those sections, and the judgment in *Danjou* v. *Marquis* (1) does not apply to the present case which rests upon legislation subsequen tto the judgment in that case.

It cannot be questioned that the legislature of Ontario had jurisdiction to make one court the court of final resort within the Province of Ontario in one class of cases, and another court the court of final resort in another class of cases. This is just what I think has been done by the sections of the Ontario Statutes of 1895, which are consolidated in R. S. O. of 1897, ch. 51, sections 74, 75, 76 and 77, above extracted and the judgment of the divisional court to which the plaintiff appealed from the judgment of a judge of the High Court in court was a final judgment of the highest court of final resort within the Province of Ontario in the particular case under consideration within the meaning of R. S. C. ch. 135, sec. 24, s s. *a*.

Then as to the application of sec. 26, s.s. 3, of said ch. 135, that section has never been repealed or altered and it still remains in full force and effect. The

(1) 3 Can. S. C. R, 251.

statute of the Parliament of Canada, 60 & 61 Vict. ch. 34, has no application to the present case for that statute applies only to "appeals from any judgment of the Court of Appeal for Ontario," and not to appeals from a judgment of a divisional court in appeal which this is. The court designated in the act by the title "the Court of Appeal for Ontario" is the court which has been known under that name ever since the passing of the Ontario Statute, 39 Vic. ch. 7, s. 22. which enacted that "The Court of Error and Appeal shall hereafter be called the Court of Appeal." That statute therefore has no operation whatever as regards a judgment of a divisional court of the High Court and the judgment of the divisional court in the present case although pronounced in the exercise of appellate jurisdiction comes, in my judgment, within the Dominion statute, R. S. C. ch. 135, sec. 26, s.s. 3, which gives an appeal by leave of this court or a judge thereof

from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court without any intermediate appeal being made to any intermediate court of appeal in the province.

Now the judgment in the present case from which the plaintiff desires to appeal is a final judgment of the High Court of Justice in Ontario pronounced by a Divisional Court of such High Court in a suit commenced in such High Court, which is a Superior Court. The jurisdiction given by that section applies in my opinion to the present case and it is, I think, a proper case for granting leave to appeal if such be necessary for the case appears to be one of considerable importance and without expressing any opinion whatever as to the correctness or the reverse of the judgment of the Divisional Court, it will, if left to stand, deprive the plaintiff for all time in a very essential degree of the use of the stream for floating down

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timber thereon obstructed as it is by a dam across it, the construction and maintenance of which the judgment pronounces to be perfectly lawful and right, and that no action lies at the suit of the plaintiff whatever may be the magnitude of the loss and damage occasioned to him by the obstruction which the dam occasions to his floating timber down the stream. That is a case in which it is but reasonable I think, that the plaintiff should have leave to take the opinion of this court, and as I think sec. 26, s.s. 3 of ch. 135, R S. C. has never been repealed or altered. I am of opinion that leave to appeal should be granted if such leave be necessary, although as I have already said, I think the plaintiff has a right to appeal to the Supreme Court under sec. 24 without special leave.

I have gone at this length into the case, tracing all the legislation upon the subject, because the parties expressed an intention to appeal to the court from my judgment, whatever it might be, and because in cases of this kind in the nature of appeal from the judgment of the registrar, the court have expressed the opinion that the judge hearing the appeal in such case should express his own opinion instead of referring the case to the court, and so leave it to the parties to elect whether they should appeal to the court or not. The form of the order will be to discharge the order of the registrar, costs to be costs to the plaintiff in any event of the cause, and to approve the bond in appeal and to allow the appeal to the Supreme Court.

Osler Q C. for the respondent moved by way of appeal before the full court,—(The Chief Justice and Taschereau, Gwynne, Sedgewick and Girouard JJ.)—from the order of Mr. Justice Gwynne.

Aylesworth Q. C. for the appellant, contra.

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The court, without expressing any opinion on the main question involving the right of appeal direct from the divisional court, held that leave to appeal having been granted by Mr. Justice Gwynne the discretion exercised by him could not be reviewed and the motion was dismissed with costs.

After the decision on the merits in the following term the following judgments on the question of jurisdiction were handed down.

THE CHIEF JUSTICE.—This is an appeal from a judgment of Mr. Justice Gwynne sitting in Chambers granting leave to appeal to the plaintiff in this action from a judgment of the Queen's Bench Division of the High Court of Ontario immediately to this court without any intermediate appeal being had to the Court of Appeal.

The action was tried before the Chancellor who entered judgment for the defendants. The plaintiff appealed to the Queen's Bench Division who upon grounds distinct from those on which the first judgment had proceeded dismissed the appeal. From this judgment the plaintiff who is by an Ontario statute debarred from having recourse to an appeal to the Court of Appeal of the province sought leave to appeal under section 26, subsection 3 of the Supreme and Exchequer Courts Act, R. S. C., chapter 155. Subsection 1 of section 26 is as follows:

Except as otherwise provided in this Act or in the Act providing for the appeal no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest court of last resort.

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The Chief Justice.

In the case of *Danjou* v. *Marquis* (1), which was an appeal to this court from a judgment of the Court of Review in the Province of Quebec, instituted before the original Act had been amended by the addition of the provision now contained in sub-section 3 of section 26, it was held that the words "highest court of last resort" were to be construed as meaning the highest Court of Appeal having jurisdiction generally in the province, and not as referring to the highest Court of Appeal in the particular case sought to be appealed; thus excluding jurisdiction in a case in which the Court of Review was by provincial legislation made the court of last resort in the province.

The law in this respect has since been altered as regards the Province of Quebec by the provision that appeals shall lie immediately from the Court of Review although no appeal may lie to the Court of Queen's Bench in cases where an appeal would lie against a judgment of the Court of Review directly to the Privy Council.

Another amendment having reference to appeals from provinces other than Quebec was contained in the following clause (2):

> Provided also that an appeal shall lie to the Supreme Court by leave of such court or a judge thereof * * * * from the final judgment of any Superior Court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court without any intermediate appeal being had to any intermediate Court of Appeal in the province.

It is under this section and on its application to the present case that there can alone be any jurisdiction to grant leave to appeal in the present case.

So long as the party had a right of appeal to the Court of Appeal in the Province of Ontario it cannot

(1) 3 Can. S. C. R. 251. (2) R. S. C, ch. 135 s 26 ss. 3.

be disputed that this court or a judge had jurisdiction under the preceding amendment to grant leave to a party to appeal directly to this court without resorting to an intermediate appeal to the Provincial Court of Appeal.

By the Ontario Act 58 Vict. cap. 13, sec. 13, subsec. 2, it was enacted:

> In case after this Act goes into effect a party appeals to a divisional court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said divisional court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the divisional court.

The effect of this legislation was to make the divisional court an appellate tribunal co-ordinate in jurisdiction with the provincial court of appeal, in the cases to which the section applied, and also to make it a court of last resort in cases in which its appellate jurisdiction under this section might be exercised.

Then the question is raised whether this had the effect of doing away with the jurisdiction of this court or a judge thereof (under the Act 38 Vict. cap. 11, sec. 11, now Supreme Court Amendment Act, sec. 26, subsec. 3, before set forth) to grant leave to appeal to this court directly from a judgment of the divisional court in a case in which owing to the change in the law by the provincial statute referred to, there could be no appeal to the Court of Appeal.

I am clearly of opinion that this change in the procedure and jurisdiction of the provincial courts has effected no alteration in the competence of this court to exercise the powers conferred by section 26, subsec. 3 of the amended Supreme Court Act. The language of that section is just as applicable to the case of an appeal directly from a division of the provincial High Court as it ever was. It was beyond the power

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of the Provincial Legislature to take away any jurisdiction which Parliament had conferred on this court. The new provincial law giving an alternative right of appeal to the divisional court or to the Court of Appeal at the election of the parties, does not imply any intention on the part of the Ontario Legislature to take away a right of appeal to this court even if it had the power to do so. There is no reason why the suitor who elects to take his appeal to a divisional court should be considered as abandoning his rights of ulterior appeal to the federal jurisdiction; on the contrary it might reasonably be assumed that he ought to be in exactly the same position in that respect whichever tribunal he selected.

The case is therefore clearly, one in which it was competent to a judge to give leave to appeal and in the present case I am of opinion that the power was properly exercised inasmuch as the case is one of great general importance involving as it does the construction of a number of statutes relating to rivers and streams conferring rights on the public which ought to be ascertained and defined by the courts with all possible exactitude.

The appeal is dismissed with costs.

TASCHEREAU J.—This appeal should be quashed. It is an appeal from the divisional court, appellant having, it is conceded, under the Ontario Statutes, ch. 51 R. S. O. 1897, secs. 74 et seq. and 62 V. (2 Sess.) ch. 11, sec. 27, no right of appeal *de plano* to the Court of Appeal, and leave to appeal thereto having been refused to him. Now, no appeal lies in this court from the judgment of the divisional court, except *per saltum*, upon special leave under subsec. 3 of sec. 26 of the Supreme Court Act (ch. 135 R. S. C.), which special leave can be granted however only in cases

where an intermediate appeal does lie to the Court of Appeal, but where the appellant desires upon special grounds to pass over that court and come direct here. The appellant here has, it is true, obtained from a judge in chambers an order purporting to have been granted under that said subsec. 3 of sec. 26, giving him leave to appeal. But a judge in chambers had not the power to grant such leave in this case, because there being no right of appeal to the Court of Appeal, there is no *per saltum* at all, in allowing appellant to appeal direct from the divisional court. "*Per saltum*,—by a leap; passing over intermediate objects." Taylor's Law Glossary. The words

without any intermediate appeal being had to any intermediate Court of Appeal in the province,

at the end of that subsection mean clearly, it seems to me, that it is only the case *when such an intermediate appeal lies*, as in *Moffatt* v. *The Merchants Bank* (1) for instance, that the enactment is restricted to. Appellant would strike these words out of the statute. That cannot be done. The words would be entirely superfluous if an appeal to this court could be allowed when there is no appeal in the province, and we cannot so treat them.

Respondent appealed to the court from that order granting leave to appeal, but we held that we could not entertain such appeal from the exercise of a discretionary power, assuming that the judge had jurisdiction to grant that order. The point had not been noticed in *Bartram* v. *Village of London West* (2). See *Ex parte Stevenson* (3); *Re Central Bank of Canada* (4), and *ratio decidendi* in *Lane* v. *Esdaile* (5). Respondent should then have moved to quash the appeal;

(1) 11 Can. S. C. R. 46.
(2) 24 Can. S. C. R. 705.
(3) [1892] 1 Q. B. 394.
(4) 17 Ont. P. R. 395.
(5) [1891] A. C. 210.

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The Ontario and Quebec Railway Co. v. *Marcheterre* (1). But his failure to do so cannot, of course, give us jurisdiction. In every case, we have to see, *in limine*, if we have power to entertain the appeal, whether the point is noticed at bar or not.

The appellant further contends that assuming the leave to appeal granted to him in Chambers to be of no avail, yet this court has jurisdiction because, he having no right of appeal to the Court of Appeal, the Divisional Court from which he now appeals, is, in his case, the highest court of last resort in the province under section 24, subsec. *a*, and section 26, subsec. 1 of the Supreme Court Act. But that contention cannot prevail. It was the contention raised in *Danjou* v. *Marquis* (2), and *Macdonald* v. *Abbott* (3), but declared unfounded by the court.

In Quebec, a party who is dissatisfied with the judgment of the Superior Court may either appeal to the Court of Review or to the Court of Appeal, but if he elects to appeal to the Court of Review, and the judgment is confirmed, he has no right to appeal further to the Court of Appeal. Though in such a case, the Court of Review was the court of final resort in the province, yet we held in those cases that no appeal could then be taken therefrom to this court, as that court was not the highest court of final resort in the province. Now, the divisional court is likewise not the highest court of final resort established in the Province of Ontario. See also *Chevalier* v. *Cuvillier* (4). By an amending Act, 54 & 55, V. c. 25 (D), an appeal now lies from the Quebec Court of Review in certain cases, but until a similar legislation is extended to the divisional court of Ontario, no appeal lies from that court.

(1) 17 Can. S. C. R. 141.
(2) 3 Can. S. C. R. 251.
(3) 3 Can. S. C. R. 278.
(4) 4 Can. S. C. R. 605.

No subsequent legislation to the cases I have referred to has altered the Supreme Court Act in that respect. In fact, *Danjou* v. *Marquis* (1), is re-asserted as law, but for the amending Act above cited, as late as 1895 in *Barrington* v. *The City of Montreal* (2).

The contention that the Ontario Legislature could not indirectly do what it cannot do directly, take away the right of appeal to this court, has been answered in *City of Ste. Cunégonde* v. *Gougeon* (3), where the learned Chief Justice said for the court.

That the Provincial Legislature may limit appeals to the Court of Appeal of the province must be admitted, although the effect of so doing may be to take away in such cases a further appeal to the Supreme Court.

The appellant would contend that though by the Dominion Act, 60 & 61 V. c. 34, no appeal, with certain exceptions, lies to the Supreme Court from any judgment of the Court of Appeal for Ontario, where the amount in controversy in appeal does not exceed one thousand dollars, yet an appeal would lie from the Divisional Court where by the Ontario statute the judgment of that court is final, even when the amount in controversy is less than one thousand dollars. Such an anomaly was not intended. Parliament of Canada, must have assumed that no appeal lies from Ontario in ordinary cases, but from the Court of Appeal, the highest court of final resort in the province. The Ontario Legislature likewise, since 1881, by ch. 49, R. S. O. (1897) sec. 2, has assumed that to be the law. And though, prior to the recent legislation on the subject, the divisional court's judgment by the Act of 1881 was final in cases under $500, where the judgment was unanimous, yet, I do not know of a single attempt during that period to bring any of those cases to the Supreme Court, though, if appellant's con-

(1) 3 Can. S. C. R. 251. (2) 25 Can, S. C. R. 202.
(3) 25 Can. S, C. R. 78.

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tention here prevailed, all of them would have been appealable. That is not, *per se*, conclusive, but it shows the novelty of the present appeal The consensus of the profession and of the Federal and Provincial Legislative authorities deserves consideration.

The order granted in Chambers as to this second point cannot give us jurisdiction. If the appeal direct was given by the statute, no order would be necessary. If it is not given by the statute, no order can give it. The case, on this point, is precisely as it the registrar had received the appeal *de plano*. The question of jurisdiction would still then be open to the respondent, with or without motion to quash, and, would have, upon his failure to do so, to be taken by the court.

GWYNNE J. took no part in the judgment on the appeal from his order in chambers.

SEDGEWICK J.—I concur in the judgment of my brother Taschereau.

GIROUARD J.—I concur in the dismissal of this appeal from the order made in chambers.

In the following term the case was heard on the merits before a differently constituted court, Mr. Justice King being present, and Mr. Justice Sedgewick not sitting.

Aylesworth Q.C. and *Shaunessy* for the appellant, referred to *Little* v. *Ince* (1).

Osler Q.C. for the respondent, The only remedy given by the Act is that of removing the obstruction, and no other is open to appellant. Hardcastle on Statutes, 2 ed. pp. 259-261. *Lamplugh* v. *Norton* (2); *Cockburn* v. *Imperial Lumber Co.* (3).

(1) 3 U. C. C. P. 528. (2) 22 Q. B. D. 452.
(3) 26 Ont. App. R. 19.

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The judgment of the court was delivered by:

GWYNNE J.—The appeal before us is from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario, dismissing an appeal of the plaintiff from the judgment of the trial judge dismissing his action, the short material substance of which as set out in his statement of claim was a complaint that he being a person engaged in the business of floating logs of timber down a stream called Bear Creek during the season of freshets suffered damage from certain logs of his which during the freshet seasons of the years 1895, 1896 and 1897 he was floating down the stream having been obstructed and delayed by two several obstructions which the plaintiff alleges had been made by the defendants across the stream and were used by them for the purpose of damming up the water of the said stream so as to hold the same during the dry season of the year when little water was in the stream, and from which since the construction of the obstructions the plaintiff alleges that the defendants have drawn and still do draw the water by a large iron pipe to an oil refinery which they operate several miles away.

This judgment of the Divisional Court appears to me to have proceeded upon a too limited and too technical construction of the plaintiff's statement of claim. The court in pronouncing their judgment say:

> The plaintiff does not put his case upon the ground that the defendants having the right to construct the dams in question negligently constructed them, nor alleging that there was a duty upon them to construct the said dams with aprons or slides therein on the ground of the neglect of such duty, but he puts it solely upon the ground that the defendants although not riparian proprietors or in anywise entitled to any right, property or interest in the said stream or creek apart from other members of the public wrongfully erected the said dams. Woodley was undoubtly the owner of the land on each side of

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the creek, and *primâ facie* the owner of the soil which formed the bed of the creek at the point at which he constructed his dam, and as such owner had as we have seen the right to construct the said dam. At the point at which the defendants constructed their dam one Fairbanks owned the land on the west side of the creek and the soil which formed the bed of the creek to the centre of the creek, and Fitzgerald and Fellows together owned the land on the east side of the creek and *primâ facie* the soil which formed the bed of the creek to the centre of the creek so that at this point Fairbanks, Fitzgerald and Fellows together owned the land on each side of the creek and were *primâ facie* owners of the soil which formed the bed of the creek, and it was under their leave, license and authority that the defendants constructed their dam, and they had therefore the right to do so.

If this was the proper construction to put upon the statement of claim, then instead of dismissing the plaintiff's appeal upon the ground stated the proper course to have been pursued would have been for the court to have exercised the powers vested in the Ontario courts by statute, and which they are not only authorized but required to exercise at any stage of the action and not only upon, but without the application of any of the parties, and to have made all such amendments as might be necessary to determine the rights and interests of the respective parties, and the real question in controversy between them, and which was in point of fact brought to trial and tried, and best calculated to secure the giving of judgment according to the very right and justice of the case; but the sentence in the statement of claim from which the Divisional Court have extracted a part continues to express clearly enough, as it appears to me, that the gist of the plaintiff's statement of claim, as alleged in the 4th paragraph, and the wrongfulness therein complained of consisted in the defendant having erected

two certain obstructions in said stream, one being about three fourths of a mile further up the stream than the other by laying timber, stones, stakes, earth and other substances firmly jointed and very difficult of removal across the full width of the said stream at those

two points, of a sufficient height to intercept the flow of the water in the stream even in high water, and to catch and obstruct saw-logs and timber floating down the stream.

Then the statement of claim in its 5th, 6th and 7th paragraphs proceeds to allege the repeated obstructions of the plaintiffs caused by these obstructions in the years 1895, 1896 and 1897, and the difficulty he had in getting the logs freed from the jams thereby caused and the damage occasioned him thereby. Then in the 8th paragraph was inserted another cause of action to which the language cited from the statement of claim by the Divisional Court as to the defendants "although not riparian proprietors," &c., &c., seems to relate; that cause of action is thus stated in paragraph 8.

The plaintiff is a riparian proprietor on the said stream below the said obstructions, and he has suffered and is suffering great damages by the withdrawal of the said water from the said stream by said defendants by reason of loss of water for cattle and other domestic purposes.

Now that the defendants never had any doubt that the gist of the plaintiff's complaint, as alleged in the first seven paragraphs of the statement of claim, consisted in the damage alleged to have been suffered by him by reason of his logs having been wrongfully impeded and jammed together in coming down the streams by two obstructions alleged to have been constructed by the defendants across the stream of a character capable of impeding, and which did impede plaintiff's logs floating down the stream without having any slide therein whereby the logs could descend the obstructions or dams, appears by the defendants statement of defence, and by the evidence and course of proceedings at the trial. The defendants in their statement of defence:—1. Plead a general denial of all the allegations in the statement of claim except those in the 1st paragraph.

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2. They deny that the said obstructions ever prevented the passage or ever caused the logs or timber of the plaintiff to become jammed as alleged.

3. The obstruction referred to in the statement of claim did not catch and obstruct the said logs and timber of the plaintiff floating down said stream as alleged, but on the contrary the said obstructions, if any, raised the water of the stream above them, thereby rendering it more convenient and possible at certain times, when otherwise it would have been impossible, to float logs and timber on the shallow parts of said stream above said obstructions.

4. That if any such obstructions existed as alleged, (which the defendants do not admit but deny) the plaintiff was well aware thereof before putting his logs and timber in the stream as alleged and the plaintiff could, as he lawfully might with little or no expense, have removed the said obstructions complained of and have thereby avoided the jams that he alleges (but which the defendants deny) occurred.

5. The right claimed of by the plaintiff in respect of the use of the said stream for floating logs and timber, (and which right the defendants deny) is, if any, a statutory right acquired under ch. 120 of the Revised Statutes of Ontario, and the defendants plead and claim the benefit of sections 5 and 6 of said Act.

Then as to the cause of action in the 8th paragraph of the statement of claim the defendants pleaded a defence covering also the allegation in the 4th paragraph that the defendants "although not riparian proprietors," &c., &c., did the act complained of for the purpose of drawing off water, &c., &c., to their oil refinery in which defence they say:

6. That they are and have been during all the times complained of, lessees and in possession of a part of lot number fourteen in the twelfth concession of the Township of Enniskillen, now in the town of Petrolia, abutting on the said stream, and as such are and have been during said times entitled to the rights of riparian proprietors, and that if they withdrew any water from the said stream to be used in their said manufactory as alleged (which, however, they do not admit) the same was a reasonable use of the said stream and did not cause any damage to the plaintiff as alleged, and the said water, if any was taken, was returned to the said stream by the defendants above the lands of which the plaintiff claims to be a riparian proprietor.

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Issue having been joined on these defences the parties went down to trial and there the main contention was as to the amount of damage, if any, sustained by the plaintiff by reason of his logs having been interrupted and delayed in their progress by the obstructions complained of. In the course of the inquiry into this matter it appeared in evidence that the upper dam was constructed by one Woodley upon his own property, and the learned trial judge held that although it appeared that the defendants assisted in the construction thereof by giving some material therefor, and although they derived a benefit from the dam by arrangement with Woodley to have a pipe in the dam enabling them to draw off water to their oil refinery, still, that Woodley was the only person who, if any, was responsible to the plaintiff for any damage by him sustained by reason of his logs having been obstructed by that dam, and he held as a matter of fact upon the evidence before him that the plaintiff had not sustained any damage which was attributable to the lower dam which was built by the defendants and for the above reasons he gave judgment dismissing the plaintiff's action. He pronounced no judgment upon the defence raised by the 5th paragraph of the statement of defence, the contention of the parties in respect of which was—on the part of the plaintiff—that all persons who hinder or delay the floating of logs down a stream by the erection therein of any dam or other obstruction are responsible to the person suffering damage from his logs being thereby obstructed unless they show that they had erected a sufficient slide to enable the logs to float over the dam and so float down the stream, and the contention of the defendants being that the right of riparian proprietors to construct a dam across a river is absolute subject only to the right of persons floating logs down

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the river to construct at their own cost a sufficient slide in such dam. As the Divisional Court although not adjudicating upon this point have expressed an opinion upon the question involved in this paragraph of the defence, and as the question is a very important one, it is necessary to deal with it under the defence contained in the 5th paragraph of the statement of defence. The question is certainly one of some apparent difficulty which arises from the manner in which divers Acts and sections of Acts of Parliament are re-enacted in divers sections of one chapter of the edition of the statutes—called the Revised Statutes of Ontario. Thus, the first section of ch. 120 R. S. O., 1887, is the consolidation of the first section of 47 Vict. ch. 17, passed in 1884, and secs. 11 to 22, both inclusive, of the said ch. 120, are severally and continuously the consolidation of secs. 2 to 13, both inclusively, severally and in continuous order of the said ch. 17 of 47 Vict., while secs. 2 to 10, both inclusively of said ch. 120, are severally the consolidation of sections of like numbers in ch. 115 R. S. O., 1877, and this ch. 115 is in like manner the consolidation of certain parts of two other Acts, namely, chs. 47 and 48 C. S. U. C. which are in like manner the consolidation of other previous Acts, but it is unnecessary for my purpose to go farther back than C. S. U. C. The first and second sections of said ch. 115 are respectively the consolidation of secs. 15 and 16 of ch. 48, C. S. U. C. intitled "An Act respecting mills and mill dams," while secs. 3 to 8, both inclusive of said ch. 115, are respectively the consolidation of secs. 1 to 6, both inclusively, and in continuous order of ch. 47 C. S. U. C.

Now every edition of the Revised Statutes of Ontario is subjected to an Act of the Legislature, intituled "An Act respecting the Revised Statutes of Ontario," pre-

scribing the manner in which the revised statutes shall be construed, and enacting

> that the said revised statutes shall not be held to operate as new law, but shall be construed, and have effect as, a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said revised statutes are substituted.

In accordance with this direction sec. 5 of ch. 120 R. S. O. 1887 cannot be construed as anything more than a section in consolidation of sec. 5 of said ch. 115 R. S. O. 1877, and as declaratory merely of the law as contained in such last mentioned section now repealed, and that the said section 5 of said ch. 115 was while in force in like manner a consolidation merely of sec. 3 of ch. 47 C. S. U. C. For the purpose therefore of construing sec. 5 of the R. S. O. 1887, ch. 120, it is necessary to refer back to this ch. 47 C. S. U C., and to determine the purport and intent of the sec. 3 thereof. This ch. 47 C. S. U. C. imposed in its first section penalties upon persons who should, except as therein authorised, fell any trees into certain large navigable rivers therein mentioned, and in its second section imposed penalties on all persons who should throw into any river, rivulet or water course, "*excepting those hereinafter mentioned*," any substance therein mentioned, or should fell or cause to be felled in or across such river, rivulet or water course any timber or growing or standing trees, and should suffer them to remain in or across such river, rivulet or water course.

Then sec. 3 enacts as follows:

> This Act shall not apply to any dam, weir or bridge erected in or over any such river, rivulet or water course, &c., &c.

And sec. 4 names the rivers excepted from such section 2 of the Act under the words "excepting these hereinafter mentioned," namely: The Rivers St. Lawrence and Ottawa, and all rivers or rivulets

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"wherein salmon, pickerel, black bass or perch do not abound."

It appears therefore to be clear that sec. 5 of the ch. 120 cannot be read as new law or as anything else than a qualification of the penal clauses 3 and 4 which are but the consolidation of the penal clauses in ch. 47 C. S. U. C. It cannot therefore be construed as having any effect in qualification of sec. 1 of ch. 120, which is a consolidation of sec. 1 of 47 Vict. ch. 17. Indeed so to construe it would be to contradict in most plain terms that section which declares that it is and always has been the right of all persons during spring and autumn freshets to float logs, timber, &c., &c., down all rivers, creeks and streams, and that no person shall by felling trees *or placing any other obstruction* in or across any such river, creek or stream prevent the passage thereof, and in case of any such obstruction being caused it is declared to have been always lawful for the persons floating logs, &c., down the stream to remove the obstruction if necessary, and to construct such apron, slide, &c., &c., &c., or other work necessary for the purpose aforesaid that is, for removal of the obstruction. Now there can be no doubt that in order to construct an apron or slide for the purpose of removing the obstruction caused to floating timber it is plain that such works must needs be constructed for the purpose of removing the obstruction caused by a dam across the whole width of a stream. There can be no pretence therefore for saying that a dam across a river which obstructs the floating of logs, &c., &c., is not an obstruction within the first section of ch. 120, R. S. O., 1887. As all persons have a legal right to float logs, &c., &c., down every river or stream in Ontario the obstruction of that legal right is necessarily a wrong and gives a good cause of action for recovery of damages for the injury sustained thereby,

but the statute gives a further remedy which enables the party suffering the injury to abate the nuisance by removal of the obstruction subject to this qualification that if the obstruction be a dam across a river which may be lawfully constructed for many useful and lawful purposes the person requiring to use the river for floating down logs therein may not remove the dam if it have an apron or sluice in it sufficient to enable the logs, &c., to float down; the remedy by removal of the obstruction can only serve to prevent a recurrence of the injury—an action affords the only remedy for an injury suffered from the obstruction prior to its removal.

The question before us must then turn upon the judgment of the trial judge and we think that the evidence sufficiently established such a connection of the defendants in the erection of the upper dam and in its maintenance, that they are answerable in an action at the suit of the plaintiff for any damages caused by the obstruction to his floating his logs.

We think that the appeal must be allowed with costs and that the whole question of the damage whether caused by the upper or the lower obstruction should be referred to the master of the High Court of Ontario to inquire and report to the court. The appellant will have the costs of this appeal and of his appeal to the Divisional Court and the costs of the action up to and inclusive of the trial; subsequent costs must be reserved until after the master's report.

Appeal allowed with costs.

Solicitors for the appellant: *Pardee & Shaunessy.*

Solicitors for the respondent: *Moncrieff & Gausby.*

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*Nov. 7,8,10.
*Nov. 29.

JOSEPH HESSE (PLAINTIFF).....APPELLANT;

AND

THE SAINT JOHN RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Action for damages—Improper evidence—Misdirection—60 V. c. 24 s. 370 (N.B.)

By 60 Vict. ch. 24 sec. 370 (N.B.) "A new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against the Electric Street Railway Company for damages on account of personal injuries, the Vice-President of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal Exchange, and proved that they sold at about 50 per cent premium. The judge in charging the jury directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages.

Held, that on cross-examination of the witness by defendant's counsel the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages.

The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he

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

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had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury he might consider more fully the question of amputation. The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible.

Held, Strong C.J. and Gwynne J. dissenting, that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.

To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction.

APPEAL from a judgment of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action in this case was for damages as compensation for personal injuries to the plaintiff, caused as was alleged, by negligence of servants of the defendant company. The plaintiff recovered a verdict with $25,000 damages, and a new trial was moved for on grounds of misdirection and improper reception and rejection of evidence. The Supreme Court of New Brunswick granted a new trial, and plaintiff appealed to this court.

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The material grounds of objection to the proceedings on the trial are stated in the judgments given on this appeal.

Quigley Q.C. (*Stockton* Q.C. with him) for the appellant.

Pugsley Q.C. and *McLean* Q.C. for the respondent.

THE CHIEF JUSTICE.—I dissent from the judgment of the court for the reasons given in the judgment of Mr. Justice Gwynne, in which I concur in all respects.

GWYNNE J.—After a protracted and much contested trial of fourteen days continuance during which the defendants disputed all liability and no less than thirty-eight witnesses were examined the jury, said to have been a special jury and a most intelligent one, unanimously rendered a verdict for the plaintiff with twenty-five thousand dollars damages. The defendants moved to set aside this verdict upon seventy-five separate items of objection stated in their motion paper of which forty were objections of alleged improper reception of evidence, eleven of alleged improper rejection of evidence, twenty-two for alleged misdirection, then for excessive damages, and finally upon alleged discovery of new evidence.

Upon one only of these several grounds of objection did a majority of the Supreme Court of New Brunswick concur in granting a new trial. That ground was one of those for alleged misdirection which did not however at all affect the liability of the defendants for the occurrence of the injury, but was pointed solely to the amount of damages which had been rendered by the jury which were contended to be excessive. The objection relates to the

observations of the learned judge in his charge to the jury in relation to certain evidence given by a Dr. Broderick, a surgeon employed by the plaintiff to attend him upon his receiving the injury which is the subject of this action. The matter testified by Dr. Broderick came out as part of the narrative of the disaster which had befallen the plaintiff, of the nature of his injury, his sufferings and their continuance until his foot was amputated, and so the evidence given constituted matter which, as part of the narrative of the disaster, could not have been withheld from the jury, and assuming the evidence so given to have been true, in the opinion of the jury, no reasonable objection can, I think, be taken to the observations made by the learned trial judge in relation to it.

The matter arose in this way. The plaintiff upon the occurrence of the injury received by him placed himself in the hands of Dr. Broderick. He had however to be taken for treatment to the general hospital at St. John where, as was said, only five or six medical men were permitted as surgeons or physicians to attend a patient. Dr. Broderick was not one of these but the defendants had retained one of the hospital surgeons, Dr. Thos D. Walker, jr., to consult with Dr. Broderick as to the treatment of the plaintiff. Dr. Broderick for reasons which he gave was of opinion that, and urged that, the foot should be amputated. Although not permitted to take part in the treatment in the hospital he was permitted to see the plaintiff as a friend or visitor, and he was present in the hospital when the hospital surgeons put the plaintiff's foot in plaster, and his testimony was that upon leaving the hospital upon that occasion with Dr. Thos. D. Walker whom he knew had been retained by the defendants to consult with him he, Dr. Broderick, in conversation with Dr. Walker upon

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the plaintiff's case remarked that in his opinion it would be best that the foot should be taken off and that Dr. Walker replied that if Dr. Quigley (the plaintiff's attorney in the matter)

did not use it to work on the sympathies of the jury and would look at it from the standpoint of a surgeon, that it might probably be arranged that the foot might be taken off earlier—that that could be arranged between them.

Now the defendant's counsel in the motion paper for a new trial without stating what were the observations of the learned judge to which the objection of misdirection is taken, in one paragraph of the motion paper put a construction upon the judge's observations which, assuming that construction to be correct, is one which is put forward by the defendants themselves as affecting Dr. Walker if the evidence of Dr. Broderick was to be adopted as true, but not in any manner as affecting the plaintiffs right to a verdict, or the amount of damages recoverable by him so as to constitute good ground for a new trial being granted for misdirection. In the motion paper for a new trial it is not suggested that, nor in my opinion is there any foundation for the suggestion in argument that, the learned trial judge's observations on this head had a tendency to induce the jury to increase the amount of damages for which they should render a verdict against the defendants. The learned trial judge in his judgment upon the motion for a new trial has, with reason, in my opinion, repudiated any such construction being put upon his charge, and indeed no such construction can, I think, be put upon it without eliminating more than half of the charge for in a very plain manner as I think did the learned judge expressly draw the attention of the jury to the evidence which he submitted to them as that upon which they should render the verdict both as to liability and as to amount

of damages if liable, and in such evidence, the reference to which occupies more than half of the learned judge's charge, there is not a syllable which relates to Dr. Broderick's evidence, while the whole contention of the defendant is laid before the jury in a clear and exhaustive manner. The gravamen however of this charge is stated in paragraph "M" of the motion paper as follows:

> In telling the jury that Dr. Walker did not contradict Dr. Broderick, he only says that he did not remember making statements whereas the evidence shows that Dr. Walker not only says that he has no recollection of having made such a statement but did not think that he had done so.

Now Dr. Walker having been called as a witness by the defendant, was asked if he had heard what Dr. Broderick had said took place in conversation between them and, having said he had, he was asked if Dr. Broderick had stated that conversation correctly as he, witness, remembered it, to which he replied that he *had no recollection of mentioning anything about damages or about Dr. Quigley.* Then on cross-examination, he was asked if Dr. Broderick had said that he thought it better to take off the foot, to which he answered that he thought he did. Then the words used by Dr. Broderick in his evidence having been repeated to him he was asked if he would swear that he did not use those words to which he replied "I won't swear it but I do not think I did, "I won't swear I didn't," and he repeated several times that he did not think he did but he would not swear that he did not. Upon re-examination the defendant's counsel put to him this rather leading question:

> Did such a thought as that ever occur to your mind? To which he answered:—No,

and further said that notwithstanding what he had said in his examination, he had no recollection of

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having made such a statement, and that he did not think he had made it. Now the learned judge in the course of his narrative of the plaintiff's injury, and his suffering, spoke of the evidence given by Dr. Broderick as not having been denied by Dr. Walker, but that he said he did not remember having said what Dr. Broderick said that he had said. This I must say does not appear to me to be what can be called an inaccurate summary of what Dr. Walker had said. If however the learned counsel for the defendant thought otherwise, and also thought that it was a point which it was material to the defendant should be corrected, the course open to him was plainly to have called the attention of the judge at the time to the matter so that it might have been corrected instead of keeping silent and taking the chance of a verdict in favour of the defendant, and if it should be against them, moving on such an objection for a new trial for misdirection. The ordinary rule in England is not to entertain a motion for misdirection upon a ground not drawn to the attention of the trial judge. This is said not to be the practice in New Brunswick, while that the law of England is the law of New Brunswick upon the subject is not denied; but the statute 60 Vict. ch. 25 of New Brunswick, sec. 370, does enact that a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action, and no such wrong or miscarriage can be said to have been occasioned in that trial of the action by anything involved in the objection upon which alone the majority of the Supreme Court of New Brunswick have proceeded. Indeed as already observed, the objection is in the motion paper rested upon this

that the learned judge's alleged misstatement of Dr. Walker's evidence injuriously affected him, not that it occasioned any wrong or miscarriage in the trial of that action.

Counsel for the respondents pressed before us two of the seventy-five objections which did not in the opinion of a majority of the Supreme Court warrant the setting aside of the verdict, but in neither of these cases can it in my opinion be said that the observations of the learned judge which are objected to have occasioned any wrong or miscarriage whatever in the trial of the action. First as to that which arose on the examination of the witness Robinson. In his examination of that witness it cannot, I think, for a moment be supposed that the plaintiff's experienced counsel, the late Judge Palmer, had any idea of eliciting from the witness statements which had been made to him by others which the learned counsel contemplated should be taken as evidence of the truth of such statements; his object was, I think, to give to the witness, who as president of the company had gone to the States for the purpose of obtaining evidence to test the correctness of the statements of the plaintiff in his claim for compensation, an opportunity of saying whether he had learned anything contradictory of such statements as presented to the defendant. The learned counsel, I think, felt that if the president had answered the questions he was proposing to put to him he must have said that he had heard nothing prejudicial to the plaintiff's claim. He would then possibly have asked why then the action was so persistently resisted. The learned judge said that the witness having thus been given this opportunity of telling what, if anything, he had heard prejudicial to the plaintiff's statement and having through his counsel objected to answer the jury might, *when considering the value of the plaintiff's*

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evidence, infer that if the president of the defendant company could have said that he had learned anything contradictory of the plaintiff's statement he would have availed himself of the opportunity given him to do so. It must be admitted that these observations were quite unnecessary for the plaintiff had Mr. Eccles in court and divers others, all of whom were called as witnesses and spoke as to the plaintiff's professional standing, his present means before the injury, and but for the injury his future prospects, all of which evidence was submitted to the jury from which they had the fullest opportunity of setting their value upon the plaintiff's evidence which was the sole point to which the judge's remarks which were objected to related without any reference to the inference which it was suggested might be drawn from the interruption of the examination of the president of the company; but however unnecessary the remarks of the learned judge may be said to have been upon this head of objection it cannot, in view of the evidence of Eccles and others upon the point in question, be said that the remarks objected to upon this head occasioned any wrong or miscarriage whatever in the trial of the action. Then upon the head of objections as to what the learned judge said as to the commission. The form of that objection for misdirection is

> in telling the jury that the defendant company were bound to have had the commission returned and that the fact that the commission had not been returned was a matter which they could take into consideration when pronouncing upon the credibility of the plaintiff.

I cannot see here any ground for an objection for misdirection. The observations which are objected to point only to the value to be attached to the plaintiff's evidence, for his credibility is not assailed in the only manner known to the law, and as to setting a proper value upon his evidence there was most abundant

evidence given by Eccles and other witnesses. The utmost that can be said is that the remarks involved in this objection were unnecessary, and it cannot be said that the learned judge's remarks on this head can have occasioned any wrong or miscarriage on the trial of the action. In the argument before us, although no point founded upon the contention was taken in any of the 75 objections on the motion paper, it was pressed upon us, although it had appeared that the commission was withheld by the commissioner and not returned by the express order of the defendants given through their solicitor, and although the defendants persistently contended that the plaintiff was not entitled to see the commission, yet that they had subsequently at the trial offered that either party might put in whatever minutes they severally had of the evidence given which they might choose to put in, an offer not accepted by the plaintiff. What was intended by the passing of this offer does not appear very plain. Whether it should be taken as a condonation of the offence committed in ordering the commission to be withheld in contempt of the order of the court or otherwise it is difficult to say. It is sufficient, however, I think, to say that the only objection on this head which we have to consider is that as framed in the motion paper for the new trial as above stated, and, so considered, the remarks of the learned judge cannot be said to constitute misdirection, and even if they could can not be said to have occasioned any wrong or miscarriage in the trial of the action.

Now all the objections taken as affecting the liability of the defendant for the injury which the plaintiff suffered are dropped at the last moment in the argument before us in which the contention that the defendant is not so liable has been no longer contended, and for the reasons already stated all the objections as of mis-

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direction as affecting the amount of damages must, I think, fail. All that remains, therefore, is the naked objection that the damages are excessive. It may be admitted that in this country it is not a usual thing for verdicts for $25,000 damages to be rendered in an action of this nature, but neither is it a usual occurrence for the loss of a foot to occasion such excessive injury as that occasioned to the plaintiff, and which I think the evidence shows to have been of the very gravest possible character, destructive of his sole means of practising his profession as an organist, and of supporting himself and his family. Under these circumstances I do not feel justified in saying that this jury, the constitutional tribunal for awarding damages in actions of this nature, have erred in awarding to the plaintiff for the injury he has received the sum of $25,000, large as that sum may appear to be. That was a matter solely for the consideration of the jury which was a special one, and said to have consisted of most competent and intelligent persons. I am of opinion, therefore, that the appeal should be allowed with costs, and that judgment should be entered for the plaintiff, in the action, upon the jury's verdict with costs.

SEDGEWICK J.—I concur in the judgment of Mr. Justice King.

KING J.—None of the objections to the admission or rejection of evidence require to be considered except one, viz.: that as to the shares of the company selling at a premium.

This occurred in the testimony of Mr J. Morris Robinson, the vice-president of the company, who was called on behalf of the plaintiff. The evidence in itself was improper, but it is contended that the matter

had first been gone into by the defendants on the cross-examination of Mr. Robinson. What took place was this: Mr. Palmer, counsel for plaintiff, questioned Mr. Robinson as to the equipment of the road and then asked:

Q. You know, I suppose, that the company put out some $400,000 of bonds. Did they not?

A. Yes. $500,000 or $450,000.

Q. And also $500,000 of stocks?

A. Yes.

Mr. Quigley in opening to the jury had said:

It is a matter of common knowledge that these defendants are making and were making at this time and are to-day making large sums of money out of the building and equipping of this road. This fact you can see because they have formed a company and issued a large amount of stock, but the investment is such a profitable one that the stock rose to the value of $145 for every $100; in other words really 50 per cent more. If meanwhile they have been converting these cars into death traps for young and old riding upon them, each one of us is equal to the realizing the sense of the outrage which has been committed against each one using the tram cars in this city.

Then the counsel for the defendants, when it came to the cross-examination, attempted to show that the proceeds of this large issue of bonds and stock had gone into the equipment of the road, but in this he wholly failed, and ended in proving what probably he would have preferred not to prove, viz.: that it had been divided up amongst the shareholders of the amalgamating companies according to a scheme agreed upon before the amalgamation.

Q. My learned friend Mr. Palmer asked you if this company had not issued stock and debentures to the amount which he named, and my learned friend, Dr. Quigley yesterday, in what I think may be the same connecton, told the jury that the company made a large amount of money out of the stock and debentures. Is that true?

A. The stock is selling at quite a premium——

Q. He said that the company made an amount out of the issue?

A. That is not within my knowledge.

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Q. Is it not a fact that the proceeds of the debentures went into the new road and the erection of the power house and thorough equipment of it?

A. No; that is not the case.

Q. I do not say all of it, but——

A. No, none of it. It was an amalgamation of two companies, and on the amalgamation certain stock and bonds were issued and divided among the shareholders according to the proportion agreed upon.

The original notes of the official stenographer and the printed case show, by a dash after the word "premium" that Mr. Robinson's answer to the first question was interrupted by counsel who, in another question, put before the sentence was completed, repeated in shorter form the question he had put before. Clearly, Mr. Robinson's unfinished answer was not responsive to the question, and, by interrupting him before he finished the sentence and drawing his mind to the real question, it is made sufficiently clear that the defendant's counsel was not accepting it as an answer to his question. The plaintiff's counsel would clearly not have been entitled to require that Mr. Robinson should be permitted to finish the sentence he had begun.

Upon re-examination the plaintiff's counsel drew attention to this answer, and went on at length into the matter of the selling price of the shares on the stock market at Montreal, proving that they had sold at 145 or 150. This evidence was objected to. I agree with Tuck C. J. that the door was not opened for such re-examination by the cross-examination of defendant's counsel, and the evidence must be considered as calculated to work substantial injury to defendants on the question of damages. The only real question remaining in reference to it is whether its natural effect was not neutralised by the observations of the learned trial judge in instructing the jury that the damages were to be assessed

upon the extent of the injury plaintiff received, independent of what these people may be or whether they are poor or rich.

Under the practice Act of the Supreme Court of New Brunswick, 60 Vict. c. 24, sec. 370,

> a new trial is not to be granted on the ground of misdirection or of the improper admission or rejection of evidence * * * unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.

In Mayne on Damages, at p. 405, it is remarked that

> although juries are frequently cautioned not to let their verdict be influenced by the poverty of the plaintiff and the wealth of the defendant, yet the caution is probably seldom much attended to.

In view of the amount of the verdict in this case it is quite likely that the general observation of the learned judge did not remove the effect of the improper evidence as to the financial ability of the company to respond well in damages.

Next as to grounds of alleged misdirection:

(1) As to the inference to be drawn from the defendant's objection to Mr. Robinson's stating what he was told in Providence by a Mr. Eccles regarding plaintiff's standing, earning capacity, etc:—About the time of action brought, the plaintiff's attorney informed Mr. Robinson (the vice-president of the company at St. John) that they could learn of the plaintiff's character and standing in his profession, etc., by inquiry at Providence, indicating several sources of information. Mr. Robinson went to Providence and made inquiries (amongst others) of a Mr. Eccles, who was not however, one of those indicated by plaintiff. Mr. Robinson called on behalf of the plaintiff, testified on direct examination that he had been recommended by a Mr. Torrance to Mr. Eccles, and that he had asked the latter as to plaintiff's standing as a musician, and as to his ability to earn money as an organist. He was then asked by plaintiff's counsel: "What information did you get" *i. e.* from Mr. Eccles. On objec-

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tion by defendant's counsel the question was disallowed, and I think properly, because it was mere hearsay, and could not possibly be held to be evidence in support of plaintiff's case. If plaintiff had mentioned Eccles as a person from whom information might be sought as to him, it might make Eccles's statements to Mr. Robinson evidence against himself, but it is quite a different thing when he seeks the benefit of the unsworn statements and opinions of third persons.

When the learned judge came to charge the jury he said:

> As I said a moment ago that the onus is upon the plaintiff to make out what he earned, but at the same time, while that is true, you have also had it in evidence that these defendants were put in a position to make the fullest inquiry as to the man's circumstances, where he was living, his social status, and his professional status, and all that. You have the evidence of Mr. Robinson that he went to Providence, that he was recommended to Mr. Eccles as a man who could give the proper information, that he had an interview with him. He comes back, and while the information he received would not be evidence, if objected to, still you may fairly consider this, that when Mr. Robinson is given an opportunity to tell all that, it was objected to and was necessarily ruled out; but when you come to consider Mr. Hesse's evidence, may you not assume that if he (*i. e.* Mr. Robinson), heard anything unfavourable, would he not have told it? It is for you to consider this, and you can consider this as to the weight to be given to or attached to Hesse's evidence, and it is for you to consider all this when you come to pronounce on the credibility of the witness. and it is not amiss for you to look at the surrounding circumstances and those things, and from them receive what assistance you can in determining how far you can accept his statement. I think it is material at which you can look when you are considering his earning capacity.

The learned judge can scarcely have well considered his words. If the unsworn statements of Mr. Eccles to Mr. Robinson were not admissible as against defendant, the objection to such improper evidence cannot prejudice the case, or help out that of the plaintiff, by inferences favourable to his credibility or

in any other way. How can A's credibility be supported by the proper rejection of B's improper testimony? It would be quite a different thing to say that failure by defendant to produce available evidence would tend to give credit to the testimony of one who was giving an account of occurrences which, if an incorrect account, could be readily shown to be so by such other proof not adduced.

While I have no doubt of the error, I am doubtful as to how far it can have affected the result prejudicially, and this for this reason:

Mr. Eccles was himself a witness on the trial, called on behalf of the plaintiff, and while his statement made in Providence to Mr. Robinson was inadmissible, the jury were in possession of his testimony on the trial, and to the extent that it went, it was much in favour of the plaintiff, and the jury might very well have found the same support in Eccles's testimony, as they were told they might find by an inference drawn from defendant's exclusion of his unsworn statements in Providence. The two things are not entirely equivalent, but there is so much approach to equivalence that it is unreasonable to conclude that the direction on this point prejudicially affected the trial of the case.

I may only add that when Mr. Eccles gave his testimony what had previously taken place in the objection to and rejection of evidence of his statement to Mr. Robinson became an incident of no importance whatever; and if the learned judge referred to it at all, he might well have added that it had then no significance, inasmuch as the jury had Eccles's evidence before them, which was much more satisfactory than any mere statement of what he had said to another could possibly be.

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(2) Next, as to the direction respecting the withholding of the evidence taken upon commission. A commission was taken out on behalf of the defendant to examine witnesses in Providence, and other places in the United States touching the plaintiff's earning capacity, &c. The evidence was taken, and one of the judges of the court made an order for its return, but the attorney for the defendant directed the commissioner not to return it, and he did not.

On this the learned judge said:

> However, it is not here,—and we cannot refer to it—good or bad, but there is this about it, that if Mr. Hesse was here as an impostor and did not receive that income, would it not occur to you that they having gone there and examined those witnesses, is it not an element which may be very fairly considered in determining about it in the absence of contradiction? People cannot play fast and loose. Either they were sincere in going there and getting this evidence, or there was some other motive; but I say to you, while you have not that evidence here, you may consider this when you come to pronounce upon the credibility of Mr. Hesse, because if he is here as an impostor and claiming that he received $4,000 or $5,000 a year and only received $1,500, then it is an imposition upon you to try to get you to believe it and an imposition upon this court. And you must be satisfied upon that reasonably and when you come to consider the matter, I think it is fair for you to consider all those surrounding circumstances.

Now this really means nothing more than this, that if a defendant sets up that there is evidence contradicting the plaintiff's case available to him, if he is afforded the opportunity of getting it, and if he therefore is afforded such opportunity and gets the evidence of the witnesses, and afterwards does not produce it (it being presumably legal and proper evidence), the testimony of the plaintiff which was sought to be contradicted is thereby strengthened. This assumes that if the facts were otherwise than as represented, this could be shown (and so much may be assumed from what took place in getting and acting on the

commission), and, therefore, failure to contradict leaves the plaintiff's statement in undisputed possession of the field so far as this class of opposing testimony is concerned.

The learned judge did not refer to the offer of defendant's counsel at the close of the plaintiff's case to have a copy of the evidence taken upon the commission admitted as if it were the original. I think it very likely that if his attention had been drawn to this omission he would have made some reference to it; although I am not prepared to say that, under the circumstances, the offer wholly made up for the failure to adduce the evidence.

(3) The next objection seems to be a more serious one. On the happening of the accident, the plaintiff was taken to the General Public Hospital in St. John. The medical and surgical staff on that day consisted of Drs. Christie, Maclaren, Emery and T. Walker, jr. Dr. Christie was of opinion that the foot should be at once amputated, and (in his recollection) Dr. Maclaren had the same view. Dr. Emery thought it possible to save the foot, and Dr. Walker agreed with him. Dr. Christie says:

> The other two were allowed to go on, because if they who had the man in charge (*i. e.* they who were acting as the staff physicians of the day) thought something could be done towards saving the limb we were not going to insist on doing anything to the contrary.

Dr. Christie adds that the patient appeared to him then to be a man about fifty, and that if he had known that he was in fact under forty he might have thought differently, adding that he was influenced very much by the appearance of the patient. He further says if he were to form a judgment upon the appearance presented by the plaintiff at the trial he should hesitate in advising as he did. The accident occurred on Sunday the 17th of July. On Wednesday Mr. Quigley

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wrote the company that he had been retained by Mr. Hesse to seek compensation for the injury, and suggested that they appoint a physician to co-operate with Dr. Broderick, the plaintiff's physician, so far as the rules of the hospital would permit. On Thursday the 21st, the company replied that they had appointed Dr. Thos. Walker, jr., to assist Dr. Broderick. By the rules of the hospital Dr. Broderick could not take part in the treatment or in consultations, as not being on the hospital staff, and so Mr. Hesse afterwards appointed Dr. Daniel, a member of the staff, to act as his immediate physician.

On the Thursday following another consultation was held, in which Drs. White, Thos. Walker, sr., Thos Walker, jr., Christie, Daniel and Maclaren took part. Dr. Broderick was present but not as a consulting physician. As a result, the leg was put up in plaster.

On Sunday the 24th, owing to the progress of disease in the injured member, another consultation was held by Drs. White, T. Walker, jr., and one or two others, when it was decided to amputate at once, and Drs. White and T. Walker, jr., as respectively the surgeon and general practitioner of the day, performed the operation.

Dr. Daniel says that the ordinary rule

among physicians is to save the limb if possible,

and Mr. Quigley in opening to the ju.y said:

We were all very anxious that Professor Hesse's foot should be preserved if possible.

Notwithstanding this he alleged that

Dr. Walker for the company strongly resisted the amputation, hopeful that the foot would he saved, and thus a large sum of money saved to the company.

And we find the learned judge saying:

It has been put forward here on the one side that the amputation ought to have taken place upon the very day that the accident occurred.

He then refers to a conversation which Dr Broderick who had been in favour of an earlier amputation, says that he had with Dr. Walker, jr., in a street car after leaving the hospital on Thursday the 21st, in which Dr. Walker said (according to Dr. Broderick) that

if he could get Mr. Quigley to look at it from the standpoint of view as a surgeon and not use it as a means of appealing to the sympathies of the jury he might consider himself more fully the question of the idea of amputation.

This is Dr. Broderick's final version given upon re-examination After referring to the facts at some length the learned judge continues thus :

It seems to me a very important thing indeed if Dr. Walker was there using his position and his voice as one of the hospital staff to keep the limb on when it ought to have been taken off. All I can say is that it is very reprehensible. That is what Dr. Broderick said, however, and it is for you to say whether you credit his statement or not.

When Dr. Walker on Sunday, the 17th, favoured trying to save the limb he had not been spoken to by the company, nor was he spoken to for three or four days after that. There was therefore no ground whatever for the suggestion that the company was responsible for the amputation not having taken place "upon the very day that the accident occurred." And as to what Dr. Broderick states as being said by Dr. Walker, following the Thursday consultation, it perhaps may fairly mean no more than that if he could be sure that Mr. Quigley would look at it from a surgeon's standpoint instead of using it, *i. e.* the amputation, as a means of appealing to the sympathies of the jury, he might reconsider his opinion, Dr. Broderick being so strongly in favour of amputation.

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The learned trial judge in his dissenting opinion at term, after quoting from his charge, says:

> I cannot myself discover any statement here from which it could be reasonably or fairly inferred that the jury were instructed that they should consider the conduct of Dr. Walker as a reason for enhancing the damages against the company. * * * The remarks were only intended to apply to Dr. Walker as a physician and to his conduct in treating this man Hesse, not using his position as the physician of the company, but using his position as one of the consulting physicians to prevent early amputation for fear amputation might lead to increased damages against the company. It was in referenee to his conduct in using his position as a member of the consulting staff that the remarks were made, as showing that he, although a medical man and there to advise, presumably in the best interests of the patient, allowed him to suffer for some days without amputation when, but for him, amputation would have taken place at an earlier day. And while it may not be clear from the evidence, it is apparent, I think, to any one who carefully peruses it, that amputation was delayed as long as it was through his instrumentality.

I cannot agree as to this appearing upon the evidence. At the time of the first consultation Dr. Walker was independent of the company. On the second and larger consultation, it does not appear that he did more than express his opinion, and, for all that appears, two-thirds of the consulting staff may have been of the like mind, certainly the majority were; and, further, it is not proved at all, in a way to be assumed as a fact, that it was not the most prudent and correct course, to endeavour to save the foot, down to the day on which it was in fact taken off. The operation was successfully performed, and the patient had a good recovery.

The learned judge's explanation of his charge shows that a matter which, in his view, could not affect, and ought not to have affected, the damages, was so laid before the jury that they would suppose that it was material to the case. Why was it declared to be most important? And why were the jury asked to pass upon

it? Manifestly the jury would consider it as bearing upon the contention of plaintiff that the amputation ought to have taken place on the very day on which the accident occurred. It is impossible to say that it was not calculated to affect the amount of the verdict. It was very important in this case to keep all irrelevant disputes out of it. There are besides expressions in the charge which cannot have been sufficiently considered, as, for instance, where the jury are told to ask themselves:

> If I were Hesse, under the evidence, how much ought I to be paid if the company did me an injury?

Suppose the contrary were put:

> If I were the defendant, under the evidence, how much ought I to pay?

It is perhaps impossible to prevent jurors looking at a case in this way, but at least they ought not to be invited to do so, and such direct resorts or appeals to the feelings and interests of the individual jurymen can only exercise a disturbing or misleading influence. In *Phillips* v. *London & South Western Railway Co.* (1) the form of the usual and well sanctioned direction in such cases is given, and it seems to me (with all respect to the very learned judge) that too many disturbing and confusing considerations got into the case, with the result of a verdict which, to say the least, is unusually large in this country.

The weakness of the plaintiff's case (if I may say so) was that his evidence was general and uncertain where it might be expected to be precise, and left the area for surmise and conjecture too large. The learned judge says in his charge that Hesse himself did not give the best information possible. Upon the whole then I think that the verdict cannot be sustained and that there should be a new trial.

(1) 5 C. P. D. 280.

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THE SAINT JOHN RAILWAY COMPANY.

King J.

A provision of the New Brunswick Statute, 60 Vict. c. 24 (sec. 371) enacts that a new trial may be ordered on any question in an action, whatever be the ground for the new trial, without interfering with the finding or decision upon any other question.

The verdict or finding of the jury in this case is for the plaintiff, with damages assessed at $25,000. I think it competent under the above statute to order that the new trial be limited to the assessment of damages, the finding as to the liability of the defendant to the plaintiff in respect of the alleged cause of action not being interfered with; and in my opinion the judgment ought to be varied to this extent, and the appeal dismissed subject to such variation.

GIROUARD J.—I concur in the judgment of Mr. Justice King.

Appeal dismissed without costs.

Solicitor for the appellant: *R. F. Quigley.*

Solicitor for the respondent: *H. H. McLean.*

JOHN H. FRASER (PLAINTIFF).....APPELLANT; 1900

AND *Feb. 20.

LEMUEL W. DREW (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

New trial—Verdict—Finding of jury—Question of fact—Misapprehension.

Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *en banc*, which refused a motion for a new trial with costs.

The material circumstances of the case are sufficiently shewn by the reasons for judgment of Mr. Justice Henry in the court below, which are as follows:

"This is a motion for a new trial. The plaintiff is assignee of the goods and estate of I. N. Mack and I. N. Mack & Co., under an assignment for the benefit of creditors made by I. N. Mack, who carried on business under the above firm name. The defendant is the sheriff of Queen's County, who under an execution against the assignor seized certain of the goods and chattels covered by the assignment. The defence was that the deed was fraudulent, as having been made to hinder and delay the creditors. The jury found a verdict for defendant, and an order for judgment in accordance with the verdict was granted

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

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by the learned trial judge. Notice of appeal from this order was given, but nothing was brought forward in support of the appeal at the argument of the motion for a new trial. We have a very full report of the charge of the learned trial judge to the jury, and it appears that he submitted to them a number of unquestionably material and important considerations based upon the evidence, for the purpose of aiding them in the determination of the question whether the deed was or was not fraudulent. It was not pretended at the argument that the case should have been withdrawn from the jury, and I am of the opinion that it is one which, having regard to the evidence as a whole, a detailed discussion of which would now serve no useful purpose, must be treated as absolutely in the control of the jury. In saying this I no not forget that the learned judge has reported that a verdict for the plaintiff would have commended itself more to his judgment."

"It appears by the learned judge's report that the jury had some difficulty in applying the view they took as to the question of fraud to the project of announcing their conclusion in the shape of a verdict for the plaintiff or the defendant. The foreman at first said that they found for plaintiff, whereupon he was interrupted by the juryman standing next to him who immediately went on to confer in an undertone with other members of the jury. The learned judge then said: 'Mr. Foreman, you say you find for the plaintiff, which means that you find in favour of the deed.' The foreman replied, 'Oh, no, we find there was fraud.' The learned judge reports that he then again addressed them, explaining the relation of the parties. It appears that some of the jury on their way back to the jury room spoke to the sheriff. The learned judge told the sheriff he must not converse

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with them and asked him what they said. He replied in their hearing that they desired to know of him who was the defendant. The learned judge gave them no further instructions, but in a very few minutes they returned and said they found a verdict for the defendant."

"It is not necessary to determine accurately the extent of the intelligence of this jury. It seems sufficient to say that, notwithstanding the difficulty which some of them, possibly only the foreman and one or two others, had in seeing the relation of the parties, plaintiff and defendant, in the cause to the only question upon which they had to pass, they do not seem to have had any difficulty in finding upon that question. Their verdict being in accordance with that finding it cannot be disturbed upon any reason based upon the circumstances under which it was rendered. I am of the opinion that the motion for a new trial should be refused with costs."

The trial court judge in his report, after referring to the conduct of the jury, said: "I concluded that all my efforts, as well as those of the counsel, to get them to understand the case intelligently, had been wasted, and that it was useless to say anything further to them. They returned in a very few minutes into court, and said they found for the defendant. A verdict for the plaintiff would have commended itself much more to my judgment."

Drysdale Q.C. for the appellant. There was no evidence upon which the jury could find fraud, and even assuming that they understood the question submitted to them, it is not such a verdict as reasonable men could find. There was a mistrial, and the jury never understood the issue upon which they were to render a verdict. The trial judge disapproved of the verdict and, under the latest authorities, this is a

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material factor in determining whether a new trial ought to be granted or refused. See *Aitkin* v. *McMeckan* (1), at page 316.

Harris Q.C. for the respondent. The jury entertained clear views as to the fraudulent character of the deed. That was the chief point, and their conclusions were reasonable and fully justified by the evidence. We rely upon *Municipality of Brisbane* v. *Martin* (2); *Phillips* v. *Martin* (3); *Metropolitan Railway Co.* v. *Wright* (4); *Solomon* v. *Bitton* (5); *Australian Newspaper Co.* v. *Bennett* (6). While fraud cannot be presumed without evidence, yet there are circumstances in this case from which the jury might infer it; *Riches* v. *Evans* (7); *Winchester* v. *Charter* (7).

THE CHIEF JUSTICE.—(Oral.) We are all of opinion that the appeal must be dismissed with costs. If some English decisions favour the appellant's case, the weight of Canadian and American decisions are the other way. We decide this appeal on the principle that the question of fact was left to and dealt with by the jury in such a manner that we cannot interfere with their findings. For precisely the same reasons as those given by Mr. Justice Henry, namely, that the finding of fraud by the jury was not an unreasonable finding upon the evidence, we think the verdict cannot be interfered with.

GWYNNE J.—(Oral.) I agree with the remarks of the learned Chief Justice. On the crucial point in issue the jury found fraud, and I agree with their finding.

(1) [1895] A. C. 310.
(2) [1894] A. C. 249.
(3) 15 App. Cas. 193.
(4) 11 App. Cas. 152.
(5) 8 Q. B. D. 176.
(6) [1894] A. C. 284.
(7) 9 Car. & P. 640.
(8) 102 Mass. 272.

SEDGEWICK, KING and GIROUARD JJ. concurred with His Lordship the Chief Justice.

Appeal dismissed with costs.

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FRASER v. DREW.

Solicitor for the appellant: *Jason M. Mack.*

Solicitor for the respondent: *David A. Hearn.*

HAVELOCK McC. HART (PLAINTIFF)...APPELLANT;

AND

THOMAS G. McMULLEN (DEFENDANT) ..... } RESPONDENT.

1900

*Feb. 20, 21.
*April 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Easement—Sale of land—Unity of possession—Severance—Continuous user.

When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), reversing the judgment of Townshend J. at the trial in favour of the plaintiff and dismissing the counter-claim filed by the judgment.

A statement of the facts and of the questions at issue in the case appears in the judgment of His Lordship Mr. Justice Sedgewick, now reported.

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

(1) 32 N. S. Rep. 340.

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Borden Q.C. and *Harris Q.C.* for the appellant. The appellant relies on the reasons stated in the judgment of Mr. Justice Townshend (1).

The easement was apparent and continuous. The alteration in the premises during unity of ownership was permanent in its character, consisting of the dam strongly constructed of permanent material and having annexed thereto and connected therewith permanent abutments and a waste-way, cut through the solid rock at great expense, which would be utterly useless unless the dam was to be used with the slanting top as now in use by the plaintiff. We refer to *Watts* v. *Kelson* (2); *Atrill* v. *Platt* (3); *Polden* v. *Bastard* (4); *Hall* v. *Lund* (5); *Worthington* v. *Gimson* (6); *Nicholas* v. *Chamberlain* (7); *Brown* v. *Alabaster* (8); *Thomas* v *Owen* (9); *Culverwell* v. *Lockington* (10); *Pearson* v. *Spencer* (11); *Wheeldon v. Burrows* (12); Gale on Easements (7 ed.), pp. 21 and 96-121; Goddard on Easements (5 ed.), pp. 174-186; Leake on the Use and Profits of Land, p. 269; Jones on Easements, secs 139, 143, 145-150; Kerr on Injunctions (3 ed.) star page 197, and *Ewart* v. *Cochrane* (13), the leading case upon this branch of the law.

As to the result when the common owner conveys to different owners by simultaneous conveyances see Elphinstone on Deeds, rule 58, p. 202; Goddard on Easements (5 ed.), pp. 270 to 273, and Gale on Easements, pp. 100 to 104. See also *Compton* v. *Richards*

(1) 32 N. S. Rep. 340.
(2) 6 Ch. App. 166.
(3) 10 Can. S. C. R. 425.
(4) L. R. 1 Q. B. 156.
(5) 1 H. & C. 676.
(6) 2 E. & E. 618.
(7) Croke Jac. 121.
(8) 37 Ch. D. 490.
(9) 20 Q. B. D. 225.
(10) 24 U. C. C. P. 611.
(11) 1 B. & S. 571; 3 B. & S. 761.
(12) 12 Ch. D. 31.
(13) 7 Jur. N. S. 925; 4 Macq. H. L. 117.

(1); *Swansborough* v. *Coventry* (2); *Allen* v. *Taylor* (3); *Barnes* v. *Loach* (4); *Rigby* v. *Bennet* (5), at page 567; *Russell* v *Watts* (6); and *Phillips* v. *Lowe* (7).

The facts indicating intention to create a quasi-easement upon the property are (*a*) the construction of mills; (*b*) that the only power for operating those mills was created by this dam; (*c*) the construction of this dam of solid and permanent material; (*d*) the waste-way and (*e*) flumes, of no use except with the dam at its present height; (*f*) the construction and facing of abutments to a height only useful or necessary with the slanting-top.

Although a portion of the slanting-top was carried away and not replaced from 1876 until 1895 the dam itself remained permanent and apparent, and the jury found that the use and purpose of the slanting-top were also apparent in 1892. The non-existence of a portion of the slanting-top during this period is of no more importance than a hole in the dam or a break in the slanting-top. The apparent easement was the right to maintain the dam at the height indicated by its appearance and construction in 1892, when the old frames of the slanting-top still remained in position, and the flat logs and the mortices therein for the frames of the slanting-top were still visible. The right to light would not be lost because window panes were destroyed by accident. The existence of the window opening and of the dam indicates the extent of the easement. *Calhoun* v. *Rourke* (8); *Courtauld* v. *Legh* (9); *Collis* v. *Laugher* (10).

There was no abandonment of nor intention to abandon the use of the dam and the position of the

(1) 1 Pr. 27.
(2) 9 Bing. 305.
(3) 16 Ch. D. 355.
(4) 4 Q. B. D. 494.
(5) 21 Ch. D. 559.
(6) 25 Ch. D. 559.
(7) [1892] 1 Ch. 47.
(8) 19 N. B. Rep. 591.
(9) L. R. 4 Ex. 126.
(10) [1894] 3 Ch. 659.

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flumes and waste-way, which never altered, made it necessary to use the slanting-top. The structure of the dam on both sides was of a height which indicated that the slanting-top must be used. The rebuilding of the mills in 1876 indicated an intention not to abandon, but to use the dam and operate the mills. But even if the owner had ceased operation because his capital could be more profitably employed, that would not be sufficient evidence of abandonment. By reason merely of non-user, an intention cannot be presumed to take from the quasi dominant tenement the qualities previously attached thereto by the common owner. Such intention should not be presumed from evidence less than would be necessary to establish abandonment of an easement on properties in possession of different owners. See *Hale* v. *Oldroyd* (1); *Stokoe* v. *Singers* (2); *Ecclesiastical Commissioners* v. *Kino* (3); *Seaman* v. *Vawdrey* (4); *Bower* v. *Hill* (5); *James* v. *Stevenson* (6); *Ward* v. *Ward* (7); *Crossley & Sons* v. *Lightowler* (8); *Reg* v. *Chorley* (9).

It was an easement of necessity incident to the act of the owner of the dominant and servient tenements and without which the intention of the parties to the severance could not be carried into effect. *Morris* v. *Edgington* (10); *Dand* v. *Kingscote* (11); *Ewart* v. *Cochrane* (12); *Brown* v. *Alabaster* (13).

The conveyance expressly grants the quasi-easement in question. The words are:—"All dams, buildings, ways, waters, watercourses, easements, privileges, and appurtenances to the said lots of land belonging or in

(1) 14 M. & W. 789.
(2) 8 E. & B. 31.
(3) 14 Ch. D. 213.
(4) 16 Ves. 390.
(5) 1 Bing. N. C. 549.
(6) [1893] A. C. 162.
(7) 7 Ex. 838.
(8) L. R. 3 Eq. 279; 2 Ch. App. 478.
(9) 12 Q. B. 515.
(10) 3 Taunt. 24.
(11) 6 M. & W. 174.
(12) 4 Macq. H. L. 117.
(13) 37 Ch. D. 490.

any wise appertaining, etc. To have and to hold the said lands and premises, appurtenances and hereditaments, together with all and singular the easements hereby conveyed." The words "easements" and "dams" are sufficient to pass this quasi-easement or privilege or quality annexed to the property. See notes on *Pinnington* v. *Galland* and *Hall* v. *Lund* (1); Washburn on Easements, p. 58; *Rackley* v. *Sprague* (2), and cases there cited; *Hathorn* v. *Stinson* (3); *Baker* v. *Bessey* (4); *Richardson* v. *Bigelow* (5); *Lammott* v. *Ewers* (6); *Oakley* v. *Stanley* (7); *Bayley* v. *Great Western Railway Co.* (8); *Broomfield* v. *Williams* (9). The conveyance of the dam would be useless unless it included the right to use it effectively, and there could be no such user unless it were raised to its full apparent height as it existed in November, 1892.

The stringer on top of the dam had the effect of raising the water one foot above the block-dam both at the time of the plaintiff's purchase and up to the present time, and penned back the water from 1876 to the present time. The court below should not have granted an injunction in terms restraining the defendant from penning back water by the block-dam and stringer as the only question tried was with respect to the right to pen back water by the slanting-top. No question was raised at the trial as to the right to use the block-dam with its stringer to the fullest extent, and, as to this, there is not any pretence of abandonment. We refer also to *Birmingham, Dudley & District Banking Co.* v. *Ross* (10), at pages 312, 314

(1) 10 Ruling Cases, 35, 46, notes pp. 54-60.
(2) 17 Me. 281.
(3) 25 Am. Dec. 228.
(4) 73 Me. 472.
(5) 15 Gray (Mass.) 154.
(6) 55 Am. Rep. 746.
(7) 5 Wend. 523.
(8) 26 Ch. D. 434.
(9) [1897] 1 Ch. 602.
(10) 38 Ch. D. 295.

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and 315, and the cases collected in *Dunklee* v. *Wilton Railroad Co.* (1) at pages 500-501, and to *Pickering* v. *Stapler* (2); *Voorhees* v. *Burchard* (3); and *New-Ispwich Factory* v. *Batchelder* (4).

Drysdale Q.C. and *Layton* for the respondent. We refer to the reasons for judgment by the learned Chief Justice and Mr. Justice Ritchie in the court below (5) shewing that there has been a failure to establish a quasi-easement of the requisite open, apparent and continuous nature, and there can be no implied grant of an easement. Neither at the time of the severances nor for upwards of seventeen years prior thereto had there been any structure upon appellant's lands capable of backing water upon respondent's lands. The doctrine of implied grant as applied to quasi-easements refers to easements in use *at the time of the severance.* The owner, before the severance, had not made or used any improvement in one part for the benefit of another nor used appellant's lands so as to back water upon those now held by respondent. There is no evidence that such a right is reasonably necessary to the beneficial enjoyment of the property, nor of severance of common property, but only a distinct sale of independent lands. *Hall* v. *Lund* (6) per Wilde B. at page 686; *Birmingham Dudley & Dist. Banking Co.* v. *Ross* (7) at page 309; *Wheeldon* v. *Burrows* (8) per Thesiger L. J. at page 49; *Ewart* v. *Cochrane* (9); *Brown* v. *Alabaster* (10); *Russell* v. *Watts* (11); *Altril* v. *Platt* (12); Jones on Easements, sec. 129; Godard on Easements, p. 174 to 186; Elphinstone on Deeds, r. 52, p. 189.

(1) 24 N. H. 489.
(2) 5 Serg & R. (Pa.) 107.
(3) 55 N. Y. 98.
(4) 3 N. H. 190.
(5) 32 N. S. Rep. 340.
(6) 1 H. & C. 676.
(7) 38 Ch. D. 295.
(8) 12 Ch. D. 31.
(9) 4 Macq. H. L., 117.
(10) 37 Ch. D. 490.
(11) 25 Ch. D. 559.
(12) 10 Can. S. C. R. 425.

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The words quoted in appellant's deed convey only legal easements. *Beddington* v. *Atlee* (1); *Polden* v. *Bastard* (2); *Birmingham Dudley & Dist. Banking Co.* v. *Ross* (3); Elphinstone on Deeds, rr. 54, 55, 59. Specific quasi-easements and privileges are mentioned so no construction can be had leaving anything implied; *expressio unius exclusio alterius.*

The judgment of the court was delivered by:

SEDGEWICK J.—The plaintiff is the owner of a mill on the St. Croix River, in Hants County, Nova Scotia. The defendant owns a mill further up the stream, which is mainly supplied with water power from a storage-dam still further up stream. This dam broke, and the waters rushing down stream broke away the plaintiff's dam, and it was for the damage thus occasioned that this action was brought. In the action, however, the defendant counterclaimed, alleging that he was damaged by reason of the plaintiff's dam penning back water upon his land and obstructing the operations of his mill. The main action has been settled, and the only question before this court is as to whether the defendant is entitled to succeed upon the counterclaim.

The properties, both of the plaintiff and the defendant, were, in the year 1873, owned by one Francis Ellershausen, who conveyed to the Nova Scotia Land & Manufacturing Co., Limited. While Mr. Ellershausen owned the property, he operated a paper mill, and for the purpose of creating water-power, he built a portion of the dam which is in question, a structure, as originally built, of about one hundred and eighty feet in length on the top, and thirty-eight feet in height from the bed of the river. The main

(1) 35 Ch. D. 317.
(2) L. R. 1 Q. B. 156.
(3) 38 Ch. D. 295.

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portion of the dam, called the block-dam, was a strong structure built of logs from the bed of the river, and that part of the dam remains to the present day. Upon the block-dam, however, Ellershausen constructed a small structure about eight feet in height, called a false-top, or slanting-top. The mill for the purposes of which this dam was constructed, was operated from the summer of 1873, to December, 1875, and from then was never operated until some time after the plaintiff purchased in 1892.

That portion of the dam called the false-top was swept away, and during the whole of the seventeen years following the original dam remained practically as if there had never been any structure on top of it, and not until 1895 was it rebuilt. During the time that Mr. Ellershausen operated this mill he also operated the mill up stream now owned by the defendant. In 1895 the plaintiff erected a new false-top upon the old structure, this false-top being no greater in height and no different in any way from the original structure. The result of this, however, was to flood back the water so that the wheel of the plaintiff's mill above was prevented from doing its proper work.

In 1892, all of these properties, then being still owned by the same parties, were put up for sale at public auction, the plaintiff buying his mill and the defendant buying his, thus severing the pre-existing unity of ownership. At this time, the block-dam existed and there were indications showing that some time before there had been a false-top built upon it.

The plaintiff's claim is that inasmuch as the owner of this property many years before had erected this dam with the false-top, and had used it for a few years, and he having purchased it, knowing the uses to which the previous owner had put it, had a right, notwithstanding that the false-top had been swept

away and had not been operated or used for seventeen years, to replace it by a structure of the same character, creating no greater burden upon the upper property than the original dam had done, and the whole question turns upon that contention.

We are all of opinion that, under the circumstances of this case, the plaintiff's claim cannot be entertained. It is not disputed that if at the time of the plaintiff's purchase, a dam of the character originally there, or of the character now there had been in existence, the plaintiff upon acquiring title, would acquire a title also to an easement upon the upper land, inasmuch as it is clearly settled that where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous and apparent quasi-easement passes with the sale. What was only a quasi-easement or user before, becomes after severance, an absolute legal right.

But the question here is: Must not the user of the original owner, which it is claimed becomes converted into a right by the purchaser, substantially exist at the time of the severance of the title? Can the purchaser after he has purchased, subject his neighbour, or can he, years after a particular user has ceased, after such a dam as is in question here has been destroyed, claim the right to re-erect the dam and impose upon a neighbour a servitude of which, when he purchased he had no notice except what might be afforded by a few planks and other decaying remains of what had once been there?

I think the authorities shew that the quasi-easement must exist and be enjoyed at the time of the severance and that it is not sufficient if that use had ceased many years before.

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In the case of *Suffield* v. *Brown* (1), Lord Westbury's observations are to the effect that on a grant by an owner of an entire heritage, of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been *and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted.* In the well known case of *Wheeldon* v. *Burrows* (2), Thesiger L. J. says that on the grant by the owner of a tenement, of part of that tenement as it is then used and enjoyed there will pass to the grantee all those apparent and continuous easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are *at the time of the grant* used by the owner of the entirety for the benefit of the part granted.

In this case, at the time of the grant, or at the time of the severance, there was in fact no existing user, or no means of using the property to the detriment of the alleged servient tenement. There was only some indication that many years previously there had been such a user.

I am of opinion, under the circumstances, that no easement such as is now claimed passed, and that the subsequent construction of the dam complained of, in so far as it in any way affected the operation of the defendant's mill up-stream, has no legal sanction.

This is not a case where there has been an accidental or temporary stoppage of an easement, as where a drain is blocked, or a way impeded, or a light obstructed. Accidental and temporary circumstances of this kind may not destroy the right to the easement, but where a way is absolutely destroyed, or a window boarded up

(1) 33 L. J. Ch. 249. (2) 12 Ch. D. 31.

for many years, we think, in that case, the right is gone.

The appeal should be dismissed with costs, but there should be a variation of the decree restraining the plaintiff only from penning back the water otherwise than by the dam as existing at the time he purchased his mill.

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Appeal dismissed with costs.

Solicitor for the appellant: *William A. Henry.*

Solicitor for the respondent: *Norman J. Layton.*

1900
*Feb. 21, 22.
*April 2.

THE HALIFAX ELECTRIC TRAMWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

WILLIAM P. C. INGLIS (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Electric car—Excessive speed—Prompt action — Contributory negligence.

A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the Tramway Company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care.

Held, affirming the judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 117) Gwynne J. dissenting, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining the verdict for the plaintiff at the trial.

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

(1) 32 N. S. Rep. 117.

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THE HALIFAX ELECTRIC TRAMWAY COMPANY v. INGLIS.

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

Harrington Q.C. and *Covert* for the appellant.

Borden Q.C. for the respondent.

The judgment of the court was delivered by:

KING J.—This is an appeal by the defendants in an action brought by a cab owner to recover damages caused by the alleged negligent running of the defendants' electric cars. The accident took place on the evening of the 20th November, 1897, while the plaintiff's vehicle was in the act of crossing the track on one of the public streets of Halifax. The jury, amongst other findings, found that there was negligence on the part of the Tramway Company in the running of their car at too high a rate of speed, and in the failure to apply the brakes and reverse the electric current in time to avert the accident, and in the opinion of the jury this could have been done had reasonable care been exercised by the motorman. They also found that there was negligence on the part of the plaintiff's driver contributing to the accident in not looking more sharply for the car. But they further found that notwithstanding such negligence of the plaintiff's driver, the defendants' servant could have averted the accident by the exercise of reasonable care. The trial took place before Mr. Justice Henry who, upon these findings, entered judgment for the plaintiff, and the Supreme Court of Nova Scotia affirmed the judgment.

No real question can arise as to there being evidence to warrant the finding that the rate of speed was excessive and unreasonable, nor (in view of the facts adduced on both sides) is there any doubt that if there

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was fault on the part of defendants in the running of the car it was the cause of the accident, subject of course, to the effect of the finding as to contributory negligence.

As to the finding of contributory negligence on the part of the plaintiff's driver in not looking more sharply for the car before attempting to cross the track; supposing (as contended by Mr. Harrington) that according to the practice of the Supreme Court of Nova Scotia the respondent is prevented from urging the manifestly unsatisfactory character of this finding by reason of not having specially moved in that court to set it aside, the observations of this court in *Rowan* v. *Toronto Railway Co.* (1), and *Toronto Railway Co.* v. *Gosnell* (2) would preclude our doing more than sending the case for a new trial in view of the fact that the plaintiff's driver did not know, and even if he had looked could not have known, that the car coming towards him was travelling at an unreasonable rate of speed, and in view of it being most probable that he could have crossed the track in entire safety (as, in fact, he very nearly succeeded in doing) if the car had been travelling only at a reasonable rate of speed at the time when, according to the jury, he might and ought to have seen it.

But it is unnecessary to further consider this, because the jury have found, upon evidence appearing to us sufficient to warrant the finding, that notwithstanding such supposed negligence the defendants' servants could, in the result, have averted the accident by the exercise of reasonable care. If this was found upon evidence warranting it, *i. e.*, upon evidence upon which the jury could reasonably find it, then of course the driver's act of negligence (if it existed at all) could no longer be considered as a con-

(1) 29 Can. S. C. R. 717. (2) 24 Can. S. C. R. 582.

tributing efficient cause, but would be reduced merely to a link in the chain of anterior circumstances without which the accident could not have happened.

The chief contention for the appellants upon this appeal was that there was an entire absence of evidence to warrant the finding that, notwithstanding negligence of the plaintiff's driver, the defendants could, in the result, by the exercise of reasonable care have avoided the accident. What is or is not reasonable care is a matter of degree and varies with circumstances. The control and management of an instrument of danger to life or limb has always been considered as calling for a higher degree of skill or care, as the measure of what is reasonable, than where no such serious consequence is to be apprehended.

Here the defendants were running their car on a dark night, in what their servants say was a dangerous place, and upon a down grade of over eleven hundred feet in length at the point of accident, and at what the jury have found to be an excessive rate of speed; it was therefore incumbent upon them to exercise a very high degree of skill and care to control and stop the car in case of imminent danger to any one upon the highway. The evidence of Townshend, the motorman, shows that he saw the carriage attempting to cross the track when he got two car lengths from it. He had two means under his control for checking and stopping the car, the brakes, and the reversing of the electric current, the latter of which is allowed by the only company to be used in case of accident, presumably on account of its effect on the car or its machinery. The motorman first put the brakes on hard. Speaking of the time when he first saw the carriage attempting to cross the track, he says:

> I put on the brake on the car then, and as I saw that I was not going to be able to stop the car with the brake I released the brake and reversed the power on the car as the last resort.

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He was then, he says, about one car length from the cab. The reversing power at once checked the speed but not sufficiently to avoid the accident, and as the result one of the hind wheels of the cab was struck as it was on the point of quitting the track. Such, however, was the power of the reversing current that the car came to a standstill within a further distance of seven or eight feet.

The above quoted passage from the evidence of the motorman is open to the reasonable construction that he at first sought to avoid the collision by the use of the brakes only, and had recourse to what he styles "the last resort" only when he found that he was not going to be able to succeed by the mere use of the brake. A jury might reasonably and properly take such meaning out of the words,

> I put on the brake, *and as I saw that I was not going to be able to stop the car with the brake I released the brake and reversed the power on the car as the last resort.*

The jury may very properly have thought that, in the circumstances, the last resort ought not to have been deferred until it was evident that the use of the brake alone would not suffice; and considering that at the time of the collision the hind wheels of the cab were about quitting the track, and that in about a second it would have cleared it entirely, the jury were not restrained from drawing their own conclusions from the motorman's account of the occurrence by his subsequently expressed opinion that he thought it would have made no difference if he had reversed the power earlier.

Another motorman of the defendant company who was with Townshend, says that the only thing that can be done to avoid a collision is to reverse the current, and his evidence tends to support the conclusion

that the reversing power ought to have been applied earlier.

It is impossible, we think, in view of Townshend's evidence to say that the defendants did all that they ought reasonably to have done to prevent damage happening from the unreasonable and excessive rate of speed at which they chose to run their car.

It is suggested that the defendants are not to be held to strict accountability for not taking the best means open to them by reason of the plaintiff having by his crossing the track put them under the necessity of acting promptly. This would be so if they had been going at a reasonable rate of speed, but it is entirely inapplicable to a case where they themselves were travelling at an unreasonable and excessive rate of speed. They deliberately tied their own hands and created for themselves the greatest difficulty they had to contend with. They ought, therefore, to have been prepared to act promptly and decisively upon an emergency such as that which arose. For these reasons we think that the appeal should be dismissed, and with costs.

GWYNNE J. (dissenting).—The plaintiff who is a cab owner doing business in the City of Halifax brings this action upon the ground as alleged in his statement of claim

> that he has suffered damage caused by the servants of the defendant company on the 20th November, 1897, so negligently controlling or managing a train or car belonging to the defendant company that the said train or car ran into and collided with a cab or carriage drawn by two horses owned by the plaintiff and driven by plaintiff's servant.

The defendants besides a general denial of the cause of action as above stated pleaded specially sec. 5 of ch. 107 of the laws of Nova Scotia of 1895, by which the defendant company are reserved in the right of

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way in the streets where their tramways are laid, and that the plaintiff's said servant

improperly and negligently drove the plaintiff's said horses and cab or carriage across the track of the defendant company directly in front of the car or tram of the defendant company, which was at the time in motion and approaching said plaintiff's horses and cab or carriage; and so close in front of the defendant company's car that it was impossible to stop said car before the plaintiff's cab or carriage was struck.

If this plea was established to be true there cannot be entertained any doubt that the plaintiff's cause of action wholly failed, and the defendants were entitled to have had judgment rendered in their favour, and in the evidence material to the determination of the issue joined in this plea there is very little if any reliable contradiction whatever.

Alfred Harvey, the driver of the plaintiff's cab, said that he left his home at 30 Grafton Street on the evening of the 20th November, 1897, at 6.30 o'clock, with the plaintiff's cab for the purpose of reaching the Intercolonial Railway Station which appeared to be on North Street, to meet a train which was due at 6.45. On his way along the Campbell road before reaching North Street which crossed the Campbell road he met or overtook a Mrs. Hines whom he took up for the purpose, as he said, of giving her a lift on her way home at a place called Richmond, which necessitated his pursuing a course different from his ordinary course to the station for he said that on his reaching North Street his horses tried to turn to go down North Street as he said they always do on reaching that street, but he drove straight on north along the Campbell road intending to take Mrs. Hines as far as the barrack gate (which by another of the plaintiff's witnesses, namely Mr. Doane, the city engineer, was proved to be 1,150 feet or about one-fifth of a mile distant from North Street), and to go

round to the station by Water Street. He had made up his mind he said to take the lady as far as the barrack gate and to get round from thence to the station by turning across a bridge over the Intercolonial Railway, leading from the Campbell road at a point almost directly opposite the barrack gate, into Water Street, and so to get round to the station. He said that he passed North Street at twenty-three minutes to seven o'clock, as appeared by a clock which he saw in a grocery store at the corner of North Street, so that it must have been about 6.45 or the hour when the train he was to meet should be due at the station when he reached the barrack gate where, as he said, he had made up his mind to let down Mrs. Hines. He said further that he did stop and let her down just south of—a few yards south of—the barrack gates, there he bade a boy whom he had on the box with him to get down and let her out, that the boy did so, and got up on the box again after shutting the door of the cab, that as the boy got up he, Harvey, looked back south and saw no car, that he then turned his horses round to cross the bridge over the Intercolonial into Water Street, to do this he had to cross the tramway track; as he turned his horses he saw, he said, the shadow of a car right alongside, that he could not back his horses so he hit them with his whip and with that the car struck him. Upon the evidence of this witness it is established that the collision took place almost instantaneously upon Harvey turning his horses round after letting down Mrs. Hines and when he should have been already at the railway station to meet the train due at 6.45 which he had set out to meet.

This fact is also confirmed by the evidence of Mrs. Hines who was also one of the plaintiff's witnesses. She said that she got out of the cab just south of the

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barrack gate, that Harvey was just in the act of turning his cab when she bade him good night and started on her way home along the sidewalk northwards and that she had only got a few steps, just two or three steps past the barrack gate, when she heard some one hollering "whoa" whereupon she looked round and saw the car stop and the horses running down the street. Now this shout of "whoa" is shown by one of defendants' witnesses to have been uttered by Harvey himself after the accident had happened and after he had jumped or fallen down from the box and while he was following in pursuit of the horses running away. This witness was Joseph James Croft who was the conductor of the car who said that while the car was running on the down grade there under its own headway when just opposite the barrack gate he noticed the motorman twist his brake sharply and then release the brake and put on the reverse current—that witness, as soon as he heard the brake released and felt the reverse current applied, knew that there must be something wrong ahead so he instantly jumped off the tram, and just as he jumped off the collision took place and he ran to the front of the car in time to see Harvey either jump or fall off and run in pursuit of the horses running away, shouting "whoa back." He said also that from the barrack gate a car could be seen below North Street, coming up. James Whelan who was the boy with Harvey and who was also one of the plaintiff's witnesses, said that on the cab stopping at the barrack gate he got down to let the lady out and that upon letting her out he closed the door and got up on the box again with Harvey. He then said

The driver started to go to North Street station. Just as we were turning the car was right alongside of us. The car jumped into us.

He added that before the car struck them

Harvey got out the whip and hit the horses.

Witness did not know whether he himself had jumped off or was knocked off but he saw Harvey running down Lockman Street in pursuit of the horses running away and witness followed him. It was then he said a quarter to seven o'clock as he should judge.

James Pearce, another of the plaintiff's witnesses, said that on the evening of the accident he was walking on the western sidewalk of the Campbell road going south towards North Street, that is to say he was walking towards the cab which was coming from North Street. Witness saw the cab approaching, it passed him and stopped just south of the barrack gate, when the cab stopped witness was about four or five yards distant from the place where it stopped, he just then turned round and saw the lady getting out and as he turned round and looked at the cab he saw the tram-car coming up; it was lighted up with electric lights. Witness then turned again and proceeded on his way along the sidewalk south and, as he said, he had not got any distance at all when he heard the smash of the collision.

Mr. Doane, the city engineer, who was also a witness called by the plaintiff, testified that the width of the sidewalk on the Campbell road at the barrack gate was twelve feet six inches, and the distance from the outside line of that sidewalk to the nearest rail of the tramway is seventeen feet six inches, and that the width of the railway is five feet over all.

The above contains the whole of the substance of the evidence given by the plaintiff as affecting the conduct of the driver of the cab on the occasion of the accident. However the defendants who had by their statement of defence pleaded that the collision had been occasioned by the negligence and wrongful conduct of the plaintiff's servant the driver of his cab

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gave evidence as follows: Joseph James Croft, the conductor of the tram car, gave the evidence already mentioned as having been given by him.

Samuel Townshend, the motorman on the tram car, which came into collision with the plaintiff's carriage, said that on the evening in question the car was going *north* on the Campbell road; that it was well lighted in the usual way with two side lights, head light, and four incandescent lights inside; that the lights could be seen at North Street from the barrack gate; that when it reached North Street it was 6.40 or 6.43 o'clock; that when he go topposite the nursery where the down grade increases he shut off the power as he said they always do there; that as the car proceeded he saw what, as he approached near to it and within about four car lengths (or 108 feet) of it, was a carriage on the left hand side of the road, going also north or standing he could not say which, however, just as the car got within about two lengths (or 54 feet) of it he saw the carriage instead of continuing north as its course had been start to turn round and make as it seemed to him a circle to come round and cross the track in front of the car; that was the first and only intimation the witness had of the intention of the driver to cross the track; witness immediately put on the brakes and reversed the current to check the speed of the car; that the power was reversed before the car got within a car's length (or twenty-seven feet) of the carriage, and that the speed was so effectually checked that it struck the carriage with such slight impact that the horses got away with the carriage and the car did not proceed after the collision more than seven or eight feet when it stopped wholly. Everything he said that could possibly have been done was done to stop the car after the witness had any intimation of the driver of the carriage having any intention to cross

the track, but he admitted that if he had had sooner any intimation of such intention he could of course have stopped the car sooner.

Alexander McQuinn, another motorman of the defendants, who was going home on the evening in question and was with Townshend in front upon the car confirmed Townshend's testimony in every particular, and added that when the hack turned round and proceeded to cross the track it was too late to avoid the collision, and further he said that from the road in front of the barrack gate a car could be plainly seen twenty yards south of North Street a distance of upwards of 600 feet.

Daniel Adams on the evening in question was walking down the Campbell road on the sidewalk adjoining the barracks. He saw the hack stop and let somebody out. He saw the tram car coming along while the hack was standing at the barrack gate. He saw the boy shut the door and get up on the box again. The tram car was then so near that he did not think any body would go across the track. The hack driver then turned his horses across the track to go to the station or wherever he was going, when he turned his horses across the track of the car was not more than about fifteen feet from the hack. Witness was himself walking down to the station and when the hack turned it was so close to the car that it took the lights of the car from him. The car was making the usual noise and racket which it always makes coming down the grade there. From the front of the barrack gate he could see to the nursery which is quite a piece up towards North Street. The car was running at the usual rate at which it runs at that place and at other places in the city where there is a down grade.

Clarence Purcell was driving a parcel wagon down the Campbell road on the night in question. It was,

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he said, not very dark, it was just about dusk. He first saw the car coming up when he was about 200 yards from the barrack gate. He did not then notice the cab. He did not notice the cab until it turned round. He was then distant from it just the space between two telegraph poles, as soon as the cab turned across the track it got struck. Witness then drove up to the place of collision and jumped off his team when he saw Harvey, the driver, running after the horses. Witness said that he could see down to North Street all right. On cross-examination he repeated that his first sight of the cab was when it crossed in front of the car, crossing the track was the first he noticed of it. He did not see any delay about it.

Now upon this evidence the first material question appears to have been whether or not the defendants had establised the defence pleaded in their statement of defence namely:

> That the plaintiff's servant improperly and negligently drove said plaintiff's horses and cab or carriage across the track of the defendant company, directly in front of the car or tram of the defendant company which was at the time in motion approaching said plaintiff's horses and cab or carriage.

Upon this question the evidence may be said to be wholly uncontradicted as to the fact of the cab having been driven across the track directly in front of an approaching car moved by electric power, and the only reasonable conclusion to be arrived at upon the evidence was, I think, that the driver of the cab being (by reason of his having gone out of his way for the purpose of giving, as he said, a lift to Mrs. Hines on her way home) late to reach the railway station so as to meet the train due at 6.40, which he set out to meet, rashly, recklessly, negligently and wrongfully drove across the track directly in front of the coming electric car, and so close to it that instantly the cab

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was struck by the car. The only excuse for this conduct which was attempted to be given was given by the driver himself who said that before turning the cab to cross the track he had looked up the road to see if there was a car coming, and that he saw no car and that he then turned. He was struck, however, almost immediately upon his getting on the track. Now the plaintiff had proved by a witness whose testimony was not questioned, that the distance from where the cab had stood to the nearest rail of the tramway was just seventeen feet six inches, so that the car was upon him as soon as he had proceeded that distance with his cab, and when he did see it then it was, as he said, lit up. Now the utter unreliability of this evidence, and the recklessness displayed by the witness in giving it, appeared upon his cross-examination, for he then said that when the boy was mounting up on the cab if the car had been within 100 yards of him he could have seen it, and he undertook to swear not only that he looked for the car, and did not see it, but that in point of fact it was not then within 100 yards of him, and that the car which struck him and which when he first saw it it was as he said about ten feet from him and must have run upwards of 100 yards while he was crossing the distance of seventeen feet six inches from the side wall to the tramway. Then as to the speed at which the car was running, he said on his examination in chief that

> he guessed from the crash that he got that the car must have been going over fifteen miles an hour, from fifteen to twenty miles an hour

(that was the only way by which he could speak of the speed of the car). Yet upon his cross-examination he admitted

> that the cab might have been hit just as hard as it was if the car had been going only at eight miles or even less than eight miles an hour.

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The evidence of this witness cannot be said with any degree of reason to be entitled to any consideration whatever by reasonable men.

Now the rule governing cases of this description is thus expressed by Lord Cairns in *Slattery's Case* (1), at page 1166.

> If a train which ought to whistle when passing through a station were to pass without whistling, and a man were in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of an advancing train and to be killed, *I think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death.*

In the application of this rule there cannot in reason be said to be any difference between "broad daylight" and a dark but clear evening between six and seven o'clock, in November, as the night in question was indisputably established to be, and when by uncontradicted evidence, as was also the case here, the tram car could have been seen 400 yards away, and was in fact seen 200 yards away from the place where the collision occurred, and which the plaintiff's driver of the injured cab admitted could have been seen over 100 yards away. Then Lord Hatherly in *Slattery's Case* (1) was of opinion that it is negligence for a man to pass over a railway at all without looking to see whether or not a train is approaching. He said, at page 1171:

> *I cannot consider it a proper question* for a judge to ask a jury whether a man's walking or running across a line of railway on which a train is expected, without looking to see whether a train is *in sight*, be an act of negligence.

And he cites with approbation the language of Willes J. pronouncing the judgment of the court in *Ryder* v. *Wombwell* (2), where he says at p. 39:

(1) 3 App. Cas. 1155. (2) L. R. 4 Ex. 32.

It was formerly considered necessary in all cases to leave the question to the jury (whether goods furnished to an infant were necessaries), if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge, (subject of course to review), is, as stated by Maule J. in *Jewell* v. *Parr* (1), not whether there is really no evidence, but whether there is some that ought reasonably to satisfy the jury that the fact sought to be proved is established.

He also cited with approbation the judgment of Mr. Justice Williams in *Toomey* v. *London and Brighton Railway Co.* (2), who enunciates the rule thus.

> It is not enough to say that there was some evidence * * a scintilla of evidence * * clearly would not justify a judge in leaving the case to the jury. *There must be evidence on which they might reasonably and properly conclude that there was negligence* (which was the *causa causans* of the act complained of),

and Lord Hatherley adds:

> If it be said that the jurors must draw the inference of negligence from the facts, the same might be said as to their duty in drawing the inferences in an action for goods supplied to an infant, whether they are or are not necessaries regard being had to the infant's position in life, but this was not done in *Ryder* v. *Wombwell* (3).

So likewise upon the same principle it is for the court as matter of law to say whether there is or is not sufficient evidence to submit to the jury on a question of reasonable and probable cause in an action for malicious arrest.

Then again in *Slattery's Case* (4) Lord Coleridge pronounced it to be the duty of the judge to withdraw a case from the jury if by the plaintiff's own evidence at the end of the plaintiff's case or by the unanswered and undisputed evidence on both sides at the end of the whole case it is proved either that there is no negligence of the defendants *which caused the injury*, or that there was negligence of the plaintiff which did, and he cites with approbation *Skelton* v. *London & North Western Railway Co.* (5). In that case the plaintiff in an

(1) 13 C. B. at p. 916.
(2) 3 C. B. N. S. 150.
(3) L. R. 4 Ex. 32.
(4) 3 App. Cas. 1155.
(5) L. R. 2 C. P. 631.

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action brought under Lord Campbell's Act for the death of a person killed when crossing the railway at a level crossing, was nonsuited, and the nonsuit was upheld by the Court of Exchequer upon the ground that the deceased when he reached the first line of rails could have seen up and down the line for 300 yards, but he did not look either to the right or left, but walked on and was killed crossing the second line of rails.

Lord Blackburn in *Slattery's Case* (1), at page 1216 made use of the following language, which seems to be exceedingly pertinent in the present case.

> My Lords, it seems to me if we were to say that judges cannot know that it is rash to cross the railway on foot on which it was known that trains were running; without taking some precaution to ascertain that no train was coming, and therefore that a judge cannot rule that, in the absence of evidence of something to excuse it, the person so crossing cannot recover for a collision; *we should in effect say that the question for the jury was whether it was not shabby in the Railway Company not to give something to the widow and orphans of the deceased. I fear too often that is the question really considered by the jury, but* I think it clear it ought not to be so.

Lord Gordon in the same case (1), at page 1217 referred to *The Metropolitan Railway* v. *Jackson* (2) as settling the rule that it is for the court to determine whether there is or not *reasonable evidence of negligence occasioning the injury* to be submitted to the jury and that if there be not evidence *from which such negligence can reasonably be inferred* the case should be withdrawn from the jury, and to this effect is the judgment of the Exchequer Chamber in *Siner* v. *Great Western Railway Co.* (3). In *Davey* v. *London & South Western Railway Co.* (4), Huddleston B. nonsuited a plaintiff who was injured by a train while crossing a railway of the defendants at a level crossing upon the ground that it appeared by the plaintiff's own evidence he crossed

(1) 3 App. Cas. 1155.
(2) 3 App. Cas. 193.
(3) L. R. 4 Ex. 117.
(4) 11 Q. B. D. 213.

the line without looking to see whether there was a train approaching which he must have seen had he looked. This nonsuit was upheld by the Queen's Bench Division. Upon counsel for the plaintiff arguing that the defendants in the discharge of their duty to use ordinary and reasonable care were bound to give to the plaintiff warning of the approaching train which they did not do and by omitting to do so he was misled into a confidence that it was safe to cross, Lord Coleridge interposed the observation :

> Is it not using ordinary care to presume that where there is no obstacle to vision people will look to see if a train is coming?

And in giving judgment he cited at length Lord Cairns's judgment in *Slattery's case* (1) at page 1166 terminating with the sentence

> *the jury could not be allowed to connect the carelessness in not whistling with the accident to a man who rushed with his eyes open on his own destruction*

and he held there was really no evidence proper to be submitted to the jury. Lord Dennan concurring with Lord Coleridge said :

> I think that the undisputed facts of this case shew that this accident was palpably and unquestionably due to the plaintiff's own folly and recklessness and nothing else.

And again :

> It seems to me that it is no answer to the contention that the accident resulted from his own folly, that there was no whistle for I do not see that the absence of a whistle *played any material part in causing the accident* :

And again :

> It *appears to me that the plaintiff brought his injuries upon himself by his own act as much as if seeing the train coming he had tried to cross in front of it.*

On appeal this judgment was upheld by the Court of Appeal (2). The Master of the Rolls pronouncing his

(1) 3 App. Cas. 1155.
(2) 12 Q. B. D. 70.

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judgment as to the contention that the plaintiff having been misled into a false confidence said that it was incumbent upon the plaintiff.

to show that reasonable persons of ordinary care would have been misled under the same circumstances,

and he held that there was no evidence proper to be submitted to a jury. Lord Justice Bowen held that there was nothing in the evidence from which any reasonable mind could draw the inference that the accident was caused by anything except the negligence of the plaintiff himself, and as to the suggestion that he had been misled by the defendants he said:

> Now what was there to mislead any reasonable person? Is there, in other words, any evidence from which the jury *would have a right to consider* that the plaintiff taking his own story to have been true ought to have been misled?

And finally he was of opinion *that the evidence did not leave open two views which could reasonably* be taken of the plaintiff's conduct, and so the nonsuit was affirmed. It is true that in *Wright* v. *The Midland Railway Co.* (1) reported at the foot of *Brown* v. *Great Western Railway Co.* (1) the Master of the Rolls is reported to have said (at pages 409-410).

> If it pleases any body to hear it I have doubted ever since I gave that judgment (*re Davey* v. *London & South Western Railway Co.* (2) whether my brother Baggallay and my brother Manisty were not more right than we were. I have doubted whether even in that case we ought to have taken it from the jury.

But his doubt did not detract from the rule of law as laid down in that case but in its application as to the facts of the case; his doubt being whether upon the evidence it was not open to the jury reasonably to hold that the conduct of the defendants excused the plaintiff "from taking the precaution which he otherwise should and would have taken." He premises the above observation by saying:—

(1) 1 Times L. R. 406. (2) 12 Q. B. D. 70.

There was no dispute about the law in the matter, the only difference being as to what was the conclusion of fact, and we thought the man ought to have seen. My brother Baggalay and my brother Manisty thought he should have been excused for not looking.

By which I understand the learned Master of the Rolls that they thought it was a question proper to be submitted to the jury whether he was not to be so excused. It was upon this question of fact alone that the Master of the Rolls changed his mind as to the propriety of withdrawing the case from the jury, and that change of mind cannot I think in the slightest degree affect our minds in the present case. In the case of *Wright* v. *The Midland Railway Co.* (1) there did appear to be open upon the evidence the two views referred to by Lord Justice Bowen in *Davey* v *London & South Western Railway Co.* (2) as necessary to justify submission of the question to the jury. The Master of the Rolls on the appeal in *Wright* v. *Midland Railway Co.* (1) adopts the language of Field J. in that case when in the Queen's Bench Division (3). The Master of the Rolls has no doubt as to the rule of law, giving judgment he says at page 407

I am not going to attempt to lay down what the law on this matter is again because it seems to me to have been laid down in the clearest language many times and as Mr. Justice Lopes says (and I am sure I will not gainsay it) beautifully laid down by Mr. Justice Field in this case. All I can say is that I do not think Mr. Justice Field in this case has added one single word as a legal proposition to what everybody had agreed to years before. Let me see what Mr. Justice Field's proposition is—"I say I may take it into my own hands when no reasonable jury acting fairly and impartially between the plaintiff and the defendant ought to draw or would draw any but one conclusion and that conclusion is conclusive against the plaintiff."

It is apparent then that upon the rule of law there was no difference of opinion whatever between the Master of the Rolls and Mr. Justice Field. They differed only as to the application of the rule to the

(1) 1 Times L. R. 406. (2) 11 Q. B. D. 213.
(3) 51 L. T. (N. S.) 539.

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facts in evidence in the case before them. Mr. Justice Field in a very full and exhaustive review of the evidence concludes by saying (1)

> Now I have not the faintest doubt in this case. I think that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased as to disentitle the plaintiff to recover.

Mr. Justice Manisty who differed from the Master of the Rolls in *Davey* v. *London & South Western Railway Co.* (2) concurred with the judgment of Mr. Justice Field, he expressed himself of opinion that the evidence disclosed no evidence whatsoever of any negligence of the defendants which caused the death of Wright, the deceased. Lord Justice Lopes in the strongest terms expressed his concurrence in the judgment of Mr. Justice Field, and said (3)

> I doubt very much whether a more able and exhaustive judgment, with regard to what is "contributory negligence" and to the question when negligence or contributory negligence ought to be left to or withdrawn from the jury, exists in any of the books, than that which has just been delivered by my learned brother Field,

and the rule was made absolute for judgment for the defendants although the trial judge had submitted the case to the jury who had rendered a verdict for the plaintiff. The Master of the Rolls then in his judgment in *Wright* v. *The Midland Railway Co.* (4) proceeded to point out several points in the evidence as to negligence both on the part of the defendants and of the deceased which appeared to him to present two views upon which reasonable men might, in his opinion, differ as to the cause of the accident which caused the death of the deceased. Lord Justice Baggalay concurred with the Master of the Rolls and so the appeal was allowed. Lord Justice Lindley who concurred in the judgment of Mr. Justice Field upon the facts dissenting.

(1) 51 L. T. N. S. at p. 544.
(2) 12 Q. B. D. 70.
(3) P. 545.
(4) 1 Times L. R. 406.

Brown v. *Great Western Railway Co.* (1), was a similar case and proceeded ultimately upon the authority of the above case of *Wright* v. *The Midland Railway Co.* (2) in appeal. Then there is the case of *Coyle* v. *Great Northern Railway Co.* (3) in the Irish Exchequer Court in 1887 which is very much in point and in which Chief Baron Pallas reviewed all of the above cases including the judgment of the Master of the Rolls in *Wright* v. *The Midland Railway Co.* (2). It was an action under Lord Campbell's Act for the death of a person killed when crossing the Great Northern Railway Company where carriages were at the time being shunted. It appears from the evidence of the plaintiff's witnesses that the view from the place where the deceased was standing to the point from which the carriages began to retrograde was unobstructed; that they were visible during the shunting to any person standing at the place where the deceased was; that they were retrograding in the direction of the deceased when he started to cross the line, and that he must have seen them moving had he looked towards them; and that there was nothing unusual in what took place that morning in the mode of shunting; and it was held that the judge at the trial ought to have directed a verdict for the defendants as the undisputed facts shewed that the deceased in crossing the track acted negligently and that his negligence if not the sole, was at least a contributory cause of the accident. Pallas C.B. delivering his judgment pointed out the unquestionable and apparent fact that the accident could not have happened but for the deceased being there, and that his negligence in being there was at least a *causa sine quâ non* of his death. There was nothing he said amounting to a statement by the company that the deceased

(1) 1 Times L. R. 406. (2) 1 Times R. L. 406, *n.*
(3) L. R. Ir. 20 C. L. 409.

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might safely cross; there was no evidence of any negligence of the defendants but for which the consequences to the deceased could have been obviated and that therefore the judge was bound to withdraw the case from the jury upon proof of the negligence of the deceased. Douse J. concurring with the Chief Baron's judgment said

there was no evidence from which a jury might or might not infer that the deceased was guilty of contributory negligence—the evidence was all one way—the deceased could and should have seen the train and thus have escaped injury.

Then there is the case of *Allen* v. *The North Metropolitan Tramways Co.* (1). The material facts in that case as appearing in the plaintiff's evidence were that on a snowy night in December, about 11 o'clock, the plaintiff was on the Stratford highway on the Bow and Stratford bridge. He was about to cross the road and had gone about two and one half paces into the roadway when he was knocked down and run over by one of the defendants tram-cars proceeding from Stratford to London, his legs broken and he received other injuries and for these he brought his action for damages by negligence. At the trial before Mr. Baron Hudderston it appeared in the plaintiff's case that he was not looking in the direction from which the tram came, and if he had looked he must have seen it; the plaintiff however said that it was usual for the tram-car to stop on the bridge and that he expected this tram-car would do the same. Upon this evidence Mr. Baron Huddleston withdrew the case from the jury and nonsuited the plaintiff. The Divisional Court was of opinion that there was some evidence to go to the jury and set aside the nonsuit and made an order for a new trial. On an appeal to the Court of Appeal Lord Justice Lindley pronounced the unanimous judgment of the

(1) 4 Times L. R. 561.

court and said that they had all come to the conclusion that the nonsuit was right.

There was, he said, some evidence that the car was going fast and there was evidence that the plaintiff did not hear the car coming owing perhaps to the ground being covered with snow. It was clear from these facts that the plaintiff had only himself to blame for the accident. In the first place the court could hardly go to the length of saying that there was no evidence of negligence in the driver of the car, though that evidence was of the slightest possible character. *On the other hand there was clear evidence that the plaintiff's conduct caused the accident;* he walked into the tram-car when if he had looked he must have seen it. Then even though the plaintiff was negligent could the driver have avoided the accident by the exercise of reasonable care. *They could find no evidence that the driver could have avoided the accident.*

The appeal was therefore allowed and judgment rendered for the defendants in the action. Then there is the case in the Privy Council, also in 1887, on appeal from the Supreme Court of New South Wales, *Commissioner for Railways* v. *Brown* (1). I extract a portion of the judgment of the Privy Council which was pronounced by Lord Fitzgerald to shew the rationale upon which the judgment proceeded. He says at p. 135.

What really took place seems to have probably been that the plaintiff was driving down Elizabeth street and his horse got into an excited state from the noise of children. One of the witnesses says that when the plaintiff could have seen the motor coming he rose in his seat and commenced slashing his horse. The object of that was that having a spirited horse he thought that spirited horse would have carried him clear of the motor by being a little accelerated and then he commenced accelerating the pace of the horse so as to rush past the motor. *He had no business to do that.* When he saw there was danger of collision his duty was at once to have held his horse in. It was a matter of seconds. The delay of a few seconds would have prevented the calamity, but he chose to make a rush across, and in fact instead of the motor running into him he ran into the motor.

This latter language is emphatically applicable to the evidence of what occurred in the present case

(1) 13 App. Cas. 133.

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The decisions in the Ontario courts proceed on the same principle; *Danger* v. *London Street Railway Co.* (1); and I do not of course cite this case as an authority binding in any sense upon this court, but because I entirely concur in the judgment pronounced in it. The action was against a street railway company for negligence. It appeared that an electric car of the defendants was being run at a very rapid rate, and that the gong was not sounded as the car approached a certain street at the junction of which the plaintiff who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails when a wheel of the vehicle was struck by the car and he was injured. It also appeared that he did not before turning look or listen to ascertain the position of the car although he knew it was coming. The learned trial judge upon this evidence nonsuited the plaintiff. Upon a motion to set aside that nonsuit and for a new trial the Divisional Court affirmed the nonsuit.

Then there is *Follet* v. *The Toronto Street Railway Co.* (2) which proceeded upon the express authority of *Allen* v. *North Metropolitan Tramway Co.* (3). The case there was left to the jury who rendered a verdict for the plaintiff; a divisional court refused to set aside that verdict, but on appeal the majority of the court being of opinion that there was no evidence of the defendants' negligence which was proper to be left to the jury, that is to say, none from which a jury could reasonably find a verdict against the defendants for negligence, set aside the judgment and ordered judgment to be entered for the defendants, Osler J. dissenting upon the point only that he thought there

(1) 30 O. R. 493.
(2) 15 Ont. App. R. 346.
(3) 4 Times L. R. 561.

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was evidence from which a jury might fairly find a verdict against the defendants.

Now upon the evidence as it stood at the close of the whole case I cannot entertain a doubt that the only conclusion which reasonable men could fairly deduce from the evidence was that the driver of the plaintiff's cab by his own rash, reckless and wrongful conduct into which he was not misled by any conduct of the defendants, was the sole cause of the accident which occurred, the case was one, to use the language of Lord Fitzgerald in 13 App. Cas. 135, of the cab driver running into the motor instead of the motor running into him. But we need not dwell upon this, for the learned trial judge submitted the case to the jury, who have expressly found that the cab driver, to say the least, did by negligent and improper conduct in attempting to cross the railway as he did just in front of the coming motor contribute to the causing of the accident and the injury suffered. That finding is conclusive, and upon it and upon the authority of all the cases upon the principle governing cases of this kind the learned trial judge should have entered judgment for the defendants, for there was not a shadow of evidence upon which reasonable men could fairly say that the motorman was guilty of negligence in omitting to do something which he could and should have done, and which, if done, would have obviated the consequences of the cab driver's wrongful conduct. Nothing of the kind was attempted to be proved at the trial; the only intimation which the motorman had of the cab driver having any intention to cross the track was his turning from the sidewalk where the cab had been standing and making straight for the railway. Now the evidence of the defendant's witnesses, and there was no contradiction whatever of that evidence, was that instantaneously upon the cab

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driver so exhibiting an intention to cross the track the motorman put on his brakes hard, and reversed the electric current, which latter was completely effected before the car got within a car's length, or twenty-seven feet of the place where the collision occurred. There was, I say, no contradiction whatever of these statements, but what counsel for the plaintiff attempted to do was to extract from the motorman on cross-examination whether, if he had applied the brakes and reversed the current sooner than he did, the car might not have been stopped before it reached the place where the collision took place. To this the motorman naturally replied that if he had any intimation of the intention of the cab driver to cross in front of him he could have stopped the car sooner than it was stopped, but there was not a particle of evidence that he did not do all that he possibly could do the moment he had any intimation of the cab driver's intention to cross the railway, that is to say the moment he turned from the sidewalk where he had been standing, just seventeen feet six inches distant from the rail upon which the cab was struck. Now it does not require the authority of any decided case to shew that the motorman having done nothing to stop the car before he had any intimation of the intention of the cab driver to cross the track, could not by any reasonable man or in law be held to be negligence contributing to an accident which could not have taken place if the plaintiff's driver had not negligently and wrongfully placed himself in a position to bring upon himself the danger of the collision which did take place.

It was argued before us that the speed at which it was suggested that the motor was running, namely at, as was suggested from fifteen to twenty miles an hour, excused the plaintiff's conduct If the motor was running at such a rate of speed the attempt of

the cab driver to cross in front of it was only the more culpable and could not affect the question whether after the cab driver had wrongfully attempted to cross the track the motorman omitted to do something which he could and should have done, which if done would have avoided the consequences of the cab driver's wrongful act. But in truth there was not anything said at the trial as to the speed of the motor which reasonable men could fairly regard as entitled to any consideration whatever as contradictory of the evidence given by the defendants upon that point, that the motor was going at its ordinary rate not exceeding about eight miles an hour, and in fact at the particular place in question it was going down a descending grade under its own headway and at the ordinary rate it always runs there and at all other places in the city at similar down grades. I have shewn how utterly valueless was the opinion of Harvey, the cab driver on the question of speed; the only other witness who said anything upon the question of speed of the motor was Pearce, who ventured to say that he judged that the motor was going at the rate of from fifteen to twenty miles an hour, but on cross-examination he said that while he was walking along for a distance of about forty yards the motor had just moved the distance of what he called 100 yards, thus showing the rate of speed of the motor to be just about what the defendants' witness stated, whose testimony was confirmed by the rapidity with which the car was stopped, and the short distance it continued to run after the brakes were applied. But the speed at which the car was going being only an item of consideration upon the question of the defendants' negligence, and as it is quite immaterial whether the defendants had been guilty of any negligence prior to the wrongful conduct of the cab driver to cross in front of the car,

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it is unnecessary to dwell upon this point. The defendants were clearly entitled to judgment upon the finding of the jury as no reasonable men could find otherwise than that the wrongful conduct of the plaintiff's cab driver contributed at least to the accident, and there was not a particle of evidence that the defendants were guilty of any negligence in omitting to do anything which if done would have obviated the consequences of the defendant's misconduct. The answer of the jury to the third question submitted to them is utterly unsupported by any evidence, and can, I think, be attributed solely to some such motive as that suggested by Lord Blackburn in *Slattery's Case* (1) as too often influencing juries to render verdicts in cases of this kind against the evidence. I cannot entertain any doubt that the appeal should be allowed with costs and judgment be ordered to be entered for the defendants in the action with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. H. Covert.*

Solicitor for the respondent: *H. C. Borden,*

(1) 3 App. Cas. 1155.

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AND

ADELINE DURAND (PLAINTIFF).....RESPONDENT.

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*March 6.

*April 2.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Negligence—Use of dangerous materials—Cause of accident—Arts. 1053, 1056 *C. C.—Employer's liability.*

To permit an unnecessary quantity of dymanite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. Gwynne J. dissenting.

As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen* v. *Filion*, (24 Can. S. C. R. 482) and *The Queen* v. *Grenier*, (30 Can. S. C. R. 42) followed.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review at Montreal, affirming the judgment of the Superior Court, District of Saint Francis, which maintained the plaintiff's action with costs.

The action was brought by the plaintiff for damages in her own behalf as widow of the late Theodore Rivard, deceased, and also in her quality of tutrix on behalf of the minor children of the deceased, in consequence of his death which occurred through an

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

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explosion of dynamite caused, as was alleged, by the fault of the defendant under the following circumstances:

The deceased was employed by the defendant as driver of a compressor engine used in working drills in a mine. The engine was in a wooden building contiguous to and connected with which was another wooden building in which there were four steam engines used to work the derricks. In the latter building, on the day of the accident, a quantity of dynamite had been placed which exploded during the dinner hour killing the deceased, who was then eating his dinner in the compressor building, and also two other employees who appeared to have been, at the time, in or about the adjoining engine house. The evidence shewed that the defendant used large quantities of dynamite or dualine, which is a high explosive, kept usually in a frozen state and requiring to be thawed out to fit it for use. It explodes at 360° F. or through friction and in order to reduce the frozen sticks to pasty consistency for immediate use they were placed in the engine room near the steam pipe where the heat ranged between 90° and 100° F. The dynamite was stored in an isolated magazine about 1000 feet from the engine house, carried thence in wooden boxes and laid in a specially constructed zinc case in quantities generally of two boxes at a time when being thawed out for use, but at the time of the accident there were two unopened wooden boxes of dynamite in the engine room besides about the same quantity in the zinc case and no person had been placed particularly in charge of it or of the engine house during the dinner hour. This building was open on all sides and could be freely entered. At the time of the accident, one of the victims who had been sent by the foreman into the building to get some of the dualine and fulminating caps

was seen coming rapidly out of the engine house door and crying "fire! fire!" and the explosion followed immediately with the fatal results already stated.

The actual cause of the explosion of the dynamite was not proved but theories were advanced of spontaneous explosion arising from proximity to the steam pipes, or fire set to rubbish by carelessness, generating sufficient heat to explode the dynamite. The plaintiff charged the defendant with imprudence in allowing so large a quantity of dynamite to remain unguarded in such a dangerous place and for neglect to make proper arrangements and provide facilities to prepare it for use in some isolated situation.

The trial court maintained the action and awarded $1,000 damages to the plaintiff personally and an additional $1,000 damages on behalf of the children and found that the deceased had not been guilty of contributory negligence, that the cause of the explosion was unknown and that imprudence and neglect on the part of the defendant had been established by the evidence.

The Court of Review affirmed the trial court judgment and considered that the defendant was in fault in imprudently placing so large a quantity of dynamite in the engine room without anyone to take charge of it, especially while the engineers had gone away for dinner. The defendant appealed from the latter judgment.

Laflamme for the appellant cited *Montreal Rolling Mills Co.* v. *Corcoran* (1); *Mercier* v. *Morin* (2); *Dominion Cartridge Co.* v. *Cairns* (3); *Canada Paint Co.* v. *Trainor* (4); *George Matthews Co.* v. *Bouchard* (5); *Burland* v. *Lee* (6); *Tooke* v. *Bergeron* (7).

(1) 26 Can. S. C. R. 595.
(2) Q. R. 1 Q. B. 86.
(3) 28 Can. S. C. R. 361.
(4) 28 Can. S. C. R. 352.
(5) 28 Can. S. C. R. 580.
(6) 28 Can. S. C. R. 348.
(7) 27 Can. S. C. R. 567.

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L. C. Bélanger Q.C. for the respondent. The cause of death was the explosion which occured through the negligence of defendant in placing dangerous material in unusual and unnecessary quantities in an unsafe situation and cases of mysterious accident from unknown cause do not apply. If dynamite had not been carelessly left lying about and unprotected the deceased would not have suffered. *Garon* v. *Anglo-Canadian Asbestos Co.* (1); Arts. 1053, 1056 C. C. Employers are liable when the accident might have been avoided, no matter how extensive or extraordinary the measures of precaution required. *Vide* Caen, 22 Dec, 1876; S. V. '77, 2, 49; Aix, 10 January, 1877; S. V. '77, 2, 336, 27 Nov. 1877; S. V. '78, 2, 232; Art. 1055 C. C. We refer also to *Robinson* v. *The Canadian Pacific Railway Co.* (2); (reversed in Supreme Court, but as to the solatium only) (3); *Canadian Pacific Railway Co.* v. *Goyette* (4); *Bélanger* v. *Riopel* (5); *Holmes* v. *McNevin* (6); *Legault* v. *City of Montreal* (7); Art. 877, par. 6: art. 1011 R. S. Q.; 55-56 V., c. 20, Quebec; *Ibbotson* v. *Trevethrick* (8); *Town of Prescott* v. *Connell* (9).

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

KING J.—Assuming it to be reasonable as between the mine owners and their servant that the dynamite needed for immediate use in the mines should be taken from the magazine to the hoisting engine house at the pit's mouth, there to be thawed out in preparation for use, the evidence still shows that an unnecessary large

(1) Q. R. 3 S. C. 185.
(2) M. L. R. 2 Q. B. 25.
(3) 14 Can. S. C. R. 105; 19 Can. S. C. R. 292; [1892] A. C. 481.
(4) 30 L. C. Jur. 207; M. L. R. 2 Q. B. 310.
(5) M. L. R. 3 S. C. 198, 258.
(6) 5 L. C. Jur. 271.
(7) 17 R. L. 279.
(8) Q. R. 4 S. C. 318.
(9) 22 Can. S. C. R. 147.

quantity was accumulated there at the time of the explosion.

The dynamite (or dualine as this preparation of it was called) as received from the manufacturers was contained in wooden boxes of from 18 to 20 inches in length by 15 by 9. The dynamite in each box weighed about 50 pounds, and was in the shape of sticks, of which there were sixty or seventy in each box. It was purchased by defendants in large quantities from the manufacturers, and was stored in a magazine constructed for the purpose upon defendant's premises at a safe distance from the works having regard to the possibility of an explosion.

It appears from the evidence of Williams, the superintendent of the mine, that the daily average use was about four boxes, and that the course of business was that a person specially entrusted with the duty would, in the morning and again at noon, carry two of the boxes from the magazine to the hoisting engine room, were they would be deposited in a certain manner near a steam pipe for the purpose of being thawed, the temperature of the sticks being originally at about 40° Fahrenheit. This transfer of two boxes at each of these stated periods, instead of the entire number for the day at one time, evidently points to this as being in the opinion and practice of the company a reasonable limit to the quantity to be accumulated in proximity to the works.

The like conclusion follows upon the fact that the company with a view to safety had prepared a specially constructed zinc box in which to place the dynamite brought from the magazine, and that the capacity of this was limited to that of two of the original boxes. It consisted of two zinc boxes placed one inside the other, with an air space of a couple of inches all around between the two, and as thus constructed it is

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stated by the superintendent to be the best sort of a receptacle for the purpose. In ordinary course when the two original boxes were brought from the magazine their contents were transferred to the zinc box.

The following appears in the examination of the superintendent:

Q. Did you ever have, to your knowledge, more dynamite in that building than you absolutely required for the daily use?

A. It has happened that there has been some left from the night that has not been used up that day.

Q. As a rule there never was more than two or three boxes?

A. No sir.

Now it appears that at the time of the explosion, although half the working day was over, there were nearly four boxes in the hoisting engine house. The zinc box, capable of containing two of the original boxes, was nearly full, and there were also, upon the platform beside it, two other of the original boxes which had not been opened at all, in all a quantity of between 150 and 200 pounds in weight.

The defendants produced an expert witness named Penhale, the manager of another asbestos mine. It appears that at his works the magazine was 1,500 feet distant from other buildings, and that the thawing out process was carried on in a small building separate from others which, when not in use, was kept locked. Upon his direct examination the following occurs:

Q. How many times a day or a week do you carry a certain quantity of dynamite from the magazine to the distributing point?

A. It is usually brought down a box at a time.

Q. And when this box is used up?

A. More is brought down.

Then on cross-examination:

Q. What quantity at a time do you allow to be kept in the distributing building?

A. Only a box at a time, and, as it is used, it is replaced.

Clearly, therefore, upon the evidence adduced by the defendants themselves there was, at the time of the explosion, an unnecessary and unreasonable quantity of this highly dangerous explosive in dangerous proximity to the workmen engaged in carrying on their work; and no attempt is made to excuse or explain the circumstance.

The negligence involved in this was one of the efficient causes of Rivard's death which, as admitted and as found, was caused by the explosion that in fact took place, and was not the conjectural consequence of a smaller explosion.

The peril to life from high explosives is so great and, as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstance or neglect of others or other cause, he takes the chance of the happening of such other event and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence.

It hence becomes unnecessary to determine as to other agencies contributing to the result, provided it appears that neither the deceased (nor any one whose act or omission may prove a legal bar) had any connection with it, and that he is not precluded from urging defendant's neglect.

Then as to whether Rivard had any part in causing the explosion; he was employed as engineer in a wholly distinct but contiguous building, and his body was found more remote from the point of explosion than the farthest limits of his engine house. Besides, the fact that victuals were found in his mouth shows

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(as stated by the superintendent) that he was eating his dinner when the explosion took place, and the court below naturally acquitted him of all participation in the cause of the explosion.

Then as to the acts or omissions of fellow servants. According to the French law common employment is no defence, and does not exonerate the employer from liability for the negligence of a servant who may by his negligence have caused an accident from which another servant has suffered. This has been held more than once in this court. *The Queen* v. *Filion* (1); *The Queen* v. *Grenier* (2). Nor was the deceased a consenting party to the excessive quantity of dynamite being deposited near him, for the evidence shews that the deposit of such a quantity was contrary to the usual course of business.

In the declaration, (after averring that the explosion which caused the death was that of at least three boxes of dualine, in the building contiguous to that occupied by the deceased,) it is averred that

> it was an act of gross neglect on the part of the defendant to leave such a large quantity of explosive matter, such as dualine, in the said building, and the death of the said Theodore Rivard resulted from, and was due to the carelessness, gross neglect, and fault of the said defendant.

In what has been adduced there is proof of this allegation and hence the appeal should be dismissed.

GWYNNE J. (dissenting)—If this case were not concluded by authority I must confess that I should have reason to distrust my own judgment in hesitating to concur in a judgment in which so many of my learned brothers, as well in the courts of the Province of Quebec, as in this court, so unanimously concur. However, I am bound to say that in my opinion, the

(1) 24 Can. S. C. R. 482. (2) 30 Can. S. C. R. 42.

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case is concluded by the authority of this court in several cases, and by the authority of all the courts in England in very many cases wherein the principles governing the determination of cases of the nature of that now under consideration are clearly laid down, to all of which authorities the judgment in the present case is, in my opinion, directly adverse. That judgment appears to me to introduce a wholly new principle for the determination of actions like the present one, namely, that although the cause of the explosion which occasioned the injury complained of is admitted to be absolutely unknown, it is nevertheless to be presumed that the explosion was caused by some negligence of the defendant, that is to say, that some negligence of the defendant was the *causa causans* of the explosion and that the onus of removing this presumption is cast upon the defendant. This, with great deference, appears to me to amount to the proclamation of the doctrine that upon the defendant was cast the onus of showing the actual cause of the explosion which is admitted to be absolutely unknown.

It has been judicially declared over and over again that in actions of this nature the inquiry is whether the defendants were guilty of negligence which was the *causa causans* of the accident which occasioned the injury complained of, that is to say, in the present case, was the *causa causans* of the explosion which killed Rivard the deceased husband of the plaintiff. In the statement of claim the only matter which is charged as the negligence of the defendant, the now appellant, which was complained of, was the mere fact of having the explosive material which consisted of dynamite in the building where the explosion took place, which killed Rivard, and two other employees of the appellant, namely Pierre Ratté and Alphonse Morin. It was not contended that there was any positive provi-

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sion of law which made it to be unlawful for the defendant to use the dynamite in the manner in which it was being used, or to have it in the building where it was when the explosion took place, but at the trial in the Superior Court several suggestions were made on behalf of the plaintiff as to the actual cause of the explosion and, among them, that it had occurred in some unexplained manner by spontaneous combustion. If it had been so caused it did not clearly appear how such a cause of the explosion could be attributed as actionable negligence in the defendant, but this is unimportant now, for the evidence established sufficiently the absolute impossibility of dynamite being exploded by spontaneous combustion, and this suggestion as well as the others made on behalf of the plaintiff were rejected by the learned judge of the Superior Court as wholly inadmissible. The learned judge in pronouncing his judgment thus expresses himself:

> La cause déterminate de la mort a été l'explosion de la dynamite mais comment cette explosion a eu lieu, personne ne peut le dire l'expèrt Brainerd n'a pu l'expliquer, et sur ce sujet nous sommes absolument dans les ténèbres.

In another place the learned judge says:

> We have to occupy ourselves not so much with the direct cause of the explosion, as with its consequences; it is of little consequence how the explosion had occurred or what was the cause of it.

The material question he thought was:

> Would it have taken place if the defendant had taken prudent measures and ordinary precautions?

But with deference, the actual cause of the explosion is the very essential point with which we have to deal in the present action, the very gist of which is to establish that cause to be due to the negligence of the defendants as the *causa causans* of the explosion. and with the consequences of the explosion we cannot intelligently and judicially deal until we know its

cause. Moreover, in order to determine whether prudent precautionary measures to prevent the explosion which occurred had been taken, it is necessary to know what it was that caused the explosion, for by that cause the nature, character and sufficiency of the precautionary measures that should have been taken to prevent the explosion must be tested. Otherwise the happening of the explosion must be taken as conclusive evidence of its having been caused by the negligence of the defendant.

The learned judge, while rejecting the suggestions made on behalf of the plaintiff as to the cause of the explosion, came himself to the conclusion that the explosion was caused by fire kindled by the ashes of pipes, by matches or in some other way before the engineers had left off work at 12 o'clock. This fire, as he held, had remained latent during some time and developed itself and produced the heat requisite to cause the explosion, that is to say 360° F., for by the evidence it had appeared that for fire to cause the explosion of dynamite, it was necessary that a heat of 360° F. should be attained. The sole evidence upon which this theory of the explosion having been caused by pre-existing fire was rested consisted of evidence which was given to the effect that Morin, one of the persons killed by the explosion, and who had just reached the door of the building and was about to enter therein when the explosion took place, cried out "fire" upon the instant of the explosion taking place, and was killed.

Now, with the greatest deference, it appears to me that this theory of pre-existing fire, caused in the manner suggested, having been the *causa causans* of the explosion belongs as much to the region of conjecture and surmise as did the theory of spontaneous combustion, and the other theories put forward on the

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part of the plaintiff and which were rejected by the learned judge as inadmissible. Moreover, the evidence had shown that when the engineers left off working at 12 o'clock for their dinner everything was in a good and safe condition, and further assuming that a pre-existing fire caused in the manner suggested was the *causa causans* of the explosion, it was as reasonable to conclude that such fire was caused by ashes from pipes or by matches in the hands of the deceased Rivard or of some other of the employees of the defendant who were in the buildings before the engineers stopped work at 12 o'clock, or in the hands of those who remain in the building after twelve o'clock. All however is mere conjecture and surmise.

In the *Dominion Cartridge Co.* v. *Cairns* (1), this court was of opinion that for the determination of that case,

it was sufficient to say that the evidence shews that the explosion originated at the press which was at the time being worked by Cairns, (the deceased,) and that the evidence not only does not warrant an adjudication that the explosion was not caused by any negligence on the part of Cairns, but on the contrary does warrant the fair presumption that it was caused by his negligence. *If not caused by his negligence the evidence fails to shew what did in fact cause it, and it cannot therefore be imputed to the defendants.*

This contains the very gist and substance of that decision, and, if I am not mistaken, the Privy Council refused leave to appeal from that judgment (2).

The last sentence in the above judgment appears to describe precisely the condition of the present case in this, that the actual cause of the explosion is still a matter absolutely unknown and it cannot therefore be judicially pronounced that the explosion was caused by negligence of the defendant. So likewise, and for the same reason the judgment in the present case appears to me to be in direct conflict with the unani-

(1) 28 S. C. R. 361. (2) Cout. Dig. 289.

mous judgment of this court in the *Canada Paint Co.* v. *Trainor* (1), wherein the court said:

> The utmost that the evidence warrants is that the cause of the accident still is as it was at the close of the plaintiff's case, a matter merely speculative and conjectural

and for that reason the appeal was allowed.

So likewise and for the same reason the judgment in the present case now before us in appeal appears to be directly at variance with the judgment of this court in *The Montreal Rolling Mills Co.* v. *Corcoran* (2), and the principle there enunciated as governing actions of like nature as the present, and indeed at variance with all the judgments of this court and of the courts in England in cases like the present.

In *Tooke* v. *Bergeron* (3) an appeal was allowed by this court because it was not shewn sufficiently in the evidence that the cause of the accident was directly due to the negligence of the defendant, appellant. So likewise in *Cowans* v. *Marshall* (4), which was the case of injury caused by explosion, and wherein the principles governing cases of this nature as established in the English courts, were discussed, an appeal was allowed because the evidence failed to prove the cause of the explosion. So likewise in the *Canada Coloured Cotton Mills Co. v. Kervin* (5), the latest case in this court upon the question under consideration. The case was of a person employed in a cotton factory being caught by the machinery and killed. The case of the plaintiff, the personal representative and widow of the deceased, was that the deceased was caught by the machinery at the place where in the course of his duty he was engaged, and that he had been so caught by reason of the default and neglect of the appellants in not having the place where the deceased was

(1) 28 S. C. R. 352,
(2) 26 S.C. R. 595.
(3) 27 S. C. R. 567.
(4) 28 S. C. R. 161.
(5) 29 S. C. R. 478.

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engaged in the discharge of his duty sufficiently protected. The case of the appellants was that there was no evidence of the accident having been caused at the place suggested by the plaintiff, and that the accident might have occurred at a different part of the machinery where the deceased had no business to be, and the court allowed the appeal upon the ground that the evidence failed to establish the cause of the accident and how it had occurred. This is the latest case in this court and in it the principle is unequivocally affirmed that if the actual *causa causans* of the catastrophe which causes injury to any one is unknown, judgment cannot be recovered against the defendant upon a charge of his negligence having *caused* the accident.

It is suggested that the quantity of dynamite which was in the building at the time of the explosion was greater than should have been allowed to be there, but there is nothing in the judgment asserting a contention, nor anything in the evidence to support a contention that the *quantity* of the dynamite in the buiding had, or could have had any effect in causing the explosion.

In fine, the judgment of the Superior Court appears to me to amount to this, that although the actual cause of the explosion is absolutely unknown, and although no cause can be suggested for it which rests upon anything else than conjecture and surmise, still as the explosion could not have taken place in the building if the dynamite had not been there, this is sufficient to require the court to pronounce a judgment that the explosion was caused by negligence of the defendant. If the judgment of the Superior Court be maintained by this court, it appears to me to be so in conflict with all the judgments heretofore rendered by this court in cases of a like nature with the present,

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as to cause the very greatest confusion in applying the judgments of this court to cases of a like nature in the future.

I am therefore of opinin that the appeal should be allowed with costs, and the action in the court below dismissed with costs.

Appeal dismised with costs.

Solicitors for the appellant: *Greenshields Greenshields, Laflamme & Dickson.*

Solicitor for the respondent: *L. C. Bélanger.*

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*Feb. 22, 23.
*April 2.

WALTER WALKER (DEFENDANT).....APPELLANT;

AND

SARAH A FOSTER AND OBEDIAH M. TAYLOR (PLAINTIFFS)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Donatio mortis causâ—Delivery to third person—Delivery of key.

To affect a *donatio mortis causâ* delivery to a third person for the use of the donee is sufficient provided that such third person is not a mere trustee, agent or servant of the donor. The assent of the donee or even his knowledge of the delivery is not requisite.

Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of and dominion over the same.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiffs at the trial.

The action in this case was brought by the respondents as administrators of the estate of the late Archi-

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(1) 32 N. S. Rep. 156.

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bald Walker to recover damages for the conversion and detention by defendant of certain promissory notes and other property alleged to belong to the estate.

The deceased Archibald Walker was endeavouring to dispose of his property after his death without making a will. To accomplish this he placed certain promissory notes in envelopes addressed to each of his five children. These envelopes with their contents he kept in a desk at his bedside for some years locked up and under his control. Shortly before his death, when he believed he would die, he had the envelopes in which the notes were, taken from the desk and handed to one Dodge, who was directed by him to seal up the envelopes and replace them in the desk and lock it. Then he delivered the keys to Dodge to retain until after his death when he instructed him to deliver to each of his children one of the envelopes so addressed. These envelopes in Dodge's presence as well as in deceased's presence were sealed up some time before his death, and afterwards Dodge delivered them to the respective donees as directed. The sole question is whether this was a *donatio causâ mortis* good in law.

The court below and the trial judge held that Dodge was a mere agent of the deceased and that there was therefore no delivery of the property for defendant's benefit. Defendant then appealed to this court.

Roscoe Q.C. for the appellant. The judgments below were wrong in holding that Dodge was the servant of deceased in accepting delivery of the donation. See *Drury* v. *Smith* (1); *Moore* v. *Darton* (2); *Sessions* v *Moseley* (3).

(1) 1 P. Wm. 404.
(2) 4 DeG. & S. 517.
(3) 4 Cush. (Mass.) 88.

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Dodge could be made the agent of the donee without the latter's assent and even without his knowledge. *Drury* v. *Smith* (1).

As a matter of fact the property itself was delivered to Dodge but it would have been sufficient if only the key of the desk containing it had been delivered. *Jones* v. *Selby* (2); *Murtapha* v. *Westlake* (3); *Trimmer* v. *Danby* (4); *Hall* v. *Hall* (5).

J. J. Ritchie Q.C. for the respondents. The findings of fact by the trial judge will not be disturbed unless clearly wrong; *Colonial Securities Trust Co.* v. *Massey* (6); and they are entirely supported by the evidence.

Delivering is essential to gifts of this class; *Irons* v. *Smallpiece* (7); *Cochrane* v. *Moore* (8); and there was no sufficient delivery to Dodge; *Powell* v. *Hellicar* (9).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The sole question in this case is as to the sufficiency of the delivery of the notes in question by Archibald Walker to James S. Dodge, to constitute a good *donatio mortis causâ*. All the other requisites of such a gift are proved.

It is well established by authority that a delivery to a third person for the use of the beneficiary is sufficient. If, however, the third person is a mere trustee, agent or servant of the donor the delivery to him is insufficient.

Such a gift is always revocable by the donor and of course entirely fails if he recovers from the illness from which he is suffering at the time he makes the donation

(1) 1 P. Wm. 404.
(2) Prec. in Ch. 300.
(3) 8 Times L. R. 160.
(4) 25 L. J. Ch. 424.
(5) 20 O. R. 684.
(6) [1896] 1 Q. B. 38.
(7) 2 B. & Ald. 551.
(8) 25 Q. B. D. 57.
(9) 26 Beav. 261.

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It is inaccurate to say that the delivery must be to an agent or trustee for the donee. No one can be an agent or trustee for another without that person's assent. Then the cases show that the delivery to the third person is sufficient without the assent or even the knowledge of the donee provided it is for the use of the donee. Indeed the very sense and object of a delivery to a third person is in some cases because the donee is not at hand to give his assent. Therefore the assent of the donee or even his knowledge of a delivery to a third person for his behoof is not an essential requisite provided the donor parts with both the possession and dominion over the subject of the gift in order that the depositee may hold it for the use of the donee. Chief Justice Shaw in *Sessions* v. *Moseley* (1) in his definition of a *donatio mortis causâ* is careful to avoid the loose and inaccurate language sometimes used by text writers and even in reported cases which requires that the third person must be an agent or trustee for the donee though the latter may know nothing of him. In the case referred to it is said "there was an actual delivery to a person for the use of the donee" thus treating such a delivery as sufficient in law without any requirement of agency or trusteeship for the donee at the time of delivery.

Then the evidence here being not contradicted the question is entirely one of its sufficiency to show that the donor, Archibald Walker, transferred the possession of and dominion over the notes in question to Dodge. The delivery of possession does not depend on the handing over of the keys of the bureau or desk alone, for the notes were previously taken out of the box and replaced there by Dodge himself after the sealing of the envelopes. However had there been no delivery except that of the keys, that would by itself have

(1) 4 Cush. 88.

constituted an actual and not a mere symbolical delivery and the possession and dominion over the securities contained in the desk would have been thus acquired by Dodge. A great number of cases may be cited in support of this view; it is sufficient however to refer to one or two. *Sessions* v. *Mosèley* (1) already referred to, is exactly in point; *Marshall* v. *Berry* (2) is to the like effect. Indeed there is no dispute as to the delivery being sufficient if (to put in negatively) it is to the third person not as an agent or trustee for the donor but for the use of the donee. *Moore* v. *Darton* (3) is an English authority the principle of which applied to the undisputed facts in evidence here is conclusive against the judgment of the court below. Many other cases might be quoted but they do not affect the rule of law, but are only instances of the application of that rule to varying states of fact.

Moreover, as in the case before us as the donee happened to be present and assented to the gift an actual trust in his favour was constituted.

It is out of the question to say that there was here any proof of agency or trusteeship for the donor, or of anything short of an actual delivery of the notes and a parting with the dominion over them to Dodge for the use of the donees after the testator's death.

The case in Beavan much relied on for the respondent, *Powell* v. *Hellicar* (4) as reported is so much at variance with other authorities that we must decline to follow it. Possibly it is not fully reported. We need not say more as Mr. Justice Townshend has written a very full and able judgment in which the case is discussed as regards both the facts and the law and with which we all agree.

(1) 4 Cush. 88.
(2) 13 Allen, (Mass.) 43.
(3) 4 DeG. & S. 517.
(4) 26 Beav. 261.

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The appeal is allowed with costs and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. E. Roscoe.*

Solicitor for the respondents: *E. Ruggles.*

1900

*May 23,

LINDLEY WATERS (PLAINTIFF).....APPELLANT;

AND

WILLIAM M. MANIGAULT AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Injunction—Ditches and watercourses—Title to land.

Proceedings to restrain the owner of land from constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property, do not involve any question of title to land or any interest therein within the meaning of 60 & 61 Vict. ch. 34 sec. 1 subsec. (*a*) relating to appeals to the Supreme Court of Canada in Ontario cases.

The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorise an appeal under subsec. (*d*) as relating to the taking of a duty or fee, nor as affecting future rights.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment of the trial court which dismissed the plaintiff's action with costs.

The plaintiff's action was for an injunction to restrain the engineer of the township of Caradoc from proceeding to the cleaning out of a ditch made under the Ditches and Watercourses Act in such a manner as he claimed would cause injury to his lands by bringing down thereon surface water by artificial

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means in an illegal and improper manner, and to interfere with the enjoyment of his legal rights in said lands. The plaintiff's land was charged with payment of a portion of the cost.

The action was tried before Mr. Justice Meredith without a jury, who held that the proceedings for the construction of the ditch were regular, and dismissed the action. His judgment was confirmed by the Court of Appeal, and the plaintiff then appealed to the Supreme Court.

Stuart for the respondent, moved to quash the appeal for want of jurisdiction, claiming that only a trifling pecuniary amount was in dispute, and the case was not within any of the exceptions provided for by 60 & 61 Vict. ch. 34.

Folinsbee for the appellant, *contra*. There is a question as to an interest in real estate, the plaintiff's land being judicially affected. Moreover, our land is taxed, and that is the taking of a duty under subsec. (*d*) of the Act. Certainly our future rights are affected.

The court quashed the appeal with costs of a motion.

Appeal quashed with costs.

Solicitor for the appellant: *John Folinsbee.*

Solicitors for the respondents: *Stuart, Stuart & Ross.*

1900

*May 1.

THE PROVINCE OF ONTARIO.....APPELLANT;

AND

THE PROVINCE OF QUEBEC AND THE DOMINION OF CANADA .....RESPONDENTS.

In re COMMON SCHOOL FUND AND LANDS.

ON APPEAL No. 2 FROM AWARDS IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Appeal—Jurisdiction—Award of arbitrators, 54 & 55 V. c. 6 (D.)—54 V. c. 2, (Ont.)—54 V. c. 4 (Que.)

In an award made under the provisions of the Acts, 54 & 55 Vict. ch. 6, sec. 6 (D.), 54 Vict. ch. 2, sec. 6 (Ont.) and 54 Vict. ch. 4, sec. 6 (Que.) there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question of law.

APPEAL from the awards made on the sixth of March, 1896, and on the twenty-first of October, 1899, by the arbitrators appointed to adjust the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec respectively, and between the said provinces, under the authority of statutes passed by the Dominion of Canada and the said provinces respectively, viz., 54 & 55 Vict. ch. 6 (D.), 54 Vict. ch. 2 (Ont.), and 54 Vict. ch. 4 (Que.)

The Acts referred to are identical and are quoted in the report of a former appeal in respect to an award relating to the Common School Fund and lands of the

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former Province of Canada (1), and each contains a provision that the arbitrators shall not be bound to decide according to the strict rules of law or evidence but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either or any party and that any award made under the Acts shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their lordships are pleased to allow such appeal.

It appeared that, at the time of rendering of the awards now appealed from, the arbitrators did not declare, but refused to declare, that in rendering the said awards or either of them they had proceeded as on a disputed question of law.

A motion was made on behalf of the Province of Quebec to quash the appeal for want of jurisdiction.

Trenholme Q.C. for the motion.

Shepley Q.C. (*Æmelius Irving Q.C.* with him) contra.

Hogg Q.C. watched the case for the Dominion of Canada.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—(Oral.)—We all agree that the motion to quash should be granted. We need not go beyond the words of the Act which make the statement on the face of the award that the arbitrators proceeded on a question of law an indispensable condition precedent to the right to appeal. The point is not arguable. I have never known a question of juris-

(1) 28 S. C. R. 609.

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diction to be raised here so extremely clear against the competence of the court.

The motion to quash is granted.

Appeal quashed.

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*May 4.

THE STANDARD LIFE ASSURANCE COMPANY (DEFENDANT). } APPELLANT;

AND

MARIE TRUDEAU (PLAINTIFF).....RESPONDENT.

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

Appeal—Jurisdiction—Amount in dispute—Questions raised by plea—Incidental issue.

Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court of Canada jurisdiction to hear an appeal. Girouard J. *dubitante.*

MOTION that the deposit of $500 made by the defendant be allowed as good and sufficient security for an appeal asserted from a judgment of the Court of Queen's Bench for Lower Canada affirming the judgment in favour of the plaintiff by the Superior Court, District of Montreal (1).

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(1) Q. R. 16 S. C. 539.

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The action was to recover one-half the amount of two endowment policies for $1,000 each, issued by the company on the life of Isidore Poirier, who was murdered, payable to him at the end of twenty years should he then be living, or to his wife, should she survive him, otherwise to his heirs. The plaintiff, Poirier's mother, claimed as heir-at-law of one-half his estate, the wife, who was convicted and executed for the murder, having been deprived of her rights under the policies and in his estate. The company pleaded fraud; asked that the policies should be set aside; and also applied to have the other heirs of Poirier made parties to the suit in the Superior Court. The application to add parties was refused, and the company took an action in the Superior Court against all Poirier's heirs-at-law, including the respondent, to have the policies declared fraudulent and set aside. On the application of the company, the two cases were united for the purpose of trial only.

The plaintiff recovered the amount of her demand, but the company's action for cancellation was dismissed. Both judgments were carried to the Court of Queen's Bench on appeal, where a further application for the consolidation of the two cases was refused and both appeals were, after hearing, dismissed. In the action to set aside the policies an appeal is pending in the Supreme Court of Canada.

An application to the Registrar of the Supreme Court, sitting as a judge in chambers, for approval of the security in the present case was refused, the registrar being of opinion that the amount involved in the action was under $2,000, and that the case did not fall within any of the exceptions mentioned in sec. 29 of the Supreme and Exchequer Courts Act. In his decision the registrar followed *Dominion Salvage Co.* v. *Brown* (1), and other

(1) 20 Can. S. C. R. 203.

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cases cited in Cassel's Supreme Court Practice (2 ed.), p. 40-46.

Falconer for the motion cited *Hunt* v. *Taplin* (1); *King* v. *Dupuis* (2); *Turcotte* v. *Dansereau* (3).

Fitzpatrick Q.C. contra.

THE CHIEF JUSTICE: (Oral.)—In actions where the demand does not bring the case within the appellate jurisdiction of this court it has frequently been decided, and it is the law and the practice of the court, that issues raised merely by the pleas cannot have the effect of increasing the amount in controversy so as to give the court jurisdiction although the questions raised by the pleas in defence to the action might affect amounts or controversies which, if originally demanded in the declaration or introduced by an incidental demand, would have been sufficient to warrant an appeal.

The motion to quash is granted with costs.

TASCHEREAU, SEDGEWICK and KING JJ. concurred with His Lordship the Chief Justice.

GIROUARD J.: (Oral.)—I have not had time to examine the cases referred to by counsel and would not at present go to the same length as His Lordship the Chief Justice. Considering, however, that in this case all the beneficiaries have not been made parties to the action, I am clearly of opinion that there can be no appeal to this court.

Appeal quashed with costs.

Solicitors for the appellant: *Robertson, Fleet & Falconer.*

Solicitors for the respondent: *Demers & Delorimier.*

(1) 24 Can. S. C. R. 36. (2) 28 Can. S. C. R. 388.
(3) 26 Can. S. C. R. 578.

D. McLAURIN BROWN (PLAINTIFF).....APPELLANT; 1900

AND *May 8.

JOHN TORRANCE (DEFENDANT).....RESPONDENT.

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

Suretyship — Conditional warranty — Notice—Possession of goods—Art. 1959 C. C.

T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee. In an action by the creditor to recover the amount of the guarantee:

Held, that the condition of the guarantee had not been complied with by the creditor, and that he could not hold the warrantor responsible.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Superior Court, district of Montreal, which dismissed the action.

The plaintiff's claim was based on a letter of guarantee signed by the defendant, and sent to the plaintiff's firm, at Bradford, England, which was as follows:—

MONTREAL, December 29th, 1896.

A. S. McLAURIN & Co.,

DEAR SIRS,—I hereby agree to continue the guarantee for £500 which you now hold against the indebtedness of W. E. Ross & Co. for one year more, namely, until the 31st of December, 1897, on the con-

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dition that you allow me, should occasion arise, to take over the goods now held on consignment from you by W. E. Ross & Co., as a payment on your account for this guarantee, which also cancels all former guarantees.

JOHN TORRANCE.

The guarantee which had been given previously read as follows:—

MONTREAL, December 31st, 1895.

MESSRS. A. S. McLAURIN & Co.,

DEAR SIRS,—In consideration of your placing in my possession all the goods held on consignment from you by the firm of W. E. Ross & Co., of this city, I hereby guarantee to you payment of his account with you to the extent of five hundred pounds. This guarantee to be null and void one year from this date.

JOHN TORRANCE.

The plaintiff claimed $2,432.33, and alleged that his firm doing business under the name of "A. S. McLaurin & Co.," in November, 1890, agreed with W. E. Ross, of Montreal, that Ross should sell goods for him as a *del credere* agent, and be responsible for all goods shipped by them to Montreal for customers whose names and orders for goods were given to the firm by Ross, and as security for payment of goods so shipped, *and to be shipped*, Ross gave the firm from time to time a letter of guarantee by defendant, the last one being the letter of guarantee sued upon. Plaintiff closed the Ross agency summarily in January, 1897, without notice to Torrance, withdrew all goods sent out which had been consigned to his own order and allowed those consigned to Ross to be seized in execution and removed from the warehouse, and about a year afterwards he called upon the defendant to pay the amount of the guarantee.

In the trial court, Pagnuelo J., considering that the goods sold by plaintiff after June 1895 to Ross exceeded £500 sterling in value, rendered judgment

in favour of the plaintiff for $2,433.33 with interest and costs.

On appeal to the Court of Queen's Bench, the trial court judgment was set aside and plaintiff's action dismissed, (Blanchet J. dissenting), on the ground that the letter of guarantee was conditional in its terms, stipulating that in case of its being enforced by plaintiff he should give defendant possession of the goods consigned to his agent Ross, at the date when the letter was given, and that the plaintiff did not comply with this condition but withdrew a part of the goods, and allowed the remainder to be dispersed without notification or warning to the defendant, and that it had in consequence become impossible for the defendant to save the recourse stipulated for his own protection under the letter of guarantee.

Hutchison Q.C. for the appellant. No acceptance of the letter of guarantee was necessary, because the letters of guarantee, instead of being offers, were a compliance with a previous demand, and their delivery completed the contract between the creditor, who asked for the security, and the respondent who gave it, and must be presumed to have been given according to the terms of the demand made by the firm or previously agreed upon between the intended parties. The guarantee sued on is not for future liability but for an actually existing one, and covered the balance due at its date by Ross to appellant as well as at any time during the continuation of his agency.

The appellant was only bound to allow respondent to take possession should occasion arise, that is, if he chose to make the request, and as respondent was the only judge of the opportunity of making this demand, and neglected to do so, he cannot complain of want of notice, or pretend that appellant failed to fulfil an obligation which was not imposed upon him.

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Holt for the respondent. The conditional guarantee was not accepted, nor any act done to give notice of acceptance to the warrantor. Suretyship cannot be presumed; art. 1935 C. C.; Championnière & Rigaud, *t.* 2, n. 1418; 4 Aubry & Rau, p. 630, § 426, 1° and p. 673, 1°; it is at an end when the surety can no longer be subrogated in the rights of the creditor, and here that has become impossible through the conduct of the plaintiff. There was no credit given upon faith of the security and no privity of contract between the parties; *Derouselle* v. *Baudet* (1); nor was there any notice of the extent of the advances, or of the principal debtor's default; Holcombe Leading Cases, p. 176; *Dorion* v. *Doutre* (2); DeColyar's Law of Guarantees, p. 5; *McIver* v. *Richardson* (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE: (Oral.)—We are all of the opinion that the judgment of the Court of Queen's Bench is perfectly correct for the reasons given by Chief Justice Sir Alexandre Lacoste and Mr. Justice Hall.

I have carefully read the reasons given by Mr. Justice Blanchet for his dissent, and I cannot agree with him. I concur with the learned Chief Justice in the court below in what he says about the condition of the guarantee. The evidence shows that the means the defendant required for his protection by his letter of guarantee were completely taken away by the plaintiff and the defendant was thus deprived of the benefit of the condition upon which he relied for indemnity in the event of his liability on the guarantee.

(1) 1 L. C. R. 41.
(2) 3 L. C. L. J. 119.
(3) 1 M. & S. 557.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hutchison & Oughtred.*

Solicitors for the respondent: *Morris & Holt.*

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BROWN v. TORRANCE.

The Chief Justice.

ALEXANDER R. GRIFFITH (DEFENDANT)..... } APPELLANT;

AND

ALFRED HARWOOD (PLAINTIFF).....RESPONDENT.

1900

*May 8.

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

Appeal—Jurisdiction—Final judgment—Plea of prescription—Judgment dismissing plea—Costs—R. S. C. c. 135, s. 24—Art. 2267 C. C.

A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies in the Supreme Court of Canada. *Hamel* v. *Hamel* (26 Can. S. C. R. 17), approved and followed.

An objection to the jurisdiction of the court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed the respondent may be allowed costs of a motion only.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming a judgment of the Superior Court, District of Montreal, which maintained a demurrer and dismissed a plea of prescription filed as one of the defences to the action.

On the case coming on for hearing, the court of its own motion suggested that the judgment appealed from was not a final judgment, and that there was no jurisdiction in the court to hear such an appeal.

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

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GRIFFITH v. HARWOOD.

Atwater Q.C. and *Duclos* for the appellant, urged that in so far as the issue raised upon the plea of prescription was concerned the judgment appealed from was final, and prohibited the defendant from availing himself of that defence which went to the root of the action. The following cases were cited in support of the view that the court had jurisdiction under the Supreme and Exchequer Courts Act, to entertain such an appeal, viz.: *Chevalier* v. *Cuvillier* (1); *Shaw* v. *St. Louis* (2); *Shields* v. *Peak* (3); *Morris* v. *London & Canadian Loan Co.* (4); *Baptist* v. *Baptist* (5); *Powell* v. *Waters* (6); *Standard Discount Co.* v. *La Grange* (7); *Salaman* v. *Warner* (8); *Baptist* v. *Baptist* (5); *Eastern Townships Bank* v. *Swan* (9), and art. 2267 C. C.

Ryan for the respondent was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE: (Oral).—The appeal must be quashed. There are decisions similar to the present in cases in the Privy Council and in this court governing the case. The recent case of *Hamel* v. *Hamel* (10) seems in point.

As regards costs, the respondent ought to have moved to quash instead of leaving the question of jurisdiction to be raised on the argument; the costs will therefore be only those of a motion to quash.

Appeal quashed with costs.

Solicitors for the appellant: *Atwater & Duclos.*

Solicitors for the respondent: *McGibbon, Casgrain, Ryan & Mitchell.*

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(1) 4 Can. S. C. R. 605.
(2) 8 Can. S. C. R. 385.
(3) 8 Can. S. C. R. 579.
(4) 19 Can. S. C. R. 434.
(5) 21 Can. S. C. R. 425.
(6) 28 Can. S. C. R. 133.
(7) 3 C. P. D. 67.
(8) [1891] 1 Q. B. 734.
(9) 29 Can. S. C. R. 193.
(10) 26 Can. S. C. R. 17.

LA BANQUE JACQUES-CARTIER (PLAINTIFF)..... } APPELLANT;

AND

PHILOMÈNE GRATTON *ès qual.* *et al.* (DEFENDANTS)..... } RESPONDENTS.

1900
*May 8.

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

Will—Powers of executors—Promissory note—Advancing legatee's share.

M., who was a merchant, by his will gave special directions for the winding up of his business and the division of his estate among a number of his children as legatees and gave to his executors, among other powers, the power "to make, sign and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of 30 years the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts;

Held, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will.

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

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

1900

LA BANQUE JACQUES-CARTIER v. GRATTON.

The action was for $12,188.40 and interest, and based on two promissory notes given in renewal of those mentioned in the evidence. The defendants were sued as executors under the will of the late Claude Melançon, and pleaded that the notes were signed by them for the purpose of obtaining a loan from the bank by discounting them, to pay the debts of Joseph Melançon, who was a legatee under the will, by advancing his legacy to him; that the bank, before advancing the money, was informed of the purpose for which it was needed; that it was employed for that purpose, to the knowledge and under the control of the bank; that the bank knew the terms of the will and the powers which the defendants had under it; and that under the terms of the will the defendants had no power to sign notes for that purpose.

The executors named in the will were given directions as to the management, liquidation and division of the business and estate of the testator who was a merchant carrying on business in Montreal at the time of his death and, among other powers necessary for the purposes of the execution of the will, the executors were given special powers by a clause therein, as follows:

De plus j'accorde à mes dits exécuteurs testamentaires et administrateurs le droit de ne faire entrer dans l'inventaire qui sera fait des biens de ma succession que le résultat en bloc qui apparaitra me revenir d'après l'inventaire commercial dans les biens et affaires de ma maison de commerce et dans toute maison de commerce ou association dans lesquelles je puisse être intéressé sans requérir d'inventaire notairé pour constater tels dits biens, droits et actions, plus le droit de vendre, céder ou transporter d'après l'usage commercial soit à vente privée, en bloc ou autrement comme ils le jugeront à propos et convenable et suivant et d'après les termes et conditions et à tels prix qu'il leur plaira tout mon fonds et roulant de commerce, *stock*, de collecter mes crédits, les vendre ou céder à tant dans la piastre, de compromettre et transiger avec les débiteurs et en cas de société de régler, compromettre et transiger avec moi ou mes associés à tant

dans la piastre sur l'actif de ma dite succession et de ne faire entrer, tel que susdit, dans l'inventaire notarié de mes dits biens que le résultat en bloc du produit de mon roulant *stock*, et de tous droits et intérêts que je possèderai dans tout société ou association quelconque sans détail, voulant que l'inventaire commercial remplace à cet effet l'inventaire notarié, et je leur donne aussi le droit de transiger et compromettre avec les débiteurs ou les créanciers sur tous les droits, réclamations, dettes ou obligations généralement quelconques, ainsi que sur tous procès et litiges quelconques, de poursuivre en justice pendant leur saisine à raison de tous droits mobiliers ou immobiliers, de même que j'aurais pu le faire moi-même, de plus le droit d'emprunter et de donner toutes garanties sur mes biens, parts ou actions de banques ou autres compagnies ou institutions monêtaires et toute hypothèque sur mes biens immeubles dans le cas où les affaires de ma succession le requerraient *ainsi qu'ils croiront à propos de le faire faire, signer et endosser tous billets, suivant qu'il [sera requis pour régler et liquider les affaires de ma dite succession.*

One of the subsequent clauses of the will was as follows:

Je donne de plus à mes dits exécuteurs testamentaires et administrateurs ou leurs remplaçcants tous les droits et pouvoirs nécessaires de payer en aucun temps, à aucun de mes dits enfants, soit garçon ou fille, après qu'il aura atteint l'âge de trente ans, toute ou aucune partie de sa part dans mes dits biens, aux fins de l'aider, soit à s'établir ou dans le cas qu'il en aurait besoin, le tout suivant la discrétion, prudence et sagesse de mes dits exécuteurs testamentaires et administrateurs à qui je m'en rapporte pour ce faire, les priant de faire en telles circonstances comme je ferais moi-même auprès de tel ou tel de mes dits enfants si je vivais alors et voyais par moi-même les circonstances dans lesquelles tel ou tel de mes dits enfants se trouvait alors placé.

The trial court, Pelletier J., dismissed the action with costs on the ground that the executors had no power to give notes for the purpose above mentioned and on an appeal to the Court of Queen's Bench this judgment was affirmed, Hall and Ouimet JJ. dissenting.

Brosseau for the appellant.

Aimé Geoffrion for the respondents was not called upon.

The judgment of the court was delivered by:

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LA BANQUE JACQUES-CARTIER v. GRATTON.

The Chief Justice.

THE CHIEF JUSTICE: (Oral.)—The question is whether or not the two clauses of the will relied upon by the appellant can be construed together as giving power to the executors to raise the loan upon promissory notes as they have done for the purpose of advancing the share of one of the beneficiaries under the will. I consider that these two clauses are entirely separate and distinct and have no connection one with the other. The testator was a merchant and the provision in his will is evidently intended to assist the executors by giving them power to make promissory notes and indorsements of notes in connection with the winding up of his business for which purpose these powers were probably necessary and are not unusual, but this intention cannot be assumed to extend so far as to give that power to the executors to be used in the distribution of the estate among the beneficiaries or in order to raise money or loans for the purpose of advancing shares to any one of them. Further, it would be simply a wrong to permit money to be borrowed in such a manner for settlements in advance with a legatee in a manner which would bind the other beneficiaries and make their shares chargeable with the legacy advanced.

I think the reasons for the judgment of the court below are clearly right and I am not at all impressed with the reasons given for the dissent from it.

I should also mention that it is quite clear from the evidence of Mr. DeMartigny that the bank had notice of the nature of the powers of the executors under the terms of the will, for a copy of the will was deposited with the bank for its use and reference.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Brosseau, Lajoie & Lacoste.*

Solicitors for the respondents: *Geoffrion, Geoffrion, Roy & Cusson.*

WILLIAM LEAK.....APPELLANT, 1900

AND *April 21.

THE CORPORATION OF THE CITY OF TORONTO.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Expropriation of land—Lands injuriously affected—Damages—Interest—Award.

If in the construction of a public work land of a private owner is injuriously affected and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of damages awarded.

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

In 1891 the City of Toronto passed a by-law authorising the construction of iron and steel bridges over the railway track crossing, Dundas street. For the purposes of such construction certain lands were expropriated, and the land of the appellant, Leak, affected by his being deprived of access thereto. A County Court Judge was appointed arbitrator between the city and land owners, and by his award he allowed Leak over $8,000 for injury to his land, with interest from the date on which the by-law was passed. The city appealed to a judge in chambers who sent the award back to the arbitrator with a direction that it should state whether or not any land of Leak's had been taken, and if not that he was not entitled to interest. The arbitrator then amended his award by

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

(1) 26 Ont. App. R. 351. (2) 29 O. R. 685.

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LEAK v. THE CORPORATION OF THE CITY OF TORONTO.

striking out the interest. The claimant appealed to the Chancellor who affirmed the amended award, and he then appealed to the Divisional Court which overruled the arbitrator's amendment and allowed interest. This judgment in its turn was reversed by the Court of Appeal and the Chancellor's judgment restored. The claimant then appealed to this court.

Du Vernet for the appellant. There is no statutory provision prohibiting the granting of interest in a case like this, and without it the appellant will not be fully compensated. See *North Shore Railway Co.* v. *Pion* (1); *Corporation of Parkdale* v. *West* (2); *Bell* v. *Corporation of Quebec* (3); Lewis on Eminent Domain, sec. 499.

Fullerton Q.C. and *Chisholm* for the respondent, were not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE: (Oral).—We need not call upon counsel for the respondents, as we are all of opinion that this claim for interest cannot be maintained. The question has been very ably and forcibly argued by the appellant's counsel, who has said everything which could possibly be said bearing on the point, but we think there is no ground whatever for the appeal. Interest is not given by any statute, and the whole analogy of the common law is against it. Nobody ever heard of a jury, in an action claiming damages for a tort, being told that after ascertaining the amount of the damages suffered they should calculate the interest thereon. Such a direction would be not only wrong but grossly wrong.

(1) 14 App. Cas. 612. (2) 12 App. Cas. 602.
(3) 5 App. Cas. 84.

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LEAK v. THE CORPORATION OF THE CITY OF TORONTO.

The Chief Justice.

The judges of the Court of Appeal have gone very fully into this question, and we agree with what they have said.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Du Vernet & Jones.*

Solicitor for the respondent: *Thomas Caswell.*

MAXIMILIAN L. SCHLOMANN (DEFENDANT) ..... APPELLANT;

1900

*May 11.

AND

LESLIE R. DOWKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

HENRY SCHLOMANN (DEFENDANT)...APPELLANT;

AND

LESLIE R. DOWKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal — Acquiescement—Estoppel—Question of costs—Practice—Motion to quash.

In order to avoid expense the Supreme Court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it.

MOTIONS to quash two appeals from judgments of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgments of the Superior Court, District of Montreal, which had maintained the con-

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

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SCHLOMANN v. DOWKER.

testations of the appellants to the plaintiffs' demand for a judicial abandonment for the benefit of creditors.

The plaintiffs were unsecured creditors, for $687.04, of a commercial firm doing business at Montreal under the style of "The Lynn Shoe Co.", alleged to be composed of John G. Lynn and the two appellants, and, upon the said firm ceasing to meet liabilities, the plaintiffs made a demand for a judicial abandonment for the benefit of creditors generally upon the members of the said firm. The appellants filed separate contestations of the demand denying that they were partners, and on the trial of the issues joined the Superior Court maintained both contestations and dismissed the demand as unfounded in respect of the contestants. On appeals taken by the plaintiffs these judgments were reversed by the Court of Queen's Bench, and the demand for abandonment declared well founded inasmuch as it had been established by evidence that the contestants were partners in the firm.

The appellants then respectively filed judicial abandonments in each of which it was declared that exception was taken to the judgments rendered by the Court of Queen's Bench, in appeal, that an appeal therefrom to the Supreme Court of Canada was intended to be taken, recourse for which was reserved, but that the abandonments were consented to under such reserves, "in order to avoid a writ of *capias*," and other "penalties, trouble and costs." A curator was at once appointed to the abandonment who proceeded to the distribution of the estate according to law, and subsequently, the appellants filed bonds for security for the appeals to the Supreme Court of Canada.

Atwater Q.C. for the respondents, moved to quash both appeals on the grounds: 1st. That there was a want of jurisdiction under sec. 29, sub-secs. 1 and 4 of the Supreme and Exchequer Courts Act, because the

demand was not of the amount of $2,000; and 2nd. That the appellants had voluntarily acquiesced in and executed the judgments appealed from instead of applying for an extension of time under art. 859 C. P. Q.

Belcourt Q.C. contra. The recourse for the appeal was specially reserved in each case, and in each the effect of the declaration of the existence of a partnership by the judgments appealed from will be to hold the appellants liable for many thousands of dollars of debt over and above the amount of $11,375.90 realised from the abandoned estate. There never has been any *acquiescement* so far as this liability is concerned, and the consent to abandon was made under stress.

THE CHIEF JUSTICE: (Oral).—Assuming that we have jurisdiction in this case (but without actually deciding that question), there cannot be any doubt that there has been *acquiescement* by the appellants in the judgments sought to be appealed from, for they have voluntarily made the abandonment and executed the orders made against them, thus leaving the matter in a position where it is impossible they can get relief against their own deliberate and voluntary acts.

This is not exactly a case such as we have hitherto considered as a proper one for a motion to quash, but we are of opinion that in future this proceeding should be adopted in cases like the present, as it has the advantage of avoiding costs.

The court disposes of this appeal on the grounds alone that the appellants have acquiesced in the judgment of the Court of Queen's Bench and abandoned their estate in conformity therewith and that there is now left nothing but a question of costs in respect of

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SCHLOMANN v. DOWKER.

The Chief Justice.

which the court always declines to entertain jurisdiction, though not incompetent to do so.

The appeal is quashed with costs of the motion to the respondent.

TASCHEREAU J.—I agree with His Lordship the Chief Justice, and I think that in cases like the present where the appeal can only involve a question of costs the procedure of moving, when possible, to quash the appeal should in future be followed.

GWYNNE J.—On the understanding that there is no *res judicata* in this case as to the question of partnership, I concur in this judgment.

SEDGEWICK J.—I am not quite sure that the abandonment was not made under stress and on account of what might be pressure. I enter a doubtful assent.

GIROUARD J.—I agree with His Lordship the Chief Justice.

Appeal quashed with costs.

Solicitors for the appellants: *Carter & Goldstein.*

Solicitors for the respondents: *Atwater & Duclos.*

LÉON O. NOEL (PETITIONER) .....APPELLANT; 1900

AND *May 5.
*May 17.

MARIE A. B. CHEVREFILS (CONTESTANT) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Matter in controversy—R. S. C. c. 135, s. 29b—Tutorship—Petition for cancellation of appointment—Arts. 249 et seq. C. C.—Tutelle proceedings.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Court of Review at Montreal and restoring the judgment of the Superior Court for the district of Arthabasca, which had dismissed the appellant's petition for the cancellation of the respondent's appointment as tutrix to her minor children.

Under the provisions of the Civil Code relating to the appointment of tutors to minor children, a family council was convened which elected male relatives as tutor and sub-tutor to the minor children of the late L. M. A. Noel, deceased, and formally excluded the widow from the tutorship of her children, issue of her marriage with the deceased. On the report of the *tutelle* proceedings being presented for homologation, the Prothonotary of the Superior Court, District of Arthabasca, ignored the advice of the family council and assuming to act in conformity with the third sub-

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

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NOEL
v.
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section of article 282 of the Civil Code, named the widow as tutrix in place of the male relative recommended for the office by the family council. The appellant then petitioned the Superior Court for the cancellation of this nomination, and, after hearing the issues joined upon the contestation by the respondent, Choquette J. dismissed the petition with costs. This judgment was reversed by the Court of Review at Montreal, and the respondent dismissed from office, but on her appeal to the Court of Queen's Bench, the judgment now appealed from was rendered reversing the judgment of the Court of Review and restoring that of the trial court in her favour.

Bisaillon Q.C. for the respondent moved to quash the appeal.

Fitzpatrick Q.C. contra.

The judgment of the court was delivered by :

TASCHEREAU J.—This is an appeal from a judgment of the Court of Queen's Bench dismissing a petition of the appellant to set aside the appointment of the respondent as tutrix to her children. We have no jurisdiction in the matter. There is no pecuniary amount in dispute, and the matter in controversy 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 and other matters or things where future rights (of that nature) might be bound.

An affidavit is filed that the estate left by these children's father is worth over $2,000. But that cannot give us jurisdiction. No part of the estate is in controversy in the case. The appellant, to support his right to appeal, relies upon the words of the statute, sec. 29,

and (not "or") other matters or things where the rights in future might be bound.

But the case of *O'Dell* v. *Gregory* (1) is a binding authority that these words are not applicable to this case.

In the case of *Mitchell* v. *Mitchell* (2), relied upon by the appellant, upon an action to remove an executor this court entertained the appeal, and the case might perhaps not be easily distinguished from this one. However, the court does not appear there to have passed upon the question of jurisdiction. The appeal being dismissed, it was unnecessary to determine that point, as is often done in such a case. *Bain* v. *Anderson* (3).

The motion to quash is granted with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Crépeau & Crépeau.*

Solicitor for the respondent: *Joseph E. Méthot.*

(1) 24 Can. S. C. R. 661. (2) 16 Can. S. C. R. 722.
(3) 28 Can. S. C. R. 481.

1900

*May 9.
*May 17.

WILLIAM CULLY (OPPOSANT).....APPELLANT;

AND

FRANÇOIS ALIAS FRANCIS FERDAIS (CONTESTANT) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Servitude—Action confessoire—Execution of judgment therein—Localization of right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.

An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal. *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed; *Chamberland* v. *Fortier* (23 Can. S. C. R. 371); and *McGoey* v. *Leamy* (27 Can. S. C. R. 193) distinguished.

If the jurisdiction of the court is doubtful the appeal must be quashed. *Langevin* v. *Les Commissaires d'École de St. Marc* (18 Can. S. C. R. 599) followed.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Supreme Court, District of Iberville, and dismissing the appellant's opposition with costs.

The circumstances under which this appeal was taken are stated in the judgment of the court by His Lordship Mr. Justice Taschereau on the motion to quash.

Lajoie for the respondent referred to the question of jurisdiction raised in the respondent's factum and moved to quash the appeal on the ground that the controversy did not relate to title to lands

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

where rights in the future might be bound, the only question being the location of a servitude, not the right or title to it. The dispute as to that was settled in the first case; *Macdonald* v. *Ferdais* (1). That dispute is not of a matter where rights in future of the parties might be bound. That the judgment appealed from, although it decides finally that the new road cannot, in its present state, be substituted for the old road, does not deprive the appellant of his right, at any time in the future, to offer another road, nor even of his right to offer the same road improved.

Lafleur Q.C. for the appellant cited Art. 557 C. C.; R. S. C. ch. 135, sec. 29 (*b*); *Chamberland* v. *Fortier* (2); and *McGoey* v. *Leamy* (3).

The judgment of the court was delivered by:

TASCHEREAU J.—An objection taken in the respondent's factum to the appellant's right of appeal has to be disposed of. In a former case between the parties, it was declared by the Superior Court's judgment, confirmed in this court on the first of May, 1893 (4), that the respondent had a certain right of way, therein described, over the appellant's land

le tout néanmoins sous la condition que le défendeur (present appellant) ou tout autre propriétaire du fond servant pourra offrir et assigner un autre chemin de voiture ou passage pour l'exercice de la dite servitude, que le demandeur (present respondent) ou tout autre propriétaire du fonds dominant sera obligé d'accepter, pourvu qu'il ne soit pas plus incommode que celui que a existé jusqu'à aujourd'hui.

The respondent, in execution of that judgment issued a writ of possession ordering the sheriff to put him in possession of the road described in the said judgment. The appellant filed an opposition to that

(1) 22 Can. S. C. R. 260.
(2) 23 Can. S. C. R. 371.
(3) 27 Can. S. C. R. 193.
(4) 22 Can. S. C R. 260 *sub nom. Macdonald* v. *Ferdais.*

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Taschereau J.

writ of execution, alleging that he had duly offered and delivered to the respondent, present and accepting, a right of way upon his land (though not the one described in the judgment), in due compliance with and in execution of the judgment of the court, in virtue of the right to do so reserved to him in the said judgment. This opposition, upon contestation by respondent, was maintained and the writ of possession set aside by the Superior Court. The Court of Appeal reversed that judgment and dismissed the opposition.

The controversy between the parties is consequently merely as to the localisation of the road in question. It is admitted, if that could possibly affect here the question of jurisdiction, that this road is not worth $2,000, and conceded on the part of the appellant, at the hearing, that the only ground upon which his right to appeal can at all be supported is that the controversy relates to a title to land and to a matter where the rights in future may be bound. But there is here no controversy of the title to the appellant's land or to any part of it; *O'Dell* v. *Gregory* (1); and the respondent's right of way over that land is not now in controversy. That controversy is at an end. It was settled in 1893 by the judgment of this court upon the action above referred to.

That case being an action *confessoire* was, as actions *négatoires* also are, appealable. *Riou* v. *Riou* (2); *Chamberland* v. *Fortier* (3); *La Commune de Berthier* v. *Denis* (4). But this is merely a contestation on the execution of that judgment. Rights in future may be bound by the judgment *a quo*, but they are not rights relating to a title to land.

The appellant would contend that as this is a contestation on the execution of a judgment which was

(1) 24 Can. S. C. R. 661.
(2) 28 Can. S. C. R. 53.
(3) 23 Can. S. C. R. 371.
(4) 27 Can. S. C. R. 147.

appealable, and, in fact, appealed, therefore the judgment upon this execution, or the contestation thereof, is likewise appealable. But such a contention cannot prevail. It would be opening the door to a multiplicity of appeals in the same case, not intended by the statute.

The case of *McGoey* v. *Leamy* (1) has been relied upon to support the right to this appeal. But in that case the controversy between the parties exclusively and directly related to the title to a strip of land. Neither does the case of *Chamberland* v. *Fortier* (2) help the appellant. All that was determined in that case is that an action *négatoire* is appealable.

The case may not be free from doubt. As forcibly pointed out by Mr. Lafleur, the judgment *a quo* determines the precise spot where this right of way will be exercised on the appellant's land. However, the right to appeal is not clear, and the rule as to appeals is that the court cannot assume jurisdiction in a doubtful case. I refer to the cases cited on that point in *Langevin* v. *Les Commissaires d'École de St. Marc* (3).

The appeal is quashed with costs of a motion.

Appeal quashed with costs.

Solicitors for the appellant: *Paradis & Paradis.*

Solicitors for the respondent: *Brosseau, Lajoie & Lacoste.*

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(1) 27 Can. S. C. R. 193. (2) 23 Can. S. C. R. 371.
(3) 18 Can. S. C. R. 599.

1900

*May 18.

*May 22,

JOAN OLIVE DUNSMUIR (DEFENDANT) ..... } APPELLANT;

AND

LOEWENBERG, HARRIS & CO., (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract — Penal agreement — Evidence—Withdrawal of questions from jury—New trial.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment appealed from, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury.

APPEAL from a judgment of the Supreme Court of British Columbia *en banc* (1), which reversed the judgment at the trial and directed a new trial.

As the result of correspondence between the appellant and a member of the respondent's firm named Harris, the latter undertook to effect a sale, if possible, of a coal mine for the appellant, in consideration of a commission on the selling price of five per cent, which

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

(1) *Sub.-nom. Harris* v. *Dunsmuir*, 6 B. C. Rep. 505.

commission was to include all expenses. The attempts at sale proved abortive on account, as alleged, of interference by the appellant, and the respondents brought suit to recover remuneration for services rendered and reimbursement of expenses incurred, relying upon the correspondence which had taken place, and also upon an alleged verbal agreement for compensation for his services and outlay, contending that this verbal agreement was collateral to the main contract, inasmuch as the payment by commission was contingent upon a sale being made whereas the verbal agreement was to indemnify the agents in case of failure. The admission of evidence of such an arrangement was objected to as inconsistent with the contents of the writings which, it was contended, became a written agreement as soon as acted upon. At the trial a ruling was made against the admission of the evidence, and, the plaintiff having refused a non-suit, the jury, under the direction of the court, found a verdict for the defendant, and judgment was entered accordingly. The plaintiff moved against this judgment before the full court, and, on the ground that there was evidence upon which a jury might reasonably have found for the plaintiff, a new trial was ordered.

Aylesworth Q.C. for the appellant.

S. H. Blake Q.C. for the respondents.

THE CHIEF JUSTICE.—After having heard the appellant's case very fully and ably argued, the court relieved the learned counsel for the respondents from answering it, for the reason that we were all of opinion that the appeal failed inasmuch as there was evidence which ought to have been left to the jury, and that therefore the order of the court below granting a new trial was not erroneous.

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DUNSMUIR v. LOEWENBERG, HARRIS & CO.

The Chief Justice.

In my opinion there was legal and admissible evidence in the deposition of the respondent Harris of a parol agreement supplemental to both the commissions to sell—to that of the 18th of January, 1892, as well as that of the 18th of September, 1890—making provision for a case which the written memoranda or letters signed by the appellant on the dates mentioned did not contemplate. Those letters only fixed the respondents' remuneration in the event of a sale being effected, in pursuance of the authority conferred upon Harris. Nothing is contained in them relating to the repayment for services and outlay for expenses in the event of a sale not being effected. It was not therefore in any way to vary or contradict the written evidence that there should have been a verbal agreement providing for indemnity to the respondents for the labour and disbursements of Harris in the event which has happened of failure to make a sale. The learned Chief Justice who presided at the trial seems to have considered that the terms of the letter from the respondent to the appellant of the 20th June, 1893, were so inconsistent with the existence of any claim of payment as a matter of right, that it neutralised the oral evidence given in the witness box and left nothing to be submitted to the jury. I cannot assent to this. The utmost that can be said is that the letter in question was a basis for contending before the jury, the proper tribunal, that they ought not to give credit to the testimony of the respondent Harris, but it was not a ground for withrawing the case altogether from the consideration of those who alone have the legal right to pass upon the credit of witnesses.

The appeal is brought before us without the amendment of the record ordered at the trial having been actually made. This ought to be done before the re-trial. There will then be presented by the plead-

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DUNSMUIR v. LOEWENBERG, HARRIS & Co.

The Chief Justice.

ings two alternative cases, that originally made and the additional case founded on the alleged verbal agreement to indemnify the respondent for his services and money expended.

Speaking only for myself, I am unable to agree that there was any evidence whatever of the original case made by the respondents that of undue interference with the respondents in their efforts to make a sale.

The order for a new trial in the court below proceeds upon this ground exclusively. Had there been nothing else in the case I should have thought the appeal ought to have succeeded; as it is it must be dismissed and with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davie, Pooley & Luxton.*

Solicitors for the respondents: *Bodwell & Duff.*

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*May 30.

THE CANADIAN PACIFIC RAILWAY COMPANY (PETITIONER) .... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Vendor and Purchaser Act—Reference to master—Admission of evidence—Appeal from certificate—Final judgment—R. S. C. c. 135, s. 24, (e.)

Where a master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to show what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling it not being a final judgment and the case not coming within the provisions of sec. 24 (*e*) of the Supreme and Exchequer Courts Act relating to proceedings in Equity. Gwynne J. dissenting.

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

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THE CANADIAN PACIFIC RAILWAY COMPANY. v. THE CITY OF TORONTO.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J., who had sustained the ruling of a referee ordered to settle the form of a lease to the Railway Company under the Vendor and Purchaser Act.

The material facts of the case were stated as follows in the judgment of the Court of Appeal delivered by Mr. Justice Maclennan.

"The question in this appeal is whether, upon a reference to settle a lease pursuant to a contract between the parties, evidence is admissible to establish that the lease ought to contain a covenant on the part of the lessees, the Railway Company, to pay taxes. The learned referee decided that the evidence was admissible, and his ruling was affirmed by Armour C.J., on appeal."

"There are two contracts between the parties, the first dated the 26th July, 1892, and the other the 4th February, 1895. and they deal with a great many different matters besides the lease in question. Among other things the Railway Company is to convey to the city absolutely all its interest in certain defined parcels of land, and the city is to demise to the Railway Company certain other lands, called the 'alternative site,' that is, a site in the City of Toronto 'for its station grounds, tracks and appurtenances.' The city's contract is in the following terms:—The city 'covenants and agrees to demise and lease the alternative site to the Canadian Pacific for successive terms of fifty years each, during all time to come. The rental for the first term of fifty years shall be $11,000 per annum, and the rental for each subsequent terms of fifty years shall at each renewal be increased by $2,750 per annum, and all rent shall be payable on the 3rd days of July, October, January and April of each year, for the first

(1) 27 Ont. App. R. 54.

quarter a proportionate amount to be paid, having regard to the time of possession under the said lease."

"The second agreement, paragraph 2, provides that the first term of fifty years is to commence on the first day of January, 1895. Paragraph three defines more particularly what is to be included in the alternative site. Paragraph four provides for an adjustment of rents to the commencement of the lease. Paragraphs 11 and 13 provide for leases to the company by the city for successive terms of twenty-one years, in perpetuity, at the expiration of existing leases, of other parcels of land, at rents to be settled by arbitration; and paragraph 12 stipulates for the delivery of an abstract of title to the alternative site, and for its approval within a month after delivery. There seems to be nothing else in the agreements, material to the present question. There is a contract for a lease renewable in perpetuity in successive terms of fifty years, at an agreed rent, payable on named days; and the agreement is silent as to what, if any, covenants on the part of either lessors or lessees, are to be inserted therein."

The Railway Company appealed from this judgment to the Supreme Court.

Robinson Q.C. and *Fullerton* Q.C. for the respondent moved to quash the appeal.

The appeal is not from a final judgment. After the case is decided by the Ontario courts on the merits there can be an appeal to this court in which the questions now raised will be open.

Moreover, the matter is one of procedure only with which this court will not interfere.

Armour Q.C. and *Macmurchy* for the appellant, *contra*. The proceeding had in this case is identical with a suit for specific performance under the former law.

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THE CANADIAN PACIFIC RAILWAY COMPANY. v. THE CITY OF TORONTO.

See *Re Burroughs* (1); Fry on Specific Performance, 3rd ed. sec. 36. That being so there is an appeal under sec. 24 (*e*) of the Supreme and Exchequer Courts Act.

The judgment need not be final under that section; *Grant* v. *McLaren* (2).

The court, Gwynne J. dissenting, quashed the appeal with costs of a motion.

Appeal quashed with costs.

Solicitors for the appellant: *Wells & Macmurchy.*

Solicitor for the respondent: *Thomas Caswell.*

1900

*April 18.
*June 12.

THOMAS W. O'BRIEN AND H. M. HEMMING (DEFENDANTS)..... } APPELLANTS;

AND

E. C. ALLEN AND GEORGE M. ALLEN (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Constitutional law—Administration of Yukon—Franchise over Dominion lands—Tolls.

The Executive Government of the Yukon Territory may lawfully authorise the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority.

APPEAL from a judgment of Mr. Justice Dugas in a Territorial Court of the Yukon in favour of the respondents.

In 1898 the executive government of the territory granted to the defendants the right to construct a toll

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

(1) 5 Ch. D. 601. (2) 23 Can. S. C. R. 310.

tramway or waggon road between certain points, which road when built passed largely through Dominion lands. The respondents, who were engaged in the business of carrying goods through the territory, were required to pay a toll of ½ cent per pound when using the appellants' tramway, and they brought an action for repayment of the sum so exacted, claiming the right to a free use of the road. Mr. Justice Dugas, before whom the action was tried, held that as the Department of the Interior, which has control over and management of Dominion lands, had not confirmed the franchise to the appellants, the latter had no right to exact tolls for the use of the lands in question. The appeal was from this decision.

This appeal was taken *ex parte*, the plaintiffs filing no factum, and not being represented by counsel at the hearing.

Aylesworth Q.C. and *McGiverin* appeared for the appellants.

The judgment of the court was delivered by:

SEDGEWICK J.—By an instrument dated November 3rd, 1898, the executive government of the Yukon Territory purported to grant to the appellants the privilege of constructing a toll tramway or waggon road, or partly both, from the towns of Dawson and Klondike to the mouth of Bonanza Creek and up to the head of Carmack's Fork, and purporting to fix a tariff of charges for the carriage of passengers and freight. In pursuance of this authority the appellants constructed, either in whole or in part, the tramway, at the expense of over $45,000, the road for the most part, if not altogether, going through Dominion lands.

On the 12th November, 1898, the respondents, who are publishers and proprietors of the Klondike Nugget,

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Sedgewick J.

at Dawson, and carry on an express and carrying business as well, were engaged in carrying certain freight to Bonanza Creek, and found it necessary to use for that purpose the appellants' tramway, and were required to pay a charge or toll of ½ a cent per pound on such freight, amounting to the sum of $1.25 on the whole. On the 18th November they brought this action for repayment of the amount alleged to have been exacted from them, claiming that they were lawfully using the roadway in question, and that the appellants had no right nor authority to levy the said toll or to make any charge against them for the carriage of freight along the trail, and in the alternative that, in any event, such charge or toll was excessive.

The case was tried before Mr. Justice Dugas, in January, 1899, and judgment was given in favour of the respondents, from which judgment this appeal is taken.

We are of opinion that it should be allowed. The Yukon Territory Act (1) gives to the Commissioner in Council the same powers to make ordinances for the government of the territory as were at that time possessed by the Lieutenant Governor and Legislature of the North-west Territories, which powers are set out in c. 22 of 54 & 55 Vict. sec. 6, and are substantially the same as are given to provincial legislatures by sec. 92 of the British North America Act. It has never been doubted that the right of building highways, and of operating them, whether under the direct authority of the Government or by means of individuals, companies or municipalities, is wholly within the purview of the provincial legislatures, and it follows that whether they be free public highways or subject to a toll authorised by legislative enactment, they are

(1) 61 Vict. c. 6 (D).

none the less within the provincial power. In the present case the privilege granted the respondents was a matter purely territorial, and so the learned judge below seems to have held, but he gave judgment as he did because he was of opinion that inasmuch as the lands through which the roadway was built were Dominion lands, and the action of the Commissioner in Council had not been confirmed by the Department of the Interior, which department has under its control the management of Dominion lands, the appellants had no right of entry upon such lands, and that, therefore, the toll exacted was an illegal one. It seems to us that this view is an erroneous one. The question of the ownership of the soil is one with which the respondents have nothing whatever to do. Only the Crown, the owners of the roadway, could raise it, and the appellants being in possession and working their tramway in the same way as an ordinary railway company does, must be deemed to be rightfully in possession as against any one who can claim no title at all. The appeal should, therefore, be allowed with costs, and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Tabor & Hulme.*

1900

*April 18.

*June 12.

MARY M. JOHNSON (DEFENDANT).....APPELLANT;

AND

EVELYN GEORGIANA KIRK (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Registry law—Registration of tax deed—Certificate of title—Priority over earlier certificate—R. S. B. C. c. 111.

Sec. 13 of the British Columbia Land Registry Act (R. S. B. C. ch. 111) provides that a person claiming ownership in fee of land may apply for registration thereof and the registrar, on being satisfied after examination of the title deeds, that a *primâ facie* case is established shall register the title in the "Register of Absolute Fees." Sec. 19, which authorizes the register to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as *primâ facie* evidence in all courts of justice in the province, of the particulars therein set forth." And by sec. 23 "the registered owner of an absolute fee shall be deemed to be the *primâ facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess" * * *

Held, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep. 12 sub nom. *Kirk* v. *Kirkland*) that a certificate of title issued on registration of a deed from the assessor of taxes issued to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the plaintiff.

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

(1) 7 B. C. Rep. 12 sub nom. *Kirk* v. *Kirkland.*

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

Gormully Q.C. and *Orde* for the appellant referred to the provisions of the British Columbia Statutes and argued that they made the certificate *primâ facie* evidence of title and cast the burden of rebutting it on the plaintiff.

J. Travers Lewis for the respondent was not called upon.

The judgment of the court was delivered by :

GWYNNE J.—This case presents the most singular case of a claim to title to land alleged to have been acquired in virtue of a sale for alleged arrears of taxes which has ever, in my experience, come before the courts. The plaintiff resides in England and is the wife of one Robert Arthur Lawrence Kirk, who upon the 24th day of January, 1888, became seized in fee simple in possession of two town lots in the City of Vancouver, in the Province of British Columbia, one of which is situate on Hastings Street, and the other on Dupont Street, in the said city. His title to the former of the said lots was acquired by a deed executed by one John Callister whereby he granted and conveyed to the said Robert A. L. Kirk, his heirs and assigns,

all that piece or parcel of land lying and being situate in the City of Vancouver, Province of British Columbia, and known and numbered as lot twenty-four, block eight, according to the subdivision of the west part of lot one hundred and ninety-six, group one, New Westminister District.

The title to the other of the said town lots the said Kirk acquired in virtue of a deed also executed upon the said 24th day of January, 1888, whereby one Southam A. Cash granted and conveyed to the said Kirk his heirs and assigns

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Gwynne J.

all that piece or parcel of land lying and being in the City of Vancouver, Province of British Columbia, and known and numbered as lot twenty, block thirteen, according to the subdivision of the west part of lot one hundred and ninety six, group one, New Westminster District.

From the said 24th day of January, 1888, the said Robert A. L. Kirk remained seized in fee simple in possession of the said respective pieces of land so conveyed to him, until the 25th day of July, 1894, when by a deed executed by him he granted and conveyed unto the plaintiff, her heirs and assigns forever, the said respective pieces of land, and the plaintiff has ever since been and still is in possession of the said respective pieces of land by her agents and tenants holding under her. Both of these town lots have buildings erected thereon, and one is occupied by certain persons trading in the sale of wines and liquors under the name of Mynhart Brothers who have a stock in trade of the value of about three thousand dollars upon the premises, of which they are in occupation in virtue of a contract made with the plaintiff for the purchase thereof upon payment of a principal sum payable by annual instalments in lieu of rent. The other of the said lots is also occupied by persons doing business therein as proprietors of a Chinese store and restaurant. The plaintiff only learned in September, 1895, through her agents, that one E. J. Kirkland, assuming to act in the character of assessor of the District of New Westminster, had in the month of July, 1898, executed a deed whereby he purported to convey to the defendant in fee simple the said pieces of land so as aforesaid situate in the City of Vancouver, and thereupon, upon the 5th of October, 1888, she instituted the present action for the purpose of having the said deed produced and declared to be null and void, and in her statement of claim she alleged that since the commencement of her action the said deed

had been registered and she claimed the right to have the said deed, or so much thereof as related to her said two town lots, set aside and declared to be null and void. The defendant in her statement of defence pleaded that

on the 15th day of July, 1896, the said lots were offered for sale by auction by E. L. Kirkland, assessor of the District of New Westminster, *for arrears of taxes due thereon*, with costs and expenses of sale, and that S. K. Twigge being the highest bidder became the purchaser thereof and had issued to him by said assessor under the provisions of said "Assessment Act" a certificate of such purchase. This certificate together with all the right, title and interest of S. K. Twigge in and to the said land was afterwards on or about the 18th day of July, 1898, for value received, assigned and transferred to the defendant. *Taxes were due and in arrear upon the land so sold to S. K. Twigge and transferred to the defendant for a sufficient time to entitle the said assessor to sell the same, and all assessments, levies, notices (prior and subsequent) and advertisements required by the "Assessment Act" were made, given* and published, and all other requirements of said Act necessary to the validity of said sale were fully complied with.

And the defendant further admitted the execution of the deed of the 20th day of July, 1898, in the plaintiff's statement of claim mentioned, and pleaded that,

the said conveyance had been duly registered and a certificate of title issued to her in respect thereof under the provisions of the "Land Registry Act."

Upon the above matters pleaded by way of defence to the plaintiff's statement of claim the defendant claimed a right

to have the plaintiff's action dismissed with costs and a declaration made that she (the defendant) is the owner in fee and entitled to the possession of the said lots.

Issue having been joined upon the above defence the case was brought down for trial when the plaintiff proved that she was in possession of the said respective lots under and by virtue of the above several deeds executed as to one of the said lots by John Callister, and as to the other of the said lots by Southam A.

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Gwynne J.

Cash, both dated the 24th day of January, 1888, and the transfer deed above mentioned bearing date the 25th day of July, 1894, executed by Robert A. L. Kirk, the grantee in the said first mentioned deeds to the plaintiff in fee, and she also produced an instrument entituled "certificate of title," dated the 28th day of August, 1894, signed "J. O. Townley, District Register," certifying to the registration of a transfer deed or conveyance in fee of the said lots dated the 25th day of July, 1894, from Robert Arthur Lawrence Kirk to Evelyn Georgiana Kirk, his wife, in fee, and that the name of the said Evelyn Georgiana Kirk was entered in the absolute fee book as the owner in fee of the said lots.

The defendant by way of defence produced an instrument also entituled "certificate of title," dated the 29th day of November, 1898, and signed "J. O. Townley, District Registrar," certifying to the registration of a deed or conveyance in fee of the said two lots *inter alia* in pursuance of the provisions of the Assessment Act for taxes due to 31st December, 1896, from E. L. Kirkland, assessor of the District of New Westminster, to Mary M. Johnson, and that in virtue of such deeds of transfer the name of Mary M. Johnson was entered in the absolute fee book as the owner in fee of the said two town lots.

The defendant rested wholly upon this certificate and contended that it was *primâ facie* evidence that the defendant was absolute owner in fee of the said two town lots, and that her said certificate being subsequent to that given to the plaintiff wholly displaced and neutralised the latter unless and until the plaintiff should prove the negative or non-existence of the conditions, the existence of which as pleaded in the defendant's statement of defence could alone give to the deed executed by Kirkland to the defendant whatever

validity, if any, it had in law; notwithstanding her defence as above pleaded the defendant absolutely refused to produce the deed from Kirkland to her, and insisted upon resting her defence upon her certificate of title of the 29th November, 1898, issued as appears nearly two months after the commencement of this action. The plaintiff thereupon gave in evidence of that deed an examined copy of the deed in the registry office and we thus find the deed to be materially different from the title as pleaded by the defendant in her statement of defence.

It is in the words and figures following:

To all to whom these presents shall come. I, E. L. Kirkland, of the District of New Westminster, in the Province of British Columbia, send greeting: Whereas by virtue of the provisions of the "Assessment Act" the assessor of the said district did on the 15th day of July, in the year of our Lord one thousand eight hundred and ninety-six, sell by public auction to Mary M. Johnson, of Skagway, in the District of Alaska, U. S. A., that certain parcel or tract of land or premises *hereinafter* mentioned at or for the price or sum of *twenty dollars and eleven cents* of lawful money of Canada on account of delinquent taxes and additions *alleged to be due thereon* up to the thirty first-day of December, in the year of our Lord one thousand eight hundred and eighty-six, together with costs.

Now know ye that I the said assessor as aforesaid, *in pursuance of such sale and the "Assessment Act" and for the consideration aforesaid* do hereby grant, bargain and sell unto the said Margaret M. Johnson, her heirs and assigns, all that certain parcel or tract of land and premises, containing—being composed of lot twenty-four (24), block eight (8), and lot twenty (20), block thirteen (13), in the west eighty-five (85) acres of one hundred and ninety-six (196), group one (1) for taxes due to thirty-first December eighteen hundred and eighty-six (1886), *also west half* ($\frac{1}{2}$), *block thirteen* (13), *in the north-west quarter* ($\frac{1}{4}$), *lot three hundred and thirty-six* (336), *group one* (1), *for taxes due to thirty-first December eighteen hundred and eighty-six* (1886), *New Westminster District.*

The instrument is then dated 20th July, 1898, and is signed with the name

E. L. KIRKLAND,
Assessor.

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The amount of taxes *so alleged* to have been due amounted in so far as the same was claimed to affect the said two town lots, the property of the plaintiff, was the small sum of twenty-two cents in respect of each of the said lots, which together were proved to be of the value of upwards of six thousand dollars, or say $3,000 each.

The learned trial judge rendered judgment for the plaintiff. His judgment has been confirmed by the Supreme Court of British Columbia. From the judgment of the latter court the present appeal is taken, and in the argument before us it was rested wholly upon the contention that the defendant's certificate of title of November, 1898, is *primâ facie* evidence of the absolute title in fee being in the defendant in displacement of the plaintiff's title by deeds as relied upon by her, and of her certificate of title of August, 1894, unless and until, (as was contended at the trial), the plaintiff shall prove the non-existence of conditions, the existence of which could alone give to the deed from Kirkland to the defendant whatever validity, if any, it ever had.

The sole foundation upon which this contention is rested is contained in secs. 13, 19 and 23 of ch. 111 of the Revised Statutes of British Columbia which are but a transcript of secs. 13, 17 and 18 of ch. 67 of the Consolidated Acts of 1888. The Land Registry office, as the 3rd section of "The Land Registry Act" shews, was established "for the record of instruments and the registration of titles," and it is apparent, I think, that the person placed in chief charge of the office under the title of "Registrar General of Titles" was intended to be a judicial officer, for in the discharge of the duties of his office he is required to exercise judicial functions. He is constituted both a judicial and a ministerial officer. Then by section 5 the like duties and powers,

both judicial and ministerial, are imposed upon and vested in district registrars.

Section 13 then purports to show how these respective functions are to be exercised. It enacts that:

> Every person claiming to be the legal owner in fee simple of real estate may apply to the registrar for registration thereof in the form marked A in the first schedule hereunto annexed, *and the registrar shall upon being satisfied after examination of the title deeds produced* that a *primâ facie* title has been established by the applicant register *the title* of such applicant in a book to be called "the register of absolute fees" in the form B, in the said first schedule, *and shall also transcribe in another book* to be called the absolute fees parcels book, a description of the lands to which *the title* relates.

Now when a person claims the right to be registered in the absolute fee book as owner of the absolute fee in land, the title to which he claims in virtue of a deed in fee simple executed to him by a person already registered in the absolute fee book as the owner in fee, such a person may, under section 13, well be accepted by the registrar and be registered in the absolute fee book as *primâ facie* owner of such land. It was, I think, in view of, and for the purpose of providing for such a case that section 13 was enacted. But where, as in the present case, the defendant was not claiming title in virtue of a deed executed by the plaintiff who was the last person appearing to have been registered in the absolute fee book as owner of the *absolute fee* (which term by the 2nd section of the Act is interpreted to mean the *legal ownership* of an estate in fee simple) it was impossible for the registrar, by mere examination of a deed which had no validity whatever in law unless the conditions precedent required by law to give it any validity had been fulfilled, to be judicially satisfied that the defendant had any right to be registered even as *primâ facie* owner of the land mentioned in the deed from Kirkland to her. Kirkland appears in the transaction

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solely in the character of a person assuming to have a power vested in him, as assessor of the district of New Westminster, to realise by the sale of lot 24, block 8, the property of the plaintiff, the sum of twenty-two cents, alleged by Kirkland to have been in arrear and unpaid upon and ever since the 31st day of December, 1886, for a tax in respect of the said lot alleged to have been (but when is not stated), assessed upon and due by the then owner of the said lot, who now appears to have been one John Callister, and for securing payment of which sum with interest and costs the said Kirkland claims that a charge or lien upon the said lot became in 1886, and has ever since been until the alleged sale in 1896, vested in Her Majesty, and also to realise by sale of said lot 20, block 13, also the property of the plaintiff, payment of the like sum of twenty-two cents, also alleged by Kirkland to have been in arrear and unpaid upon and ever since the 31st day of December, 1886, for a tax in respect of the last mentioned lot alleged to have been (but when is not stated), assessed upon the then owner thereof who now appears to have been one Southam A. Cash, and for securing payment of which sum, interest and costs, the said Kirkland claims that a charge or lien upon the said last mentioned lot was vested in Her Majesty.

Now the deed under which the defendant claims title contains nothing whatever to establish that there were such liens or charges upon the said respective lots of land vested in Her Majesty at the time of the alleged sale in 1896, or if there were, that Kirkland had any authority to realise such charges by sale of the lands.

At the time of the passing of the 43 Vict. ch. 36, on the 8th of May, 1880, sec. 66 of the Act of 1876, as amended by sec. 15, of the Assessment Amendment

Act of 1878, was and continued to be in full force, and it enacted that:

If any of the taxes mentioned in the collector's roll in each year shall remain unpaid, and the collector be not able to collect the same he shall deliver to the officer in charge of the treasury an account of all the taxes remaining due on the roll and in such account the collector shall show opposite to each assessment the reason why he could not collect the same by inserting in each case the words "non-resident" or "not sufficient property to destrain" as the case may be.

Then by sec. 14 of the Act of 1878 it was enacted that

the assessor or collector shall pay over monthly to the officer in charge of the treasury the monies from time to time received by him and shall forward to the officer in charge of the treasury on or before such day in the year 1878 as the Lieutenant-Governor in Council may appoint, and on or before the 30th day of November or such other day as may be appointed by the Lieutenant-Governor in Council in each subsequent year, *his roll together with a list of all arrears of taxes due, and in cases of taxes chargeable against land, with a description of the parcels, sections or lots and the amounts chargeable against the same.*

Then the Act of 1880 makes *the person assessed* not only personally liable for the taxes imposed both in respect of real and personal estate but also all his lands situate within the province and prescribes the proceedings to be taken *in each year* by the assessor or collector to levy the taxes.

Sec. 8 by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession wherever the same may be found within the province, or of any goods and chattels found on the premises the property of, or in the possession of, any other occupant of the premises.

And it is enacted in sec. 13:

In default of sufficient distress or in case the collector shall deem it advisable to proceed for the recovery of the taxes due by levying the same in the first instance *against the lands of the person owing such taxes* he may levy the same together with all costs and charges including the costs of distress against goods and chattels, if any, *by sale of so much of the lands of such person* situate in his district as may be sufficient to pay the same.

And by sec. 19:

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In case the collector fails or omits to collect the taxes or any portion thereof the Lieutenant-Governor in Council may authorise the collector or some other person in his stead to continue the levy and collection of the unpaid taxes in the manner and with the powers provided by law for the general levy and collection of taxes, *but no such authority shall alter or affect the duty of the collector to return his roll.*

Upon the return o the roll provision is made by the 21st section which enacts:

If any tax and additions remain unpaid after the return of the roll by the collector to the said officer in charge of the treasury, interest shall continue to attach thereon after the rate of twelve per cent per annum, and such tax, interest, and the cost of registration may on the application of the officer in charge of the treasury, *be registered as a* charge against the said land in respect of which such tax is payable, and the registrar general of titles is hereby required to register the same accordingly.

Then sec. 23 prescribes the amount leviable as *this land* tax to be

one half of one per cent on the assessed value of real estate provided that the collector *in lieu of the above rate shall* receive *one-third of one per cent* on the assessed value of real estate if paid on or before the 30th day of June in each year.

Then by sec. 40 of 42 Vict. ch. 36, A.D. 1878, as amended by the 22nd sec. of 43rd Vict. ch. 26, A.D. 1880, it was enacted that

on and after the 1st day of January, 1879, the provisions of "the Assessment Act, 1876," as regards the tax on real estate shall not apply to, nor shall any taxes on real estate be assessed, *levied or collected thereunder in any municipality.*

Now upon the 6th of April, 1886, the Act 49 Vict. ch. 32, to incorporate the City of Vancouver was passed, whereupon the above section of the Act of 1878 as amended by the Act of 1880 came into immediate operation, whereby the "Assessment Act of 1876" ceased to have any operation and which declared that no taxes should be collected or levied under it within the municipality, without any reservation whatever as to taxes if any there were due in virtue of any

assessment made prior to the incorporation of the municipality; but in point of fact there were not on the 6th of April, 1886, any taxes due in respect of assessments upon the lots in the City of Vancouver under consideration in the present case for by 42nd Vic. ch. 35, A.D. 1879, no taxes if any were assessed upon either of the lots in question in 1886 became delinquent until the 30th of June of that year. It is needless further to add that if any tax had been in arrear upon these lots respectively upon the 31st December, 1886, the collecting and levying of the same, if they could be collected and levied in despite of the 40th sec. of the Act of 1878 as amended by the 22nd sec. of the Act of 1880, could only be effected by order of the Lieutenant-Governor in Council after the return of the collector's roll of 1886 to the officer in charge of the treasury.

But it is useless to endeavour to enumerate all the objections to the validity of the sale attempted to have been made of the respondent's property by a person not appearing to have had any authority whatever to interfere in the premises, but who has presumed to interfere not only in a matter in which he does not appear to have had any concern, but to have acted in direct defiance of the statute law governing the case. There is, however, one point which should be mentioned as absolutely fatal to the deed under which the applicant claims, if no other objection existed. One of the lots as already shown was professed to be liable to be sold for taxes alleged to have been due in December, 1886, by one John Callister, the then owner of the lot, and the other was professed to be liable to be sold for taxes alleged to have been due in December, 1886, by one Southam A. Cash, the then owner of this lot; but we must take it from the deed, of which proof was made as aforesaid,

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that the two lots and a third lot of whom somebody else was the owner in fee and which was in like manner alleged to be liable to be sold for taxes, but for what amount is not named, alleged to have been also due in December, 1886, by some person, (but who is not known) the then owner of, and assessed for this lot. Now the union of these three lots in one block and the sale of them as one, as appears by the deed executed by Mr. Kirkland to have been professed to be done for the sum of twenty dollars and eleven cents, was not authorised by any law and such a sale and the deed given thereon would be absolutely null and void even if no other objection to it existed. In fine the whole proceeding in the present case presents so many features of the utter absence of *bona fides* as to remove all *primâ facie* evidence of title which the certificate given by the registrar afforded if it afforded any. The evidence which has appeared in the case is abundantly sufficient (by reference to the statutes bearing upon the subject) to call for a judgment pronouncing the deed under which the appellant claims and the registration thereof in the absolute fee book and the certificate of such registration to be absolutely null and void, and we are of opinion that to the judgment of the court below of the 11th of May, 1896, should be added a direction that the entries in the said registrar's department in relation to the said pretended sale and conveyance of the said lots to the appellant be expunged from the records in the said registrar's department. With this variation made in the judgment of the court below the appeal is dismissed with costs.

It is to be regretted that Mr. Kirkland is not before us in this appeal that he might be made responsible to the respondent for the costs of her action instituted to maintain her rights so wantonly and vexatiously

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interfered with by the defendant Kirkland in a matter in which he does not appear to have had any concern and wholly unauthorised in law.

Appeal dismissed with costs.

Solicitors for the appellant: *Russell & Russell.*

Solicitor for the respondent: *S. Lucas Hunt.*

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*April 19,20.

*June 12.

ROBERT THOMSON & CO. (DEFENDANTS) ..... APPELLANTS;

AND

JOHN A. MATHESON & BRO., AND HENRY WINEMAN, THE YOUNGER (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of lumber—Inspection.

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final."

Held, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court by which the judgment at the trial dismissing the action with costs was set aside and a new trial ordered.

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

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THOMSON v. MATHESON.

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

Riddell Q.C. for the appellant.

Aylesworth Q.C. and *Smith* for the respondents.

The judgment of the court was delivered by:

SEDGEWICK J.—The appellants are lumber dealers doing business at Windsor, in the County of Essex, and the respondents are lumber dealers doing business in Detroit, Michigan. Early in May, 1897, the appellants sold, and the respondents purchased, a certain quantity of pine lumber at various prices according to the grade, and delivery at Windsor within a specified time. The contract was wholly by correspondence. The letter of the appellants of the 3rd May, 1897, completed the bargain between the parties, and contained the following clause:

> The inspection of this lumber to be made after the same is landed here (Windsor), by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final;

and the only question in this case is as to whether the inspection thus provided for was in fact made by a person agreed upon between the parties. The action was tried before Mr. Justice Ferguson without a jury, and judgment was rendered for the appellants. Upon appeal to the Divisional Court the judgment was set aside and a new trial granted, which judgment was confirmed by the Court of Appeal, Mr. Justice Maclennan dissenting. The case now comes to this court in appeal from that decision.

A majority of the judges of the appellate courts below seem to have considered that the inspector referred to in the letter, a part of which I have just set out, should have been agreed upon before he began to inspect at all. If they are correct in that view the

appeal must be dismissed. We are of opinion, however, that that is not the correct view, and the question is whether or not both parties, at any time before the inspection was completed, agreed upon Jubinville, who actually did inspect the lumber, and gave a certificate to that effect to the buyers. The learned trial judge, who heard the witnesses, found as a matter of fact that he was agreed upon by the parties as an inspector, while the lumber was being landed at Windsor.

It is not necessary to review the evidence, but in my view it fully justifies the finding of the learned trial judge. Mr. Justice Maclennan, in his dissenting judgment, has discussed the evidence and in a way which meets with my entire concurrence, and with him I am of opinion that the appeal should be allowed with costs and that the judgment of the trial judge should be restored, the appellants having their costs in all the courts below.

Appeal allowed with costs.

Solicitors for the appellants: *Clarke, Cowan, Bartlet & Bartlet.*

Solicitors for the respondents: *Fleming, Wigle & Rodd*

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*April 18,19.
*June 12.

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

ELSIE BARCLAY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Railway accident — Shunting cars — Warning — Proof of negligence.

B, in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, Gwynne J. dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line.

APPEAL from the decision of the Court of Appeal for Ontario affirming the verdict at the trial in favour of the plaintiff.

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

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The facts of the case are sufficiently set out in the above head-note, and more fully in the judgment of the majority of the court delivered by Mr. Justice Sedgewick.

Riddell Q.C. and *Coburn* for the appellant. The company cannot be compelled to place watchmen on the highway to warn the public; *Canadian Pacific Railway Co.* v. *Notre-Dame de Bonsecours* (1); *Madden* v. *Nelson & Fort Sheppard Railway Co* (2); and has no legal right to do so; *Battishill* v. *Humphreys* (3); *Hickman* v. *Maisey* (4).

Wilson Q.C. and *Gundy* for the respondent, referred to *Cox* v. *Great Western Railway Co.* (5); *Slattery* v. *Dublin, Wicklow & Wexford Railway Co.* (6); *Blake* v. *Canadian Pacific Railway Co.* (7); *Hollinger* v. *Canadian Pacific Railway Co.* (8).

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

SEDGEWICK J.—The respondent is the widow and administratrix of David Barclay, late of Ridgetown, Ontario, and the appellants are a railway company operating a railway between Ridgetown and Walkerville. On the 9th of September, 1898, Barclay was driving towards his home in Ridgetown, between nine and ten o'clock in the evening. In order to reach his home he had to cross the appellant company's railway tracks by means of a level crossing on Victoria Avenue. As he was in the act of driving along the street his carriage collided with a moving passenger car and he was killed.

(1) [1899] A. C. 367.
(2) [1899] A. C. 626.
(3) 64 Mich. 494.
(4) 16 Times L. R. 274.
(5) 9 Q. B. D. 106.
(6) 3 App. Cas. 1155.
(7) 17 O. R. 177.
(8) 21 O. R. 705; 20 Ont. App. R. 244.

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His widow brought an action against the company under Lord Campbell's Act and recovered a verdict for $3,000, $2,000 of which was allotted to herself, and $500 to each of her minor children

The questions submitted to the jury and the answers thereto will indicate the nature of the issue in the present case:

(1). Were the defendants guilty of any negligence which caused the accident? Yes.

(2). If they were, in what did such negligence consist? We agree that a man should have been on the crossing when making that switch to warn the public.

(3). Could the deceased have avoided the accident by the exercise of reasonable care? No.

(4). If the plaintiff is entitled to damages, at what sum do you assess them? Divide the amount at which you assess them between the widow and children in such proportion as you think proper.

To the widow	$ 2,000 00
To the boy Lawson, 9 years old	500 00
To the girl Jeannette, 7 years old	500 00
Total damages assessed	$3,000 00

Judgment was entered upon these findings, and an appeal to the Court of Appeal for Ontario was dismissed by a unanimous judgment, from which judgment an appeal is taken to this court.

Ridgetown is the eastern terminus of the railway and Victoria Avenue was east of the station. The evening train had arrived at Ridgetown a few minutes before the accident, and was composed of an engine and tender, a baggage and a passenger car. It was necessary to turn the train for the western trip, and also to pick up a passenger car which was standing upon the siding. After some switching the train was arranged with the engine and tender at the east, in the front, followed by the two passenger coaches and the baggage car. In this order it proceeded eastward on the main line to cross Victoria Avenue, as the engine

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and tender had to go to the round house and the cars to the main line north of the round house; the train was started, then the coupling between the tender and the cars being disconnected the engine proceeded at an increased speed, and the cars followed at the original speed, one brakesman going with the engine that he might turn the round house points to the main line for the cars after the engine had gone down the round-house switch, another brakesman remaining on the train in front, or east end of the front passenger car. The deceased, I gather from the evidence, must have seen, or at all events heard, the engine and train approaching before the cars were separated from the engine, but he did not in all probability see or notice the fact of such separation, and after the engine had passed the crossing, he was noticed driving his horse and carriage slowly across the track without noticing the cars coming on behind, and having no notice of the approaching cars, and it being impossible in the short time to stop the cars, the fatal accident occurred. There was some evidence to show that owing to piles of lumber on the company's lands at the point in question, his vision of the train was necessarily obstructed, and there was also evidence to show that the train was not sufficiently manned. There was, as the jury have found, no watchman at the crossing. The jury found that the appellants' negligence consisted in their failure to have a man on the crossing at the moment of the accident. The learned counsel for the appellants endeavoured at the argument to make it appear that the only question raised in this case was as to whether it is to be left to a jury to determine if a railway company can be compelled to place a watchman upon level highway crossings to warn persons about to cross the line and rail. I do not consider that any such broad ques-

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tion is raised here at all. The respondent's counsel do not make any such contention. It was, I think, properly left to the jury to determine whether or not in this particular case where, late on a dark night, at the terminus of a railway, shunting was being carried on, and that of an excessively dangerous character (the process being that of a running or flying switch), at a place in a town thickly populated, and over a much frequented avenue or highway, there being no engine connected with the train colliding with the carriage, and none of the usual signals such as the blowing of whistles or the ringing of bells to give warning to passers by, it was not necessary, at that particular time and under those particular circumstances, to take greater precautions than they really did take, and to be much more careful than in ordinary cases where these conditions did not exist. There was, in my view, a clear case to submit to the jury, and I entirely concur in the judgment of the learned Chief Justice of the Court of Appeal in delivering the judgment of that court.

The appeal should be dismissed with costs.

GWYNNE J. (dissenting.)—The respondent brought an action as administratrix of her deceased husband, one David Barclay, against the appellants for damages occasioned by the death of her said husband who was killed by a train of carriages of the defendants upon a main line of the defendants, as it crosses Victoria Avenue in the town of Ridgetown, by reason as is alleged of the negligence of the defendants' servants in charge of the said train. The acts of negligence relied upon in the plaintiff's statement of claim as negligence which caused the death of the deceased are as follows :

1st. That the defendants negligently and carelessly allowed cars and obstructions to stand near to the crossing so as to obstruct the view of persons using the said highway and passing the said crossing.

2nd. That they carelessly and negligently left the said crossing without fence or gates and without watchmen or signals.

3rd. That they negligently used the said highway and crossing as a place for switching and shunting, handling and driving cars in a dangerous manner; and

4th. That as the said David Barclay was approaching the defendants' said track, a steam engine of the defendants under the charge and control of defendants' servants was driven very rapidly and with a great deal of noise and commotion along the main track across said Victoria Avenue immediately in front of him and in such a manner as to attract his attention thereto, and when the said engine had crossed Victoria Avenue, and while the said David Barclay was crossing the main track of the defendants, in rear of the said engine, and before he could get clear of the said track, a number of coaches of the defendants under the charge and control of defendants' servants were *negligently, suddenly, at a rapid and dangerous speed driven across the said Victoria Avenue,*

and the statement of claim concludes by alleging that by reason of such negligence the said David Barclay was struck by the buffer or platform of the forward car and was instantly killed. Issue having been joined upon a plea of not guilty the case was brought down to trial before a jury.

Upon the main question essentially necessary to have been established, namely, whether the defendants were chargeable with any negligence to which the collision which caused the death of the deceased could fairly and reasonably be attributed, there was no contradiction whatever in the evidence which was as follows:

At about 9.30 o'clock on the night of the 9th of September, 1898, a passenger train of the defendants arrived from the west at Ridgetown station and shortly afterwards proceeded eastwardly along the main line across Victoria Avenue to take the engine to an engine or round house which was situated at

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the distance of between 700 and 800 feet east of Victoria Avenue, and to leave three cars which were being hauled by the engine upon the main track to a point north and east of a switch situated east of Victoria Avenue, and which led down northeasterly from the main line to the engine house so as to place these three cars in proper order for the being taken on the passenger train going west on the following morning. The station house from which these carriages and engine proceeded is situated at a distance of over 600 feet west of Victoria Avenue. When the engine with the carriages had proceeded to a point distant about the length of three cars from the western limit of Victoria Avenue the engine was separated from the carriages and proceeded ahead at a somewhat increased speed so as to reach the switch leading down to the engine house in time to enable the engine to pass down and to have the switch placed so as to let the coaches following pass on to their destination on the main line. The evidence showed the length of the company's passenger coaches to be 57 feet, so that the point where the engine became separated from the coaches was, according to the only evidence upon the subject, situate just about 171 feet from the west limit of Victoria Avenue, and according to the like evidence the engine proceeded from thence, fully lighted as required by law, and ringing its bells and going at a speed not exceeding six miles an hour, while the carriages followed with the speed previously given at a rate of about four miles an hour. The evidence further showed that Victoria Avenue was 100 feet in width. Thus this evidence, which as I have said was the only evidence upon the subject, establishes as a fact that when the engine had reached the centre of Victoria Avenue, or the distance of 221 feet from the place where it had dropped the carriages,

the carriages had proceeded the distance of nearly 150 feet and the front carriage had reached a point about 21 feet west of the avenue, and upon the same calculation, before the engine had completely crossed the avenue the front carriage had entered upon and traversed about eight feet of the avenue. Then the uncontradicted evidence also established that this front car and also the third were fully lighted throughout and that a man stood on the front of the first car as it proceeded east, with a lighted lamp, standing on the platform in front of the open door of the car throwing light all round, while he himself leaned over the front of the car on the lookout as they approached the crossing, and when about a car length or 57 feet from the crossing he by the light proceeding from the cars saw a horse and rig coming up in the darkness, for the night was dark, from the south, on the avenue towards the railway; and then he hallooed to the person in the rig whom he did not see, to look out, in a voice quite loud so that he could have been heard by the person in the rig if he was paying any attention. In expectation that the person in charge of the rig would stop his horse upon being so warned the cars proceeded. The horse however was not stopped, but proceeded walking up towards the railway and was not even stopped when it reached the south track of a siding which was situate about twelve feet south of the main track; upon reaching this siding the horse and rig were quite close to the carriages running on the main line, but proceeded across the siding and entered upon the main line directly in front of the carriages when the collision immediately occurred and the man in the rig was instantly killed. At what distance from the railway the horse and rig were when the man on the front carriage gave the alarm and hallooed to the occupant of the rig to look out

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did not appear, but it is obvious he was near enough to have heard the alarm as the only evidence upon the point states it to have been given, and it is absolutely inconceivable that he could have failed to see the approaching carriage which was fully lighted, and the light from which had enabled the man who gave the alarm upon the front carriage to see the horse coming up in the darkness; but when the horse and rig reached the siding south of the main line the south rail of which was about 12 feet south of the main line nothing short of the maddest recklessness of the man driving the horse and rig can account for his not having then stopped and so have prevented the happening of the collision, unless indeed he was asleep or otherwise incapable of taking care of himself, for the evidence shows him to have been in perfect health and having no defect either in his hearing or his eye-sight. Almost all the time occupied in the trial was naturally taken up in an attempt made on behalf of the plaintiff to explain this apparently very negligent and careless conduct of the deceased by an effort to establish that his apparent apathy was attributable to his not having seen the approaching carriages by reason of a car and other things standing, as was alleged, on the railway premises between the deceased in his rig and the approaching carriages; but assuming there to be any thing in the contention all its force, if any, became irrelevant for it was wholly vested upon the assumption of the deceased, (in order that he should have been so prevented from seeing the lighted coaches) being at points on the avenue further south than the point where he was when the man in the first carriage saw the horse coming up in the darkness and gave the alarm as stated by him. From that point until the collision took place there was nothing whatever inter-

vening which could have prevented the deceased seeing the lighted coaches if he had been using his faculties as it was his duty to do. The declaration admits that the engine was driven across the avenue "with a great deal of noise and commotion," and in a manner sufficient to have attracted the attention of the deceased, and there was not a particle of evidence reasonably to explain the apathetic conduct of the deceased. That this was the opinion entertained by the learned trial judge appears from his charge to the jury upon this branch of the case wherein, after referring to the evidence of the man on the first carriage as to his having seen the horse coming up and to his having shouted an alarm in the manner testified by him, the learned judge proceeded as follows:

Now you know how quickly a horse can be stopped that is going two miles an hour—that is walking at a slow walk. Why did not that man stop his horse? Was there anything on earth to prevent him if he had been looking out? Just think of that. You are bound by your oaths to determine this case by the evidence. Now, can you find any reason on earth why that man should not have stopped his horse ten feet away from the track before the train came along. If he might have done it, then you should answer the question that is put to you "that he could by reasonable care have avoided the accident." If you can find any reason in the world in order to account for his not having stopped it, consistently with the exercise of reasonable care under the circumstances, then of course you will consider it, *but I myself cannot suggest to you any reason now for his not stopping, when you take* (into consideration) *his duty which is a duty to look out when he comes to a railway crossing.*

Now, the learned judge having entertained this opinion, I must say that I think he should not have submitted any question to the jury as to the deceased having been or not having been guilty of contributory negligence but should have told the jury that upon the evidence the only conclusion that reasonable men could arrive at was that the deceased by his own carelessness, indifference or recklessness had either

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wholly caused or had at least contributed to the causing of the collision which resulted in his death, in either of which cases the defendants were entitled to judgment in their favour. In the recent case of *The Halifax Electric Railway Co.* v. *Inglis* (1) I have cited several of the numerous cases which bear upon this point. The learned judge however submitted the following questions to the jury, namely:

1st. Were the defendants guilty of any, and if any, what negligence, which caused the accident?

2nd. Could the deceased have avoided the accident by the exercise of reasonable care?

These questions the jury answered by saying that they found the defendants guilty of negligence *in not having a watchman at the crossing to warn the public*, and they answered the question as to contributory negligence of the deceased in the negative.

The answer of the jury to the first of these questions absolves the defendants from all charge of negligence which caused the collision, unless the not having had a watchman at the crossing constituted such negligence. Now there is no legislative provision requiring the defendants to have a watchman at the crossing. Parliament has, by the statute 51 Vict. ch. 29 sec. 187, vested in the Railway Committee of the Privy Council the power and duty to determine whether or not and when it shall be necessary for a railway company to maintain in the interest of the public safety a watchman where the railway crosses a public highway, and to make an order to that effect if they shall deem it to be expedient. Such order when made has statutory obligation. No such order has been deemed to be necessary or been made by the Committee of the Privy Council in relation to the crossing under consideration in the present case, and

(1) 30 Can. S. C. R. 256.

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the defendants are under no obligation to maintain a watchman at such crossing unless the obligation is imposed by the common law. All that the common law requires is that the defendants should give such warning of approaching trains as should be reasonably sufficient to attract the attention of travellers on the highway so as to enable them to make use of their faculties to avoid all danger, and in view of the warning given, as appears in the uncontradicted evidence, both by the voice of the person standing for that purpose in front of the first carriage, and by the light proceeding from the lighted up carriages which was abundantly sufficient to attract the notice of the deceased, if he had been, as he ought to have been, paying attention, which warning appears to have been wholly disregarded by him, no jury acting as reasonable men who duly appreciated the nature of their duty as jurors can be justified in finding that *the collision was caused* by there not having been a watchman at the crossing, whose warning, if one had been there, might have been equally disregarded, as was the warning which was given. The fact of there not having been a watchman at the crossing cannot, notwithstanding the finding of the jury, be accepted in law under the circumstances as constituting negligence which caused the collision.

Then as to the answer of the jury to the question relating to contributory negligence of the deceased it can only be attributed to sympathy with the plaintiff in her no doubt grievous loss, for there is not in the evidence anything to support it. The judgment in appeal appears to me to sanction the introduction of a new principle in the determination of actions of the nature of the present one, namely, that however sufficient to attract the attention of travellers upon a highway crossed by a railway upon the level the

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warning given by the railway company may be, and however recklessly and carelessly the traveller may disregard such warning, nevertheless if a collision should take place and the traveller should suffer, and if a jury should be of opinion that some other mode of warning might by possibility have been more effectual in arousing the traveller to the proper exercise of his faculties, it would be quite competent for the jury to pronounce the not giving of such possibly effective warning to be negligence in the company which caused the injury, and to acquit the injured person of having by negligence on his part contributed to the happening of his injury.

The appeal should in my opinion be allowed, and the action dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Coburn.*

Solicitor for the respondent: *W. E. Gundy.*

THE DUEBER WATCH CASE MANUFACTURING COMPANY (PLAINTIFF) ..... APPELLANT;

AND

FRANK S. TAGGART & CO., FRANK S. TAGGART AND CHARLES CAMPBELL (DEFENDANTS) ..... RESPONDENTS.

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*April 24.

*June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Insolvent firm—Assignment for benefit of creditors—Composition—Discharge of debt—Release of debtor.

T. and C. doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T then induced the Dueber Company, a creditor, to pay off a chattel mortgage on the stock, and a composition of 25 cents on the dollar of unsecured claims, the company to receive its own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the Dueber Company, and the arrangement was carried out, the company eventually as provided in a contemporaneous deed executed by the parties interested reconveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action by the company against T. & Co. on the original debt.

Held, affirming the judgment of the Court of Appeal (26 Ont. App. R. 295) that the original debt was extinguished and C. was released from all liability thereunder.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of MacMahon J. at the trial, who dismissed the action with costs.

The facts are sufficiently stated in the above headnote.

C. Millar for the appellant.

Nesbitt Q.C. for the respondents.

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

(1) 26 Ont. App. R. 295.

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THE DUEBER WATCH CASE MANUFACTURING CO. v. TAGGART.

Gwynne J.

The judgment of the court was delivered by:

GWYNNE J.—This appeal is from a judgment which relates only to the interests of defendant Campbell who formerly was a partner of the defendant Taggart, they having been in business together in partnership under the name of "Frank S. Taggart and Company." The appeal must be dismissed with costs, and upon the grounds upon which the courts of Ontario have proceeded. There cannot be entertained a doubt that the proper construction to be put upon the subject matter involved in this appeal is that all the acts and undertakings of Mr. Moore, who was secretary treasurer and had sole management of all the affairs of the company with the exception of the manufacturing business which is under the management of the president, were the acts and undertakings of the plaintiff company. Upon Taggart and Company executing the assignment for the benefit of their creditors, Taggart went to the State of Ohio to see the plaintiff company who next to a firm of Buntin, Reid and Company (who had security by chattel mortgage upon the stock in trade of the insolvent firm) were the principal creditors of the latter. The insolvent firm had also several other creditors whose united claims amounted to a little over $30,000. Taggart's object in seeing the plaintiffs was to endeavour to get them to come to his assistance in getting him out of his difficulties, and to set him up again in business on his own account altogether apart from the defendant Campbell. He had on that occasion an interview with the president of the company and the secretary treasurer, Mr. Moore, and gave them to understand that if the plaintiff company would pay 25 cents on the dollar to the creditors, other than Buntin, Reid, and Company, and the plaintiffs themselves, he could get a discharge from all

the other creditors, and that then his estate which he represented to be worth more than $40,000 would be amply sufficient to pay Buntin, Reid & Co., and the plaintiffs. He so far prevailed with the plaintiffs that Mr. Moore was sent to Toronto to investigate the matter with full authority to make any arrangement he should think fit upon behalf of the plaintiffs. The president of the company says that it was left to Moore to carry out the transaction and to do what he liked in the matter. Whatever Moore did, he said, "was us, was for us."

Moore came to Toronto and saw the assignee in the insolvency, and adopted the valuation which the assignee had made of the insolvent estate and agreed to advance the sum of 25 cents on the dollar of the claims of the unsecured creditors, and did advance the sum necessary for that purpose, and thereupon the said creditors executed a deed of discharge of the said insolvent firm dated the 27th day of April, 1893.

The next step was the preparation of a deed in such form that it could be executed by Mr. Clarkson, the assignee of the insolvent firm, and for that purpose a deed was prepared and executed by the said assignee bearing date the 11th day of May, 1893, whereby in consideration of the sum of $8,637 therein alleged to be paid by Moore to the said assignee, the latter conveyed to Moore, his executors, administrators and assigns, all the estate and effects, real and personal, and all the right, title, interest, property, claim, demand, rights and credits of every nature whatsoever of the insolvent firm subject to the claims of the plaintiff company and of the Hampden Watch Company, and of Messrs. Buntin, Reid and Company.

The above sum of $8,637 was the 25 cents in the dollar advanced by the plaintiff company through Moore to pay the other creditors of the insolvent firm

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and a sum to cover costs of the proceedings taken on the consignment for the benefit of creditors, and the Hampden Watch Company was either a part of the plaintiff company or under its control

The deed contained a covenant executed by Moore, that he would duly settle with the said plaintiff company and with the Hampden Watch Company for their claims against the estate of the said firm of Taggart and Company, and would indemnify and save harmless the said assignee from all said claims.

Now this deed, in which Moore is named to be the grantee, was in substance a deed conveying the estate of the insolvent firm to the plaintiff company, and that this is so plainly appears by an instrument bearing date the same day and expressed to be made between the plaintiff company of the first part, Buntin, Reid and Company of the second part, Moore of the third part, and Taggart of the fourth part, whereby it was declared that Moore *should become* the purchaser of the said estate of the said insolvent firm, and should hold the same upon trust to sell and to apply the proceeds after deducting necessary expenses, as follows: 1st. To pay Buntin, Reid & Co. the amount secured by the chattel mortgage with interest and costs. 2nd. To pay the said sum of $8,637 and interest and costs 3rd. To pay the plaintiff company the amount of their debt with interest at the rate of 7 per cent; and 4th. Upon trust to assign and set over unto Frank Stark Taggart aforesaid, his executors, administrators or assigns, or to whom he or they should appoint, all the rest, residue and remainder of the said estate and effects together with the right of successorship in the said business, and all the assets of the said business then subsisting. The agreement then provided that Moore might at his discretion buy such other stock as he might think fit, and that the cost of the purchase

money of such goods, and the expenses attending the sale thereof should be added to the amount of $8,637 paid to Clarkson, and the proceeds arising from the sale thereof applied first in paying for the same and subject thereto in the same manner as the proceeds of the goods conveyed by Clarkson. Then the agreement contained a clause as follows:

> And the said Frank Stark Taggart having himself the sole and absolute right to the use of the firm name of "Frank S. Taggart & Co.," hereby consents and agrees that the said business shall be carried on as aforesaid by the said Moore in the name of "Frank S. Taggart & Co."

The business was then carried on by Moore on behalf of the plaintiffs, or I should rather say by the plaintiffs through the intervention of Moore, who placed Taggart and one Williams acting in the interest of Buntin, Reid & Co., in possession of the stock in trade conveyed by Clarkson, and of such other goods as the plaintiff through Moore supplied, and who sold them by retail under the name of "Frank S. Taggart & Co.," as provided in the above recited agreement. Moore from time to time received the accounts of and proceeds of sales until the month of October, 1893, when Buntin, Reid & Co. having been paid the amount of their claim upon the 7th day of October, executed a release of such their claim, and thereupon Moore on behalf of the plaintiff, or rather the plaintiff through the intervention of Moore, transferred what remained of the estate and effects which had been conveyed to Moore as aforesaid by Clarkson, the value of which was then estimated at $30,000, to Taggart for the sum of $25,000 secured by Taggart's promissory notes and a chattel mortgage executed by him on the stock in trade, and thus as it appears to me was affected the arrangement as prepared by Taggart in his own private interest, to the utter exclusion of the defendant Campbell, when Taggart in April sought

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THE DUEBER WATCH CASE MANUFACTURING CO. v. TAGGART.

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the assistance of the plaintiffs. There cannot, I think, be entertained a doubt that all the subsequent proceedings as above related were entered into and carried out for the purpose of setting Taggart up in business again, and that the plaintiffs are the parties who entered into the arrangements with Taggart in the name of Moore, who acted simply as the representative of the plaintiffs; and that the transactions as above narrated had the effect of absolutely discharging the defendant Campbell from all liability to the plaintiffs in respect of the debt of the old firm of which he was a member, cannot I think admit of a doubt.

Appeal dismissed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hughes.*

Solicitors for the respondents: *Mills & Tennant*

FRANK F. COLE (DEFENDANT).....APPELLANT;

AND

WALTER C. SUMNER (PLAINTIFF).....RESPONDENT.

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*May 3.

*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Offer and acceptance—Telegrams—Completion—Mutuality.

S. a grain merchant in Truro, N. S., telegraphed to C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each" C. replied next day, "White oats 32 half, Truro, bags two cents bushel extra." S. wired same day, "How much less can you do mixed oats for? Might work white at thirty-two, but not any more. Answer." C. answered, "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in four bushel bags, Truro." Next day S. wired, "I confirm purchase 20,000 bushels oats, white, at thirty-two; mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asked half cent for bagging. Bags extra." S. replied, "All right: Book order. Will have to pay for bagging." C. wired same day, "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired, "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered and S. brought an action for damages.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover.

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

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COLE v. SUMNER.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated above and in the judgment of the court.

W. J. O'Connor for the appellant.

Borden Q.C. for the respondent.

The judgment of the court was delivered by;

SEDGEWICK J.—The appellant is a grain merchant carrying on business in Toronto, Ontario, and the respondent is also a grain merchant carrying on business in Truro, N.S., and the question in controversy is as to whether or not there was a completed bargain between them as to a quantity of oats. The negotiations commenced on December 6th, 1897, by the following telegram from the respondent to the appellant.

F. F. Cole, Toronto, Ont.

Quote bottom prices twenty to twenty-five cars, thousand bushels each, white oats, delivered, basis Truro freight, bagged in our bags, even four bushels each.

Walter. C. Sumner.

The next day the following reply was sent:

White oats, 32½, Truro, bags two cents bushel extra. F. F. Cole.

On the same day the respondent telegraphed:

F. F. Cole, Toronto, Ont.

How much less can you do mixed oats for. Might work white at thirty-two, but not any more. Answer.

Walter C. Sumner.

The same day the appellant telegraphed back:

Mixed oats scarce, but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34½ in 4 bushel bags, Truro.

The respondent next day telegraphed the appellant:

F. F. Cole, Toronto, Ont.

I confirm purchase twenty thousand bushels oats, white at thirty-two, mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk.

Walter S. Sumner.

And on the same day the respondent confirmed by letter his proposal as just stated, adding:

If it is at all possible, would like to have 12,000 bushels of this order mixed oats. If cannot get that many, get what you can, but do not ship them to any other than the destinations we give you for mixed oats.

On receipt of respondent's telegram, the appellant telegraphed him:

W. C. Sumner, Truro.

Cannot confirm bagged. Am asked half cent for bagging. Bags extra.

And received in reply the following telegram:

F. F. Cole, Toronto, Ont.

All right. Book order. Will have to pay for bagging.

Walter C. Sumner.

On the same day the following reply was sent:

W. C. Sumner, Truro.

Too late to-day. Made too many sales already. Will try confirm to-morrow.

On the receipt of this last telegram, the respondent wrote the appellant confirming previous telegrams and adding:

Your message just to hand saying, "too late to-day. Made too many sales already. Will try confirm to-morrow." Want you to try hard to do this for we confirmed to our customers. After waiting over four hours for your answer concluded you had accepted.

On December 9th the respondent telegraphed appellant:

Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship.

On December 10th the appellant telegraphed:

Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire arrived yesterday. This is why I could not confirm. Think advance too sudden to last.

On the same day in addition, the appellant wrote the respondent:

The lot of oats which I had under offer for you were sold for export the same day you wired accepting them in bags.

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And he added:

In regard to mixed oats, I do not know at this writing where I could get even one car load. When a car is offered it can be bought for half cent bushel less than white oats. If your wire which I received here at noon on the 8th had accepted 20,000 bushels of oats at 32 cents, you would have got them but you did not accept. You accepted white oats at 32 cents, mixed 31½ bagged even four bushel bags, and you asked me to confirm. You will note that I did not confirm. Later that day, you subsequently confirmed, but it was too late for me to secure them, and I so advised you.

There was further correspondence which so far as I can see does not materially affect the case. The oats not having been delivered, an action was brought for damages. The case was tried before Mr. Justice Townshend, who awarded damages to the amount of $543.84. Upon appeal, his judgment was confirmed, Mr. Justice Meagher dissenting.

I am of opinion that this correspondence does not contain a complete contract. The rule of law is that:

An acceptance of a proposition must be a simple and direct affirmative in order to constitute a contract, and if the party to whom the offer or proposition is made accepts it on any condition, or with any change of its terms or provisions which is not altogether immaterial, it is no contract until the party making the offer consents to the modification; that there can be no contract which the law will enforce until the parties to it have agreed upon the same thing in the same sense. *Carter* v. *Bingham* (1).

Now it appears to me that the parties have never come to a common understanding upon more than one material term in respect to each of which there may be a difference of opinion, a difference which, from the correspondence, it is simply impossible to adjust. For instance, both the appellant and the respondent want to supply the bags. The bags cost the appellant 6½ cents, while he is asking for them 8 cents. The telegram of December 8th, "all right book order; will have to pay for bagging" which the respondent con-

(1) 32 U. C. Q. B. 617.

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tends was the final acceptance and completion of the contract, while it makes it clear that the "bagging," that is the cost of placing the grain in bags, was provided for, there was no determination as to who was to provide the bags, or as to how much was to be paid for them if the respondent did provide them.

Again, there had been offers and replies as to mixed oats; no definite agreement has been come to as to those; and still again, there would be difficulty as to the quantity to be delivered; the appellant never assented to 20,000 bushels, but to twenty to twenty-five cars, thousand bushels each.

The court below appeared to think that a letter of the appellant written in January, 1897, ten months before, might be looked at in order to construe the alleged contract. In that letter the appellant made the respondent a standing offer as follows:

> I will bag oats for you at any time free of expense, you furnishing the bags.

This contract, however, if a contract at all, shows that the terms of that letter must not have been in contemplation by the parties, or at all events, that the contract was made irrespective of the letter, because it expressly provides that the respondent should pay for bagging.

On the whole, I am of opinion that no completed contract existed between the parties. The appeal must be allowed and the action dismissed, the whole with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Alex. McNeil.*

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

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*May 2.

*June 12.

JOHN STARR, SON AND COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE ROYAL ELECTRIC COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Principal and agent—Sale by agent—Commission—Evidence.

The appellant company deal in electrical supplies at Halifax and have at times sold goods on commission for the defendant, a company manufacturing electric machinery in Montreal. In 1897 the appellant telegraphed the respondent as follows:—"Windsor Electric Station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was:—"Can furnish Windsor 180 Killowatt Stanley two phase, complete exciter and switchboard, $4,900, including commission for you. Transformers, large sizes, 75 cents per light." * * * The manager of appellant company went to Windsor but could not effect a sale of this machinery. Shortly after a travelling agent of the Independent Company came to Halifax and saw the manager and they worked together for a time trying to make a sale but the agent finally sold a smaller plant to the Windsor Company for $1,800. The Starr Company claimed a commission on this sale and on its being refused brought an action therefor.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the Starr Company was not employed to effect the sale actually made; that the Montreal Company offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the Starr Company to such commission.

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

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THE STARR, SON AND COMPANY v. THE ROYAL ELECTRIC COMPANY.

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

The facts of the case are sufficiently stated in the above head-note and in the judgment of Mr. Justice Sedgewick on this appeal.

Cahan for the appellant.

Belcourt Q.C. for the respondent.

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

SEDGEWICK J.—In October, 1897, a fire occurred at Windsor, N.S., and the Windsor Electric Light Station was destroyed. On October 18th the appellant company, who carry on the business of dealers in electrical supplies, sent the following telegram to the respondent corporation, who are manufacturers of, and dealers in, electrical machinery in Montreal:

Windsor Electric Station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest.

(Signed) JOHN STARR, SON & CO.

To this the respondent company replied by telegraph as follows:

MONTREAL, October 18th, 1897.

MESSRS. JOHN STARR, SON & CO.,
Halifax, N.S.

Answering telegram. Can furnish Windsor one hundred and eighty Killowatt Stanley two phase, complete exciter and switchboard, forty-nine hundred dollars, including commission for you. Transformers, large sizes, seventy-five cents per light. Can make immediate shipment of generators and transformers. They can use generators for transmission scheme later.

(Signed,) THE ROYAL ELECTRIC CO.

This, in my view, was a specific offer by the Royal Company of one large machine of 4,000 lights and upwards, for the sum of $4,900, including a commission for the Starr Company, and it was the only

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authority the Starr Company had from the Royal Company in connection with furnishing new machinery for the Windsor Electric Light Station. Mr. Starr went to Windsor to endeavour to make a sale of this machinery, but signally failed. Afterwards, Mr. Ross, a travelling agent of the respondents, sold to the Windsor Company another, and different machine, of a much smaller make, for $1,800, and under specific instructions as to price from the head office. This action was brought to recover $180 as commission upon the price of the machine thus sold.

Much stress was laid upon an alleged course of dealing which, previous to the correspondence above mentioned, had taken place by correspondence between the two companies, and it was sought to make this alleged course of dealing a part of the contract in respect of which commission was claimed. But although the trial judge found there was a course of dealing as alleged the evidence completely failed to establish it, and the court upon appeal so determined.

The Starr Company further contended that they were entitled to a commission in consequence of a contract which their travelling agent had made with them prior to the actual sale. But there was no evidence whatever given to prove any authority on the part of the travelling agent to make any bargain whatever with the Starr Company. That also the court below found. The judgment of the court below was therefore right. The right of the appellant company to a commission depended solely upon whether they had sold the specific machine described in the telegram of October 18th. They did not sell that machine, or anything in character like it, and therefore their right to commission failed.

I need not discuss more fully the evidence, which has been fully dealt with in the judgment of Mr.

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Justice Townshend, a judgment in which I entirely concur. The appeal should be dismissed with costs.

GWYNNE J. (dissenting.)—The judgments of the learned trial judge and of Mr. Justice Graham in the Supreme Court of Nova Scotia in affirmation thereof are, in my opinion, free from objection. The defendants are manufacturers at Montreal of electric plant designated by the term "Stanley Apparatus." The plaintiffs are a company doing business at Halifax as agents or intermediate dealers in electric plant between the manufacturers and purchasers of such plant. In a letter dated the 8th May, 1895, the plaintiffs as such intermediate dealers applied to the defendants and asked for particulars and specifications of their "Stanley apparatus" electric plant, and tendered their services in effecting sales thereof for the defendants. In reply to this letter the defendants on the 13th of May, 1895, wrote a letter to the plaintiffs in which they express themselves ready to accept offers for their Stanley plant at prices named for several classes then manufactured by them at the respective prices in the letter attached to each class, and they assure the plaintiffs that in working for orders for them they should have the protection of the defendants upon the terms therein stated which were that the defendants should be informed of the parties with whom the plaintiffs should be in treaty and should be kept advised of the progress of the plaintiffs' negotiations. No direct tractions between the defendants and purchasers with whom the plaintiffs were in treaty took place, but many transactions took place of sales effected for defendants of their plant to divers parties by and through the plaintiffs, who out of the purchase monies passing from the purchasers, through their hands, to the defendants, the plaintiffs were authorized by

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the defendants to retain and did retain the sum of ten per centum on the amount of purchase money agreed upon by the defendants as remuneration to the plaintiffs for their services as intermediate dealers.

In October, 1897, the whole of the plant of a company doing business at Windsor, Nova Scotia, under the name of the Windsor Electric Co. was utterly destroyed by fire. In a telegram of the 18th October, 1897, the plaintiff communicate from Halifax this fact to the defendants at Montreal, and say "Send us quotations for new plant; will look after your interest."

The defendants reply by telegram on same day and furnish particulars of an improved plant of a higher class and cost than any of those already mentioned in defendants' letter to plaintiffs of 13th May, 1895.

Thereupon the plaintiffs immediately proceed to Windsor and enter into negotiations with the Windsor Electric Company for the defendants to supply all the electric plant they should require, and urged them to put up the defendants' "Stanley apparatus," and particularly urged them to take that specified in the defendants' telegram of the 18th October. On the 20th of October, 1897, they communicated to defendants what they had done in the matter in their interest. Shortly afterwards the defendants sent their own foreman, one Ross, to Halifax to see the plaintiffs and to assist them in their negotiation with the Windsor Electric Company. Ross informed the plaintiffs of the purpose of his arrival being to assist the plaintiffs and the plaintiffs took him to the Windsor Electric Company to whom (being informed by the president of that company, that they did not wish to pay a price which should include commission to any one) Ross, in the plaintiffs' absence, stated that the plaintiffs had no authority to act as agents on behalf of the defendants and notwithstanding his assurance to the

plaintiffs that he came to assist them in their negotiation, and that whatever he did would be in the interest of the plaintiffs, upon the faith of which assurance the plaintiff, John Starr, returned to Halifax, and in his absence Ross proceeded to carry on the negotiation initiated by the plaintiffs which terminated in the defendants closing the negotiation with the Windsor Electric Company for the sale to them not of plant of the class mentioned in the telegram of the 18th of October but of one of the smaller classes of the defendants' manufacture, and at the sum of eighteen hundred dollars. It is for commission upon this sale that the action is brought, and the defendants not disputing the reasonableness of the amount if they are liable, repudiate all liability. The learned trial judge has found the facts to be as above stated, and that it was not competent for the defendants so to interfere with the negotiations initiated by the plaintiffs, and he estimated the amount of the remuneration to which they are entitled at 10 per cent upon the amount of purchase money proceeding upon the basis of all the transactions which had taken place between the defendants and the plaintiffs since the letter of 13th May, 1895. In this judgment I can see nothing which can be objected to. There is no foundation I think for the contention that the plaintiffs' powers of negotiation and their right to be remunerated was limited to the sale of the particular plant mentioned in the telegram of October That plant being placed in the hands of the plaintiffs appears to me to have been simply an addition to the plant named in the letter of the 13th May, 1895, and all were placed in the same position as to the plaintiffs negotiating for sales. No amount of commission was specified in respect of the plant named in the telegram of October, 1897, or in respect of that named in the letter of May, 1895, and the evidence

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being clear that the plaintiffs entered upon negotiations with the Windsor Electric Company upon behalf of the defendants, and with their authority had no right whatever to interfere in any manner to prevent the negotiations initiated by the plaintiffs being brought to a close by them without adequately remunerating the plaintiffs for their services, and as there is no dispute as to the amount of the remuneration to the plaintiffs if the defendants are liable for any amount, I am of opinion that the appeal should be allowed with costs and the judgment of the learned trial judge restored.

Appeal dismissed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Drysdale & McInnes.*

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } APPELLANT;

AND

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FREDERIC A. CASTON (PLAINTIFF)...RESPONDENT.

*April 21.
*June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assessment and taxes—Ontario Assessment Act—R. S O. (1887) *c.* 193—*Construction of statute—Arrears of taxes—Distress.*

The provisions of section 135 of the Ontario Assessment Act (R. S. O. (1887) ch. 193) in respect to taxes on the roll being uncollectable, providing for what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgment of the Court of Appeal (26 Ont. App. R. 459) affirming the judgment of the Divisional Court (30 O. R. 16) affirmed.

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

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

In 1891 the plaintiff was on the collector's roll for the taxes for that year in respect to lot 65 Huntley street, Toronto, and his sister for the adjoining lot 63. In January, 1892, plaintiff paid the collector $75, and at the trial there was a dispute about its appropriation, the collector swearing that he was instructed to pay off all the taxes on lot 63 and apply the balance towards payment of the sum due on the plaintiff's own lot. These instructions were denied by the plaintiff.

In 1895 a sum for arrears of taxes on lot 65 was placed on the collector's roll, though such arrears had never been demanded from the plaintiff. The roll for 1891 delivered to the treasurer in the following year did not show opposite the respective assessments remaining unpaid, the reason the same were not collected, nor was the city clerk furnished with a copy of the account as required by section 143 of the Assessment Act.

In 1896 the plaintiff's goods were distrained upon for the arrears and the action in this case was for damages caused by such alleged illegal distress. At the trial the action was dismissed, but the Divisional Court reversed the judgment of dismissal and gave judgment for the plaintiff with $100 damages, which the Court of Appeal affirmed. The city then appealed to this court.

Fullerton Q.C. and *Chisholm* for the appellant. The plaintiff had means of relief under the statute which should have been exhausted before he could bring an action. Cooley on Taxation, 2 ed. p. 283. Blackwell on Tax Titles, secs. 471 and 475. *Stewart* v. *Taggart* (3).

(1) 26 Ont. App. R. 459. (2) 30 O. R. 16.
(3) 22 U. C. C. P. 284.

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Failure of the collector to distrain in the first instance does not take away the remedy by distress in the future. *McDonell* v. *McDonald* (1); *Allan* v. *Fisher* (2).

J. W. McCullough for the respondent. The provisions of the Act as to the duties of officers of the municipality are imperative, and the city must show that they were strictly complied with. *O'Brien* v. *Cogswell* (3). And see *Whelan* v. *Ryan* (4); *Love* v. *Webster* (5).

The judgment of the court was delivered by:

GWYNNE J.—The respondent brought an action against the appellants alleging in his statement of claim that they had in 1896 caused a distress to be made upon his goods situate upon premises owned and occupied by him in the ward of St Thomas, in the City of Toronto, for taxes assessed upon him in respect of the same premises in the year 1891. and which the respondent in his statement of claim alleged had been paid by him to the collector, having had the roll of that year for the collection of the taxes therein mentioned.

The premises in question consisted of a lot numbered 65 on the east side of Huntley street, in the City of Toronto, with a dwelling house thereon in which the respondent lived. He produced a receipt dated January 16th, 1892, signed by John Kidd, the collector of the taxes assessed in St. Thomas Ward, for the year 1891, as follows:

Received from F. A. Caston, on account of taxes on Huntley street, seventy-five dollars.

An extract from the collector's roll of the year 1891 was produced whereby it appeared that the respondent

(1) 24 U. C. Q. B. 74.
(2) 13 U. C. C. P. 63.
(3) 17 Can. S. C. R. 420.
(4) 20 Can. S. C. R. 65.
(5) 26 O. R. 453.

was assessed in that year as occupant and owner of said lot No. 65 in the sum of $48.24 taxes which the collector was authorised and directed to levy. And that immediately preceding this entry on the roll Mary L. Caston appeared to be assessed as occupant, and Richard T. Coady and Charlotte Coady as owners of lot 63 on the east side of said Huntley street, and adjoining said lot No. 65 in the sum of $46.31¾.

It appeared that the roll when returned by the collector to the treasurer did not comply with the provisions of section 135 R. S. O. 1887, but in lieu thereof there was an entry in pencil made in the column headed "date of demand of taxes" as follows: "Jan. 16, "'92, paid on account $75." This entry was placed opposite to both of lots Nos. 63 and 65, and no sum was appropriated to either lot. The respondent swore that the payment was made in respect of the taxes charged on the roll upon his lot No. 65, and not at all in respect of taxes charged on the lot No. 63. He also said that he never had any notice that the City of Toronto claimed that any arrears were due upon his said lot until the year 1895, when a sum of $69.27 arrears appeared in the collector's bill of taxes demanded of him in 1895, and served upon him. He said that upon receipt of this bill he made repeated efforts to have this corrected, but failed, and then he proved the distress complained of which was made in June, 1896, to collect said sum of $69.27 which with additional interest and charges then amounted to $73.43. On the defence the collector of the ward for the year 1891, who prior to that year and thenceforth until and in the year 1896 had been and still was collector of the ward, was called, and he testified that when the respondent paid the $75 mentioned in the receipt of 16th January, 1892 he gave express directions that the money should be applied first in

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payment of the taxes charged on lot 63, and the balance on his own lot 65. He said also that the respondent had paid the taxes on the lot 63 every year since 1885. In fine upon a lengthy examination and cross-examination of the collector, and upon a further examination and cross-examination of the respondent in reply, and upon an examination and cross-examination of Mr. Coady, who in 1891 was, and in 1897 still was treasurer of the city, was assessed as owner of lot 63, of which Mary L. Caston was assessed as occupant, in 1891. The learned trial judge came to the conclusion arrived at, as plainly appears by his judgment upon the estimate made by him of the weight and credibility of the evidence, that the respondent had instructed the collector to apply the $75 paid in January, 1892, in the manner the collector had stated, and he gave judgment dismissing the action with costs. From this judgment the respondent appealed to the Divisional Court of Queen's Bench. That court called for some further evidence to admit of proof of some by-laws and some other points, and while it declined to interfere in any respect with the judgment of the learned trial judge upon the question of fact so as aforesaid determined by him, namely that the taxes charged in respect of lot 65, in 1891, were not paid in full as was contended by the plaintiff in the action, still the court was of opinion that the distress made in 1896 for arrears of taxes in 1891 was unauthorised in law and could not be supported, and they therefore reversed the judgment of the learned trial judge and gave judgment for the plaintiff in the action with $100 damages.

Upon an appeal from that judgment by the above appellants to the Court of Appeal in Toronto, that court affirmed the judgment of the Divisional Court of Queen's Bench and dismissed the appeal. The appellants now appeal from that judgment to this court.

It has been held by both courts, and in this, I think, we must concur, whatever the result may be, that the duties prescribed in sec. 135 of ch. 193 R. S. O. 1887, are enacted as the basis and foundation of all subsequent proceedings which are authorised to be taken for the recovery of taxes not paid while the roll remains in the collector's hands unreturned; and that therefore the requirements prescribed in the section are imperative. That section enacts that:

If any of the taxes mentioned in the collector's roll remain unpaid and the collector is not able to collect the same, he shall deliver to the treasurer of his municipality an account of all the taxes remaining due on the roll, and in said account the collector shall *show opposite to each assessment* the reason why he could not collect the same by inserting *in each case* the words, *non resident or not sufficient property to distrain, or instructed by council not to collect* as the case may be, and such collector shall at the *same time furnish the clerk of the municipality with a duplicate* of such account, and the clerk shall upon receiving such account mail a notice to each person appearing on the roll with respect to whose land any taxes appear to be in arrear for that year.

It appeared in evidence that a return was made to the treasurer by the collector of his roll of 1891 professedly with intent to fulfil the obligations of sec. 135. Yet by an extract from the returned roll which, as affecting the lots 63 and 65 on Huntley street, was produced at the trial, it appeared that no entry was made showing what sum, if any, was paid in respect of the said lots respectively, nor of either of them, nor why the respective amounts directed by the roll to be levied in respect of the said lots were not levied, as, if not levied, was required by the section. All that was entered on the returned roll as appeared by the said extract as affecting these lots, was the entry already mentioned set opposite to both of them, "Jan 16, '92, paid on account $75." No duplicate return whatever as was required by the section was furnished by the collector to the clerk of the municipality. It appeared also in evidence that in levying

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the tax by distress the collector could not have had and had not any difficulty, for that the respondent resided upon the lot and had abundance of chattels on the lot for which he was assessed as occupant and owner by distress upon which the taxes due could have been collected.

The effect as it appears to me of this default of the collector in obedience to the requirements of the section was, not merely that notice was not, as indeed it could not have been given by the clerk to the respondent as required by the section (the importance of which notice being given to the respondent in the circumstances of the present case is referred to by Mr Justice Moss, in the Court of Appeal), but the main effect of the collector's default appears to me to be that the treasurer *could not from the collector's return on his roll* say how much of the $75 appearing on the roll to have been paid in respect of both lots, should be applied to each, and could not therefore *from the collector's return* say to which of the lots the sum which the $75 were insufficient to pay could be charged as arrears still due. The return therefore which the treasurer appears to have furnished to the clerk in 1894 containing a list of all the lands in his municipality in respect of which any taxes have been in arrears for three years wherein the sum of $69.27 as set down as due by the respondent for arrears of taxes assessed upon him in the year 1891, as occupant and owner of the said lot 65, could not have been made out *from entries* made on the collector's returned roll of 1891, as required by section 135, but apparently from oral information given by the collector to the treasurer.

In the Court of Appeal for Ontaro, Burton C.J. gives a reason for affirming the judgment of the Divisional Court not expressed in the judgment of that court which proceeds upon the ground that the default of

the collector of 1891 in fulfilling the requirements of section 135 *fatally effects all* future proceedings to enforce payment of arrears, if any there be, of 1891 from the respondent, and confines the remedy of the appellants to a claim against the collector for the injury suffered by his default. In the opinion of the learned Chief Justice of the Court of Appeal the law does not authorise any arrears of taxes of a previous year to be recovered by distress in a subsequent year except in the one case provided for in section 143 of the Act which, as the learned Chief Justice says in his judgment, is only where the "arrears" have accrued while the land in respect of which they have accrued was unoccupied.

If the learned Chief Justice's construction of section 143 is correct it is admitted as beyond dispute that the levy by distress upon respondent's property in 1896 was illegal and cannot be justified.

Now apart from all consideration of any question whether the return of the respondent's name on the list furnished by the treasurer to the clerk in 1894 can be used *for any* purpose affecting the respondent in view of the default as already referred to, of the collector to fulfil the requirements of section 135, let us for the present purpose look upon that return as quite valid. Section 141 requires the clerk to keep the list so furnished to him by the treasurer, and to give a copy of it to the assessor of the next year who is required to ascertain if the lots in such lists are occupied or incorrectly described, and if occupied to notify the occupants and also the owners, if known, whether resident in the municipality or not "that the lands are liable to be sold for arrears of taxes." Then the assessor is required to return the list to the clerk together with his assessment roll of the year and also a memorandum *of any error discovered in the list.* All

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this enactment points to the taking of a step preliminary to a sale of the land for the arrears of taxes.

Now the clerk of the municipality who has charge of all the assessment rolls as returned in each year upon which are entered the names of all occupants of the lands therein assessed and who from these rolls makes out the collector's rolls in each year upon which are entered the names of all occupants as assessed in each year and who by section 135 is furnished with a duplicate of the collector's returned rolls every year would require to do no more than refer to these rolls upon receipt from the treasurer of a list of the lots upon which there is said to be an arrear of taxes for three years for the purpose of seeing whether the lands enumerated on that list are occupied or not, but he would require information otherwise to ascertain whether any of the lands on the list and which upon the rolls in his possession appear to have been assessed as unoccupied have since *become* occupied, and that this is the object for which the clerk is required to place in the hands of the assessors the list of lots in arrear furnished by the treasurer sufficiently appears, as was held by Burton C.J., from section 143 of the Act which enacts that the clerk shall examine the assessment roll when returned by the assessor to ascertain whether the lands on the list furnished by the treasurer are returned on the assessment roll as then occupied, and that he shall forthwith furnish the treasurer with a list of the several parcels which appear on *the resident* roll as *having become* occupied, and the treasurer thereupon, s. s. 2, shall render to the clerk an account of all arrears of taxes due *on such occupied* lands, and by s. s. 3, the clerk of the municipality is directed on making out the collector's roll of the current year to add *such* arrears of taxes to the taxes assessed against *such occupied* lands that is plainly as it appears to me *such*

lands as since the last assessment roll *have become* occupied, in order that the taxes in arrear upon lands assessed as *unoccupied* may be collected by distress if necessary against *the person who has become*, and in the current year is *assessed as the occupant.* The construction put upon this section by Burton C.J. appears to me to be the true one.

The appeal therefore must, I think, be dismissed with costs, and as to the notice given to the appellants by the respondent that upon the argument of the appeal he would ask that the judgment in his favour should be varied by increasing the amount adjudged to him for damages, that application is refused. In view of the grounds upon which the learned trial judge determined the question of the fact as to payment of the tax of 1891, in full, as was insisted by the respondent, we are of opinion that the damages awarded by the Divisional Court judgment gave ample compensation to the respondent.

As the claim of the respondent for an increase of the amount adjudged does not appear to have increased the cost of the appeal it is unnecessary to say anything as to costs upon our refusal of the respondent's application.

Appeal dismissed with costs.

Solicitor for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Caston & Co.*

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*May 17.

*June 12.

L'ASSOCIATION PHARMACEUTIQUE DE QUEBEC (PLAINTIFF).. } APPELLANT;

AND

J. E. LIVERNOIS (DEFENDANT).....RESPONDENT.

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

Appeal—Jurisdiction--Action for penalties—Plea of ultra vires of statute —Judgment on other grounds—R. S. C. c. 135 s. 29 (a).

To an action claiming $325 as penalties for an offence against the Pharmacy Act, the pleas were: 1. General denial. 2. That the Act was *ultra vires*. In the courts below the action was dismissed for want of proof of the alleged offence.

Held, Strong C. J. and Gwynne J. dissenting, that an appeal would lie to the Supreme Court; that if the court should hold that there was error in the judgment which held the offence not proved the respondent would be entitled to a decision on his plea of *ultra vires* and the appeal would therefore lie under sec. 29 (a) of the Supreme Court Act.

MOTION to quash an appeal from a decision of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court by which the action was dismissed.

The grounds for the motion to quash are stated in the above head-note.

Fitzpatrick Q.C., Solicitor General for Canada, for the motion referred to *City of Sherbrooke* v. *McManamy* (1); *Longueuil Navigation Co.* v. *City of Montreal* (2).

Lajoie, contra, cited *Blachford* v. *McBain* (3).

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

(1) 18 Can. S. C. R. 594. (2) 15 Can. S. C. R. 566.
(3) 19 Can. S. C. R. 42.

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The judgment of the majority of the court, TASCHEREAU, SEDGEWICK and GIROUARD JJ. was delivered by:

TASCHEREAU J.—This case comes up on a motion to quash the appeal. The appellant sued the respondent under the "Quebec Pharmacy Act," 53 Vict. c. 46, for $325, amount of certain penalties for keeping open shops for retailing drugs without a license against the provisions of that Act. The respondent fyled a plea of general denial accompanied with a plea that the Act in question was *ultra vires* of the legislature of Quebec. In the Superior Court the action was dismissed for want of proof (1). That judgment was confirmed upon the same grounds by the Court of Appeal, neither court having to pass on the question of *ultra vires*. The appellant now claims the right to appeal to this court from the judgment of the Court of Queen's Bench, on the ground that the matter in controversy involves the question of the validity of the said "Quebec Pharmacy Act."

I am of opinion that the appeal lies. The unconstitutionality of the Act having been pleaded by the respondent, if we should be of opinion that the appellant has proved its case and that there is error, on that point, in the judgment appealed from, the respondent would then have the right to argue the constitutional point before this court, and ask that if the appellant's action be not dismissed for want of proof, as it was in the courts below, it be nevertheless dismissed on the ground that the statute upon which it is based was *ultra vires* of the Quebec legislature. *Longueuil Navigation Co.* v. *City of Montreal* (2). On the part of the respondent, the case of *The City of Sherbrooke* v. *McManamy* (3), has been cited as supporting his contention that the present case is not appealable. But

(1) Q. R. 16, S. C. 536.
(2) 15 Can. S. C. R. 566.
(3) 18 Can. S. C. R. 594.

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Taschereau J.

there the case settled by the judge of the Court of Queen's Bench for the appeal to this court, as I have ascertained by the printed record itself, was confined exclusively to the question whether the by-law there in question was authorized by the statute upon which it assumed to be based. *King* v. *Pinsoneault* (1). Consequently, the constitutional question had been abandoned, and could not under any circumstances be raised before this court. That case is therefore clearly distinguishable from the present one. It must be upon the appeal before this court that the constitutional question is in controversy upon the record to give us jurisdiction. The fact alone that it has been in controversy in the courts below cannot render the case appealable, if that controversy for some reason or another is at an end, and cannot be re-opened before this court. In the case of *City of Sherbrooke* v. *McManamy* (2), it could not. Here it can. *Bennett* v. *Missouri Pacific Railway Co.* (3); *The State of Louisiana* v. *Tsni Ho* (4); *The State, ex rel. Lamarque* v. *Burthe* (5); *City of New Orleans* v. *Hill* (6); *The State of Louisiana* v. *Deffes* (7).

In *Blachford* v. *McBain* (8), the judgment appealed from had dismissed the action upon the ground of want of jurisdiction without passing upon a plea which involved a controversy as to a title to real property, the only ground upon which the case could be brought to this court. This court held that the plaintiff had the right to appeal from that judgment because the controversy as to the title to real property, though not adjudicated upon in the courts below, still appeared upon the pleadings. The fact that we may

(1) L. R. 6 P. C. 245.
(2) 18 Can. S. C. R. 594.
(3) 105 Mo. 642.
(4) 37 La. An. 50.
(5) 39 La. An. 341.
(6) 32 La. An. 1161.
(7) 44 La An. 581.
(7) 19 Can. S. C. R. 42; 20 Can. S. C. R. 269.

have to pass upon a point which the courts below overlooked, or which they had not to pass upon because they disposed of the case on other grounds, cannot affect our jurisdiction.

If the constitutional point is raised by the pleadings it does not lie in the power of the provincial courts to take away the right of appeal to this court by refraining to adjudicate upon it.

The judgment of the dissenting judges, the CHIEF JUSTICE and GWYNNE J., was delivered by :

GWYNNE J.—The appellants sued the defendant for the sum of $325 claimed to be due to the appellants for certain penalties alleged to have been incurred by the defendant in virtue of the provisions of an Act of the Legislature of the Province of Quebec, 53 Vict. c. 46, for retailing, as was alleged, drugs without a license for that purpose. To that action the respondent pleaded, 1st. a plea of general denial, and 2ndly, that the Act in question was *ultra vires* of the Provincial Legislature. The court rendered judgment dismissing the action upon the ground that, without any reference to the plea of *ultra vires*, the plaintiffs failed to prove the acts complained of as having been committed by the defendant in contravention of the Act, thus deciding the action upon the plea of general denial only. Having disposed of the action upon this ground it became wholly unnecessary for the court to adjudicate, and they therefore did not adjudicate, upon the question of *ultra vires*. Upon that question the judgment dismissing the plaintiff's action has no effect whatever. And the question now as it appears to me simply is: Have the appellants a right to appeal from the judgment which dismissed their action on the above grounds, for the purpose of obtaining the judgment of

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Gwynne J.

this court upon the question of *ultra vires* which was not adjudicated upon or necessary to be adjudicated upon for the purpose of supporting the judgment which was pronounced in the action, and by this means open an appeal in respect of the matters upon which the court has adjudicated, which matters *per se* are not appealable? In my opinion the appellants have no such right. From the judgment as rendered there is no appeal. Neither the *Longueuil Navigation Co.* v. *City of Montreal* (1), nor *City of Sherbrooke* v. *McManamy* (2), nor *Blachford* v. *McBain* (3), has any application to the present case. In the two former cases the question of *ultra vires* was adjudicated upon in the court below, and such adjudication was the basis upon which the judgments rested, and in the latter the sole point was whether the facts of the cause of action being within the jurisdiction of the Circuit Court although the action was instituted in the Superior Court, was sufficient cause for depriving the appellant of a right of appeal which otherwise existed.

If this court should now adjudicate upon the question of *ultra vires* upon the record in the present case it would not be acting as a Court of Appeal from a judgment affecting that question, but as a court of first instance. In my opinion the appeal should be quashed with costs.

Motion refused with costs.

Solicitors for the appellant: *Drouin, Pelletier & Belanger.*

Solicitors for the respondent: *Robitaille & Roy.*

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(1) 15 Can. S. C. R. 566. (2) 18 Can. S. C. R. 594.
(3) 19 Can. S. C. R. 42.

PAUL PARADIS (PLAINTIFF).....APPELLANT; 1900

AND *Mar. 7, 8.
*June 12.

THE MUNICIPALITY OF LIMOILOU (DEFENDANT)..... } RESPONDENT.

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

Appeal—Questions of fact..

Where there d es not appear to have been manifest error in the findings of the courts below they will not be disturbed on appeal.

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, at Quebec, and restoring the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was dismissed with costs.

A statement of the case appears in the judgment reported.

Fitzpatrick Q.C. and *Alex. Taschereau* for the appellant.

Belleau Q.C. for the respondent.

The judgment of the court was delivered by :

GIROUARD J.—Cet appel, débarrassé de détails qui servent plutôt à l'embrouiller qu'à l'éclaircir, ne soulève qu'une simple question de faits décidée par deux cours. Il s'agit de savoir si certains travaux faits par l'intimée dans un cours d'eau forment une menace ou un trouble aux droits de l'appellant. La cour de première instance (Routhier J.) après avoir entendu *vivâ*

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

(1) Q. R. 9, Q. B. 18.

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PARADIS v. THE MUNICIPALITY OF LIMOILOU.

Girouard J.

voce les témoins et un expert chargé spécialement de faire certaines constatations, et après que le juge qui présidait fit lui même une descente sur les lieux, jugea qu'il n'y avait pas de menace ni trouble et renvoya l'action de l'appelant avec dépens. La Cour de Revision décida tout le contraire, et puis enfin la Cour d'Appel, à l'unanimité, rétablit le jugement de la Cour Supérieure.

Cette cour a souvent déclaré qu'elle n'interviendrait pas dans de pareilles circonstances, à moins que la preuve ne montre qu'il y a eu erreur évidente de la part des tribunaux inférieurs. Or c'est cette preuve qui manque dans l'espèce, ce que l'honorable Juge Ouimet démontre clairement dans l'appréciation minutieuse qu'il en a faite.

L'appel est donc rejeté avec dépens contre l'appelant.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitzpatrick, Parent, Taschereau & Roy.*

Solicitors for the respondent: *Belleau & Belleau.*

1900

*May 9.

*June 12.

DAVID CRAWFORD (PLAINTIFF).....APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT.....) RESPONDENT.

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

Evidence—Expert opinions—Hearsay—Extra judicial statements—Assessor's reports.

Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements and municipal reports.

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

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CRAWFORD v. THE CITY OF MONTREAL.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Superior Court, District of Montreal, in favour of the plaintiff.

A statement of the case appears in the judgment of His Lordship Mr. Justice Girouard, now reported.

Perron for the appellant.

Atwater Q.C. and *Ethier Q.C.* for the respondent.

The judgment of the court was delivered by :

GIROUARD J.—Il s'agit ici d'une de ces nombreuses poursuites en dommages intentées contre la cité de Montréal par suite de la confusion de sa législation sur l'élargissement de ses rues

En 1895, elle obtient de la législature de Québec l'autorisation de ne pas

exécuter les améliorations dont le coût, à la charge en tout ou en partie de la cité, excèdera les limites du pouvoir d'emprunt, sans préjudice des recours en loi pour les dommages, les pertes et les dépenses encourus réellement par suite de la non-exécution des dites améliorations (1).

Armée de ce pouvoir, la cité abandonna l'élargissement de la rue St. Antoine. De là la présente action de la part d'un propriétaire riverain qui réclame des dommages considérables pour dépréciation de sa propriété, pertes de loyer, etc. La cour de première instance accorda onze mille cinq cent cinquante-neuf dollars de ces deux chefs, savoir : trois mille cinq cent cinquante-neuf dollars pour perte de loyer, et huit mille dollars pour dommages à la propriété. Ce jugement fut infirmé par la Cour d'Appel et l'action déboutée avec dépens, les juges Blanchet et Ouimet dissidents, qui étaient d'avis d'accorder deux mille dollars pour pertes de loyer.

(1) 59 Vict. c. 49 s. 17.

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Girouard J.

Il s'agit donc d'une simple question de faits où les tribunaux inférieurs sont divisés, trois juges contre trois. Nous croyons que les juges dissidents avaient raison, et nous sommes d'avis de maintenir l'action au montant de deux mille sept cent soixante et trois dollars et dix-neuf cents pour pertes de loyer, avec intérêt et les dépens devant toutes les cours, et nous croyons ne pouvoir mieux nous expliquer là-dessus qu'en reproduisant les remarques de M. le juge Blanchet.

Quels sont les dommages, les pertes et les dépenses établis par le présent intimé ?

Il réclame d'abord $4,085, pour pertes de loyer de 1892 à 1897.

Il est établi par les témoins Dugas, Harris, Savage, deMartigny, Manseau, que depuis 1892 la location des propriétés qui devaient être expropriées sur la rue St. Antoine est devenue très difficile, parce que les propriétaires ne pouvaient plus donner de baux à long terme, surtout pour des magasins comme ceux de l'intimé, et que ne voulant pas laisser leurs bâtisses inoccupées, ils étaient forcés d'accepter des locataires à prix réduits et qui très souvent ne les payaient pas. * * * * * * * *

Harris jure positivement qu'en 1892, les loyers des bâtisses de l'intimé s'élevaient à $226.80 par mois et qu'en 1894 et 1895, la diminution des loyers a été de $90 par mois, ce qui pour ces deux années seulement, formerait un montant de $2,184, et ils ajoutent, avec un grand nombre d'autres témoins que cette diminution de loyer a été causée par la perspective alors imminente de l'expropriation que la cité était autorisée à faire.

Mais cet état de chose avait cessé au 1er mai, 1896, car la nouvelle loi était alors en force et l'intimé ne peut rien réclamer de ce chef au delà de cette date, car il a pu alors donner des baux à long terme et faire à ses bâtisses toutes les réparations nécessaires

Le jugement qui lui accorde $3,559 de dommages doit donc être modifié.

En effet il est établi par ses propres témoins que la diminution de ses loyers due à l'expropriation annoncée a été de $36, pour l'année 1893-1894, et de $638.72 pour chacune des années 1894-1895. Ce qui forme une somme totale de $1,313.44.

D'une autre côté, il est aussi constaté que pendant ces trois années, l'intimé a perdu $1,975.75 qu'il n'a pu retirer des locataires pauvres

qu'il avait été obligé d'accepter pour ne pas laisser ses bâtisses inoccupées. * * * * *

Il est vrai que les experts de la cité, Rielle, Resther et Chartrand, se basant sur les chiffres des cotiseurs et sur des rensignements obtenus des locataires, disent que les loyers au lieu de diminuer ont augmenté et qu'ils étaient de $1,730 en 1892 et de $2,030 en 1896, tandis que Dugas et Harris affirment qu'ils ont de fait diminué de $1,313.44 de 1893 à 1896.

Il y a là une contradiction manifeste, mais les experts de la cité ne s'appuient que sur des ouï-dires, le rapport des cotiseurs et des déclarations des locataires, tandis que Dugas et Harris parlent des faits arrivés à leur connaisance et n'avaient en outre aucun intérêt à laisser échapper leurs locataires sans les faire payer si la chose avait été possible et leur témoignage doit en consequence être préféré sur ce point à celui des témoins de la cité.

Pour ces raisons nous sommes d'avis d'accorder le montant total de ces pertes, savoir $1,313.44 et $1,975 75, dont il faut déduire $526 pour les taxes ordinaires de 1895 et 1896 que l'appelant offre de payer, formant une somme totale de $2,763.19, que l'intimée doit payer à l'appelant avec intérêt du jour de la signification de l'action et les dépens.

L'action est donc maintenue pour autant et l'appel accordé avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Archer & Perron.*

Solicitors for the respondent: *Ethier & Archambault.*

1900

*May 10.
*June 12.

SARAH McFARRAN (PLAINTIFF).....APPELLANT;

AND

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (DEFENDANT) .....RESPONDENT.

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

Married woman—Community—Personal injuries—Right of action—Pleading—Exception à la forme—Arts. 14, 116, 119 *C. C. P. (Old Text.) Appeal—Questions of procedure.*

The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband.

Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by *exception à la forme.* Absolute want of legal right of action may be invoked by a defendant at any stage of a suit.

Judgment of the Court of Queen's Bench, 3 Q. P. R. 1, over-ruled on the *motifs*, but affirmed in its result.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), affirming the judgment of the Court of Review at Montreal (2) which reversed the judgment entered in the Superior Court, District of Montreal, upon a verdict in favour of the plaintiff, and dismissed the action.

The plaintiff, a married woman, brought the action for the recovery of damages suffered by her through bodily injuries caused by a collision which was alleged to have occurred in consequence of the defend-

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

(1) 3 Q. P. R. 1. (2) 2 Q. P. R. 14.

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ant's negligence. Her husband was made a party to the action for the purpose only of authorizing her to sue. The defence raised no question as to the plaintiff's right of action and upon verdict by the jury judgment was entered in her favour in the Superior Court. The defendant then inscribed the cause for revision, and, for the first time, raised the question that the right of action belonged to the husband alone and could not be exercised by his wife even with his authorization. The Court of Review, on this ground, reversed the judgment of the Superior Court, set aside the verdict and dismissed the action with costs.

On appeal, the Court of Queen's Bench was of opinion that, by pleading to the merits without contesting the plaintiff's right of action, the defendant had waived the right to invoke that ground, but held, (Hall J. dissenting), that the action had been properly dismissed on the merits.

Macmaster Q C. and *F. S. Maclennan Q.C.* for the appellant. Decisions of provisional courts on questions of procedure should not be interfered with on an appeal to this court; *Ferrier* v. *Trepannier* (1). It was too late by the inscription in review to raise questions as to form of action. The judgment now appealed from holds that the defendant could not raise that question after verdict and judgment. *Gladwin* v. *Cummings* (2); *Dawson* v. *Union Bank* (3); *Mayor of Montreal* v. *Brown* (4); *Boston* v. *Lelièvre* (5). All informalities and nullities in the writ of service are expressly waived by the appearance of the defendant and failure to take advantage of them; Art. 119 C C. P. *Exception à la forme* was compulsory; Arts. 116-119 C. C. P.

(1) 24 Can. S. C. R. 86.
(2) Cass. Dig. (2 ed.) 427.
(3) Cass. Dig. (2 ed.) 429.
(4) 2 App. Cas. 184.
(5) L. R. 3 P. C. 157.

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Art. 1298 C. C. does not vest the husband with the exclusive power to exercise the wife's rights of action; it is permissive. He may "stand by" and allow his wife to exercise them with his assent or with the authorization of a judge. She is not ousted of the right of action merely because her husband *may exercise* it. When both join there can be no question. Art 1272 C. C. does not include unrecovered damages for personal injuries, but only property reduced into possession. A married woman authorised by her husband may sue for damages for personal wrongs, see *Waldron* v. *White* (1), followed in *Simmons* v. *Elliott* (2); *Turcotte* v. *Nolet* (3); *Brisbois* v. *Simard* (4). See also *Ruckwart* v. *Bazin* (5); *Charest* v. *Tessier* (6); *Bonneau* v. *Laterreur* (7), and Art. 1292 C. C.

Many of the commentators and leading cases in France support this contention; Coutume d'Orléans, Art. 200; Pothier, Puissance du Mari, no. 6; 1 Baudry-Lacantinerie, Cont. de Mar. p. 564, no. 734 p. 567; Dal. '58, 2, 114; 86, 2, 38; '96, 2, 91; '98, 1, 121; S. V. '87, 2, 67.

Stuart Q.C. and *Francis McLennan* for the respondent. The right of action alleged belongs to the husband, and under the *regime de la communauté* can be exercised by him alone. This defect is apparent upon the face of the summons and declaration and need not be pleaded by *exception à la forme*; it can be invoked at any stage of the proceedings without special pleadings. Arts. 387, 1272, 1292, 1298 C. C.; Pothier, Com. nos. 72, 77, 497; 1 Guillouard, no. 363; Dal. Rep. vo. Con. de Mar. nos. 583, 596, Supp. nos. 194, 196, 200, 202. The husband alone can bring an

(1) M. L. R. 3 Q. B. 375.
(2) M. L. R. 5 S. C. 182, and 6 Q. B. 368.
(3) Q. R. 4 S. C. 438.
(4) Q. R. 6 S. C. 381.
(5) 19 R. L. 655.
(6) Q. R. 8 Q. B. 500.
(7) 1 Q. L. R. 351.

action for and on behalf of the community, the wife cannot do so; C. C. 1292; C. N. 1421; Pand. Fr. vo. Mariage, nos. 5516 to 5520; Pand. Fr. Rec. '97, 1, 382; Dal. Rep. vo. Con. de Mar. nos. 1111, 1120, 1124; *Cooper* v. *Cappel* (1).

The want of right of action has been properly raised without special pleadings and there can be no waiver; the proceedings are null. *Forbes* v. *Atkinson* (2). The defect is not a mere informality within Art. 116 C. C. P., nor is it of the class of objections generally raised by preliminary exception; *Coté* v. *Coté* (3); *Thivierge* v. *Les Curé, &c., de St. Vincent de Paul* (4). The effect of the plaintiff's description is to deprive her of any right to her conclusions, a ground for a demurrer, or motion in arrest of judgment (Art. 431), or for judgment *non obstante veredicto* (Art. 433), to be urged before the Court of Review under the old procedure, but now the trial judge *must* enter up judgment in accordance with the verdict (Art. 491), and such an objection is heard for the first time in the the Court of Review. Arts. 492 to 508 C. P. Q.

The judgment of the court was delivered by:

TASCHEREAU J.—The appellant is a married woman, *commune en biens*, who brought this action for bodily injuries caused to her by the respondent, her husband being joined by the writ for the purpose of authorising her therein. The Court of Review (Taschereau, Gill and Doherty JJ.) dismissed her action on the ground that:

Considérant que sous le régime de la communauté l'action en dommages-intérêts à raison d'un délit ou d'un quasi délit, dont la femme est victime, est une action mobilière, et que la créance née du fait délictueux ou quasi-délictueux, tombe dans la communauté;

(1) 29 La. An. 213.
(2) Stu. K. B. 106, note.
(3) 1 Q. P. R. 297.
(4) 1 Q. P. R. 378.

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qu'en conséquence la femme, même autorisée du mari, ne peut exercer cette action qui appartient au mari seul, et qui doit être portée en son nom comme chef de la communauté.

The Court of Appeal concurred with the Court of Review upon that point, but held that as the defendant had not taken the objection to the appellant's right of action by exception to the form, it could not avail itself of it. They, however, dismissed the action on the facts of the case, holding that the respondent was not guilty of negligence.

We are of opinion that the plaintiff's appeal from that judgment should be dismissed upon the ground that she had, as *commune en biens*, no right of action, and that the defendant was not obliged to plead it by exception to the form.

Upon the first point, that a married woman, *commune en biens*, has no right to such an action even with the authorization of her husband, it is not necessary, as we adopt without reserve the ruling of the two courts below thereupon, to cite any authorities. Decisions to the contrary may be found, but "*on cite de pareils arrêts comme on signale des écueils.* They are illustrations of the saying "*toutes les erreurs peuvent trouver des arrêts et tous les paradoxes des autorités.*"

An attempt has been made to distinguish between an ordinary debt and the damages resulting from a tort on the ground that the former exists before the judgment, and the latter are created by the judgment. But that is a fallacy which has received no countenance in the courts below, and rightly so. The amount of the sum due for a tort under Art. 1053 C. C. is only established by the judgment, but the liability for it exists from the date of the act that caused it; so much so, that it is from that date that the prescription runs. It is a debt due from the date of the tortious act. Then, even if it were the judg-

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McFARRAN v. THE MONTREAL PARK AND ISLAND RAILWAY COMPANY.

Taschereau J.

ment that created the debt for a tort, yet the action to have that debt determined would belong to the husband.

On the point of pleading we are of opinion with the Court of Review, that if, on the face of the writ and of the declaration, it appears that the plaintiff has no right of action, it is not necessary for the defendant to plead it by exception to the form. An absolute want of legal right to the action may be invoked by the defendant at any stage of a cause. The female plaintiff sues for a debt which, upon her own allegations, appears to be due to another. That cannot be called an informality, and Arts. 14, 116 and 119 of the old Code of Procedure referred to in the formal judgment of the Court of Appeal have no application. Her action could not be maintained even if the defendant had not appeared.

I need hardly say that this is not, as contended for by the appellant, one of these questions of procedure upon which this court does not as a general rule interfere with the rulings of the provincial courts. It is a pure question of law.

The appeal is dismissed with costs in the Court of Review, the Court of Appeal and in this court against the appellant; each party paying his own costs in the Superior Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Macmaster, Maclennan & Hickson.*

Solicitors for the respondent: *Hatton & McLennan.*

1900
*May 14,15.
June 12.

ROBERT ANDERSON ALLAN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

HARRIET ELIZABETH EVANS *et vir* (PLAINTIFFS)..... } RESPONDENTS.

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

Will—Codicil—Testamentary succession—"Heir"—Universal legatee—Arts. 596, 597, 831, 864, 840 *C.C.*—14 *Geo. III., c.* 83 *s.* 10 (*Imp.*)—41 *Geo. III., c.* 4 (*L. C.*)

R. A. who died in Montreal in 1896 had, by his will made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1895 leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A. and made a codicil to his own will in the terms following:

"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A. * * * my will and desire is that her said share of said residue shall go to her heirs."

Held, Gwynne and Girouard JJ. dissenting, that under the provisions of the Civil Code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will.

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

The questions at issue on the appeal are stated in the judgment of the court by His Lordship Mr. Justice Taschereau. The action was brought by the representative of a child of the late Margaret Anderson who was not appointed a legatee under her will to recover

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

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a share of her estate, claimed as having passed to her natural heirs, and to compel an account of the administration by the defendants.

The trial court ordered judgment to be entered in favour of the plaintiffs and on appeal this judgment was affirmed by the Court of Queen's Bench, Sir Alexandre Lacoste C.J. and Bossé J. dissenting.

Chase-Casgrain Q.C. and *Fitzpatrick Q.C.* for the appellants, (*Travers Lewis* with them). When the late Robert Anderson read his deceased sister's will he made his codicil and used the words "his heirs" to designate the particular persons who had become seized of her succession as universal legatees. The word "heir" in the law of the Province of Quebec has a distinct technical meaning which differs from that of the English law and even of the French modern law. Arts. 597, 606, 840, 891 C.C.; Rolland de Villargues, vo. *Héritier*, nos. 2, 3; 8 Pothier, *Successions* (1); Rogron, Civil Code p. 610; 32 Merlin, Rep. vo. "Substit. Fidéicom." sec. viii., n. v., p. 152 *et seq.*; *Théoret* v. *Chaurette* (2); Dalloz, Rep. vo. *Héritier*, Merlin, Rep. vo. *Héritier*, sec. I.; Ferrière, *Coutume de Paris* (3).

Béique Q.C. and *Cruikshank Q.C.* for the respondents. The definition in Art. 597 C. C. has no application in the construction of the codicil but is merely explanatory of the expression "heirs" when used in the Code. The intention of the testator must be gathered from what is said in the instrument itself, and the word is used there in its ordinary grammatical sense. The dispute here is not as to Margaret Anderson's estate but as to a portion of the estate of Robert Anderson disposed of in the codicil by giving it to the children, the natural heirs, of his sister, with-

(1) Vol. 8 [ed. Bugnet], p. 1. (2) 3 Rev. de Jur. 182.
(3) [ed. 1714] col. 382.

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out any reference to any testamentary dispositions she may have made in regard to her own property. He selected his own beneficiaries and expressed his choice by an ordinary well understood expression.

The admission of evidence of extrinsic circumstances, such as knowledge of the terms of his sister's will, is illegal and cannot, in any case, influence the interpretation of the codicil. Jarman on Wills (5 ed.) pp. 379 *et seq.*, 1654 and Rule viii.; *De Salaberry* v. *Faribault* (1), and authorities there cited; Art. 1234 C C.; *Grey* v. *Pearson*, (2). The interpretation of a will is more the meaning of language than of law. In the construction of wills the law favours heirs-at-law who cannot be disinherited by conjecture but only by express words and necessary implications. According to the French and English jurisprudence, the word "heir" is never construed to mean legatee. *Dieu seul peut faire un héritier l'homme ne le peut.* 8 Laurent, nn. 469, 478, 479, 480.

We also refer to the remarks of Mr. Justice Hall in the court below and the following authorities cited by him: 8 Pothier (ed. Bugnet) "*Successions*," p. 27; 2 Mourlon, Droit Civil, (8 ed.), n. 836 p. 443; *Clark* v. *Cordis* (3); *Re Newton's Trusts* (4).

The judgment of the court was delivered by:

TASCHEREAU J.—By his will dated the 20th December, 1890, Robert Anderson bequeathed to his sister Margaret Anderson and her heirs one-fourth of his residuary estate. The said Margaret Anderson died on the 19th of June, 1895, leaving a will, dated the 9th of February preceding, by which she had appointed her five surviving children her universal legatees.

(1) 11 R. L. 621.
(2) 6 H. L. Cas. 61.
(3) 4 Allen (Mass.) 466.
(4) L. R. 4 Eq. 171.

On the 17th of July following, Robert Anderson, after having taken communication of his deceased sister's will, made a codicil in the following terms:

With respect to the share of the residue of my property, which I bequeathed by my will to my sister, the late Margaret Anderson, widow of the late John Allan, now deceased, my will and desire is that her said share of the said residue shall go to her heirs.

He died in March, 1896.

Whom did the testator mean by the aforesaid words "her heirs" in that codicil, is the question in controversy. Are these words to be construed as meaning exclusively Margaret's testamentary heirs, as contended for by the appellants, or as meaning all her heirs-at-law, as contended for by the respondents?

Under the Civil Code of the province it is, when there is a will, the person to whom the testamentary succession devolves, the universal legatee, if the testator has appointed one, that is called the heir, and is, in law, the only heir of the deceased. Art. 597 C. C. So that her universal legatees, and they alone, are in law the heirs of Margaret Anderson. Art. 864 C. C. No one else can be called her heir.

It cannot be said that one who does not, and cannot inherit is an heir, though, but for a will, he would have been one. He is disinherited. The testator has taken away from him, as he had the right to do, the very name of heir that he otherwise would have been entitled to. Such is the consequence of the unrestricted freedom of disposing by will given by the Acts, 14 Geo. III. c. 83 (Imp.), and 41 Geo. III. c. 4 (Lower Canada), re-enacted by Article 831 of the Civil Code.

Under the *droit coutumier* no other heir was known to the law but the natural or legitimate heir, and the word "succession" applied more correctly to intestate successions, successions conferred by the law. But under the express terms of Article 596 of the Code, the word,

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in the Province of Quebec, now means a transmission by a will as well as a transmission by the law. And when there is a transmission by a will of the whole of the estate of the deceased, there is no transmission by the law; consequently, there is no heir but the one made such by the will. The universal legatee is the appointed heir, the *héritier institué*. Merlin, Rep. vo. *Légataire*, sec. 1, n. 3, and vo. *Instit. d'hér.*, sec. 1, n. 2. Consequently, the words "her heirs" in Robert Anderson's codicil must be applied exclusively to Margaret's testamentary heirs.

The respondent's contention that when Robert Anderson made the bequest in question to his sister's heirs, he intended some one else than her testamentary heirs, imports the irrational consequence that he intended a person or some persons that had no possible existence, and could never have any. They would have us read it as made not to his sister's heirs but to those who would have been her heirs had she died intestate. We cannot do it. Her will must be read as if it said in express terms "I appoint John, Robert * * * my heirs." It says nothing else though in different words The words "heir" and "universal legatee" are synonymous expressions. Art. 840 C. C.; 6 Huc, p. 404.

Nothing whatsoever of Margaret Anderson's estate passed to the respondents. In her testamentary heirs alone vested the right to the action *petitio hereditatis* to revendicate it had it been in the possession of anyone else at her death. Merlin, Rep. v. *Hérédité*. They alone were then seized of all her rights and of all her property, real and personal. Art. 891 C. C. They alone are liable for her debts and obligations.

Under the *Coutume de Paris*, as at one time in force in the province, it was the heir-at-law who was liable for the debts of the testator even in the case of a will

appointing a universal legatee, saving his recourse against the latter for his share. That was the consequence of a system under which a universal legatee was not, and could not be, a legatee of the whole estate, the testator not being allowed to dispose of the *reserves* nor of the *légitime*; the *droit coutumier* then provided for the heirs-at-law, from whom the universal legatee had to get delivery, because said Pothier:

The universal legatee is not the heir; in this, the universal legacy differs from the appointment of an heir. Pothier, Donats. Test. vol. 6, p. 318.

In the Province of Quebec this difference has disappeared, and the universal legatee is now the heir, and the only heir. As under the Roman law, testamentary heredity and legitimate or natural heredity are incompatible. A testamentary heredity excludes the legitimate heredity. Simmonet, de la Saisine Héréditaire 13, 145.

It is undoubtedly true, as argued at Bar on the part of the respondents, that the heir-at-law has the right to contest the validity of the will, and, if he succeeds, he then is the heir. But he is the heir because there is then no will, because there is then no testamentary heir.

The question here, of course, is not what the word "heir" means generally, or what it means in the Code, but what it means upon the true construction of this codicil, what the testator's intention was in using it. But it being an incontrovertible proposition that under the Code when there is a will appointing an heir, he is, in law, the only one who can be called heir, or who can assume that title, the onus was upon the respondents to establish beyond all doubt their contention that, in this codicil, the testator used it in a different sense. For it is a universally admitted rule in the construction of wills that when the law has

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affixed a certain meaning to an expression of this nature, that meaning must be given to it, unless the testator excluded beyond all doubt such construction. *Towns* v. *Wentworth* (1); *De Beauvoir* v. *De Beauvoir* (2); *Dorin* v. *Dorin* (3).

In considering the will before us * * * (said the court in the case of *The Royal Institution* v. *Desrivières* (4), in words that apply here) we are upon every fair principle led to adopt the legal import of the words therein used.

The principle of the English jurisprudence invoked by the respondents, that the law favours the heir-at-law, clearly has no application under a system that denies the very existence of an heir-at-law when there is a testamentary heir. Even the expression of the Code and of all the commentators of the French law, "testamentary heir" is unknown to the English law. The *droit coutumier* also favoured the heir-at-law, but as the court said in *The Royal Institution* v. *Desrivières* (4),

the consideration for and favour shewn to the *heritier du sang*, by the ancient law, has ceased to prevail

in the province.

The appellants' contention receives strong support from the case of *Herse* v. *Dufaux* (5), in the Privy Council (not cited at Bar) where their Lordships said upon the construction to be put upon that very same word in the Province of Quebec.

The contention of the appellants is that the term "*autres hèritiers*" imports certain *personæ designatæ*, viz., the legal heirs of the donor. * * It may be taken for granted that the term "*les autres héritiers*" if found in a French instrument would necessarily import *the legal heirs*. * * But it is to be observed that, owing probably in a great measure to the fact that the statute law of Lower Canada has engrafted on the old French law an unlimited power of disposition by will, the

(1) 11 Moo. P. C. 526.
(2) 3 H. L. Cas. 524.
(3) L. R. 7 H. L. 568.
(4) Stu. K. B. 224.n
(5) L. R. 4 P. C. 468.

word "*héritiers*" has there acquired a signification wider than and differing from that it would obtain in France.

And their Lordships, citing Article 597 of the Code, held that the word *heirs* in that case meant the testamentary heirs, and that it was competent to the testator there in question to deprive his grandchildren of the character of "heirs-at-law" that they would have been entitled to in the absence of a will.

The respondents' contentions imply that Article 318 of the *Coutume de Paris:*

Le mort saisit le vif son hoir plus proche et habile à lui succéder

is still the law of the Province of Quebec. Now that is not so when there is a will disposing of the whole succession, or more correctly speaking, the *hoir* in such a case, the *hoir saisi*, is the heir appointed by the will, the *héritier institué*. This was, at one time, a controverted question, but it has been authoritatively settled by the case of *Blanchet* v. *Blanchet* (1), and since by Article 891 of the Code. *Webb* v. *Hall* (2); *King* v. *Tunstall* (3); Art. 831 C. C. The rule "the appointment of an heir is forbidden" (*institution d'héritier n'a pas lieu*) is now superseded. The provincial law in the matter is assimilated to the law of the *pays de droit écrit*, where the rule was, not as under the *coutumes* that *Dieu seul peut faire des héritiers*, but that it is the will of man that makes an heir, the law only intervening by way of exception in default of a will. Merlin, Rep. vo. *Héritier*, vol. v., p. 630; Ferrière, Dict. de Dr. vo. *Héritier*; 13 Demol. no. 80; 8 Laurent, nos. 477 et seq.; 5 Toullier, 486; *The Royal Institution* v. *Desrivières* (4), confirmed in the Privy Council in May, 1828.

The respondents' argument based upon the terminology of the Code and the fact that in many of its

(1) 11 L. C. R. 204.
(2) 15 L. C. R. 172.
(3) L. R. 6 P. C. 55.
(4) Stu. K. B. 224.

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enactments the word "heir" means the heir-at-law does not help their contentions. Of course, where as in the chapter on successions for instance, intestate successions alone are in question, the word "heir" applies exclusively to the heir-at-law. In the chapter on wills likewise, when a distinction has to be made between a legatee and an heir-at-law, the word "heir" applies and could then apply only to the heir-at-law. But when no such distinction is necessary to render the enactment intelligible, the word "heir" applies, as the context requires, as well to the testamentary heir as to the heir-at-law. Then Article 597 already referred to, when it decrees in so many words that he who inherits under a will is called "heir" is by itself alone a complete answer to the respondents' argument on that ground.

The respondents further contended that in ordinary language the word "heir" means "heir-at-law." No doubt that is so in England, and also in France, where the old rules of the *droit coutumier* on the subject have been in a great measure incorporated in the Code Napoleon. In the Province of Quebec, likewise, when speaking of an intestate succession, the word "heir" has that same meaning. But when speaking of the succession of any one who has bequeathed his estate to a universal legatee, the word "heir" in plain language means that legatee, the person made heir by the will of the testator.

If Robert Anderson on the day he made his codicil had been asked who were his deceased sister's heirs he would have answered that she had left John, Robert * * * as her heirs, that she had appointed them her heirs. The word "heir" in popular language is used as a word of succession, and, under a system and in a country where testamentary successions are the rule, and legitimate successions or suc-

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cessions conferred by law the exception, when used in relation to the succession of any one who by his will has appointed an heir, it means the testamentary heir. *Herse* v. *Dufaux* (1).

Considerable stress was laid by the respondents upon the terms of certain parts of the will of Robert Anderson, in which it may be that the word "heir" means "heir-at-law"; but in my view of the case the terms of the codicil are so clear, so free from doubt, that not to adhere strictly to what they say would be assuming the risk of making a bequest for the testator. It was for the very purpose of ascertaining whom Margaret Anderson had appointed her heirs that he asked to have communication of her will before making this codicil. He then knew that her only heirs were her universal legatees, and when he subsequently made a bequest to "her heirs" he must be taken to have meant what he said.

Moreover, if in his will, Robert Anderson by the word "and to her heirs" meant his sister's heirs-at-law, it does not follow that when he made this codicil after her death, and because of her death, he meant to use the same words in the same sense. Quite the contrary. He made this codicil purposely, it is evident, not to leave anything of her share but to those whom she herself had since appointed her heirs, so that it should pass as it would have passed under her will had he died before her. He clearly intended to alter the bequest that he had made by his will to her heirs-at-law, as he altered by another clause of this same codicil the bequest he had made by the 39th clause of his will to his cousin Watson's heirs-at-law.

It was further argued on behalf of the respondents that Robert Anderson could not have meant the same persons in the first and third clauses of this codicil

(1) L. R. 4 P. C. 468.

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because he merely used the words "her heirs," heirs of Margaret, in the first clause, whilst in the third clause he mentioned the names of those to whom he bequeathed the lapsed share of his cousin Watson, though they are Margaret's only testamentary heirs. I do not see much weight in that argument. It certainly was not absolutely necessary so to describe them nominatively in the third clause, but he did so, it would appear, because they were not the heirs of Watson whose lapsed legacy he by this third clause desired to provide for as he had done for Margaret's share by the first clause. He could hardly have been expected in a bequest to them by a separate clause of Watson's share to describe them as Margaret's heirs. No doubt he might have made both bequests by one and the same clause. But the fact that he did not do it does not, under the circumstances, at all tend to prove that the two bequests were not intended for the same parties. In the will, each bequest is in a separate clause, and the codicil follows that course.

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

I deliberately refrain from referring to the English authorities quoted by the parties. Upon a branch of the provincial law so completely at variance with the English law as this one is, they could not, it is obvious, but mislead, though I am quite sure they were not quoted with the intention of misleading. The case is governed exclusively by the Civil Code of the province wherein the law which obtains on the subject is to be looked for. *McGibbon* v. *Abbott* (1); *Herse* v. *Dufaux* (2). And not only must also the French Code and its commentators be read with caution as the differences between it and the Quebec Code in the matter are very great, but in any reference to the *droit coutumier*

(1) 10 App. Cas. 653. (2) L. R. 4 P. C. 468.

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itself, the changes introduced in the province by the statutes of 1774 and 1801 have to be constantly kept in mind.

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GWYNNE J. (dissenting).—The only question in this case is as to the construction to be put upon the word "heirs" as used in a codicil to the will of the late Robert Anderson which is in the words following:

With respect to the share of the residue of my property which I bequeathed by my will to my sister the late Margaret Anderson widow of the late John Allan, now deceased, my will and desire is that her said share of the said residue shall go to her heirs.

During the argument before us an emphatic opinion was expressed from the court that the rule governing the case is that the word "heirs" as here used must be construed in its ordinary and natural sense unless there be something in the will or codicil, the former of which contained 45, and the latter 4 clauses, which shews the intention of the testator to have been to use the word in a special, limited, peculiar sense.

I so thoroughly agree with the judgment delivered by Mr. Justice Hall, in the Court of Appeal, which in my opinion has in a most exhaustive manner treated the subject that I only think it necessary to add, with great deference, that in my opinion any other conclusion than that which that learned Judge has arrived at would operate as a distortion of the rule governing the case, which is that the intention of the testator to use the word in the special sense contended for by the appellants must be found in the instrument itself, that is to say in the will and codicil thereto, in which the word is used.

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

GIROUARD J. (dissenting).—The question is not whether testamentary heirs exclude heirs at law; it is

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whether or not the respondents are sole testamentary heirs, and I have no hesitation in saying that they are not. The late Mr. Robert Anderson did not declare that they were, and the will of his sister Margaret is insufficient to make them so. The testator simply provided in his codicil that her share should go to her "heirs," which in law and in common parlance, and within the terms of his will, means all her "children" or natural heirs. I entirely concur in the opinion of Mr. Justice Hall.

Appeal allowed with costs.

Solicitors for the appellants: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitor for the respondents: *W. G. Cruikshank.*

THOMAS GEORGE BRIGHAM (DEFENDANT)..... APPELLANT;

AND

LA BANQUE JACQUES-CARTIER (PLAINTIFF)..... RESPONDENT.

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*Mar. 5.
June 12.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW, AT MONTREAL.

Assignment for benefit of creditors—Fraudulent preference—Bribery—Promissory note—Illegal consideration—Nullity—Costs.

A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business.

A promissory note given to secure the amount of the preference payable under such an arrangement is wholly void.

An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Montreal, affirming a judgment of the Superior Court, District of Ottawa (1), maintaining the plaintiff's action with costs.

The questions at issue upon this appeal and a statement of the case will be found in the judgments reported.

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

(1) Q. R. 16 S. C. 113.

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Aylen Q.C. for the appellant. The transaction which served as consideration for the notes sued on is prohibited by the policy of the law providing for equal distribution of assets amongst an insolvent's creditors and contrary to good morals and public order. *Ex dolo malo non oritur actio.* Arts. 789, 990 C. C. *Greene* v. *Tobin* (1); *Birch* v. *Jervis* (2), per Tenterden C.J.; *Hall* v. *Dyson* (3); *Nerot* v. *Wallace* (4); *Gastonguay* v. *Savoie* (5); *Arpin* v. *Poulin* (6); *Martin* v. *Poulin* (7); *Leclaire* v. *Casgrain* (8); *Ross* v. *Paul* (9); *Garneau* v. *Larivière* (10); *McDonald* v. *Senez* (11); *Bury* v. *Nowell* (12); *Howland Sons & Co.* v. *Grant* (13); 16 Laurent, n. 157; Lyon-Caen & Renault, (2 ed.) Faillites, nos. 965, 968 & 968, *bis;* Code de Commerce. Arts. 596, 597, 598; 3 Bédarride, Dr. Com., Faillites, nos. 1285, 1286, 1287 & 1292; 31 Demolombe, nos. 431, 433, 434.

Foran Q.C. and *Lajoie* for the respondent. The transaction was merely a sale by the bank of its claim against the insolvent estate and, after being duly approved by the judge's order, the transfer was made accordingly. Subsequently, to simplify matters, the appellant consented to the respondent receiving from George C. Wright, on account of his promissory note, the 30 cents in the dollar, which the latter had undertaken to pay, and credit was given in the usual manner Arts. 1715, 1716 C. C.; 28 Laurent, n. 50; Troplong, Mandat, nn. 519, 522, 535, 597. The bank had full liberty to sell the debt; *Fry* v. *Malcolm* (14); *Four*

(1) Q. R. 1 S. C. 377.
(2) 3 C. & P. 379.
(3) 16 Jur. 270; 21 L. J. Q. B. 224.
(4) 3 T. R. 17.
(5) 29 Can. S. C. R. 613.
(6) 22 L. C. Jur. 331.
(7) 4 Legal News 20; 1 Dor. Q. B. 75.
(8) M. L. R. 3 S. C. 355.
(9) M. L. R. 3 Q. B. 299.
(10) Q. R. 1 S. C. 491.
(11) 21 L. C. Jur. 290.
(12) Q. R. 10 S. C. 537.
(13) 26 Can. S. C. R. 372.
(14) 5 Taunt 117.

v. *Tardy* (1). See also S. V. '38-1-461; S. V. '74-1-127; and *Beausoleil* v. *Normand* (2). As there is no legislative prohibition nor an Insolvent Act whereby the majority of creditors could bind the remainder to conditions of composition and discharge, nothing, as between debtor and creditor, could invalidate an agreement by the debtor undertaking to pay such creditor more than the amount of the composition and a promissory note given for such excess is valid. *Racine* v. *Champoux* (3); *Lamalice* v. *Ethier* (4); *Tees* v. *McArthur* (5); *Collins* v. *Baril* (6); *Chapleau* v. *Lemay* (7), and authorities there cited.

In this instance, four inspectors advocated the transfer before the agreement was made and it did not affect the assets of the insolvents. The appellant's relationship to the insolvents and George C. Wright was sufficient consideration for the note. The appellant cannot invoke his own fraud and perfidy. *Nemo potest invocare turpitudinem suam.* See Benjamin on Sales, no. 513 (*a*), 16 Laurent, no. 109; Dal. Rep. vo. "Oblig." no. 115; *Dussol* v. *Benoit* (8); *Mahieu* v. *Blum* (9); Merlin Quest. de Dr. vo. "Atermoiement" pp. 278, 279; Sirey & Gilbert, Code de Commerce, Arts. 597, 598.

THE CHIEF JUSTICE.—In my opinion the judgment appealed from is erroneous and must be reversed. The depositions disclose uncontradicted facts which shew that the promissory note, the balance of which is sought to be recovered in this action, was given for the purpose of carrying out what amounted to a fraud

(1) S. V. '55-1-357.
(2) 9 Can. S. C. R. 711.
(3) M. L. R. 6 S. C. 478.
(4) Q. R. 1 S. C. 377 note.
(5) 35 L. C. Jur. 33.
(6) Q. R. 1 S. C. 377; Q. R. 4 S. C. 192.
(7) 14 R. L. 198.
(8) Dal. 1890-2-256.
(9) Dal. 1890-1-303.

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on the creditors of the insolvent firm of C. B. Wright & Sons, other than the respondent.

The facts are not complicated and may be concisely stated as follows: The firm of C. B. Wright & Sons having abandoned their property for the benefit of their creditors under the provisions of the Code of Civil Procedure relating to cessions of property contained in Articles 853 to 892 inclusively, the defendant, Thomas George Brigham, Mr. Anderson of the Union Bank, Mr. Hector McRae, Mr. Campbell and Mr. de Martigny, the general manager of the respondent's bank, were appointed inspectors of the estate, and Mr. Hyde was named as curator. Of the five inspectors, three were creditors in their own right, and the other two, Mr. Anderson and Mr. de Martigny, were the officers and representatives of banks which were large creditors. George C. Wright, a son of one and a brother of the other partner in the insolvent firm, proposed to purchase the assets for an amount sufficient to pay privileged creditors in full, and the unprivileged creditors a dividend of thirty cents in the dollar on the amount of their debts.

This proposition having been submitted to the inspectors, it was, on the 8th of November, 1894, at a meeting of those persons, accepted by all but de Martigny, the respondent's general manager, who expressly dissented from the resolution in which the approval of the offer by the other inspectors was recorded. Subsequently, by a secret arrangement between George C. Wright and Mr. de Martigny, acting on behalf of the respondent bank, it was agreed that the respondent should be paid ten cents in the dollar more than the other creditors, that is to say, forty per cent of their debt, and that, in consideration of this arrangement which was to be kept secret from the other creditors, and also in consideration of $150 to be paid to Mr. de Martigny

for his own personal use, he (de Martigny), should withdraw his objection as one of the inspectors, and the Banque Jacques-Cartier should accept the forty cents in satisfaction of their interest in the assets. This arrangement, as far as regards the acceptance of the forty cents, was assented to by the directors of the respondent bank.

Mr. de Martigny having refused to accept the note of George C. Wright for the additional ten per cent to be paid to the bank, the latter having no other means of paying the excess over the thirty per cent, applied to the present appellant, who was his brother-in-law, to secure the payment of the additional amount to de Martigny's satisfaction, and also to pay de Martigny the $150 he was to receive as a bonus for his services in the matter.

In order to carry out this arrangement a meeting was held on the 27th of November, 1894, at the office of the solicitor of the bank in Hull, where there appears to have been present besides Mr. McDougall (the solicitor and a mis-en-cause in the present action), Mr. de Martigny, George C. Wright and the appellant. The latter then signed, a promissory note for the sum of $7,676.45, being forty per cent of the full amount of the respondent's claim against the estate according to the divident sheet settled by the curator, also a cheque purporting to be drawn by the appellant on the Quebec Bank of Ottawa in favour of Mr. de Martigny for $150.

These securities having been placed in the hands of Mr. McDougall, and Mr. de Martigny having also deposited with him all the notes and securities held by the bank for their debt to be delivered up to the respondent on payment of the respondent's claim as well as of the cheque, a memorandum signed by Mr. McDougall, as trustee, which is set forth in the decla-

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ration, was drawn up and signed by him whereby the arrangement with Mr. de Martigny was described as a sale by the bank of its debt and claim to the appellant, and whereby it was agreed that the documents mentioned as having been signed by the appellant should be held by Mr. McDougall as a trustee until the sale of the estate to George C Wright, and the transfer in pursuance of such sale should be completed by payment of the purchase money.

On the same day, Mr. Justice Malhiot, a judge of the Superior Court, authorised the proposed sale of the estate to George C. Wright at the price mentioned in the letter of the latter to the curator, dated 30th October, 1894, therein referred to, namely, a sum sufficient to pay the privileged debts in full and thirty cents in the dollar on the unprivileged debts, and the learned judge signed an order accordingly. This order was made upon the withdrawal of all opposition by Mr. de Martigny and the respondent bank.

There was no communication either to the judge who so made the order, or to the inspectors other than de Martigny and the appellant, or to the curator, Hyde, or to any of the other creditors of the secret agreement of the 27th of November, 1894, which had, as before mentioned, been entered into between Mr. de Martigny on behalf of the respondent and the appellant.

The attempt to give this transaction the colour of a sale by the respondent of its debt or claim to the appellant was just one of those fraudulent contrivances which so often recoil against those who resort to them. So far from helping the respondent's case it assists to prove the fraudulent character of the transaction as regards the general body of the creditors.

In the divident sheet dated the 10th of July, 1895, prepared and signed by John Hyde, the curator to the estate, the respondent is collocated as a creditor for

the full amount of its claim, $18,953.05, and the dividend to which it was entitled therein at thirty cents in the dollar is put down at $5,685.91. This latter amount was, months after the bank had pretended to sell its debt to the appellant, received by the bank itself and credited as a payment on the promissory note of the appellant for the balance of which alone, after deducting the payment, this action is brought.

How the respondent could have honestly and rightfully claimed and received payment of the thirty cents in the dollar out of the estate if it really had sold and transferred the debt to the appellant is not explained. The inference must be and is that the arrangement so carefully cloaked and concealed from all those who were interested in frustrating it was in substance and in reality nothing less than an agreement by which the bank was to receive ten per cent more than the other creditors, induced by a money payment of $150 secured to de Martigny by the cheque deposited with Mr. McDougall, and the concealment practised by the parties shews their consciousness of the fraudulent and illegal character of the arrangement they had entered into.

The law applicable to such an agreement cannot be and is not doubtful. Where the law carefully provides for the equal distribution of assets amongst creditors any arrangement concealed from the general body of creditors, whereby the policy of the law is defeated, and a particular creditor, having no legal right to preference or priority, is secured an advantage over the other creditors must, under every system of law, be void as a fraud on those to whom another is so preferred in the distribution of assets. *Cockshott* v. *Bennett* (1) *Jackson* v. *Lomas* (2); *Eastabrook* v. *Scott* (3); *Jackman* v. *Mitchell* (4); *Mare* v. *Sandford* ( ).

(1) 2 T. R. 763.
(2) 4 T. R. 166.
(3) 3 Ves. 456.
(4) 13 Ves. 581.
(5) 1 Giff. 288.

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All the ground of fairness, common honesty and public policy which have led to the establishment of the principle by the English courts that such an arrangement cannot stand are equally applicable under the Quebec Code.

That the additional amount which, under the secret agreement, was in the present case to be paid to the respondent, was guaranteed and to be paid in the first instance by a third person, the appellant, who was to take no direct interest in the purchased assets, can make no difference. Upon a principle well established by the English courts such a payment by a third person is just as much a fraud on the general body of creditors as a payment or an agreement to pay by the insolvent debtor himself. *Wells* v. *Girling* (1); *Knight* v. *Hunt* (2); *Bradshaw* v. *Bradshaw* (3); *McKewan* v. *Sanderson* (4); *Re Milner* (5).

For these reasons the promissory note sued upon must be considered as wholly void, as having been given in furtherance of a fraudulent and corrupt agreement, and the judgment recovered on it cannot stand. To decide otherwise would be to subvert all those principles of equality in the payment of creditors which the articles of the Code providing for abandonment were destined to secure.

There remains the question of the $150 cheque payable to Mr. de Martigny and signed by the appellant. That is not sued upon in this action, but it is material as shewing that for this personal advantage in addition to the extra ten cents on the dollar to be paid to the respondent, de Martigny was induced to allow himself to be influenced to consent to a sale which, as he says himself, was not for the general

(1) 1 Brod. & Bing. 447.
(2) 5 Bing. 432.
(3) 9 M. & W. 29.
(4) L. R. 20 Eq. 65.
(5) 15 Q. B. D. 605.

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benefit of the creditors. This $150 cheque was therefore nothing less than an illegal advantage, and for this reason alone the transaction to induce which it was given must be adjudged corrupt, fraudulent and void.

The appeal is allowed with costs, and the action must be dismissed without costs. The appellant was himself an inspector and should not have been a party to the agreement with de Martigny.

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment, allowing the appeal with costs in the Supreme Court and dismissing the action without costs. No costs to be allowed in the Court of Review or in the Court of Queen's Bench.

GIROUARD J.—The question raised by the appeal is not whether pending the proceedings for the liquidation of an insolvent estate, a creditor can *bonâ fide* sell or transfer his claim to a third party, whether a creditor or not, for a sum larger than the amount realised or received by the other creditors, but whether one of the inspectors of an insolvent estate, without the knowledge of his co-inspectors, or of the curator or judge, and in violation of his duties as such inspector, can legally bargain for and secure an undue preference with a third party, whether related or not to the insolvent, in favour of a creditor who is a party to the transaction, fully aware of its nature and object. Is such a contract contrary to public order and public morals?

The facts of the case are not disputed, and in order to fully understand the point at issue it is sufficient to reproduce the following remarks of Acting Chief Justice Tait, speaking for the court appealed from:—

As I have stated, Mr. de Martigny, general manager of the plaintiff, was appointed one of the inspectors of the estate. Under the law it

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is the duty of the judge, upon demand of a party interested, to appoint upon the advice of the creditors, inspectors or advisers. (Arts. 769 and 772 C. C. P. (old) ; Arts. 867 and 877 (new).

Those gentlemen, in accepting that position, became officers of the court like the curator, and like him are subject to its order. It seems to me that an inspector is bound to act in absolute good faith towards the court. Now we have it established in this case that de Martigny first opposed the acceptance of George C. Wright's proposition to purchase the balance of the assets although the other inspectors were in favour of that offer. He has stated in his evidence that the plaintiff at first wanted fifty cents on the dollar ; that George C. Wright, the purchaser, offered him his own note for an additional ten cents, which he refused ; that afterwards the Board of Directors told him to accept forty cents on the dollar if he thought best, and that after it was arranged that the bank was to get forty cents, the method of carrying this out was being left to the solicitor. He admits that it was understood that the plaintiff should get the thirty cents from the curator in the same manner as the ordinary creditors, but all he thought of was to settle his bank's claim, and did not concern himself about the Union Bank. He admits that it is probable that the Union Bank would have asked for forty cents if they had known that the plaintiff was getting it. I now quote from his evidence at page 7, which is as follows :

Q. You see this resolution of the inspectors of the 8th of November was not approved of by you. It says, "motion carried, Mr. de Martigny dissenting." Would you read the letter recited in that resolution and say if it is the offer of the purchase of this estate that you refer to ?—A. Yes.

Q. Why did you dissent from that ?—A. It was accepted.

Q. It was accepted afterwards, but you voted against it ?—A. I voted against it at the time, because I had not sold at the time.

Q. Why did you vote against it ?—A. Because we thought the estate would pay a great deal more than that. That was our impression, and that is my impression yet.

Q. That has always been your impression ?—A. Yes.

Q. And has that always been the impression of the directors of your bank ?—A. Yes.

And at page 11, his evidence is as follows :

Q. You still were dissenting at this time, the 8th of November ?—A. Yes, always dissenting.

Q. Did you notify your bank that a majority of the inspectors had passed a resolution accepting, as far as they could, the thirty cents ?—A. Yes.

Q. What did they say ?—A. They authorised me to refuse it.

Q. What steps did they take to protect your refusal?—A. I left it completely to the lawyer.

Q. Did you give him instructions to refuse the transfer for the thirty cents?—A. Until the sale was made to Mr. Brigham, always.

Q. So it was the intention of the bank to oppose the carrying out of the sale for thirty cents from the start?—A. Yes, they wanted to get fifty cents.

Q. And then when this arrangement was made with Mr. Brigham, whatever it was, they withdrew their opposition?—A. Yes.

He states that his intention was to be paid by some one ten cents over the other creditors, and although he does not admit any agreement to keep the matter secret, still he intimates that the reason it was kept a secret was that they did not want the other parties to hear of it, as they might object.

It is clear from the proof of record that the other inspectors would not have allowed the sale of the estate to have been made had they known the plaintiff's real motive for withdrawing its opposition to it.

The learned Chief Justice could not however disturb the judgment of the Superior Court condemning the third party, that is the appellant, to pay the extra ten per cent, because

the proof seems to fall short of establishing conclusively that it was represented to the judge that Mr. de Martigny had withdrawn his opposition. If it had been established to my satisfaction, (continues the learned Chief Justice), that Mr. de Martigny had allowed it to be represented to the judge that he was in favour of this sale while at the same time he was under the belief that the assets were worth more than thirty cents on the dollar, and in virtue of that belief had secured by secret arrangement, ten cents more than any other creditor, I should have regarded such conduct as wilful deception practised towards the judge, and taken in conjunction with his conduct towards his co-inspectors, I should have considered that there was ample ground for reversing this judgment. In such a case I think it should be our duty to see that inspectors act in good faith and above board in their transactions towards their co-inspectors, and towards the court.

As we understand the case, we believe it is of little importance whether the judge was actually deceived or not. We know for a certainty that an attempt was made to deceive him; that he was not made aware of the transaction concluded with the appellant through

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one of the inspectors. We have also the evidence of some of the inspectors that, after the compromise with the bank, Mr. de Martigny recommended "very strongly" the acceptance of the offer of thirty cents, and that they were all deceived by him Finally we cannot forget that as such inspector, Mr. de Martigny was the "adviser" of both the curator and of the judge, and that his duty was clearly to communicate to them his honest opinion as to the value of the estate. He intentionally did not do so at the request of the respondents and for their benefit, because his sole object was to protect a large preference in favour of his bank and a remuneration of $150 for his alleged expenses and fees, or rather a promise from the appellant to pay both.

The Superior Court held that the cheque for the $150 was absolutely void and null, and dismissed de Martigny's action, but maintained the claim of the bank for the amount of the preference. We believe that the contract or note to obtain such a preference is likewise null and void and cannot be enforced, as being contrary to public order and good morals. The whole transaction savours of a bribe made to a person in a position of trust to violate the duties of his trust. To sanction especially such a partial and even corrupt conduct on the part of officers of a court of justice, called upon to discharge quasi judicial functions, and to permit any party to it to benefit by the same, would be to destroy the machinery created by the legislature for the honest and equitable realisation and distribution of insolvent estates. This court has recently laid down in *Gastonguay* v. *Savoie* (1) that

> no one having duties of a fiduciary character to discharge should be allowed to put his duties in conflict with his interest,

(1) 29 Can. S. C. R. 614.

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and in *Lambe* v. *Armstrong* (1), we said that to permit litigants in default

to take advantage of the irregularities and misdoings of officers of the court would be simply to hinder the administration of justice and destroy the usefulness of courts of law.

We are therefore of opinion that the appeal should be allowed with costs and that the action of the respondent should be dismissed without costs, as the appellant was himself one of the inspectors and participated in the fraud. No costs will be allowed in any of the courts below.

Appeal allowed with costs.

Solicitor for the appellant: *Henry Aylen.*

Solicitor for the respondent: *Thomas P. Foran.*

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*March 5.
*June 12.

ALEXANDER DINGWALL (INTERVENANT) ..... } APPELLANT;

AND

GEORGE McBEAN (PLAINTIFF).....RESPONDENT.

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

Mandate—Partnership—Agency—Factor—Pledge—Lien—Notice—Right of action—Intervention—Res judicata—Arts. 1739, 1740, 1742, 1975 *C. C.*

A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only.

Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt and he cannot claim any lien upon the goods themselves nor on the price received for them.

The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy.

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

(1) 27 Can. S. C. R. 309.

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Superior Court, District of Montreal, dismissing the appellant's interventions with costs.

In a former action by a firm trading under the style of Ayer & Co. against the respondent for the revendication of a quantity of cheese the plaintiffs, Ayer & Co., obtained possession of the cheese, upon the filing of a security bond, and sold it. At the trial the action for revendication was dismissed and this judgment was affirmed upon appeal. The respondent then sued upon the bond for the value of the cheese and the appellant filed two interventions claiming, ownership of one-third of the cheese, as a partner, and also another share as assignee of another partner in a firm, alleged to be the owner thereof, and demanded a lien upon its price. The interventions set up that appellant, as a partner along with Donald McBean and one Fraser, had been proprietors of the cheese; that it was from them that Ayer & Co. had derived their title; that through the agency of Donald McBean they had placed the cheese in the hands of respondent to be stored for the partnership at Montreal; that, subsequently, McBean sold the cheese to Bell, Simpson & Co, who sold to Ayer & Co; that the cheese had never been pledged for advances; that respondent had no right to make advances thereon, nor had Donald McBean any authority to pledge it or to receive advances thereon, and that if any advances had been made, they had been repaid in full and the security released by the dealings had therewith by the respondent. Both interventions were dismissed by the Superior Court and, on appeal, this judgment was affirmed by the Court of Queen's Bench.

A statement of the circumstances under which the action was taken and the questions at issue upon this

appeal will be found in the judgment of His Lordship the Chief Justice

Leet Q.C. for the appellant. Neither of the judgments below is based on the question of *chose jugée*, but what is termed *practically chose jugée*. This is not pretended to be law. There is no *chose jugée*, because the former case did not decide the rights between respondent and intervenant, but only as between the respondent and Donald McBean. Art. 1241, C. C.; Rolland de Villargues, "*Chose jugée*," 36; Larombière n. 1351, p. 18; Pand. Fr. Rep. "*Chose jugée*," nn. 832, 446, 563, 637, 647; *Cooper* v. *Molsons Bank*, (1); *Stuart* v. *Mott*, (2); *Muir* v. *Carter*, (3).

After the appellant notified the pledgee of the position of affairs, the relation between the pledgee and appellant was that of a creditor and surety. Before notice the pledgee might presume that all the produce belonged to Donald McBean and that he could deal with it as he liked, but after notice this could no longer be done. The moment the pledgee became aware that the goods did not belong to the factor and that he had no right to pledge them for his personal debt, he could obtain no lien thereon for any future advances. The goods must be regarded as the property of a third party held as security, and as soon as the advances were paid or the pledgee released the principal or dealt with the principal, to the prejudice of the surety, the security would be released. The release of cheese worth $7530, held at the time of the seizure, with full knowledge of the circumstances, without payment, and without appellant's consent, was in bad faith and fraudulent, and the appellant is entitled to an account of the securities held for the same debt for which this cheese was also pledged.

(1) 26 Can. S. C. R. 611. (2) 23 Can. S. C. R. 384.
(3) 16 Can. S. C. R. 473.

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The whole balance was for advances and credits after seizure and after knowledge that the cheese did not belong to the factor and that he had no right to pledge it. As to imputation of payments see arts. 1161, 1742 C. C.; *Clayton's Case* (1) at page 608; *Hooper* v. *Keay* (2); *Bank of Scotland* v. *Christie* (3); *Simson* v. *Ingham* (4); *Bodenham* v. *Purchas* (5); *Green* v. *Clark* (6); *Cleveland* v. *Exchange Bank of Canada* (7); 4 Aubry & Rau, §320 p. 167; *Doyle* v. *Gaudette* (8); *Field* v. *Carr* (9); *Buchanan* v. *Kerby* (10); *In re Brown* (11). As to sureties' remedies against the principal, see arts. 1958, 1959 C. C.; *Macmaster* v. *Hannah* (12); *Ménard* v. *Gravel* (13); De Colayar on Guarantees (2 ed.) 290; *Polak* v. *Everett* (14); *Campbell* v. *Rothwell* (15); *Molsons Bank* v. *Heilig* (16); *Allison* v. *McDonald* (17).

Greenshields Q.C. and *Dickson* for the respondent. The seizure of the cheese had no more effect than to make the pledgee aware that the goods did not belong to the pledger. It did not notify him that Donald McBean had no authority to pledge, and could not, for, as a matter of fact, he had that authority. Arts. 1739 *et seq.* C. C. Such notice could not prevent a valid lien being created upon these goods, nor invalidate the lien previously created. No seizure could take the goods out of the running account in which they had been validly entered. Dalloz, Rep. "Compte Courant," nos. 1, 6, 51, 55, 56. As there are no legal imputations of payments in respect to running accounts, the whole balance of $15,947.65 constitutes a proper

(1) 1 Mer. 572.
(2) 1 Q. B. D. 178.
(3) 8 C. & F. 214.
(4) 2 B. & C. 65.
(5) 2 B. & Ald. 39.
(6) Cass. Dig. (2 ed.) 614.
(7) M. L. R. 3 Q. B. 30.
(8) 20 L. C. Jur. 134.
(9) 5 Bing. 13.
(10) 5 Gr. 332.
(11) 2 Gr. 112.
(12) M. L. R. 3 S. C. 459.
(13) 30 L. C. Jur. 275.
(14) 1 Q. B. D. 669.
(15) 38 L. T., N. S. 33.
(16) 26 O. R. 276.
(17) 23 Can. S. C. R. 635.

lien upon all merchandise received from Donald McBean and entered in the account, and even if the delivery up of some of the cheese is to be considered there would still be a large balance. Moreover, this cheese was not delivered gratuitously, but only on receipt of its market value. We also refer to *Roger* v. *Chapleau* (1), and *Marsolais* v. *Willett* (2).

THE CHIEF JUSTICE.—In 1885 Donald McBean, a brother of the respondent, was in partnership with Alexander Dingwall, the present appellant, and one Fraser in a cheese factory near Charlottenburg, in the County of Glengarry, Ontario. Donald McBean, who carried on business near the same place as a factor and dealer in agricultural products was entrusted by his partners with the produce of the factory for the purpose of sale. Donald McBean dealt with the cheese from this factory as he did with all the produce which came from time to time into his hands either as the owner of it by purchase or as the agent or factor for others, that is to say, he consigned it to his brother, George McBean, a commission merchant in Montreal, for sale. George McBean made large advances on the security of the goods so consigned to him for which he always claimed as security the usual consignee's or factor's lien. Some short time subsequent to the first of August, 1885, several lots of cheese, in all about 405 boxes, the product of the Glengarry factory, worth about $2,300, were included in consignments made by Donald McBean to his brother the respondent. The partners of Donald McBean in the factory having received no returns for the cheese, the present appellant, Alexander Dingwall, proceeded to Montreal and having demanded the delivery of the cheese from George McBean, the latter claimed a lien on it for his

(1) 3 Rev. de Leg. 352. (2) 2 Q. P. R. 409.

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general balance for advances made on the security of various consignments of produce received by him

At the time the cheese was so demanded there remained due to George McBean, on account of these advances, some $13,000 against and as security for which he held the cheese in question and a quantity of other produce, grain, peas and cheese, belonging either to Donald McBean or to those for whom he acted as a factor and in which Dingwall and Fraser, his partners in the cheese factory, had no interest whatever.

Upon the refusal of George McBean to deliver up the 405 boxes of cheese, the appellant sold, or assumed to sell the same to a firm of Bell, Simpson & Co. who in turn re-sold it to Ayer & Co., the defendants in the present action. No money was paid on either of these sales and there is good ground for inferring from the intervention of the appellant and his claim in the present action that they were merely colourable, made for the purpose of apparently vesting the property in the ultimate transferees, in order that the appellant, Dingwall, might himself make the affidavit required to obtain an order for delivery in the action of revendication which he purposed to institute and did thereupon immediately institute in the name of Ayer & Co. for the specific delivery up of the cheese.

The action for revendication being thus pending the defendants Ayer & Co. on giving the required bond securing the re-delivery of the goods, or the payment of their value in case of failure in the action, obtained an order of the court for the writ of *saisie revendication* and thus obtained delivery of the cheese to them through the sheriff. The action then proceeded and was dismissed at the hearing by Mr. Justice Cimon, whose judgment was, on appeal to the Court of Queen's Bench, affirmed by the latter court. Thereupon the

respondent, George McBean, instituted the present action against Ayer & Co., upon the security given in the action for revendication, (on the faith of which the goods had been delivered up,) to recover the value of the cheese which had been sold by Ayer & Co. or by the appellant through them. Ayer & Co. pleaded to the action and the present appellant intervened filing a principal and subsequently an incidental intervention. Although issue does not seem to have ever been regularly joined on the appellant's intervention, the parties by consent, as it appears from the judgment of Mr. Justice Gill who heard the cause, went to *enquête* and hearing, whereupon the pleas of the defendants and the interventions of the present appellant were all dismissed and judgment was given in favour of the respondent for the amount realised for the cheese sold less a certain proportion thereof which had been transferred by the respondent to one Alexander McBean. Upon appeal to the Court of Queen's Bench the judgment of Mr. Justice Gill was affirmed with costs. From this latter judgment the present appeal has been taken to this court.

We have in the notes of Mr. Justice Hall a very full, clear and able statement of the grounds in law as well as in fact upon which the judgment now under appeal proceeded, and we entirely concur in the opinion thus expressed. There can be no doubt that Donald McBean, either as a partner in the business of the cheese factory or as the factor of the firm or company which carried on the manufacture, had authority in law effectually to pledge the cheese in question with George McBean for advances made to him by the latter. The authority of Donald McBean to pledge the cheese as he did cannot be doubted in view of article 1740 of the Civil Code and the right of the respondent to retain the property so pledged for the general

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balance due to him by his principal is equally clear under the same article 1740, and article 1975 of the same code.

There exists no law warranting any such position as that assumed by the appellant, who insists that it was the duty of the respondent so soon as he had notice from Dingwall that the cheese was the property of the firm and not of Donald McBean personally so to impute the credits for moneys received from the sales of other goods held in pledge by the respondent as to liberate this cheese from any lien or charge created by Donald McBean. Under the article 1740, which is a re-enactment of the law as embodied in the British Factors Acts, the pledgee or lien holder is, in all respects, in the same position as if the factor or agent giving the security was himself the absolute owner of the property.

Equally groundless is the contention of the intervenant that the respondent on receiving notice of the rights of the intervenant and Fraser was bound so to deal with the property held in security as not to prejudice their rights and that he therefore lost all claim to a lien on the cheese when he released other property deposited with him in security by Donald McBean. The answer to this is the same as that given to the former contention, namely, that the pledge holder can deal with the property as freely as if the factor or consignor creating the pledge were the absolute owner. Further there is a complete answer to this last point on the facts, since it clearly appears in the evidence that the property released was not given up gratuitously but only on payment of $8,000 which was its then market value.

For these reasons, therefore, which are the same as those in the Court of Appeal, the judgment in first instance was properly affirmed.

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There is an additional ground for holding the appellant disentitled to maintain his intervention which is pointed out in the respondent's factum. It is proved that after the delivery up of the cheese taken under the *saisie revendication*, it was sold and the proceeds received by the defendants, Ayer & Co. The goods therefore no longer remained in *specie* and, if the sale to Ayer & Co. was genuine, the recourse of the intervenant against them, supposing him to be still unpaid, would be a pure money demand—an ordinary debt. How this can give the appellant any *locus standi* to intervene in the present action, it is hard to see. There is no allegation that the firm of Ayer & Co. was a mere *prête-nom* for the appellant or that they in any way re-transferred the property in the cheese to the intervenant. Therefore there is really no foundation for the claim set up by the intervention as the case is presented. If, on the other hand, Ayer & Co. in any way represented the intervenant in the former action or, if the case really is that they have ceded their rights to the intervenant, then the defence of *chose jugée* maintained by the judgment of Mr. Justice Gill must be conclusive against the intervention.

The appeal is dismissed with costs.

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment dismissing the appeal with costs.

GIROUARD J.—This case presents no difficulty. The question is simply whether or not a factor has a lien upon and can retain goods consigned to him and in his possession until the advances in good faith made by him to the consignor in the ordinary course of business have been paid, notwithstanding his knowledge that the consignor was only an agent. An affirmative

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answer was given in a former suit practically between the same parties, (*Ayer* v. *McBean*), in a judgment rendered by the Superior Court and confirmed by the Court of Appeal which was accepted by them as *chose jugée*, and also in the present case. Evidently no other conclusion can be arrived at under articles 1739, 1740, 1742 and 1975 of the Civil Code, and I have no hesitation in dismissing the present appeal for the reasons fully set forth by Mr. Justice Hall in his elaborate opinion.

Appeal dismissed with costs.

Solicitor for the appellant: *Seth P. Leet.*

Solicitor for the respondent: *Greenshields, Greenshields, Laflamme & Dickson.*

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*Mar. 6, 7.

*June 12.

PATRICK KING *et al.* (DEFENDANTS)...APPELLANTS;

AND

ELLEN MCHENDRY *et vir.* (PLAINTIFFS) .....RESPONDENTS.

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

Marriage laws—Community—Continuation of community—Inventory—Procès-verbal de carence—Tripartite community.

At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or *procès-verbal de carence* made and subsequently the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community,

Held, that there was no necessity for an inventory of property of such insignificant value and that failure to make an inventory or *procès-verbal de carence* did not, under the circumstances, effect a continuation of community.

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

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KING
v.
MCHENDRY.

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, at Montreal, and restoring the judgment of the Superior Court, District of Montreal (2), which maintained the action with costs.

The female plaintiff's parents were married at Montreal in 1845 and resided there under the *regime de la communauté* until her father's death in 1846. The entire assets at the time of dissolution of this community consisted of bare necessaries of insignificant value within the class of chattels exempted from seizure under execution. The widow made no inventory or *procès-verbal de carence*, and subsequently, in 1848, married the defendant, Patrick King, and they together continued the business of hucksters on the Montreal Market, which had been previously carried on by the widow and her first husband. The second marriage was also subject to the *regime de la communauté* and was dissolved by the death of the wife in 1895, the property of the consorts being then of considerable value. After receipt of a share of her mother's estate devised to her, the female plaintiff brought the present action, against her step-father and the children of the second marriage, asking for an account and demanding a share of the common property in virtue of a continuation of the community under the first marriage and consequent tripartite community between her, her deceased mother and the second husband. The defences raised were, (1) that there had been no continuation of community; (2) that as continuation had not been demanded during the lifetime of the deceased consort there could be no tripartite community; and (3) that the assets in possession of the con-

(1) Q. R. 9 Q. B. 44.

(2) Q. R. 15 S. C. 542.

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sorts at the death of the first husband were insufficient to constitute an estate of which the law required an inventory to be made.

The action was maintained by the Superior Court, Doherty J., but on inscription in review this judgment was annulled, Sir Melbourne Tait, A. C. J. and Taschereau J., (Curran J. dissenting), on the ground that the demand for continuation of community ought to have been made during the lifetime of the consort who survived the first marriage and that the demand by the action came to late. On further appeal the Court of Queen's Bench reversed the judgment of the Court of Review and rendered the judgment from which the present appeal is asserted.

Mignault Q.C. and *Beaudin Q.C.* for the appellants. The plaintiff did not allege that her parents possessed assets which could have been comprised in legal community and the presumptions are that that community never possessed anything, that there was no community to be continued or of which it was possible for the surviving consort to make an inventory. It is impossible to infer, from the want of such inventory, that the community continued. Lebrun, Communauté (1); Pothier, Communauté, nn. 778, 786, 787; *Pearson* v. *Spooner* (2); Dalloz Rep. vo. "Scellé et Inventaire," n. 1; art. 240 C. de P.; art. 1343 C. C. The surviving consort was not required by law to establish the absence of property by means of an official return, *procès-verbal de carence.* The law imposing a penalty on the consort who neglects to make an inventory of the common property must be strictly construed. As the first community possessed nothing the essential condition was wanting, and to require this to be shown by *procès-verbal de carence* would be to add to the law and impose a new obli-

(1) Lib. iii. cap. 3, sec. 1, n. 1. (2) Q. R. 2 Q. B. 200.

gation. The admission that there was no property does away with the necessity of a *procès-verbal de carence*. Exacting a *procès-verbal de carence* where no property exists would be contrary to elementary principles of equity. See the *Lordonnois Case* decided by the Parlement de Paris, in 1731, Lebrun (2 ed.) 1754, p. 559, and recent decisions under art. 1442 C. N. in the Cour d'Appel in France; S. V. '94, 2, 199; S. V. '95, 2, 30; *Patrix* v. *Quesnel*, Jour. de P. '95, 2, 230. Compare also exceptions in cases of minors, (art. 311 C. C. and art. 472 C. N.) Dalloz, Rep. vo. "Minorité," no. 649; "*Cessante ratione, legis, cessat ipsa lex.*"

The continuation should have been demanded from the survivor and it is too late now, after her death, to make that demand upon her heirs. Continuation does not exist *de plein droit*, the demand to the survivor is essential consequently, during her life time. Arts. 240, 291 C. de P.; art. 1323 C. C. (old text); Pothier, Com. no. 800; Merlin, Rep. vo. "Con. de Com." p. 177. The continuation is dissolved by death of the survivor; art. 1335 C. C.; *Morte socii solvitur societas.* See also *Bourassa* v. *Lacerte* (1), per Sir L. N. Casault, C.J. at page 121; *Beckett* v. *The Merchants Bank* (2).

Monk Q.C. and *Pelletier* for the respondents. The duty imposed upon the survivor existed from the time of the death of the deceased consort and corresponds to the right of the child to the continuation of community. Lamoignon, *Arrêtés*, *tit*, 33, art. 2; 2 Prévost de la Jannès, no. 374. To prevent the continuation of community, the survivor *must* make a formal inventory. 2 Argou Int. Liv. 3, chap. 5, pages 46, 47; Lebrun, Comm. Lib. 3, chap. 3, s. 1, n. 9, par. 1; Pothier, Comm. nn. 772, 876; art. 241 C. de P.; arts. 1323-1325 C. C. The law presumes the existence of common property in cases of community

(1) 10 Q. L. R. 118.

(2) M. L. R. 3 Q. B. 381.

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and it is consequently unnecessary to make proof of its existence, quantity or value. The omission to make the inventory leaves the survivor in reputed usurpation of the presumed property of the first community, small though it may be. She prevented dissolution taking effect, and voluntarily and deliberately submitted herself to the obligation as well as to the penalty of continuation of community. This presumption can be destroyed only by authentic proof in writing. Apart from that, property existed in a sufficiently appreciable proportion to give rise to the continuation. There was at the time of the marriage, a bed, bedding and some other small effects. The second husband admits having continued the business of the first husband, and no doubt made use of the instruments and tools of the first husband in his occupation as a gardener and dealer in garden produce. See Pothier, "Comm." nn. 565, 771, 772, 784, 785, 800, 803, 876; *Armour* v *Ramsay* (1). The defence does not deny the existence of common property and the law can now only regard the confusion resulting from the omission of the inventory and apply the provisions of the Code. The cases cited by the appellants all involve special circumstances which distinguish them completely from the condition of facts in this action. See also Renusson, "Communauté," 3rd part., ch. 2, no. 42. The law regards the inventory as a quasi-judicial proceeding of the greatest importance and it cannot be omitted without incurring the penalty. Art. 1323 *et seq.* C. C. (old text); arts. 1387 *et seq.* C. P. Q. The deceased consort and the defendant were defaulters and can claim no equitable rights in face of their disregard of the law.

(1) 26 L. C. Jur. 167.

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This court should not disturb the findings of the courts below as to the fact of the existence of common property.

There has not been any decision in the Province of Quebec that a demand was necessary during the lifetime of the survivor; the remarks of Sir L. N. Cassault in *Bourassa* v. *Lacerte* (1) are merely *obiter dicta*. A valid demand can be made upon the survivor's representatives.

THE CHIEF JUSTICE.—I entirely agree with Mr. Justice Girouard in the ground on which he places his judgment for the allowance of this appeal, namely, that it sufficiently appears that there was nothing to include in an inventory and, such being the case, the omission to make an inventory is not to be followed by the penal consequences imposed by the Code, viz., a continuation of community, but I think it right to say that I also agree with the reasons given by the majority of the Court of Review for their judgment. Those learned judges following the jurisprudence and especially the decision of Chief Justice Casault and the late Chief Justice Meredith in *Bourassa* v. *Lacerte* (1), held that the continuation of community must be demanded in the lifetime of the surviving spouse, and that a demand of the heirs after the death of that survivor and at a time when a continued community would by the express provision of article 1335 C. C., if one had existed, have been dissolved, is too late.

The appeal must be allowed with costs and the action dismissed with costs to the appellant in all the courts below.

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment allowing the appeal and dismissing the action.

(1) 10 Q. L. R. 118.

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GIROUARD J.—De droit commun, la continuation de communauté n'existe pas. Elle fut introduite en France en 1510 par l'article 118 de l'ancienne coutume de Paris et puis continuée en 1580 par les articles 240 et 241 de la nouvelle coutume, qui devinrent le droit commun de la province de Québec, reproduite au Code Civil, art. 1323 et 1324. Il faut donc l'entendre conformément aux termes de ces lois, sans en étendre les dispositions à ce qui n'a pas été prévu. Or le Code, comme la coutume, décrète que, si le survivant des époux

manque de faire procéder à l'inventaire *des biens communs*, la communauté se continue, etc.

Il faut donc qu'il ait des biens communs et c'est aux parties qui invoquent la continuation de communauté à alléguer et prouver ce fait. C'est ce que les intimés n'ont pas fait. Ils ont cependant examiné l'appelant qui a répondu que lors de son marriage il n'avait rien,

ni elle non plus, seulement un lit, une couchette et quelques petites affaires.

Les intimés savaient si bien que telle était la situation de fait de la première communauté qu'ils n'ont pas même tenté de faire la preuve par commune renommée.

Bien peu de commentateurs ont examiné la question de savoir s'il fallait un procès-verbal de carence, lorsque la communauté n'avait rien ou presque rien à inventorier. LeBrun fut le premier à l'exiger dans son Traité de la Communauté, qui fut publié la première fois un an après sa mort, en 1709. La seconde édition parut en 1734 avec des additions, une, entr'autres, où est rapporté un arrêt du Parlement de Paris du 4 septembre, 1731, qui, sur un appel du Chatelet de Paris, décida tout le contraire de la doctrine de LeBrun. L'annotateur observe

Le Parlement de Paris a jugé le contraire de la décision de M. LeBrun par arrêt rendu en la quatrième chambre des Enquêtes, le 4 septembre 1731. Quand on supposerait que les deux conjoints auraient eu quelque peu de meubles, c'est-à-dire, leurs hardes, cela ne pouvait valoir la peine, ni les frais d'un inventaire, ni payer le coût d'un procès-verbal de carence, qui d'ailleurs n'est prescrit par aucune Ordonnance, ni par un arrêt de réglement.

Renusson, un contemporain de LeBrun, adopte son sentiment dans son Traité de la Communauté, se contentant d'observer que c'est l'opinion de LeBrun. Les dernières éditions de ses œuvres constatent cependant qu'elle fut rejetée par le Parlement de Paris par l'arrêt de 1731, et que c'est le dernier mot de la jurisprudence. Egalement, Meslé, un autre autorité sur la matière, rapporte cette décision avec approbation sur le fondement de la notoriété évidente de la pauvreté de la communauté

car, dit-il, là où il n'y a point de bien, il ne peut y avoir ni communauté ni continuation de communauté (p. 645.)

Mais, disent les intimés, il résulte du témoignage même de l'appelant qu'il y avait des biens communs, peu de choses, il est vrai, mais enfin quelque chose. Oui, quelques choses non appréciables à prix d'argent, un lit, des hardes de corps, et probablement quelques petits meubles de nécessité première et exempts de saisie. L'inventaire de tels biens échappe à l'attention de la loi. *De minimis non curat lex.* Aussi Denizart, vo. "Carence," définit-il le procès-verbal de carence;

un acte qui se fait pour constater qu'un défunt n'a rien laissé dans sa succession, ou n'a laissé que très peu de choses.

Les intimés ont invoqué l'autorité de Pothier, "Communauté" n. 565; mais cet éminent jurisconsulte n'y entend pas parler de la continuation de communauté, mais simplement de la renonciation à la commuanuté de la part de la femme qui n'a pas fait inventaire. Pothier ajoute qu'un acte de notoriété du 23 février 1708, atteste que, dans ce cas, il ne suffit pas à

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la veuve, pour se dispenser de rapporter un inventaire, de dire que son mari n'a laissé, à sa mort, aucuns effets, mais qu'elle doit le justifier par un procès-verbal de carence. L'on trouve cet acte de notoriété rapporté au long par Denizart, "Actes de Notoriété" p. 331; mais nulle part, Pothier enseigne que cette règle doit également être suivie s'il s'agit de la continuation de communauté. A ce sujet, il garde le silence; il ne cite ni LeBrun, ni l'arrêt en 1731. Pas un arrêtiste, pas un commentateur n'enseigne que cet arrêt ne fit pas autorité; bien au contraire, il est cité comme étant la dernière expression de l'ancienne jurisprudence française.

Enfin, la règle qu'il consacre a été appliquée par les tribunaux et les jurisconsultes modernes dans des cas analogues (1). Elle parait solidement appuyée sur le texte de la coutume de Paris et je ne crois pas que celui du Code Civil de Québec puisse raisonnablement admettre une autre interprétation.

Pour cette raison, et sans examiner les autres points soulevés par cet appel, nous sommes d'avis d'accorder l'appel et de renvoyer l'action des intimés avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Beaudin, Cardinal, Loranger & St. Germain.*

Solicitors for the respondents: *Pelletier & Letourneau.*

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(1) Sirey, '94-2-199; '95-2-230; J. P. '99-2-230; P. F. '90-1-293.

JANET PARKER HIBBEN AND WILLIAM HENRY BONE (DEFENDANTS) ..... APPELLANTS;

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*April 18.
June 12.

AND

ELIZABETH CHRISTINA COLLISTER AND JAMES KAMMERER LEWIS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Partnership—Construction of deed—Continuance after expiry of term—Deceased partner—Purchase of share—Discount—Goodwill.

A deed providing for a partnership during seven years from its date provided for purchase by the survivors of the share of a deceased partner with a special provision that if one partner should die the value of his share should be subject to a discount of 20 per cent. After the seven years had expired the partners continued the business by verbal agreement for an indefinite period and while it so continued K. died.

Held, varying the judgment of the Supreme Court of British Columbia, that even if the parties had not admitted that the business was continued under the terms of the partnership deed such terms would still govern as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K. and to be allowed the deduction of 20 per cent therefrom as the deed provided; and that in the absence of any stipulation in the deed to the contrary the goodwill of the business and K's interest therein should be taken into account in the valuation to be made for such purpose.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favour of the plaintiffs.

The appeal was brought on a special case agreed to by the parties which, omitting immaterial portions, was as follows:

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

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SPECIAL CASE STATED BY CONSENT FOR THE OPINION OF THE COURT, PURSUANT TO THE RULES OF THE SUPREME COURT, ORDER XXXIV.

1. This action was commenced on the 13th day of December, 1898, by the plaintiff as executrix of Christian William August Kammerer, deceased, against Janet Parker Hibben, as executrix of Thomas Napier Hibben, deceased, and William Henry Bone, to have an account taken of the partnership dealings of the firm of T. N. Hibben & Co, and to have the affairs of the partnership wound up and for a receiver, and for a declaration that the proceedings purported to have been taken by the defendants under the deed of 1st August, 1884, for the purpose of determining the disputes between the parties are void as against the plaintiff, to the writ in which action the defendants appeared on the 15th December, 1898.

2. By a deed of partnership dated the 1st day of August, 1884, Thomas Napier Hibben, the said Christian William August Kammerer (therein called Christian William Kammerer) and the said William Henry Bone agreed to become and remain partners in the business of wholesale and retail booksellers and stationers for the term of seven years from the date of the deed, if they should so long live, upon the terms set out in the deed.

3. The deed is in the following terms:

"THIS INDENTURE made the first day of August, one thousand eight hundred and eighty-four, between Thomas Napier Hibben, of the City of Victoria, British Columbia, of the first part, Christian William Kammerer, of the same place, of the second part, and William Henry Bone, of the same place, of the third part:

"Whereas the said Thomas Napier Hibben has been carrying on business in the City of Victoria aforesaid under the style or firm name of "T. N. Hibben & Co." as wholesale and retail bookseller and stationer up to the date hereof:

"And Whereas, the said Thomas Napier Hibben is (among other liabilities) indebted to the said Christian William Kammerer in the sum of $10,400.00, and is also indebted on the security of his stock in trade to the Needham Estate in the sum of $5,000.00, and is also indebted to one Thomas Sawdy Bone, on a certain promissory note dated the fifteenth day of July, 1884, in the sum of $1,500.00.

"And Whereas, it has been agreed between the parties hereto that in consideration of the said Christian William Kammerer releasing the said Thomas Napier Hibben from the said debt of $10,400.00, and in consideration of the said William Henry Bone paying off and discharging the said sum of $5,000.00 due on the said stock and taking up and cancelling the said note of $1,500.00, and paying in cash to the credit of the partnership intended to be hereby created the sum of $1,750.00, that the said Christian William Kammerer and William Henry Bone shall become and be partners and owners with the said Thomas Napier Hibben in the said business and in the lease or leases or tenancy of premises, stock, chattels and effects whatsoever now belonging to the said business or used and enjoyed in connection therewith, upon and subject to the terms and conditions hereinafter contained, the shares or interests of the parties to be in the proportions following, that is to say: The share of the said Thomas Napier Hibben to be 165/538. The share of the said Christian William Kammerer to be 208/538. The share of the said William Henry Bone to be 165/-538. The profits and losses to be received and paid

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in equal shares, and all liabilities of the said business to the date hereof (except those to be paid as aforesaid) to be paid by the parties in equal shares.

NOW THIS INDENTURE WITNESSETH:

"1. That the said Thomas Napier Hibben, Christian William Kammerer and William Henry Bone will become and remain partners in the business aforesaid for the term of seven years from the date of these presents if they shall so long live.

"2. Nevertheless the partnership may be determined at any time during the term aforesaid by any of the partners who shall give to each of the others six months' notice in writing expiring on the last day of some month of the said term of his intention so to determine the said partnership. Any such notice shall be taken to be properly and personally served when the same shall be mailed within three days after the date thereof in a registered letter addressed to each of the partners at Victoria aforesaid in the post office at the said City of Victoria, and at the end of the six months mentioned in any such notice the said partnership and business shall be wound up as hereinafter mentioned.

* * * * *

23. Within three months after the expiration of the partnership or at the expiration of any notice to be given as aforesaid (except in case of death of one of the partners) a general account shall be taken by the partners of all the capital, property, engagements and liabilities of the partnership, and immediately after such last mentioned account shall have been so taken and settled the partners then concerned shall make due provision for the payment of the debts and all other liabilities of the partnership and subject thereto all the property of the partnership shall be divided

between the partners in the shares aforesaid and more particularly mentioned in clause eight hereof, and such instruments in writing shall be executed by the partners respectively for facilitating the getting in of the debts due to the partnership and for vesting the whole right in the said respective shares of the said property in the partner to whom the same shall respectively upon such division belong, and for releasing each to the others or other all claims on account of the partnership and otherwise as are usual in cases of a like nature: Provided always that any partner giving such notice as aforesaid shall before taking or disposing of his share in the partnership when ascertained as aforesaid to any other person or persons offer the same during the space of fourteen days for sale to the partner or partners not giving such notice the price to be paid for the share of any partner giving the notice aforesaid to be the ascertained value of his share at the time of taking such general account after deducting the proportion of liabilities, and if the said Christian William Kammerer shall give such notice he shall allow off the ascertained value of his shares after deduction of liabilities as aforesaid a discount of twenty per cent to the partner or partners desiring to purchase.

"24. If any partner shall die during the term of the partnership, the survivors shall within six months after such death cause a general account to be taken in manner aforesaid and shall pay to the executors or administrators of the deceased partner the ascertained value subject to the terms and conditions of these presents of the share of the partner so dying. And if the said Christian William Kammerer shall die then the value of his share subject to the discount aforesaid, and the partnership hereby created shall cease and determine, or it shall be lawful for the survivors and

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the executors and administrators of any deceased partner or partners to carry on the partnership business subject to the terms and conditions hereof as if such death had not taken place, and the account of the deceased partner or partners shall be charged with the salary of a suitable person or persons to be selected by the survivor or survivors to perform the physical work which the deceased partner or partners should have performed if he or they had not so died, and if the business shall not be so carried on by the survivor or survivors and the respective executors or administrators of the deceased partner or partners, the survivor or survivors shall execute to the respective executors or administrators of the deceased partner or partners a good and sufficient bond or bonds of indemnity against all claims and demands whatsoever on account of the business of the debts, liabilities or engagements thereof. And further, it shall be lawful for the survivors of the partners, if the executors or administrators of a deceased partner shall not wish to carry on the business as aforesaid, or for the remaining partners after notice as aforesaid, if they or either of them purchase the interest of any deceased or retiring partner, to carry on the business under the like terms and conditions as herein contained to the end of the term hereinbefore mentioned, such intention to carry on the business to be signified by writing indorsed on these presents, and to be for the term aforesaid or for any extension thereof as may be mentioned in such indorsement. And the interests or shares of the partners so carrying on shall be the respective shares for the time being owned by the partners at the time of such death or withdrawal added to the interest or share or part thereof acquired by purchase from the executors or administrators of any

deceased partner, or by purchase as aforesaid from any retiring partner."

* * * * *

4. Prior to the execution of the said deed the said C. W. Kammerer and W. H. Bone had been for some years in the employ of the said T. N. Hibben, who had theretofore for many years carried on the business of a wholesale and retail bookseller and stationer, under the name and style of T. N. Hibben & Co.

5. The shares of the respective partners in the property of the partnership were arrived at upon the basis of the value of the stock in trade and book debts belonging to the said business as compared with the amounts contributed by the said C. W. Kammerer and W. H. Bone, as recited in the said deed.

6. In valuing the said stock in trade and book debts no allowance was made for the value of the good will.

7. The said Thomas Napier Hibben died on the 12th January, 1890, having duly made his will whereof he appointed the said Janet Parker Hibben sole executrix, who duly proved the same in the Supreme Court of British Columbia on the 27th January, 1890.

8. The said Thomas Napier Hibben, C. W. A. Kammerer and William Henry Bone carried on the business under the said partnership deed until the death of the said Thomas Napier Hibben, and thereafter the said Janet Parker Hibben and Christian William August Kammerer and William Henry Bone carried on the said business under the said partnership deed until the end of the said term.

8*a*. After the expiration of the partnership term the said C. W. Kammerer, Janet Parker Hibben and W. H. Bone entered into a verbal agreement that the said partnership should continue on under the terms of the said deed, but the period of time during which the said partnership should continue was not fixed by the

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said agreement, and the said partnership was so carried on by the said persons until the death of the said C. W. Kammerer.

9. From time to time during the continuance of the partnership a general account was taken under Article 19 of the said deed of all the capital, property, engagements and liabilities of the said partnership, and in taking the said accounts no regard was paid to the value of goodwill.

10. The said Christian William August Kammerer duly made his will, and thereof appointed the plaintiff and James Kammerer Lewis executors, and thereby devised and bequeathed all his property, real and personal, to the plaintiff and the said James Kammerer Lewis absolutely, and the said James Kammerer Lewis in 1898 sold and assigned his interest in the said business of T. N. Hibben & Co., to the plaintiff absolutely.

THE QUESTIONS FOR THE OPINION OF THE COURT ARE:

1. Whether the said Janet Parker Hibben and William Henry Bone are entitled as of right to buy the share of the said C. W. Kammerer under section 24 of the said deed.

2. If the said Janet Parker Hibben and William Henry Bone have such right, whether they have the right to buy the said share by paying to the plaintiffs the value of that share in the said business (ascertained by an account as provided in the partnership deed) less a discount of twenty per cent, or in other words, whether, if the said Janet Parker Hibben and William Henry Bone are entitled as of right to buy the share of the said Christian William August Kammerer in the said business, the plaintiff is not entitled to be paid the sum equal to 208/538 of the value of the partnership property without any discount.

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3. Whether the defendants are entitled to buy the share of the said Christian William August Kammerer, the plaintiff is entitled in valuing the share of the said Christian William August Kammerer to anything in respect to the goodwill of the said business.

* * * * *

The courts below decided, in favour of the plaintiffs, that defendants were not entitled to buy the share of the deceased partner, Kammerer, and that the plaintiffs were entitled to value the goodwill. The defendants appealed to this court.

Aylesworth Q.C. for the appellants.

Riddell Q.C. for the respondents.

The judgment of the Court was delivered by:

THE CHIEF JUSTICE.—This is a special case stated for the opinion of the Supreme Court of British Columbia pursuant to order 34 of the rules of that court. The opinion of the original court is by the Supreme and Exchequer Courts Act expressly made the subject of appeal to this court.

The case was originally argued before Mr. Justice Drake, whose judgment was carried by way of appeal to the full court, which, after argument, expressed its opinion in favour of the present respondents. The facts which are fully set forth in the special case may be concisely stated as follows:

By deed dated the 1st of August, 1884, and made between Thomas Napier Hibben of the first part, Christian William Kammerer of the second part, and William Henry Bone of the third part, the same parties agreed to become partners in the business up to that time carried on by Mr. Hibben alone at Victoria, in British Columbia, of a wholesale and retail bookseller and stationer, and it was thereby agreed

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that the shares and interests of the parties were to be in the proportions following, namely, the share of Thomas Napier Hibben was to be 165/538ths; the share of C. W. Kammerer was to be 208/538ths, and the share of Bone was to 165/538ths. The partnership was to be for the term of seven years determinable by six months notice during the term. The deed which is set forth *in extenso* contains minute recitals as to contributions of capital and other matters and precise and somewhat intricate covenants as to the carrying on of the business, and regarding the dissolution of the partnership and the division of the assets. Amongst other clauses it contained two, numbered respectively, 23 and 24, a difference of opinion as to the construction of which and their application in the events which have happened, has led to the present action. These clauses 23 and 24 are as follows:

23. Within three months after the expiration of the partnership, or at the expiration of any notice to be given as aforesaid (except in case of death of one of the partners) a general account shall be taken by the partners of all the capital, property, engagements and liabilities of the partnership, and immediately after such last mentioned account shall have been so taken and settled the partners then concerned shall make due provision for the payment of the debts and all other liabilities of the partnership and subject thereto all the property of the partnership shall be divided between the partners in the shares aforesaid and more particularly mentioned in clause eight thereof, and such instruments in writing shall be executed by the partners respectively for facilitating the getting in of the debts due to the partnership, and for vesting the whole right in the said respective shares of the said property in the partner to whom the same shall respectively upon such division belong, and for releasing each to the others or other all claims on account of the partnership and otherwise as are usual in cases of a like nature: Provided always that any partner giving such notice as aforesaid shall before taking or disposing of his share in the partnership when ascertained as aforesaid to any other person or persons offer the same during the space of fourteen days for sale to the partner or partners not giving such notice, the price to be paid for the share of any partner giving the notice aforesaid to be the ascertained value of his share at the time of taking such

general account after deducting the proportion of liabilities, and if the said Christian William Kammerer shall give such notice he shall allow off the ascertained value of his shares after deduction of liabilities as aforesaid a discount of twenty per cent to the partner or partners desiring to purchase.

24. If any partner shall die during the term of the partnership the survivors shall within six months after such death cause a general account to be taken in manner aforesaid and shall pay to the executors or administrators of the deceased partner the ascertained value subject to the terms and conditions of these presents of the share of the partner so dying. And if the said Christian William Kammerer shall die then the value of his share subject to the discount aforesaid, and the partnership hereby created shall cease and determine, or it shall be lawful for the survivors and the executors or administrators of any deceased partner or partners to carry on the partnership business subject to the terms and conditions hereof as if such death had not taken place, and the account of the deceased partner or partners shall be charged with the salary of a suitable person or persons to be selected by the survivor or survivors to perform the physical work which the deceased partner or partners would have performed if he or they had not so died, and if the business shall not be so carried on by the survivor or survivors and the respective executors or administrators of the deceased partner or partners, the survivor or survivors shall execute to the respective executors or administrators of the deceased partner or partners a good and sufficient bond or bonds of indemnity against all claims and demands whatsoever on account of the business of the debts, liabilities or engagements thereof. And further, it shall be lawful for the survivors of the partners, if the executors or administrators of a deceased partner shall not wish to carry on the business as aforesaid, or for the remaining partners after notice as aforesaid, if they or either of them purchase the interest of any deceased or retiring partner to carry on the business under the like terms and conditions as herein contained to the end of the term hereinbefore mentioned, such intention to carry on the business to be signified by writing indorsed on these presents, and to be for the term aforesaid or for any extension thereof as may be mentioned in such indorsement. And the interests or shares of the partners so carrying on shall be the respective shares for the time being owned by the partners at the time of such death or withdrawal added to the interest, or share or part thereof acquired by purchase from the executors or administrators of any deceased partner, or by purchase as aforesaid from any retiring partner.

The partners, Hibben, Kammerer and Bone carried on the business under the articles of partnership until

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the death of Hibben, on the 12th of January, 1890. Thenceforward the business was carried on under the articles by the executrix of Hibben, the present appellant, Janet Parker Hibben and the surviving partners Kammerer and Bone up to the expiration of the term of seven years.

Subsequently to the expiration of the original partnership term the business was carried on by Mrs. Hibben, Kammerer and Bone up to the death of Kammerer, at a date not specified in the case, as a partnership at will.

The special case contains the following paragraph relative to the terms on which this last mentioned partnership business was carried on, viz.:

8*a*. After the expiration of the partnership term the said C. W. Kammerer, Janet Parker Hibben and W. H. Bone entered into a verbal agreement that the said partnership should continue on under the terms of the said deed, but the period of the time during which the said partnership should continue was not fixed by the said agreement, and the said partnership was so carried on by the said persons until the death of the said C. W. Kammerer.

Upon the death of Kammerer the other partners Mrs. Hibben and Bone resolved to continue the business exercising the power conferred upon them by section 24, that is, they gave to Kammerer's executors the notice provided for by section 24 (called therein the notice under clause two) that they would purchase Kammerer's share. Their right to do so having been contested by Kammerer's representatives, the question submitted by the special case as to the proper construction of clause 24 and its applicability under the circumstances stated was raised.

That clause 24 was applicable the parties themselves expressly admit when they say in the words of paragraph 8*a*. of the special case that the partnership at will was carried on under the "terms of the said deed."

Without this admission however the result would have been the same, since there was nothing repugnant to a partnership at will in the provision as to the purchase of Kammerer's share in case of his death, and a prolongation of a partnership business at will by surviving partners and representatives of a deceased partner is in the absence of express agreement always presumed to be in the terms of the original partnership so long as these terms are not inconsistent with a partnership at will. Authorities need not be cited for so plain a proposition of law.

Then the question arises whether the deduction of twenty per cent is to be made from the valuation of Kammerer's share. I see no reason why the appellants should not have the benefit of that reduction. According to the plain meaning of paragraph 8*a* it must be now assumed by the court that the last partnership was expressly carried on on these terms, and I am at a loss to find ground for refusing to give effect to it. I have heard no good ground assigned in argument and I am of opinion that none can be propounded.

Lastly the respondents who are the executors of Kammerer insist that they are entitled to have the goodwill of the business and Kammerer's interest in it taken into account in the valuation to be made for the purposes of the purchase of Kammerer's share. The goodwill is one of the partnership assets and most certainly ought to be taken into account in valuing the business and assets. The case of *Steuart* v. *Gladstone* (1) relied on as an authority for the appellants is clearly not applicable; in that case there was an agreement to pay a retiring partner the value of his share *as shown by the last annual account*. It was held that this did not entitle the partner retiring to have the goodwill included as it was not included in

(1) 10 Ch. D. 626.

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but rightly omitted from the last annual account. Thus by the clearly expressed terms of the agreement it was excluded. There is nothing of this kind in the present case.

The questions submitted for the opinion of the court in the special case are as follows, viz.:

1. Whether the said Janet Parker Hibben and William Henry Bone are entitled as of right to buy the share of the said C. W. Kammerer under section 24 of the said deed.

2. If the said Janet Parker Hibben and William Henry Bone have such right, whether they have the right to buy the said share by paying to the plaintiffs the value of that share in the said business (ascertained by an account as provided in the partnership deed) less a discount of twenty per cent, or in other words, whether, if the said Janet Parker Hibben and William Henry Bone are entitled as of right to buy the share of the said Christian William August Kammerer in the said business, the plaintiff is not entitled to be paid a sum equal to 208/538ths of the value of the partnership property without any discount.

3. Whether if the defendants are enitled to buy the share of the said Christian William August Kammerer, the plaintiff is entitled in valuing the share of the said Christian William August Kammerer to anything in respect to the goodwill of the said business.

These questions must in accordance with the foregoing opinion be formally answered as follows:

(1) The said Janet Parker Hibben and William Henry Bone are entitled as of right to buy the share of the said C. W. A. Kammerer under clause 24 of the said deed.

(2) The said Janet Parker Hibben and William Henry Bone having the right to buy the share of C. W. A. Kammerer, the value of that share is to be ascertained by an account as provided in the partnership deed, and the said parties so purchasing the share are entitled to a deduction or discount of twenty per cent from the value of the share so ascertained.

(3) If the appellants (defendants below) elect to exercise their right of purchasing Kammerer's share

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the respondents are entitled to have allowed to them in taking the accounts for ascertaining the value of the share, his proportion or share of the goodwill of the business, to be valued as a partnership asset.

There must be no costs of this appeal. The appellants succeed on the two first questions submitted, but they fail on the third the important question as to the goodwill.

An order is to be drawn up stating the formal answers as above which with the record is to be transmitted to the Supreme Court of British Columbia.

Appeal allowed without costs.

Solicitor for the appellants: *James H. Lawson, Jr.*

Solicitor for the respondents: *A. P. Luxton.*

J. J. PARSONS AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

FRANCIS J. HART (PLAINTIFF).....RESPONDENT.

1900

*May 11.

*June 12.

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

Shipping—Bill of lading—Ship's agent—Mandate—Custom of port—Delivery—Carriers.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests required them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom.

Judgment appealed from reversed, the Chief Justice dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the

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

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judgment of the Court of Review, at Montreal, and restoring, in part, the judgment of the Superior Court, District of Montreal, in favour of the plaintiff with costs.

A statement of the case and questions in issue upon this appeal will be found in the judgment of the majority of the court delivered by His Lordship Mr. Justice Sedgewick.

Atwater Q.C. and *Duclos* for the appellants. The consignee failed to take delivery in accordance with the specific terms of the bills of lading and was in default. Arts. 1067, 1069 C. C. When the goods were delivered over the rail from the ship's deck and placed upon the dock the ship was discharged under the bills of lading and the goods remained there at the risk of the consignee. R. S. C. chap. 90; art. 2430 C. C. There is no proof of a prevailing custom supported by the general practice of the port; *Cunningham* v *Fonblanque* (1); *Svendson* v. *Wallace* (2). Custom cannot be read into the contract if it be inconsistent with or repugnant to the terms of the bills of lading. *Humphrey* v. *Dale* (3), remarks of Lord Campbell at page 141; *Yates* v. *Pym.* (4); *Hutchinson* v. *Tatham* (5); *Tucker* v. *Linger* (6); *Perry* v. *Barnett* (7). Here there is nothing doubtful as to the terms of the contract and it must prevail; *Bowes* v. *Shand* (8); *Petrocochino* v. *Bott* (9). The ship delivered all the cargo called for by the bills of lading according to the terms and conditions thereof; there is no evidence of shortage, loss or damage to that portion of the cargo which belonged to the plaintiff, and if he suffered it was through his

(1) 6 C. & P. 44.
(2) 46 L. T. 742.
(3) 26 L. J. Q. B. 137.
(4) 6 Taunt 441.
(5) L. R. 8 C. P. 482.
(6) 8 App. Cas. 508.
(7) 15 Q. B. D. 388.
(8) 2 App. Cas. 455.
(9) L. R. 9 C. P. 355.

own fault in his breach of the terms of the contract of carriage.

Macmaster Q.C. and *F. S. Maclennan Q.C.* for the respondent. The pleadings admit the shortages established by the evidence and correspondence filed; on this the courts below based their findings of fact which should not now be interfered with. *Sénésac* v. *Central Vermont Railway Co.* (1), per Girouard J. at page 646; *Montreal Gas Co.* v. *St. Laurent* (2); *Gingras* v. *Desilets* (3); *George Matthews Co.* v. *Bouchard* (4); *Arpin* v. *The Queen* (5); *Bickford* v. *Hawkins* (6); *Grand Trunk Railway Co.* v. *Rainville* (7).

The respondent was not notified to be ready to receive the goods from the ship's side, nor did the defendants expect or intend to make delivery from the ship's side on the wharf. They have not so pleaded, nor proved that they so notified plaintiff. Plaintiff was not bound to be ready to receive the goods nor in default until after notice, and the provisions in the bill of lading authorizing entry at the Custom House, landing and warehousing at the risk of the consignee, can not be invoked. *Bourne* v. *Gatliffe* (8); *Golden* v. *Manning* (9); *Duff* v. *Budd* (10); *Garnett* v. *Willan* (11); arts. 2429, 2430 C. C.; *Juson* v. *Aylward* (12); *Richardson* v. *Goddard* (13); *The Eddy* (14). Delivery according to the custom of the port was contemplated when the bills of lading were issued and must be implied though not expressed in terms. The stipulations as to mode of delivery

(1) 26 Can. S. C. R. 641.
(2) 26 Can. S. C. R. 176.
(3) Cass. Dig. (2 ed.) 213.
(4) 28 Can. S. C. R. 580.
(5) 14 Can. S. C. R. 736.
(6) 19 Can. S. C. R. 362.
(7) 29 Can. S. C. R. 201.
(8) 7 Man. & G. 850; 4 Bing. N. C. 314.
(9) 2 Wm. Bl. 916.
(10) 3 Brod. & B. 177.
(11) 5 B. & Ald. 53.
(12) 14 L. C. R. 164.
(13) 23 Howard 28.
(14) 5 Wall. 481.

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must be construed as made with reference to the custom of the port of discharge and the usage governing the particular trade. *Postlethwaite* v. *Freeland* (1), per Blackburn L. J. at p. 613; 1 Pritchard's Adm. Dig. (3 ed.) p. 477, no. 36; McLaughlin's Merchant Shipping, (3 ed.) p. 384; *Meyerstein* v. *Barber* (2). The manner of delivery and period at which the responsibility of the ship ceases depends upon the custom of particular places and the usage of particular trades. In *Petrocochino* v. *Bott* (3), delivery was not direct from the ship. See *Cairns* v. *Robins* (4), per Abinger, C. B. at p. 262; *Wright* v. *London & North Western Railway Co.* (5). The bills of lading did not exempt from liability for deficiencies in the packages.

We refer to arts. 1674, 1675, 1676 C. C. as to carriers' liability.

THE CHIEF JUSTICE (dissenting.)—I am unable to agree with the conclusion at which the other members of the court have arrived.

It appears to me that there is no error in the judgment of the Court of Queen's Bench and, adhering to the reasons given in the judgment of Mr. Justice Blanchet, I am of opinion that this appeal should be dismissed with costs.

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

SEDGEWICK J.—The appellants are the owners of the steamship Phœnix. In April, 1894, this vessel made a voyage from two Mediterranean ports, Catenia and Messina, to Montreal, with a cargo of fruit. Bills of lading were issued in the regular course and the

(1) 5 App. Cas. 599.
(2) L. R. 2 C. P. 38.
(3) L. R. 9 C. P. 355.
(4) 8 M. & W. 258.
(5) 44 L. J. Q. B. 119.

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plaintiff was the holder of the great majority of them, representing 29,359 boxes of lemons and oranges.

The Phœnix arrived in Montreal on the 27th of April, 1894, and immediately commenced to discharge her cargo, by landing the fruit upon the wharf. These goods were not immediately taken away by the consignees but were allowed to remain upon the wharf or in sheds by Carbray, Routh & Co., the ship's agents, until they were sold on the 2nd of May following at public auction. The delivery to the auction purchasers occupied several days. After these auction purchasers had claimed their goods the respondent complained that there was a large shortage in the quantities to which he was entitled and that the ship-owners, their officers and servants, had allowed a large number of boxes while on the wharf or in the shed to be broken and their contents abstracted, and also that there was a failure to deliver certain other boxes according to their marks and numbers and this action was brought to recover the amount of these damages.

The only authority which Messrs. Carbray, Routh & Co. had to act as ship's agents upon the arrival of the Phœnix is contained in the following letter written by the appellants:

DEAR SIRS,—We beg to advise you that our SS. Phœnix left Messina on the 31st ult. with a cargo of fruit for Montreal consigned to your address. The object of the present is to say, will you kindly render Captain Pick all necessary assistance he may require. We hope the cargo will be delivered in first class order and that no claim may arise. We rely upon your goodselves to keep down expenses to the lowest possible point in these very bad times, as well you know. We have about £1,166 balance of freight to receive, will you please therefore disburse the ship inward and outward of it and let us have the balance and accounts as early as you can.

The Phœnix is chartered with Messrs. Richard R. Dobell & Co., at London, from Montreal to Dundee and, as we are quite free for stevedoring outward please get this done at the lowest current price consistent with good reliable stevedore. Messrs. Peter Ferns & Son

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have been named to us as good people in this department. We trust the Phœnix will receive good despatch on both cargoes; in the meantime we shall be pleased to hear from you.

We are, dear sirs, yours faithfully,

PARSONS & LINTON.

We are writing Captain Pick to your address.

Ninety-four bills of lading were given by the master all of which were in the same terms. Among other stipulations therein were the following:

Shipped—(148) one hundred and forty-eight boxes lemons said to be marked and numbered as per margin, and to be delivered from the ship's deck, *where the ship's responsibility shall cease.* * * * * *

Simultaneously with the ship being ready to unload the above mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge or into lighters provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof, the master or agent of the ship and the collector of the port of discharge are hereby authorised to enter the said goods at the Custom House and land, warehouse or place them in lighter without notice to and at the risk and expense of the said consignee of the goods after they leave the deck of the ship.

WILLIAM A. PICK,
Master.

The declaration of the respondent contained the following statements:

4. The said steamer Phœnix during the said voyage had on board as part of her cargo 25,259 boxes of lemons and oranges and 4,100 half-boxes of oranges and lemons consigned to and the property of the said plaintiff which the master of the said steamer acknowledged to have received in good order and condition at Messina and Catania aforesaid and for which the said master issued bills of lading which were duly indorsed and delivered to the said plaintiff.

5. On the arrival of the said steamer Phœnix in Montreal the said cargo was discharged and unloaded from the steamer by the defendants and their agents in Montreal, Messrs. Carbray, Routh & Co., and placed upon the wharf and dock alongside the said steamer, and the defendants, through their agents, took full charge and control of the said cargo during its discharge and after it had been placed upon the wharf as aforesaid.

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It was proved at the trial that all the goods which had been taken on board the ship in the Mediterranean ports were delivered at the wharf at Montreal and, I think, these two paragraphs of the declaration show that the claim is not for any loss occurring during the voyage, but for loss wholly occurring subsequent thereto, and the evidence was altogether with a view of proving that damage, and the principal question in issue, in this case, is as to whether or not the ship-owners are liable therefor. I am opinion that they are not, for the following reasons:

Primâ facie, the responsibility of the owner to the consignee of the goods shipped depends upon the terms of the bill of lading. The bills of lading in this case provide that when the goods are delivered from the ship's deck the ship's responsibility shall cease, and further that, simultaneously with the ship being ready to unload, the consignee is bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge.

These goods were delivered from the ship's deck. They were unloaded on the wharf and thereupon the consignees were bound to be ready to receive them. The shipper's responsibility wholly ceased; they were from that moment at the risk wholly of the consignees. Any arrangements for the disposal or warehousing or holding of the cargo after delivery, in order to bind the appellants, must be made either with them personally or with agents authorised by them specially for that purpose. The appellants themselves made no such arrangement and, as the power of the ship's agents was set out in the letter to Carbray, Routh & Co. above set out and did not either directly or indirectly authorise them to constitute the ship-owners warehousemen on behalf of the consignees,

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there was no authority anywhere on the part of the ship's agents to deviate in the slightest degree from the terms of the bills of lading. If they did make arrangements in regard to the custody of the goods after delivery on the wharf, they and not the ship-owners must be responsible for any loss subsequently occurring.

It was argued by counsel for the respondent that the parties here did not intend to make a delivery in accordance with the bills of lading, and that it was competent for them to adopt a delivery in accordance with an alleged custom prevailing at the port of Montreal in respect to fruit charges. There is no evidence to show that the ship-owners, at least, had any intention of departing in the manner of delivery from the delivery mentioned in the bills of lading nor do I think that any custom was proved. It doubtless is true that in the case of a few vessels, previously arriving in Montreal laden with fruit, the fruit was disposed of precisely as in the present case, but, for all we know, the course adopted in those cases may have been the result of special arrangements made in respect to each particular case. But there is no complete or satisfactory evidence that such a custom existed in such a manner as to be known to the trade generally and known to foreign ship-owners. The evidence must be such as to lead to the conviction that a custom in order to be binding upon the whole world, must be known, speaking largely, to all persons whose interest it would be to know of its existence.

But, even supposing there was a custom, the terms of the bills of lading being inconsistent with and repugnant to the custom they must prevail against the custom. The contention of the respondent is that, in order to know the full and complete contract between the parties, there should be added to the bills

of lading the following words, as suggested by the appellant's factum:

> The ship agrees, after discharging the goods, to check and sort them upon the dock or wharf, to appoint a sufficient number of men day and night to care for them and to protect them from deterioration loss or theft until the consignee shall have been able to sell the said goods and then make delivery to the different purchasers upon the orders of the consignees after the said purchasers have had an opportunity of inspecting the said goods upon the wharf or quay.

I do not think it possible that such an agreement was ever contemplated by the parties. The very fact, as Mr. Justice Lynch in his judgment in the Superior Court suggests, that such a custom would be most unjust, leads to the conclusion that it was no custom at all or at all events a custom not binding upon the world.

It is not necessary, taking this view of the case, that we should place liability anywhere. Our duty is done when we have determined that, in the present case, it does not rest upon the owners of the ship.

I am of opinion that the appeal should be allowed with costs and the action dismissed, the appellants having their costs in all the courts below.

Appeal allowed with costs.

Solicitors for the appellants: *Atwater & Duclos.*

Solicitor for the respondent: *Macmaster, Maclennan & Hickson.*

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*May 31,
*June 12.

O. E. TALBOT (DEFENDANT).....APPELLANT;

AND

M. A. L. GUILMARTIN (PLAINTIFF)...RESPONDENT.

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

Appeal—Jurisdiction—Action for séparation de corps—Money demand.

In an action by a wife for *séparation de corps* for ill treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property.

Held, that no appeal would lie to the Supreme Court from the decree for separation; *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed; and the money demand in the declaration being only incidental to the main cause of action could not give the court jurisdiction to entertain the appeal.

MOTION to quash an appeal from a decision of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Superior Court in favour of the plaintiff.

The grounds on which the motion was based are sufficiently indicated in the above head-note and in the judgment of the court.

Stuart Q.C. for the motion. There can be no appeal to this court from the judgment in an action *en séparation de corps*; *O'Dell* v. *Gregory* (1); and the money demand, the granting of which is a necessary consequence of the decree for separation; Art. 208 *et seq.* C. C.; cannot confer jurisdiction. See also

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

(1) 24 Can. S. C. R. 661.

Ontario & Quebec Railway Co. v. *Marcheterre* (1); *McDonald* v. *Galivan* (2); 5 Aubry et Rau p. 282.

Fitzpatrick Q.C. Sol. Gen. of Canada, *contra*. The plaintiff demands by her declaration a sum of $18,000 which, by sec. 29, subsec. 4 of the Supreme Court Act fixes the amount in dispute on this appeal at that sum and gives jurisdiction to the court to hear it. *Laberge* v. *Equitable Life Assurance Society*. (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is a motion to quash an appeal from a judgment of the Court of Queen's Bench affirming a judgment of the Superior Court, whereby in an action for *séparation de corps* instituted by the present respondent against her husband, the present appellant, the latter court decreed separation.

The action of the respondent is founded on allegations of cruel and unlawful treatment and the conclusion taken is in the usual form for separation from bed and board which of course is the principal relief sought, the other heads which include amongst several others a condemnation to pay $18,000 money of the respondent alleged to have come to the hands of the appellant, all being dependent upon and subordinate and incidental to the principal head, the separation from bed and board. The appeal therefore, if admitted, would necessarily involve a discussion as to the sufficiency of the evidence and the grounds for the adjudication on the question of separation. The judgment as to the incidental matters would follow as of course the decision of the court upon the main question involved in the action which this court would therefore be compelled to deal with primarily, irrespective

(1) 17 Can. S. C. R. 141. (2) 28 Can. S. C. R. 258.
(3) 24 Can. S. C. R. 59.

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TALBOT v. GUILMARTIN.

The Chief Justice.

altogether of any matters in dispute as to the pecuniary or other consequential rights between the parties.

In the case of *O'Dell* v. *Gregory* (1) this court has already determined that an action for separation is not within its competence, the statute to which the jurisdiction here must always be referred not having provided for an appeal in this class of cases. If we were to hold that the mere addition to the conclusion of a claim for relief, in respect of a money demand consequent upon and incidental to a judgment for the plaintiff, could give this court jurisdiction, the want of jurisdiction which we must presume was withheld by the legislature for some good reason, would be rendered illusory and the rule formulated in *O'Dell* v. *Gregory* (1) would be evaded.

We are all of opinion that the motion to quash must be granted.

Appeal quashed with costs.

Solicitors for the appellant: *Fitzpatrick, Parent, Taschereau & Roy.*

Solicitors for the respondent: *Caron, Pentland & Stuart.*

(1) 24 Can. S. C. R. 661.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

1900
*May 5.
*Oct. 8.

AND

JOSEPH THERRIEN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT SITTING IN REVIEW AT QUEBEC.

Railways—Farm crossings—Servitude—Arts. 540-544 *C. C.—Right of way—Grand Trunk Railway of Canada—Interpretation of statute—"The Railway Act" of Canada, s.* 191—16 *V. c.* 37, *s.* 2—18 *V. c.* 33. *s.* 4—14 *& 15 V. c.* 51, *c.* 9, *s.* 16—*Constitutional law—Jurisdiction of provincial legislature.*

An owner whose lands adjoin a railway subject to "The Railway Act" of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than "The Railway Act" of Canada. *The Midland Railway Co.* v. *Gribble* ([1895] 2 Ch. 827), and *The Canada Southern Railway Co.* v. *Clouse* (13 Can. S. C. R. 139) referred to.

The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of "The Railway Act" of Canada. *The Canadian Pacific Railway Co.* v. *The Corporation of the Parish of Notre-Dame de Bonsecours* ([1899] A. C. 367), followed.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Quebec, affirming the judgment of the Superior Court, District of Quebec, which maintained the plaintiff's action with costs.

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

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THE GRAND TRUNK RAILWAY COMPANY. v. THERRIEN.

A statement of the case and of the questions at issue upon this appeal appears in the judgments reported.

Stuart Q.C. for the appellant. The plaintiff's land is not crossed by the railway, but merely adjoins the railway lands which form its southern boundary, therefore sec. 191 of "The Railway Act" of Canada does not apply.

The special acts in respect to the incorporation of the Grand Trunk Railway Company and its powers give no greater rights to crossings than the general Act of the Dominion Parliament, and even if the Provincial Act in Quebec can be said to be more favourable to the plaintiff's pretentions, it cannot affect questions in respect to the road-bed or construction of any railway subject to the Dominion Act.

This action is not based upon articles 540, 541 C.C., but claims, without offering indemnity, a right of a statutory nature, and we contend that no such right exists. We rely also upon our deed of the lands and the release therein by Ross, who was fully indemnified and made no reservations when the right of way was originally conveyed to the company.

We also cite the following cases: *The Grand Trunk Railway Co.* v. *Campbell* (1); *The Grand Trunk Railway Co.* v. *Vogel* (2), which has not been impugned on the point now in question; *The Grand Trunk Railway Co.* v. *Huard* (3); *The Canada Southern Railway Co.* v. *Clouse* (4); *Roy* v. *Beaulieu* (5); *Vézina* v. *The Queen* (6), and R. S. C. ch. 1, and sec. 7, sub-sec. 51.

Fitzpatrick Q.C., (Solicitor-General), and *L. A. Taschereau* for the respondent. The Railway Acts must be read as aided by Articles 540-544 C. C., and

(1) Q. R. 3 Q. B. 570.
(2) 11 Can. S. C. R. 612.
(3) Q. R. 1 Q. B. 501.
(4) 13 Can. S. C. R. 139.
(5) 9 Q. L. R. 97.
(6) 17 Can. S. C. R. 1.

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THE GRAND TRUNK RAILWAY COMPANY. v. THERRIEN.

give respondent the necessary right of way from his lands across the railway as the only direct means of reaching the nearest and only public road which lies on the other side of the railway and runs parallel to it. This is his only exit to his only highway and refusal of the necessary servitude is a hardship for which both the general statutes and the Civil Code provide a remedy.

The appellant company is governed also by 16 Vict. ch 37, which by its second section incorporates the clauses of the Railway Clauses Consolidation Act (14 & 15 Vict. ch. 51), with respect to the first, second, third and fourth clauses thereof, and also with respect to interpretation, highways, bridges, fences and general provisions. Section 13 of that Act provides that "fences shall be erected and maintained on each side of the railway * * * with openings, or gates, or bars therein, and *farm crossings* on the road, for the use of the proprietors of the lands *adjoining* the railway." It is clear that crossings are to be provided and maintained not only for the use of the proprietors whose lands are cut or separated in two by the railway, but also for the use of all lands *adjoining* railways.

Art. 5171, clauses 1 and 2 of the Revised Statutes of Quebec, by similar provisions, requires farm crossings to be made and maintained by the company, upon the application of any proprietor of such land, *present or future.* This provision of the provincial statute is quite *intra vires*, and applicable notwithstanding that the Grand Trunk is a federal railway. See remarks by Mr. Justice Plamandon (1) in reference to the case of *Gagné* v. *The Grand Trunk Railway Co.*; Art. 6 C. C.; C. S. C. ch. 66, sec. 13; R. S. C. ch. 109, sec 54. In this instance the appellant is clearly

(1) *G. T. R. Co.* v. *Huard*, (Q. R. 1 Q. B.) at page 502.

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bound by its special Act to furnish the respondent with the required crossing. *The Grand Trunk Railway Co.* v. *Huard* (1), per Plamondon J. in the Superior Court, and Bossé J. in Appeal.

The respondent has priority by Art. 2085 C. C. over the conveyance and release by Ross to the company which, although executed in the year 1856, was not registered until 13th June, 1899, and the respondent had no notice of the deed or its contents when he obtained and registered his title.

TASCHEREAU J.—In 1856, the Grand Trunk Railway Company, present appellants, purchased from Arthur Ross the strip of land, many miles in length, required for their road across the Seigniory of Beaurivage, then in a state of wilderness, for the sum of two hundred and fifty pounds,

being in full for the price and value of the said piece or parcel of ground, as well as the amount of the compensation allowed to the said party of the first part for damages suffered by him by reason of the taking of the said piece or parcel of ground, *cutting his property*, and all other damages generally whatsoever.

The company then, or very soon after, built their line on the land they had so acquired.

Subsequently, Ross got his Seigniory surveyed and subdivided into concessions and lots; and in 1885, one O'Brien, whose title from Ross is not in evidence, sold two lots thereof, Nos. 74 and 75, in the first concession of the then newly erected Parish of St. Agapit, in the said Seigniory, containing three *arpents* each by thirty, bounded in front on the south by the said railway, to one Sifroid Therrien, who, soon thereafter, entered into possession and built a house on lot 74. A public road was then in existence parallel to the railway line, south of it, and immediately adjoining it,

(1) Q. R. 1 Q. B. 501.

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THE GRAND TRUNK RAILWAY COMPANY. v. THERRIEN.

Taschereau J.

the railway line thus separating the two lots in question from the said public road. The company, however, gave to Sifroid Therrien a crossing over their line on lot 74 to give him access to the road. Later, Sifroid Therrien assigned lot 74 to one of his sons, named Telesphore, and subsequently, in 1898, lot 75 to another one of his sons named Joseph, the present respondent, who by this action claims the right to have a crossing on the company's line so as to have access to the public road, as his brother has on lot 74. His claim is not for a right of way at common law (Art. 540 C. C.) but for a statutory crossing.

I do not see how his claim can be supported. The railway is not built across his land. He has no land on the south of the railway line. It is the railway property that is his boundary, and the statute which provides that every company shall make crossings for persons across whose land the railway is carried, has no application. 51 Vict. ch. 29, sec. 191. *The Canada Southern Railway Co.* v. *Clouse* (1). Then Ross has received compensation from the company for the severance of his property and all damages resulting from the construction of the railway. He sold this land without reserving a right of way across the company's road. Those who hold under him, as the respondent does, cannot have more rights than Ross would have under the same circumstances, were that lot 75 still in his hands.

Before the public road was located, the owner of this lot 75, having no land on the other side of the railway, had no right of exit across the railway line. I do not see that the location of the road has given him any rights that he did not have previously, any more than the building of a church, or of a store, or of a public building of any kind, would have done.

(1) 13 Can. S. C. R. 139.

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The respondent may or may not have the right at common law to get an access to the public road over the company's line at his own cost, but he certainly has not got the statutory right at the company's cost that he claims by his action.

The appeal must be allowed with costs and the action dismissed with costs.

SEDGEWICK J.—The plaintiff claims that he is entitled by law to a crossing over the railway of the defendant company, not because of any grant from the company to him or his predecessors in title, but on the ground that the statute imposes such an obligation on the company.

The plaintiff owns a parcel of land known as lot 75 on one side of and adjoining the strip of land used by the defendant company for its tracks and right of way, but he owns no land on the other side. If the rights of the parties are governed by the general railway law of Canada, the fact that the plaintiff owns land only on one side of the railway is fatal to his claim.

The company obtained title to this strip of land on which its railway is now constructed and operated, by a conveyance from one Arthur Ross, more than forty years ago. This conveyance recites that the company

> having followed and complied with all the provisions of the statutes in force in the Province of Canada relating to railways are entitled to take possession of the land described in the conveyance.

The plaintiff's father owned the land now in question, and other land, all adjoining the railway on the north side, and for some years before the grant to his son used a crossing of the railway tracks starting from the portion of his land which has not been conveyed to the plaintiff, thence across the railway tracks to a public highway. The portion conveyed to and

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now owned by the son never had from it any crossing over the railway.

There is no evidence as to how the plaintiff's father got the right to use his crossing, and it is not material to the consideration of this case, because it is not argued that the plaintiff's right depends in any way upon the right of the father to cross the railway tracks at the old crossing; the plaintiff's right is admitted to depend on the liability of the railway company to make a farm crossing under some statute law.

The present general railway Act passed in 1888 enacts in section 191:

> Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles.

The plaintiff became the owner of the land in question on the 27th of September, 1898, subsequent to the passing of the Railway Act of 1888.

This enactment in the Railway Act declares the liability of the railway company to make crossings for *parties across whose land the railway is carried*, and therefore it does not apply to any one whose land is not crossed by the railway.

The English Railways Clauses Consolidation Act of 1845 contains a similar provision; the language is:

> The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of land adjoining the railway, that is to say, such * * * convenient gates * * * and passages over * * * the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands *through which* the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof.

That this provision is intended to apply only to a person who owns parcels of land on opposite sides of and adjoining each side of the railway, is shown in

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the case of *The Midland Railway Co.* v. *Gribble* (1). In that case the judgment of the court was in effect that a crossing of a railway reserved for a person through those land the railway had been constructed was an *easement enjoyable only so long* as that person owned land on both sides of the railway, and goes so far as to declare that this easement would be lost as soon as he parted with his land on either side of the railway and would not be restored even if he should repurchase that parcel so as to become again an owner of land on both sides of the railway; in other words, it is confined to the person across whose land the railway is carried in the first place, and under certain circumstances to his heirs and assigns, and continues only so long as he or they own land on both sides of the railway.

There has been some argument on the part of the plaintiff based on the theory that the Provincial Act of the Province of Quebec governs the rights of the parties in this case. That theory is no longer arguable. In the case of *The Canadian Pacific Railway Co.* v. *The Corporation of the Parish of Notre-Dame de Bonsecours* (1), the Judicial Committee of the Privy Council, while deciding that a Dominion railway company might be under the jurisdiction of the provincial legislature so far as to require it to clean out the silt which accumulated in one of the existing ditches and which caused water to flow back upon the lands of adjoining owners, declared in effect that provincial legislation would be *ultra vires* if it directed the structural condition of the road bed or crossing of its tracks to be altered.

The plaintiff also argues that even if the "Railway Act" of Canada compelled a railway company to build crossings *only for the use of those* whose farms

(1) [1895], 2 Ch. D. 827.

(1) [1899] A. C. 367.

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are cut in two, still the Grand Trunk Railway Company is governed by a special Act which provides for this particular case and makes the general Act inapplicable.

This defendant company was incorporated by 16 Vict. ch. 37. Section 2 of that Act declares that the several clauses of the Railway Consolidation Act shall be incorporated in that Act of incorporation, and a later Act, namely, 18 Vict. ch. 33, in its fourth section declares that the Railway Clauses Consolidation Act shall extend and be applicable to the Grand Trunk Railway Company.

The Railway Clauses Consolidation Act, 14 & 15 Vict. ch. 51, deals with fences, etc, in its thirteenth clause, which enacts that fences should be erected and maintained on each side of the railway * * * with openings, or gates or bars *and* farm crossings of the road for the use of the proprietors of the lands adjoining the railway. In a subsequent Consolidated Railway Act, after Confederation, namely, 42 Vict. ch. 9, (D.) section 16 deals with this same subject enacting in effect that a railway company (if so required) should erect and maintain, on each side of the railway, fences of the strength and height of an ordinary division fence with sliding gates, commonly called hurdle gates, with proper fastenings *at* farm crossings of the road for the use of the proprietors of the land adjoining the railway.

It was held in *The Canada Southern Railway Co.* v. *Clouse* (1), that the substitution of the word "at" in the later Act was merely the correction of an error, and was made to render more apparent the meaning of The Railway Clauses Consolidation Act, and therefore it is to be now interpreted as if the railway company was liable to erect and maintain fences with

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openings, or gates, or bars therein *at* farm crossings of the road without attempting to describe when, or where, or upon what occasion the railway company should be obliged to provide a farm crossing; consequently there is no statutory direction prescribing a liability of the railway company to make a farm crossing under the circumstance contended for now by the plaintiff; in other words, there is no difference in the effect of the statute known as "The Railway Clauses Consolidation Act" and the general Railway Act of 1888 now in force.

The result is that there is no statutory liability on the part of the appellant to supply such a crossing as the plaintiff desires, he having land only on one side of the railway.

It is not necessary in this case to discuss the question as to how far or under what circumstances the person whose land was originally crossed by the railway can transfer his rights to a third party.

KING and GIROUARD JJ. concurred in the judgment allowing the appeal and dismissing the action with costs.

THE CHIEF JUSTICE took no part in the judgment on account of illness.

Appeal allowed with costs.

Solicitors for the appellant: *Caron, Pentland & Stuart.*

Solicitors for the respondent: *Fitzpatrick, Parent, Taschereau & Roy.*

THE SUTHERLAND-INNES COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE TOWNSHIP OF ROMNEY (DEFENDANT) ..... } RESPONDENT.

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*May 25-29.
*Oct. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Drainage works—Municipal corporation—Improvement of natural watercourses—Artificial watercourses—Embankments—Dykes—"The Drainage Act, 1894," 57 V. c. 56 (Ont.)—"The Ontario Drainage Act, 1873"—The "Municipal Drainage Aid Act"—36 V. c. 39—36 V. c. 48 (Ont.)—"Benefit" assessment—"Injuring liability"—"Outlet liability"—Assessment of wild lands—Construction of statute.

The Ontario Act 57 Vict. ch. 56 has not abrogated the fundamental principle underlying the provisions of the previous Acts of the Legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners which rests on the maxim *qui sentit commodum sentire debet et onus.*

Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under said Act.

Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet.

Every assessment, whether for "injuring liability" or for "outlet liability" must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury which water is to be carried off by the proposed drainage work.

Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work,

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

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and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances.

Section 75 of that Act only authorises an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said section 75 but must constitute a charge upon the general funds of the municipality.

In the present case, the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said section 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Mr. Justice Ferguson at the trial which dismissed the plaintiff's action with costs.

The action was to set aside a by-law, (no. 601,) of the Township of Romney, and the report and proceedings on which it was based whereby certain wild lands, situate in that township, were assessed for "outlet" and "injuring" liability in respect to lands in the adjoining Township of Tilbury North, and for repairs to certain drainage works and improvement of streams and dykes constructed in connection therewith in the Township of Tilbury North; and also to set aside another by-law, (no. 602,) of the Township of Romney, assessing said lands for outlet charges and maintenance of other drains in the Township of Romney, and to have both by-laws declared *ultra vires* of the Corporation of the Township of Romney.

A statement of the circumstances under which the action was taken and the questions at issue upon this appeal will be found in the judgment of the court delivered by His Lordship Mr. Justice Gwynne.

(1) 26 Ont. App. R. 495.

Atkinson Q.C. and *M. Wilson Q.C.* for the appellant. Actions similar to this have frequently been before the Ontario courts. See *Sweeney* v. *The Corporation of Smith's Falls* (1); *Broughton* v. *Townships of Grey and Elma* (2).

West Tilbury was not bound to keep these drains in repair and lands in Romney could not therefore be assessed for the cost of repairs. *Re Township of Mersea and Township of Rochester* (3).

As to the powers of the municipality under sec. 75 of 57 Vict. ch. 56, see *In re Stonehouse and Plympton* (4), and as to "injuring liability", *Scott* v. *Town of Peterborough* (5).

Aylesworth Q.C. and *Rankin Q.C.* for the respondent. That improvement work can be done without a petition, see *Re Townships of Caradoc and Ekfrid* (6); *Re Stonehouse and Plympton* (4); and see also *Bickford* v. *Corporation of Chatham* (7).

The Judgment of the Court was delivered by:

GWYNNE J.—This is an appeal from a judgment of the Court of Appeal for Ontario affirming a judgment of the High Court dismissing an action instituted by the appellants to restrain the respondents, the Municipality of Romney (for reasons stated in the statement of claim), from enforcing two certain by-laws numbered respectively 601 and 602, passed by the Municipal Council of the Township of Romney against the lands of the appellants in the pleadings mentioned, situate in the Township of Romney, and for other relief.

(1) 22 Ont. App. R. 429.
(2) 27 Can. S. C. R. 495.
(3) 22 Ont. App. R. 110.
(4) 24 Ont. App. R. 416.
(5) 19 U. C. Q. B. 469.
(6) 24 Ont. App. R. 576.
(7) 14 Ont. App. R. 32; 16 Can. S. C. R. 235.

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These by-laws profess to have been passed by virtue of authority claimed to have been conferred by an Act of the Legislature of Ontario, 57 Vict. ch. 56, intituled "An Act to consolidate and amend the drainage laws," whereas the contention of the appellants is that, upon the facts appearing in evidence, the said consolidated Act did not confer any authority to affect the lands of the appellants with the burden purported to be imposed upon them by the said by-laws. The objections to these by-laws, relied upon by the appellants, rest upon different considerations, and so they must be dealt with separately.

The by-law 601 purports to be a by-law passed by the Municipal Council of Romney for the purpose of giving effect to a by-law of the Municipality of the Township of Tilbury West, assuming to impose a burthen upon the lands of the appellants situate in Romney to bear a part of the cost of certain works mentioned in a by-law No. 45 of the Township of Tilbury West passed in 1897 under the title of "A by-law to provide for extending and otherwise improving Big Creek, in the Townships of Tilbury North and Tilbury West."

The questions arising in this appeal necessitate a review of the several Acts of the province relating to drainage works, but it will not be necessary to go further back than the year 1873, upon the 29th of March in which year two Acts of the Legislature of Ontario were passed, the one being 36 Vict. c. 38, intituled "An Act to authorise a further expenditure of public money for drainage works," to which by the Act is given the short title of "The Ontario Drainage Act, 1873"; and the other being 36 Vict. c. 39, intituled "An Act to authorise the investment of certain monies in debentures to be issued for the construction of drainage works by municipalities." This

Act by sec. 29 is given the short title of the "Municipal Drainage Aid Act."

The first section of this Act repealed a former Act 35 Vict. c. 26 and substituted therefor, in the precise language of the repealed Act, the provisions following, among others:

2. In case the majority in number of the owners as shewn by the last revised assessment roll to be resident *on the property to be benefited* in any part of any municipality, do petition the council *for the deepening of any stream, creek or water course or for the draining of the property* (describing it) the council may procure an examination to be made by an engineer or provincial land surveyor, of the stream, creek or water-course proposed to be deepened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or provincial land surveyor and an assessment to be made by such engineer or surveyor *of the real property to be benefited* by such deepening or drainage stating as nearly as may be in the opinion of such engineer or provincial land surveyor, *the proportion of benefit* to be derived by such deepening or drainage by every road and lot or portion of a lot, and if the council be of opinion that the deepening of such stream, creek or water course, or the draining of the locality described or a portion thereof would be desirable the council may pass by-laws; * * *

1. For providing for the deepening of the stream, creek or water-course or the draining of the locality;

2. For borrowing on the credit of the municipality the funds necessary for the work and for issuing the debentures of the municipality therefor;

3. For assessing and levying in the same manner as taxes are levied, upon the real property *to be benefited* by the deepening or draining, *a special rate* sufficient for the payment of the principal and interest of the debentures, and for so assessing and levying the same * * * by an assessment and rate *on the real property so benefited* * * * as nearly as may be *to the benefit derived by each lot or portion of lot and road in the locality*; * * * *

4. For regulating the times and manner in which the assessment shall be paid; * * * *

5. For determining what real property will be benefited by the deepening or draining and the proportion in which the assessment should be made on the various portions of lands so benefited; * * * *

subject, however, to appeal before the Court of Revi-

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sion, and from thence to the Judge of the County Court as in the case of ordinary asssesments.

The above provisions relate to works constructed wholly within the limits of the municipality passing the by-law for its construction and which works confer benefit only on lands situate within the limits of such municipality.

Then section 6 of the Act enacted that :

6. Whenever it is necessary to continue the deepening or drainage aforesaid beyond the limits of any municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels into the adjoining municipality *until he finds fall enough to carry the water beyond the limits of the municipality in which the deepening or drainage was commenced.*

Then section 7 provides for the case of lands outside of the municipality in which such work of deepening or draining is constructed *being benefited by such work in an adjoining municipality* as follows :

7. When the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, *but in the opinion of the engineer or surveyor aforesaid benefit lands in an adjoining municipality,* or greatly improve any road lying within any municipality or between two or more municipalities then the engineer or surveyor aforesaid shall *charge the lands to be so benefited* * * * * *with such proportion of the cost of the work as he may deem just.*

Then by section 8 it is enacted that

the engineer or surveyor aforesaid shall determine and report to the council by which he was employed *whether the deepening or drainage shall be constructed and maintained solely at the expense of such municipality or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportion.*

Provision then is made for service, by the council of the municipality undertaking such work, upon the head of the council of an adjoining municipality the lands in which are so benefited, of a copy of the report, plans and specifications of the engineer *so far as they affect such last mentioned* municipality. And in section 10 it is enacted that

unless the same is appealed from as hereinbefore provided it shall be binding *on the council* of such municipality,

which council is required in such case by section eleven to

pass a by-law in the same manner as if a majority of the owners resident on the lands to be taxed had petitioned as provided in the first section of this Act to raise such sum as may be named in the report, *or in case of an appeal*, for such sum as may be determined by the arbitrators.

Provision is then made for an appeal by the council of the adjoining municipality whose lands or roads are to be benefited as aforesaid to arbitrators to be appointed, one by the council of each of the said municipalities and a third by the two so chosen, whose award is, by section 15, declared to be binding upon all parties, and that a copy shall be registered with the registrar of deeds for the county in which either of the municipalities is situate.

Then by section 17 it was enacted that

after such deepening or drainage is fully made and completed, *it shall be the duty of each municipality* in the proportion determined by the engineer or arbitrators, as the case may be, or *until otherwise determined by the engineer or arbitrators, under the same formalities as near as may be as provided in the preceding sections, to preserve, maintain and keep in repair the same within its own limits* either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council, upon the report of the engineer or surveyor may seem just, and any such municipality neglecting or refusing so to do upon reasonable notice being given by any party interested therein shall be compelled by mandamus to be issued from any court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable to pecuniary damage to any person whose property shall be injuriously affected by reason of such neglect or refusal.

Then by sec. 18 it was enacted that

should a *drain* already constructed or hereafter constructed by a municipality be used as an outlet or otherwise by another municipality, company or individual, such municipality, company or

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individual using the same as an outlet or otherwise may be assessed for the construction and maintenance thereof in such proportion and amount as shall be ascertained by the engineer, surveyor or arbitrators under the formalities provided in the preceding sections.

Then by sec. 27 it was enacted that all disputes as to damages alleged to have been done to any property in the construction of drainage works or consequent thereon should be referred to arbitration in the manner provided in the Act and that the award made thereon should be binding upon all parties.

All of the above provisions were repeated in the Municipal Institutions Act, [36 Vict. c. 48,] passed in the same session of the Legislature of Ontario by which Act it was further among other things enacted, s. 372, s. s. 10 that the council of every municipality may pass by-laws for opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and pulling down drains, sewers or watercourses within the jurisdiction of the council.

this enactment plainly related to the general powers of municipal councils over property within the municipality and had no reference to any drainage work of the character of drains constructed or to be constructed by a municipality under the provisions of the special local acts relating to drains constructed at the cost of the parties whose lands should be specially benefited by such works.

Prior to the month of February, 1875, two drains had been constructed in the Township of Romney and wholly at the cost of that township, and the lands therein benefited thereby, under the provisions of the Act above set out; one of these drains, called the Campbell Drain, commenced at a point in the westerly end of the third concession of the township and extended from thence northerly along the line between lots numbers eighteen and nineteen to the town line constituting the northern limit of the Township of Romney and the southern limit of the Township of

East Tilbury. From this point the drain was continued westerly along the Romney side of the said town line to the north-west angle of Romney from which point it was continued into and across two lots in the ninth concession of Tilbury West for the distance of about 196 rods where it was connected with a natural stream or watercourse, called the East Branch of Big Creek, which rising close by that spot flows down a natural descent of fifteen feet in three miles to a point in lot fifteen, in the seventh concession of Tilbury West called "The Forks," where its waters flow into another natural stream or watercourse called "Big Creek," which rises in the westerly end of the eighth concession of the Township of Mersea (which lies west of Romney and south of Tilbury West,) and after crossing several concessions in Mersea and in Tilbury West, its waters become united with the waters of the stream called the East Branch at the place called the "Forks," from which point the waters of the two streams flow as one stream to its outlet into the River Thames about half a mile east of where the Thames falls into Lake St. Clair. The other of these drains in Romney is called "Drain No. 4" which commencing at a point in the easterly end of the third concession in Romney runs northerly to the northerly limit of the said township opposite to the Township of East Tilbury at a point where the line between the fourth and fifth concessions of Romney intersects the north town line of Romney from which point it extends westerly along the Romney side of the said town line until it reaches the point where the Campbell Drain reached the same town line; from that point the Campbell Drain was deepened and widened to the north-west angle of Romney and thence for the aforesaid distance of 196 rods into Tilbury West where connection was made as aforesaid with the said stream

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called the East Branch, which thus became the outlet of these two drains.

The extension of these two Romney drains into Tilbury West until fall enough was found to carry the waters coming down the drains beyond the limits of the Township of Romney was in perfect accordance with the provisions of 36 Vict. c. 39, sec. 6 (above extracted), and the outlet so reached being a natural stream or watercourse, the Romney drains so conducted into it had as perfect a right to the use of it as such outlet as if the stream where the combined drains reached it had been, and for some distance had continued to be, within the Township of Romney.

At this same time the Council of the Township of Tilbury West had procured two land surveyors, Mr. Augustine McDonnell and a Mr. J. S. Holwell, to design and make plans of several drainage works within the township The council of the township declined to undertake themselves the construction of the works or any of the works which were by these gentlemen respectively designed and suggested upon the ground, as is said, that they were too expensive for construction under 36 Vict. c. 39, but they made application to the Provincial Government to construct them under the provisions of 36 Vict. c. 38.

Upon the 3rd June, 1875, the township clerk of the township addressed a letter to the Chief Engineer of Public Works in the Province in the terms following:

TOWNSHIP CLERK'S OFFICE,
Tilbury West, 3rd June, 1875.

SIR,—In reply to your letter of the 26th April now last past addressed to Pierre Tremblay, Esq., Reeve of Tilbury West, respecting drainage works in Tilbury West which have been surveyed by Messrs. Holwell and McDonell, Civil Engineers, I am directed by the Council of Tilbury West to inform you that the said municipal council are very desirous for the Government to undertake *the construction of all the drainage works embraced in both the said surveys.*

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You will see by turning over this leaf that the council laid this matter before the ratepayers in open meetings of the council, and there was not one word said against the council applying to the Government to undertake the construction of the said drainage works.

And upon the 3rd July, 1875, Mr. Pierre Tremblay, Reeve of the Township, addressed a letter to the Hon. C. F. Fraser, Commissioner of Public Works for the Province of Ontario, in the terms following:

SIR,—The Municipal Council of Tilbury West, county of Essex, desire the *following drainage works* constructed under the provisions of the Ontario Drainage Act, 36 Vict. c. 38, viz.: "*The Tremblay Creek Drain*," "*Big Creek Outlet*," and the two branches thereof; also the creek known as "Little Creek" from the lake southerly as far as necessary, and the drains called Nos. 1, 2, 3 and 4 of Mr. Holwell's survey.

By this statute, 36 Vict. c. 38, it was enacted that the Commissioner of Public Works on the written application of the council of any municipality, or on the petition of a majority of the owners, as shewn on the last revised assessment roll resident on the property to be described in the petition, the whole or any portion of which is to be benefited by the drainage, may undertake and complete the same as if the council had applied for the drainage. Then it was enacted that the Commissioner of Public Works should notify the council of any municipality in which drainage works had been executed under the provisions of the Act requesting them to appoint three assessors *who should assess all lands and roads benefited* by such drainage. The Act then, in the 14th section, enacted that as soon as conveniently might be after any works for the drainage or improvement of any land authorised to be executed under the Act should have been completed, the commissioner should furnish the assessors with a map of the municipality with the drain or drains marked upon it, and a statement of the sums expended in and about the works so executed, upon receipt of which, assessors should inspect the lands and assess

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them setting opposite each parcel of land the proportion which ought to be payable in respect of the several parcels.

Then in sec. 16 provision was made to the like effect as in sec. 7 of 36 Vict. c. 39, that when the drainage works do not extend beyond the limits of the municipality in which they were commenced, but in the opinion of the assessors *benefit lands in an adjoining municipality*, then that the *assessors should charge the lands so benefited* with such proportion of the cost of the works as they might deem just; like provision then was made for an appeal by the council of the municipality whose lands are benefited without the drainage works being continued thereinto, to arbitrators whose award, as provided *in simile casu* in 36 Vict. ch. 39, should be final upon all parties. Then in sec. 25, provision was made for the maintenance and keeping in repair of the drainage works executed under the Act at the expense of the parties whose lands respectively are benefited by the works to the like effect as is provided in sec. 17 of 36 Vict. c. 39. Then sec. 26 enacted that should any drain *constructed under the provisions of that Act*, 36 Vict. c. 38, be used as an outlet or otherwise by any other municipality, company or individual, such municipality, company or individual might be assessed for the construction and maintenance of the drain so used as an outlet in such proportion and amount as should be ascertained by the assessors or arbitrators under the formalities provided in the preceding sections.

We have seen by the above letter of the 3rd July, 1875, that the works which the Commissioner of Public Works was requested to execute under the provisions of 36 Vict. c. 38, consisted of nine several separate and distinct works, and as such when all were completed they were, in the year 1878, returned for the

purpose of assessment of the lands benefited by the said several works respectively under the provisions of the said Act then consolidated as chapter 33 in the Revised Statutes of Ontario, 1877. The drain called Tremblay Creek Drain is a natural stream or watercourse called "Tremblay Creek," which rises in Tilbury East, which several artificially constructed drains, constructed under the provisions of "The Municipal Drainage Acts," now use as their outlet. This stream enters Tilbury West in lot 22, in the 6th concession of that township, and after crossing the line between the townships Tilbury East and Tilbury West, and running by a devious course across the 6th, 5th, 4th, 3rd and 2nd concessions (in which latter concession it passes under the Canadian Pacific Railway on lot No. 20) and after crossing said lot No. 20 enters Big Creek proper at or about the centre line of the south half of lot No. 19 in the first concession. The cost of this work as returned for assessment of the several parcels of land benefited by it is $4,156.79.

The drain called "Little Creek" drain is a small natural watercourse which rises in or about lot No. 10 in the seventh concession of Tilbury West, runs into and through the lots numbered 11 in the several concessions in a northerly course to the second concession in which it enters lot No. 10, and thence enters lot No. 10 in the first concession, an angle of which it crosses into lot No. 11 in the first concession and flows through the last mentioned lot northerly and lot No. 11 in the broken front concession in which lot, passing under the Grand Trunk Railway, it empties its waters directly into Lake St. Clair. The cost of this work as returned for assessment of the several parcels of land benefited by it is $6,095.96. The course of this work is distant from and lying to the west of Big Creek proper by from $1\frac{1}{2}$ to $2\frac{1}{2}$ miles.

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The work called the West Branch Drain was work done also in a natural stream or watercourse, namely that part of the stream called Big Creek which rising, as already said, in the Township of Mersea flows across Mersea and Tilbury West, until, under the name of "The West Branch" it reaches the point called the "Forks" on lot 15 in the seventh concession. From this point to its mouth the stream is called Big Creek proper. The cost of the work done in this West Branch as returned for assessment of the several parcels of land benefited by that work was $5,305.26.

The drains designated by numbers "1, 2, 3 and 4 of Mr. Holwell's survey," were wholly artificially constructed drains situate respectively in the 7th, 9th, 10th and 11th concessions of Tilbury West, west of the West Branch, into which as their outlets they respectively debouch in those respective concessions, and the cost of the construction of each, as returned for assessment of the several parcels of land benefited by each of these respective works, was as follows:

No. 1	Drain in	7th	concession	.....$2,836.99
No. 2	"	9th	"	..... 2,348.93
No. 3	"	10th	"	..... 2,545.51
No. 4	"	11th	"	..... 2,018.74

The work done upon the Big Creek proper extended from the Forks in lot 15, in the seventh concession, to the concession line between the third and fourth concessions at lot No. 18. The distance of this point from the shore of the Lake St. Clair, in the broken front concession, is fully 4½ miles in about a due north direction, while the distance along the stream which here takes a more north-easterly and easterly direction to its mouth in the River Thames, east of Lake St. Clair, is between six and seven miles. The greatest height of any land between this concession line and the lake in this neighbourhood is said to be

three feet. All the evidence concurred in saying that the height varied from one to three feet. A witness who had been employed on this work, which was executed by the Ontario Government in 1878, says that the work was carried as far as it could be because of the waters of the lake, which were so very high then. The cost of this work, as returned for assessment of the several parcels of land benefited by it, was $5,983.32.

The only other work comprehended in the works thus undertaken by the Provincial Government was done upon the East Branch stream which also is a natural stream or watercourse, and the work done upon this stream, which as already mentioned had a fall of fifteen feet to its mouth at the Forks, a distance of three miles, and in which the two drains in Romney had their outlet, extended from about the point where the Romney drains in one channel debouched into the said East Branch about half a mile or three quarters of a mile distant from the north-west angle of Romney to the mouth of the said East Branch Stream at the Forks. The cost of the work done on this stream, as returned for assessment of the several parcels of land benefited by this work, was $3,570.34.

Now it appears to be clear beyond all controversy that no lands in Romney derived or could by possibility be supposed to derive any benefit whatever from the work done on the Little Creek which debouched into Lake St. Clair at a point in the broken front concession of Tilbury West about three miles west of the mouth of Big Creek. So neither could any lands in Romney be supposed to derive any benefit from the work done upon Tremblay Creek, which emptied into Big Creek in the first concession of Tilbury West about two miles from its mouth, but where its waters in their natural state were almost, if not actually, upon a level with the waters of Lake St.

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Clair; nor from the work done in any of the drains numbered "1, 2, 3 and 4 of Mr. Holwell's survey" as above described; nor from the work done on Big Creek proper itself—that is to say, between the place called "The Forks" and the termination of the work at or about the line between the third and fourth concessions.

The only work by which the lands in Romney could have been supposed to have been benefited was the work done on the East Branch Stream by deepening and it may be widening that stream where it had been so as aforesaid made the outlet of the Romney drains above mentioned. The improvement of this outlet constituted the sole benefit conferred upon lands in Romney. The cost of this work as we have seen was $3,570.34.

Now I think it may fairly be assumed that the assessors to whom was entrusted the duty to determine the amount chargeable to lands in Romney for such benefit, did as I think they should have done, that is to say, did according to the best of their judgment, charge all the Romney lands benefited by apportioning to those lands such proportion of the cost of that work as they considered fair and just having regard to the value to those lands of the improvement to the outlet of the Romney drains so as aforesaid made into the said East Branch Stream. The assessors determined all the lands in Romney which were so benefited and upon a roll they set opposite to each lot the amount chargeble to each; and here it may incidentally be remarked that lots Nos. 21, 22 and 23, in the third concession, (450 acres of which are now owned by the appellants and have been charged by the by-law of Tilbury West which the by-law 601 of Romney has been passed to give effect unto, with the sum of $414.42, notwithstanding that some time since 1878

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the council of the Township of Romney have, under the provisions of 36 Vict. ch. 39, constructed a drain along the front of said lots in the 3rd concession, which by a tunnel through a ridge of high land which separates the water flowing into Lake St. Clair from those flowing into Lake Erie, whereby means of drainage of the said lots in the 3rd concession into Lake Erie is supplied in relief of the No. 4 drain in Romney) were not entered as lands benefited and were not charged with any sum. The total amount chargeable to lands in Romney, as adjudged by the assessors, was $2,127 or about two-thirds of the cost of the work done in the East Branch; of this amount the sum charged to lands in the fourth and fifth concessions now owned by the appellants containing in the whole 1,000 acres, was $120. Upon appeal by the council of Romney from this assessment it was reduced by an award made by arbitrators under the provisions of the statute in that behalf who adjudged and awarded as follows:

That the said assessment be reduced from the said sum of two thousand one hundred and twenty-seven dollars to the sum of twelve hundred dollars, said sum to be distributed and apportioned over and upon the said lands and highways particularly specified in the said assessment roll in the same relative proportion that they bear one to the other at present, in and by the said roll, the said reduction being equal to about forty-three per cent and three-fifths of one per cent upon each of the respective assessments.

The effect of this award was to reduce the sum total of the charge upon the lands now owned by the appellants as aforesaid from $120 to $67.70.

Now that award so made operated as a conclusive adjudication of what lands in Romney were benefited by the works constructed, and it operated as I think further, by force of the statutory provisions in that behalf, as determining conclusively and judicially the utmost extent to which the lands so benefited in

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Romney and so assessed for cost of construction, could be charged for the cost of the repair and maintenance of the work from time to time when necessary.

All of the above provisions of 36 Vict. c. 39 so incorporated into the Municipal Institutions Act of the same year, 36 Vict ch. 48, with certain alterations and additions from time to time subsequently made, have been retained in the several sections relating to drainage works, inserted in the several Municipal Institutions Acts passed from thence until the year 1894, when the Drainage Act of 1894, 57 Vict. ch. 56 was passed, in which are consolidated all the provisions of the Municipal Institutions Act of 1892 relating to drainage works constructed upon the local improvement principle, namely, that the cost of the construction and of the repair and maintenance thereof should be chargeable and charged wholly upon the lands benefited thereby and the owners of such lands. Although the point now immediately under consideration relates solely to the liability of lands of the appellants, situate in the Township of Romney, to contribute to payment of the cost of works which by the by-law of Tilbury West (which the by-law 601 of Romney is passed to give effect unto) were proposed to be executed chiefly within the Township of Tilbury North, and the residue within the Township of Tilbury West, still as the contention of the respondents is that the fundamental principle of the statutes relating to works of local improvement (which these clauses affecting drainage works are) has been wholly subverted by 57 Vict. c. 56, I shall take occasion to refer briefly to the main provisions of that statute before dwelling upon those which bear specially upon the question raised in this appeal, which is as to the jurisdiction of the council of Tilbury West to charge the lands of the appellants situate in the Township of Romney for the

cost of the works as proposed to be executed under the by-law of Tilbury West which the by-law 601 of Romney was passed to give effect unto.

By sec. 3, s. s. 1, the petition for the construction of any drain, or the deepening, widening, clearing of obstructions or otherwise improving any stream, creek or watercourse, &c., &c., must be in the form formerly prescribed *and in it must be described*, as formerly, the area proposed to be drained by the particular species of work mentioned in the petition, and it is the area so proposed to be drained, or the stream or watercourse proposed to be deepened, straightened, widened, cleared of obstructions, or otherwise improved *according to the prayer of the petition* that the engineer is authorised to make an examination of

and to prepare a report, plans, specifications and estimates of the drainage work, and to make an assessment of the lands and roads within said area to be benefited, and of any other lands and roads liable to be assessed *as hereinafter provided*, stating, as nearly as may be, in his opinion the proportion of the cost of the work to be paid by every road and lot or portion of lot, for *benefit* and for *outlet* and relief from *injuring liability as hereinafter defined.*

Then sub-sec. 2 enacts that the provisions of the preceding sub-section shall apply in every case where the drainage work can only be effectually executed by embanking, pumping or other mechanical operations, *but in every such case* the municipal council shall not proceed except upon the petition of at least two-thirds of the owners of lands within the area described according to said sub-section.

Then the definition of the term "injuring liability" as used in the Act is given in sub-sec. 3:

If from the lands or roads of any municipality, company or individual, water is by any means caused to flow upon and injure the lands and roads of any other municipality, company or individual, *the lands and roads from which* the water is *so caused to flow* may under all the formalities and powers contained herein, *except the petition*, be

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assessed and charged for the construction and maintenance of the drainage work required *for relieving the injured lands or roads from such water and to the extent of the cost of the work necessary for their relief* as may be determined by the engineer or surveyor, Court of Revision, county judge, or referee, and such assessment may be termed "injuring liability."

Then the definition of the term "outlet liability," as used in the Act, is given in sub-sec. 4.

The lands and roads of any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed an improved outlet is thereby provided either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse, may, under all the formalities and powers contained herein, except the petition, be assessed and charged *for the construction* and maintenance of the drainage *work so used as an outlet*, or providing an improved outlet and *to the extent of the cost of the work necessary for any such outlet* as may be determined by the engineer or surveyor, court of revision, county judge or referee, and such assessment may be termed "outlet liability."

Then precise directions for determining in every case what lands shall be chargeable with "injuring liability" and also with "outlet liability," as those terms are used in the Act, and how the amounts chargeable to each lot in respect of each of those *liabilities* shall be determined is given in s. s. 5 of this third section.

Sub-section 5: The assessment for injuring liability and outlet liability provided for in the two next preceding sub-sections shall be based upon the volume and shall also have regard to the speed *of the water artificially caused to flow upon the injured lands*, or into the drainage work *from the lands and roads liable for such assessments.*

Then by section 57 provision is made for the assessment of lands "benefited" by any drainage work, as this term "benefited" had always been used in all previous statutes relating to drainage works constructed under municipal by-laws, in precisely the same circumstances in which "lands using any drainage works as an outlet" are authorised to be assessed by sec. 3, s. s. 3 and 4.

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Sec. 57 : Where any drainage work is not continued into any other than the initiating municipality any lands or roads in the initiating municipality *or in any other municipality* or roads between two or more municipalities *which will* in the opinion of the engineer or surveyor *be benefited* by such work *or* furnished with an improved outlet *or* relieved from liability for causing water to flow upon and injure lands or roads may be assessed for such proportion of the cost of the work as to the engineer or surveyor seems just.

Then the Act prescribed that in the by-law "shall be" set out "the purport of the petition describing generally *the lands and roads to be benefited.*"

Now whatever may have been the reason (for none appears in the statute) for this alteration in the language of the provisions contained in the third section which, read literally, purports to authorise the engineer to make an assessment not only on the lands and roads to be benefited within the area of the proposed work, but also of "any other lands and roads liable to be assessed as hereinafter provided," I find an insuperable difficulty in construing them as having the intent and effect contended for by the respondents, namely, of abrogating the fundamental, essential, principle upon which rest these clauses in the Municipal Institutions Acts for constructing local works for the improvement of particular lands at the cost of the owners of the lands which are benefited thereby, expressed in the maxim *qui sentit commodum sentire debet et onus*, and substituting therefor a provision which subjects persons who derive no benefit whatever from the work to contribute to the payment of its cost. There is nothing new in the substantial elements of the ideas expressed by the terms "injuring liability," and "outlet liability." These were matters which had always to be taken into consideration as part of the cost of the work to be constructed under all previous municipal by-laws passed for the construction of drainage works. As to "injuring liability"

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under a clause in the Municipal Institutions Act which subjected all persons whose lands were benefited by the proposed work to assessment to bear and pay for (as part of the cost of the work) any damage done in the construction of or consequent upon the construction of the work, and if a sufficient sum was not included in the assessment (of the lands benefited), for the cost of construction to compensate for all damages subsequently appearing to have been occasioned as consequential upon the construction, relief for such damage (how great soever it might be) could be obtained by, and only by, an award made under the provisions of the Acts in that behalf, though the damage occasioned could not have been foreseen and became developed only many years after the construction of the works to which the damage was attributed and arose directly by reason of non repair of the works. This appears to be the effect of the judgment of the Privy Council in *Williams* v. *Corporation of Raleigh* (1).

It can scarcely be contended that the legislature had any intention, in passing 57 Vic. c. 56, to exempt the owners of land benefited by a drainage work constructed under the Act from injuring liability of this nature, and yet the Act in its terms only authorises an assessment to be made for "injuring liability," when the injury and its cause are apparent and are of the precise nature of that described in sec. 3, s. s. 3; and surely there cannot be entertained a doubt that, if water, which, (to use the language of the subsection) had been *caused* to flow from any lands, the property of one person, upon other lands so as to injure such other lands, is so cut off and carried away by any drainage work constructed under sec. 3 as to relieve the injured lands from the injury so caused, and to relieve the owners of the land from which the waters

(1) [1893] A. C. 540.

so flowed from liability, that constitutes undoubtedly a most material benefit conferred by the said drainage work upon the owner of the land from which the water was so caused to flow for which his land so benefited is justly chargeable in the mode prescribed in the Act in its definition of "*injuring liability*," with an assessment for the benefit so conferred. The Act, however, in some degree sets a limit to the arbitrary discretion of the engineer or land surveyor in determining the amount chargeable for such benefit by prescribing that the amount to be charged shall be based upon a calculation of the volume in which and the speed at which, the water is artificially caused to flow from the lands from which they do flow to and upon the injured lands, or into the drainage work which cut this water off.

This provision seems to be calculated, if not intended, to afford some protection to the parties assessed against the uncontrolled discretion of the engineer or land surveyor initiating the scheme of drainage work, first, by providing that before any authority is vested in the engineer or land surveyor to make any assessment for "injuring liability," there must, in each particular case, be a "*corpus delicti*," so to speak, that is to say, there must be apparent, water which *is caused* to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury, which water is to be carried off by the proposed drainage work, and each assessment must be made upon the circumstances of each particular case upon the basis prescribed in the subsection 5; and, secondly, as supplying some mode, though not a very perfect one, of testing the value of the calculations as made by the engineer.

That this is well calculated to be of some benefit to the parties assessed is apparent from the present

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case, in which the engineer (apparently in the mere exercise of an uncontrolled discretion) has assessed all of the lands of the appellants in Romney at 30 cents per acre for injuring liability, whereas another engineer, one of the respondent's own witnesses, of upwards of twenty years practice of his profession in the immediate neighbourhood of the lands in question, said that he could not see any foundation whatever for any charge for "injuring liability," and, in point of fact, not a single case appeared of any injury whatever of the nature of that which is defined in the Act as "injuring liability"; no case whatever of water caused to flow artificially from any lands into the Romney drains having their outlet as aforesaid in said East Branch Stream or indeed into any drainage work or upon any lands.

Then as to "outlet liability" nothing can be more mistaken than the idea that an assessment by way of enforcing contribution to the payment of the cost of a drainage work constructed under the provisions of the Act, can under the term "*outlet liability*" be made upon lands not benefited by the work. The idea of "outlet liability" apart from benefit is inconceivable; but the language of the Act upon this subject is, I think, sufficiently clear, upon the question when, and when only, an assessment may be made for "outlet liability." Section 59 enacts, as had been enacted by all the drainage work clauses in the several Municipal Institutions Acts from time to time in force, that a drainage work commenced in one municipality "*may be continued into another municipality until a sufficient outlet is reached,*" and this term "sufficient "outlet" is, by the interpretation section of the present Act, defined to mean "the safe discharge of water *at a point* where it will do no injury to lands or roads."

In every such case the engineer may assess all lands and roads to be "*affected by benefit, outlet or relief.*"

Then the Act in sufficiently plain terms defines what it means by this term "outlet," and prescribes the only occasion when liability to assessment for "outlet liability" shall arise.

Sec. 3, s.s. 4. The lands and roads of any municipality, company, or individual *using any drainage work as an outlet* or for which, when the work is constructed, an improved outlet is thereby provided, * * * * may * * * * be assessed and charged for the construction and maintenance of the drainage work *so used as an outlet*,

but only "to the extent of the *cost* of the work *necessary for any such* "outlet." Then in sub-section 5, is enacted the mode by which the amount to be charged to *each particular lot to be assessed* is to be determined.

A careful consideration of the Act therefore condemns, in my judgment, as wholly inadmissible, a construction which should hold that lands not benefited by a drainage work constructed under the provisions of the Act are nevertheless made liable to assessment for "injuring liability" or "outlet liability," notwithstanding the words in the third section purporting to authorise the engineer "to make an assessment of the lands and roads within said area to be *benefited* and *of any other* lands and roads liable to assessment as hereinafter provided."

The provisions coming under the terms "as hereinafter provided" seem I think to favour rather the construction that what the legislature intended was, to provide, in the interest of the persons to be assessed, that the sums to be assessed upon all lands benefited by the work should shew the nature of each item charged separately as follows: 1. For "benefit," meaning, I apprehend thereby (for no definition is given of this work in the Act), the benefit conferred by the

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facility for the drainage of all lands within the area of the drainage work, which benefit would vary according to the difference of elevation of the respective lots—the quantity of water to be drained from each—the distance of the several lots from the drainage work—and the like. 2. For "injuring liability," *i.e.* for the special charge to each lot from which water *is caused* to flow to the injury of other lands in the manner described in the Act under the definition of "injuring liability"; *the whole of the cost* of this work in so far as it relates to the removal of this water is to be borne specially by an assessment upon the lot from which the water doing the injury is *so caused to flow*. 3. For "outlet liability"—which is only authorised to be assessed for in the one particular case of a drain constructed in one township being continued into another until a "sufficient outlet" for the waters coming down such drain is reached.

The application of the same precise mode for determining the amounts chargeable for "injuring liability" and for "outlet liability" does not appear to be, I think, quite felicitous. The just mode of applying that subsection to "outlet liability" would seem to be; first, to determine the total amount chargeable for "outlet liability" by a calculation based upon the volume in which and the speed at which this water comes down the drain to its outlet in another municipality than that in which the drain is initiated; and secondly, to apportion that sum among the several lots from which the water *is caused* to flow *by artificial* means from the lands assessable into the drains upon a calculation based upon the volume in which and the speed at which *such* waters *are respectively so caused* to flow into the drain. In any case all lands from which no water is so caused to flow into a drain having its outlet in another

municipality than that in which the drain was initiated would be exempt from assessment, and this is the condition of all of the lands of the appellants in Romney assessed for "outlet liability" in the present case.

Two sections still remain, to which alone it seems to be necessary to refer, viz., sections 70 and 75, upon the latter of which the main contention of the respondents has been rested.

Section 70 is the only section of the Act which in terms is made applicable to a work constructed under the Ontario Drainage Act, 36 Vict. c. 38. The section simply enacts that the same provisions as to the repair and maintenance of a work constructed under the Ontario Drainage Act, and initiated in one municipality but continued into another to a "*sufficient outlet*," there reached as in sec. 69, are made applicable in similar circumstances in the case of a work constructed under a municipal by-law. The provisions of sec. 70 had their origin in the Municipal Amendment Act, 48 Vict c. 39, sec. 26, which made the sections of the Municipal Institutions Act of 1883, 46 Vict. c. 18, as to the maintenance and repair of a work initiated in one municipality and continued into another until an *outlet* is reached, and constructed under a municipal by-law, applicable to the case of a work initiated in one municipality and in like circumstances continued into another, and constructed under the Ontario Drainage Act. The utility of this enactment is not apparent for precisely similar provisions as those contained in the Municipal Acts in relation to works constructed under municipal by-laws, were contained in the Ontario Drainage Act, 36 Vict. c. 38 in relation to like works constructed under that Act; and as an award was made in 1878, under the provisions of that statute, which determined the extent of the liability of lands in Romney for the construction, maintenance and

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repair of the work executed by the Ontario Government in the East Branch stream at the point where the Romney drains continued into the Township of Tilbury West reached their *sufficient outlet* the necessity of section 70 is not apparent.

However, this is by the way at present, for we are not now dealing with a by-law passed for maintenance and repair of the work for which the lands in Romney were assessed in 1878 and done by the Ontario Government in the outlet of the Romney drains. When the question of the liability of lands in Romney to contribute to the cost of repair and maintenance of that work shall arise, it will be time enough to consider whether they can be rated for the cost of maintenance and repair in any greater proportion than that in which they were, by the award of 1878, rated for the cost of construction.

However the language of this section 70 has, I think, some considerable bearing upon the construction of section 75 upon which the respondents so much rely. The legislature, by the language used in section 70, seems to shew a plain intention of limiting the application of the Act to works constructed under the Ontario Drainage Act, to the provisions of that section, namely, to cases of repair and maintenance alone.

Then it is enacted by section 75 that wherever it shall be deemed expedient to change the course of any "*drainage work*"

> constructed under the provisions of this Act or any Act respecting drainage by local assessment, * * * * or to make a new outlet for the whole or any part of the *work*, or otherwise improve, extend or alter the *work*, or to cover the whole or any part of it, the council of the municipality or any of the municipalities whose duty it is to maintain *the said drainage work* may, without the petition required by section 3 of this Act, but on the report of an engineer, * * * * undertake and complete the *change of course, new outlet, improvement, extension, alteration or covering* specified in the

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report and the engineer or surveyor shall, for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge *lands and roads in any way liable to assessment under this Act* for the expense thereof in the same manner and to the same extent * * * * as are provided with regard to any *drainage work* constructed under the provisions of this Act.

Now while the language of this section is most apt when construed as applying only to a "drain," that is a wholly artificial work having a course capable of being altered, extended and improved, and having an "outlet" for which a new outlet is capable of being substituted, the language appears to be quite inapt to be applied to a work such as that done by the Ontario Government in Big Creek in 1878 terminating at the line between the third and fourth concessions of Tilbury West, which *work* consisted merely in the straightening and deepening the natural stream by dredging. *Work* of that character so terminating and done wholly in the bed of the running stream cannot be said to have there an *outlet* capable of being altered and to have another substituted therefor. The stream in which the work of dredging was done, flowed on in *its* natural course to *its* outlet (but that is quite a different thing), about seven miles further down, but the work done in that stream which consisted of deepening by dredging, and straightening, could not be said to have an *outlet*, to which section 75 could apply.

Then again, this section 75 is enacted in lieu of section 585 of The Consolidated Municipal Act of 1892 which is repealed by section 114 of 57 Vict. c. 56. Now that section 585 so repealed was a clause in consolidation of section 585 of The Municipal Act, ch. 184, R. S. O. of 1887, which again was in consolidation of section 586 of The Municipal Institutions Act of 1883, [46 Vict. c. 18,] which again was but in consolidation of section 17 of 45 Vict. c. 26, an Act intituled "An Act to make further provision for the construction of

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Drainage Works by Municipalities," where the clause originated, and in each of these sections the word "drain" was used in every place where the words "drainage works" or "work" (simply) occur in this section 75, so that the fair and reasonable construction of this section, I think, is that the words "drainage work" and "work" as used in it mean precisely the same thing as the word "drain" as used in section 585 of the Act of 1892, and in all the other sections of the above mentioned Acts of which that section was but a consolidation, and nothing more. When then we find the legislature in section 70 applying in express terms the provisions of that section (as to repair and maintenance) to a work *constructed* under the "Ontario Drainage Act" and in section 75 re-enacting all the provisions of the repealed section 585 of the Consolidated Municipal Act of 1892 except the words comprehending "*a work constructed under the Ontario Drainage Act*" the natural and reasonable conclusion would seem to be that the section could not be construed to have any application to such a work, and if all works constructed under the Ontario Drainage Act were of the character of the works appearing in this case as having been executed by the Ontario Government in 1878, with the exception of the drains 1, 2, 3 and 4 of Mr. Holwell's survey, the omission of those words of section 585 from this section 75 would appear to have been most wise, because of the inaptitude of the words used in the section to works of the character of those done in the beds of Big Creek and of Tremblay Creek and of the East and West Branches by the Ontario Government in 1878.

The language used in the section is apt enough to include works of the nature of the "drains Nos. 1, 2, 3 and 4 of Mr. Holwell's survey," if the words of the repealed section 585, comprehending works "con-

structed under the Ontario Drainage Act" had been re-enacted, but quite inapt by way of application to a work of straightening a running stream, or of deepening it by dredging. The effect of the omission of the above words from section 75 would seem to be, to exclude even the "drains Nos. 1, 2, 3 and 4 of Mr. Holwell's survey" from the operation of the section. which works, if the omitted words had been re-enacted, would have been within it; but assuming the words in the section, "*any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment*" to be sufficient, by reason of these latter words, notwithstanding the omission of the omitted words, to include *a work constructed* under the Ontario Drainage Act, such work must be one *constructed*, that is to say, as it appears to me, must be an *artificial drain* just such as is mentioned in section 585 of the Act of 1892, and in all the previous Acts above mentioned since, and inclusive of 45 Vict. c. 26. The reasonable and natural construction of the section, by reason of the omission of the omitted words of section 585 appears to me to be that section 75, like all the other sections, except section 70, applies only to case of drainage works *constructed*, that is to artificial drains constructed, under municipal by-laws, and the exception made that the works contemplated by the section to be undertaken and completed by the council of the municipality whose duty it is to maintain such work "without the petition" required by section 3 of this Act seems to me to afford corroboration of that view. Why without such petition? Why should a work of the character referred to in the section, to be paid for by special local assessments under section 3, be constructed without the petition required in section 3, when such a projected work could not be entertained by a municipal council without such petition? The

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legislature must have had some reason for this distinction, and the only one which presents itself would seem to be, that, in the case of a drainage work *constructed* under a municipal by-law which only could be undertaken and constructed originally under such a petition as is provided in section 3, it was thought that power might be given to a municipal council which had authorised the construction of the work originally, or which had imposed upon it the duty to maintain such a work, to change the course of such work, or to make a new outlet for it, &c., &c., as mentioned in the section without the necessity of any further petition.

The by-law No. 45 of Tilbury West was, as we have seen, expressed to be passed

to provide for extending and otherwise improving Big Creek, in the Townships of Tilbury North and Tilbury West.

In point of fact no such project was or could have been in contemplation; it would have been practically impossible. That the council of Tilbury West under R. S. O. of 1887 ch. 184 s. 479, s s. 15, which was the section in 1897 in force in consolidation of 36 Vict. c. 48 s. 372, s s. 10, above extracted, had power to widen, alter the course of, or even to *extend* (if that were possible) Big Creek, may be admitted, but such work performed under that section must needs have been performed at the charge of the general funds of the municipality. That such was not the intention of the council of Tilbury West can confidently be asserted. The council of Tilbury North appears to have entertained the idea that (under the provisions of section 7 of 54 Vict. c. 81, which was "An Act passed for the purpose of dividing Tilbury West into two townships, Tilbury North and Tilbury West") the council of Tilbury West had power, which the council of Tilbury North had not, to initiate and complete under

the provisions of section 75 of 57 Vict. c. 56, a work of a purely local character by the construction of which the council of Tilbury North and the owners of certain lands therein situate would alone be benefited; the procuring the construction of which work unless it could be so procured to be undertaken was hopeless. It appears incontestible, upon the evidence, that this by-law 45 of Tilbury West was passed, and the works therein mentioned were undertaken, by the council of Tilbury West at the earnest instance and pressing solicitation of the council of Tilbury North. It is true that at the trial it was said that some individuals had made some applications by letter to the council of Tilbury West, but the nature of those applications did not appear, for upon counsel for the appellants insisting that they should not be spoken of unless produced the defendants in the action refused to produce them, and so the case was left to stand upon the evidence which was unequivocal, that the engineer was employed to make a report, but upon what particular matter did not appear, and that upon his report the by-law was passed and the work therein mentioned was undertaken at the special instance of the council of Tilbury North. This is an incontestible fact established by the evidence whatever may be the effect of the established fact. Whether the municipality of Tilbury West fulfil the condition precedent necessary to give them the right to act in the circumstances of the present case under section 75 of 57 Vict. ch. 56, may perhaps be open to some doubt, that is to say, whether the *municipality* had a duty imposed upon it to maintain the drainage works which, done by the Ontario Government in 1878, at the cost wholly, both as to construction and maintenance, of the owners of lands particularly benefited thereby, may perhaps be open to question. But no such point was made in

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the argument before us and I do not think that it is necessary that it should be decided on this appeal.

Now by the Act 54 Vict. c. 81, Tilbury North was made to consist of

> *all that portion* of the former Township of Tilbury West which lies north of the centre of the road allowance between the ninth and tenth concessions, and east of the line between lots 15 and 16, and north of the centre of the road allowance between the range of lots north of the middle road and fourth concession, and north of the centre of the road allowance between the fourth and fifth concessions of said Township of Tilbury West.

By this description the whole of the land lying between Lake St. Clair, the extreme northern boundary of the township, and the line between the fourth and fifth concessions was situate in Tilbury North, and Big Creek proper also which extended from the Forks to its mouth at the River Thames with the exception of about three quarters of a mile measured from the Forks, was in Tilbury North. The only apparent interest which the Council of Tilbury North had which could explain their earnest solicitation of the Council of Tilbury West, to pass the by-law, and undertake the work therein mentioned, consisted in this, that all the lands in Tilbury North lying north of the line between the third and fourth concessions are low, wet, marsh lands called "The Plains," no part of which is anywhere more than three feet above the ordinary level of the Lake St. Clair. The waters of this lake rise gradually and periodically (and some times to a very great height) and again in like manner subside and rise again in such a manner that this rising and subsiding of the waters is in common language (although inaccurately) spoken of as a tide The broken front concession and the three adjoining concessions have always in every year been overflowed more or less by this rising of the waters of the lake, and in some years so as to leave only a mound of earth

here and there visible. The ordinary level of Big Creek at a place called The Narrows in the centre of the third concession, and thence to its mouth, a distance of over three miles, is the same as the ordinary level of the lake. These low, wet, marsh lands, besides being exposed to being overflowed and drowned from this cause are also, in all times of freshets, exposed every year to further overflow from the waters of the River Thames, a large navigable river rushing down with great force and in large volume directly opposite to the mouth of Big Creek, thereby forcing the waters of the Thames up the Big Creek and up a large stream called Baptiste Creek, and up Tremblay Creek, and up another stream called Bruley Creek which three latter streams flow into Big Creek as it flows through those low, wet lands called "The Plains," and so also the waters flowing down all of those streams are penned back and made to spread over "The Plains" where, uniting with the waters of the lake so as aforesaid overflowing the Plains, the combined waters keep the Plains continually flooded to a greater or less height until the waters of the lake subside and the force of the freshets have ceased. There is not, nor does there appear to have been supposed to be any possible mode of *draining* those lands either into Big Creek or otherwise, and there is said to be no possible mode of *reclaiming* them except by embankments made so as to enclose the parts to be reclaimed, and thus keep out the flood waters.

Within the last ten years many pieces of those lands have been reclaimed in this manner in Tilbury East along Baptiste Creek. Pumping has been used in some cases to get the water out of the parts enclosed by the embankments, but this is not essentially necessary. Since the Grand Trunk Railway and the Canadian Pacific Railway have been con-

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structed across these "Plains," the former in the broken front concession, and the latter in the second concession, their embankments which it has been necessary to construct to a height sufficient to enable the railway tracks to be laid above the flood waters, have served to be used as embankments in this reclaiming process. This is the unquestioned evidence as given by engineers who have been familiar with the condition of these "Plains," for very many years. Mr. McDonald, an engineer, who designed some of the works completed by the Ontario Government in 1878, says that these embankments, together with *the embankments constructed in the present scheme* would afford perfect means of reclaiming all of the lands in the Plains if the railway companies would close the many passages kept open under the railways by which the flood waters pass up from the lake on to the "Plains" and back again when the lake subsides. He suggested this to the Grand Trunk Railway Company some years ago, but that company refused to concur in his suggestion through apprehension, as it would seem, that if the flood waters from the lake were prevented from passing under the railway, their force might destroy the railway embankment. A Mr. Holland has reclaimed a farm upon lot 16, in the first concession, about 1½ miles west of Big Creek. He used the process of pumping to clear the water from his enclosure, but that is not requisite in all cases A Mr. Morris has reclaimed a farm in the third concession about half a mile east of Little Creek, and over a mile west of Big Creek. He has not made use of the pumping process but has availed himself of a railway embankment upon one side of his enclosure.

Now the work designed by the said by-law no. 45 of Tilbury West to be done here, as appears by

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the engineer's report, which was made part of the by-law, was of the following description, namely:

That embankments should be made on each side of Big Creek proper from the Canada Southern Railway, that is to say, from where it crosses the line between the fourth and fifth concessions to the Grand Trunk Railway which crosses Big Creek about half a mile from its mouth, a distance of over six miles, and like embankments along Tremblay Creek from its junction with Big Creek on lot 19, in the first concession, to where the Canadian Pacific Railway crosses Tremblay Creek on lot 20, in the fourth concession. These embankments were to be made according to plans and specifications referred to in the report which was made part of the by-law and were to be of prescribed dimensions in height and width and of sufficient strength to prevent the waters of these two streams Big Creek and Tremblay Creek expanding over these low, wet lands called the Plains, of which, as the report says, there are 4,500 acres in Tilbury North which, as the report also says, will be greatly benefited by the embankments which were designed to prevent the overflow of water upon them from Big Creek and Tremblay Creek. That these lands would not only be greatly benefited, but that they would be the only lands deriving any benefit from this work which was designed to be constructed at a cost of $31,000 is the only conclusion reasonably to be deduced from the evidence. Now such a work, constructed along Big Creek and its affluent Tremblay Creek where the ordinary level of these streams is the same as the level of Lake St. Clair, cannot, in my opinion, be said with any propriety to be a drainage work at all or to be in any respect connected with the work done in Big Creek proper in 1878 between the Forks and the line between the third and fourth concessions at a cost as already

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stated of $5,983.32, nor can it be said, in my opinion, to come within the provisions of sec. 75 of 57 Vict. c. 56. The work so designed at a cost of $31,000 is nothing but a scheme for reclamation of drowned lands situate in such a low position as to be incapable of being drained, a work in fact of a character that has been in much use as a reclamation scheme on these plains within the last ten years, since the railway embankments were made across the plains. There is no novelty in the scheme, save only in attributing to it the character of a drainage work; that it does not come within the scope and intent of the section 75 appears to me to be clear for the reasons already given, and that it does not appears to be concluded by s.s. 2 of sec. 3 of 57 Vict. c. 56. It is said that the embankments under consideration here are not such embankments as that sub-section refers to, but no reason is suggested that I can see in support of such a contention. It is perfectly obvious that without the embankments the purpose for which they were designed, namely, of preventing the waters in the streams expanding over those low lands, could not be obtained. If the work can be considered to be a drainage work at all the embankments are essentially necessary to such work.

Then the by-law wholly ignores the condition of the lands in Romney and the clauses of the Act in virtue of which the council of Tilbury West claims to have jurisdiction to affect those lands.

The lands in Romney are subject to whatever obligation has been imposed upon them, by 36 Vict. c. 38 and the award made thereunder in 1878, to maintain in repair the work done by the Ontario Government on the outlet of the drains in Romney into the natural watercourse of the East Branch stream, that is to say at the point where the Romney drains reached a

sufficient fall to prevent injury to lands and roads. Whatever may be the extent of this obligation, the lands in Romney assessed in 1878 by the award then made are subject to it; but that obligation gives no jurisdiction whatever to the council of any of the townships through which Big Creek flows to charge lands in Romney for contribution to the cost of every work any one or more of such townships might undertake to construct anywhere along the course of Big Creek from its source in the township of Mersea to its mouth, a distance of eighteen or twenty miles. The obligation to maintain the work at the outlet of the Romney drains for which the lands in Romney were assessed by the award in 1878 can, I apprehend, be enforced against the council of Romney, and the owners of such lands, by any person claiming to suffer injury by neglect to repair and maintain. Whether the council of Tilbury West has jurisdiction *suo motu*, to determine when the work has fallen into such a condition as to require repair and to enforce the obligation upon the lands in Romney, cannot be judicially determined until such jurisdiction shall be asserted. It is sufficient at present to say that this is not a case of that description. When the case shall arise it will be time enough to determine what is the extent of the liability of the lands in Romney in view of the award made in 1878 under the provisions of 36 Vict. c. 38.

The engineer who made the report which is made part of the by-law has said in his evidence that the charges for "injuring liability" and "outlet liability" which he has made upon the lands in Romney were made upon the principle of preventing injury to the low, wet lands above referred to; this was the only explanation he could, or at least did, offer for making those charges. He was asked to explain upon what principle he had proceeded in charging the lands in

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Romney thirty cents per acre as for "outlet liability." To this inquiry he could not or, at least, did not give an answer save as above. It is not strange then, I think, that two engineers of considerable experience, one called as a witness for the plaintiff, and the other for the defendant in the action, Mr. McGeorge and Mr. Laird, should have said in their evidence that they could not see any ground whatever for any charge for "injuring liability" in the present case. Referring to the definition of those terms, "injuring liability" and "outlet liability" as given in the Act, and to the only obligation to which the lands in Romney were made liable by 36 Vict. c. 38, and the award thereunder, the council of Tilbury West had, I think, no more jurisdiction to charge lands in Romney for the work mentioned in the by-law, either for "benefit," or "injuring liability," or "outlet liability" than they had to charge lands in the Township of Dover at the opposite side of the River Thames.

For the reasons above given, I am of opinion that the appeal, in so far as it relates to the by-law 601 of Romney, must be allowed with costs, and that judgment in the action must be ordered to be entered for the plaintiff with costs in so far as relates to the said by-law 601. The form of the judgment (being limited as was the action to the interests of the plaintiff, the now appellant) should be to the following effect:

Declare that the council of the municipality of Tilbury West had no jurisdiction to attempt to impose any charge, as they have assumed to do by the by-law 45, upon the lands in the pleadings mentioned, the property now of the appellant, viz., lots Nos. 21, 22 and 23 in the 5th concession, the South ½ of lot 21, lots 22, 23 and 26 in the 4th concession, and the North ½, and the West ½ of the South ½ of lot 21, and the North ½ of lot 22, and the North ½ and the West ½ of the South ½

of lot 23 in the 3rd concession of the Township of Romney, in the County of Kent:

Restrain the council of the Township of Romney from taking any steps or proceedings to enforce the by-law No. 601 of the Township of Romney against the said lands:

Declare that the registration of the said by-law is ineffectual and void and has imposed no lien upon the said lands in respect of the assessments in the said by-law assumed to be imposed.

AS TO BY-LAW NO. 602.

There can be no doubt that the Council of the Township of Romney had jurisdiction to pass this by-law. It is nothing but a by-law to repair and maintain a drain constructed under the provisions of 36 Vict. ch. 39. Whether or not there has been any miscarriage in the proceedings taken under the provisions of the statute as regards such a by-law is not a matter open to inquiry in this action.

In so far, therefore, as relates to by-law no. 602, the appeal must be dismissed, but as the main, and indeed almost the whole contention in the appeal related to the by-law no. 601, and the costs of the appeal do not appear to have been increased by the contention as to the by-law no. 602, the appeal, in so far as it relates to that by-law, is dismissed without costs.

Appeal allowed with costs as to by-law 601; dismissed without costs as to by-law 602.

Solicitor for the appelant: *Geo. M. Douglas.*

Solicitors for the respondent: *Rankin & Scullard.*

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*Oct. 5, 8.

GEORGE H. ALLAN (PLAINTIFF).....APPELLANT;

AND

WILLIAM PRICE (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT QUEBEC.

Sale of land—Warranty—Special agreement—Knowledge of cause of eviction—Damages—Art. 1512 *C. C.*

A warranty of title accompanying a sale of lands does not constitute the special agreement mentioned in Article 1512 of the Civil Code of Lower Canada in respect to liability to damages for eviction.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Quebec, which affirmed the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was dismissed with costs.

The defendant sold to the plaintiff certain lands with buildings thereon which had previously been used as a sawmill and residences for employees, the description including "a dam forming part of the said property" according to the cadastral plan and book of reference with warranty of title The evidence shewed that there was some doubt as to the title of the vendor to the dam in question and that, at the time of the sale, the purchaser was aware that the St. Francis Mill Company claimed to be proprietors of the dam and of the ground on which it stood. Subsequently the St. Francis Mill Company recovered a judgment against the purchaser in an action in which the vendor was made a party whereby the purchaser was evicted from

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

the dam property and the said company declared to be owner thereof.

The present action was then brought by the plaintiff to recover $20,000 damages on account of his eviction and the defendant's default to make good the title and place him in possession of the dam property. The defendant denied any special agreement of warranty in regard to the dam property, alleged that the plaintiff was aware, at the time of the sale, of the causes which led to his eviction therefrom and tendered into court the full amount paid to him by the purchaser with costs as a sufficient indemnity under the provisions of Article 1512 of the Civil Code. It appeared that the sale had been made by the vendor in good faith believing himself to be the owner of all the property sold including the dam property, and that he had paid the costs in the action whereby the purchaser was evicted, in addition to the amounts tendered by his plea.

The judgment of the trial court declared the tender sufficient and dismissed the action, and the appeal is from the decision of the Court of Review affirming that judgment. The questions at issue on the present appeal sufficiently appear in the judgment reported.

Lafleur Q.C. and *Cate* for the appellant.

Pentland Q.C. for the respondent.

The judgment of the court was delivered by ;

GIROUARD J.—This is an action in damages resulting from the eviction of part of an immovable property which was sold by the respondent to the appellant "with warranty against all hindrances whatsoever."

The respondent met this action by alleging that at the time of the sale the appellant knew of the causes of the eviction, but that there was no special agreement with regard to the same and that consequently

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he had a right to recover only the price of the thing sold in accordance with Article 1512 of the Civil Code and he tendered him not only the value of the part he was evicted from, but the total amount of the price of the whole property sold with costs. Both the Superior Court and the Court of Review maintained this plea.

The appellant before this court contends for the first time that the above expressed warranty amounts to the "special agreement" mentioned in Article 1512 C. C. He quotes several French authorities to establish that when a warranty is stipulated, the vendor is bound to return the price and also to pay damages, but he admits that the French Code has no enactment corresponding to Article 1512 of the Quebec Code. We have no hesitation in holding that the "special agreement" referred to in Article 1512 is more than the conventional warranty; it is an agreement made with reference to the very cause or causes of the eviction which are known to the buyer. The French version of Article 1512 of the code is perhaps more explicit than the English one.

Dans le cas de garantie (and this undoubtedly means conventional warranty) si l'acheteur avait connaissance, lors du contrat des causes d' viction, *et qu'il n'y ait eu aucune stipulation à cet égard,* il ne peut alors réclamer que le prix de la chose vendue.

The words "*à cet égard*" are not to be found in the English version, but they are clearly understood.

As to the question of fact as to whether the appellant knew the causes of this eviction, two courts have unanimously found against him and there is ample evidence to support that finding.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cate, Wells & White.*

Solicitors for the respondent: *Caron, Pentland & Stuart.*

WILLIAM PRICE AND AMOS COLSTON, EXECUTORS OF THE LATE EVAN JOHN PRICE (PLAINTIFFS). } APPELLANTS;

AND

CIRICE LEBLOND (DEFENDANT) .....RESPONDENT.

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*May 5.
*Oct. 8.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT QUEBEC.

Lease—Transfer of lease——Title to land—Alienation for rent—Emphyteusis—Bail à rente—Bail à longues années—Droit mobilier—Cumulative demand—Incompatible pleadings—Action pétitoire—Arts. 567, 572, 1593 *C. C.—Arts.* 176, 177 (*b*), 1064. 1066 *C. P. Q.—Possessory action—Réintegrande—Dénonciation de nouvel œuvre.*

An instrument by which lands were leased for sixteen years at an annual rental, subject to renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. The leased premises were transferred by the lessee by deed of sale, and on disturbance an action, with both petitory and possessory conclusions, was brought by the transferee against an alleged trespasser, who pleaded title and possession in himself without taking objection to its cumulative form.

Held, affirming the judgment appealed from, that under the circumstances the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a *bail à rente* (lease in perpetuity), but merely an ordinary contract of lease which did not convey a title to the land nor real rights sufficient to confer upon the transferee the right of instituting a petitory action in his own name.

Held, also, that the transfer by the deed of sale of such leased premises would not support the petitory action, as the lessee could not convey proprietary rights which he did not himself possess.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Quebec, affirming the

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

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judgment of the Superior Court, District of Kamouraska, which dismissed the plaintiff's action.

The action was instituted by the Honourable Evan John Price, and continued by his executors. The conclusions were possessory as well as petitory, and the declaration set out that the plaintiff was proprietor, in possession, as such, of the lands in question under a conveyance by an instrument, which it was contended constituted an emphyteutic lease and conferred proprietary rights which had been transferred to and were held by the plaintiff under a deed of sale of the lands from the original grantee at the time of the action. The original instrument so relied upon by the plaintiff was in authentic form, the clauses material to the issues raised on the appeal being as follows:

"Lequel (bailleur) a, par ces présentes, baillé et affermé pour l'espace de seize années consécutives, * * * avec garantie de tous troubles. * * * Tous les droits de jouissance et de propriété qu'il a ou peut avoir sur la Rivière de Trois Pistoles, depuis le pont public érigé sur la dite rivière, au premier rang de la dite Paroisse de Trois Pistoles, en remontant jusqu'à *l'ancienne chaussée* qui s'y rencontre, pour y construire un moulin à scie ou toutes autres industries que le premier jugera à propos d'y construire en aucun temps pendant la durée du présent bail, y compris tous travaux et ouvrages que le preneur y a déjà pratiqués."

"Ce bail est fait avec droit au dit preneur, 1o. de jouir de la rive sud-ouest de la dite rivière pour les fins du dit établissement projeté, tout le long de la partie d'icelle sus-louée; 2o. de jouir en commun avec le bailleur, et ses ayants cause, d'un chemin, etc., de quatre à cinq pieds de largeur, sur la dite rive sud-ouest, vis-à-vis l'étendue sus-louée, lequel chemin sera fait par le bailleur d'hui au premier juillet prochain

et ensuite entretenu par lui, pour y communiquer en voiture pendant l'hiver et à pied pendant la saison de l'été; 3o. avec droit encore au preneur de pratiquer dans le dite rivière et sur la dite rive sud-ouest au dit endroit tous piliers, quais et autres constructions qui seront nécessaires pour retenir ses booms et sa chaussée."

"Fait enfin pour et moyennant une rente annuelle de douze piastres par année, que le preneur s'oblige payer au bailleur, en sa demeure, le premier mai de chaque année, * * * * et ainsi ensuite à pareille époque chaque année en suivant, jusqu'à l'expiration du dit bail."

"Il est de plus convenu entre les parties qu'il sera loisible au preneur et ses ayants cause de continuer le présent bail pour une nouvelle période de dix à douze années, en payant au bailleur, à la dite date du premier mai de chacune des années de la continuation du présent bail, en sa demeure, la somme de dix-huit piastres de prix de bail par année, sous les mêmes conditions et obligation d'ailleur que ci-dessus mentionnées aux présentes; si non, le preneur sera tenu d'enlever toutes constructions qu'il aura faites sur la dite rivière et sur la rive, de manière à laisser les prémisses sus affermées en bon ordre. Il en sera ainsi à l'expiration de la continuation du bail, si elle a lieu."

"Au paiement du loyer et fermage ci-dessus stipulés le dit moulin à scie, chaussée, booms et autres constructions, mouvement et travaillants, engins, outils et généralement tous accessoires d'icelui demeurent spécialement affectés et hypothequés."

"Le preneur promet en outre payer au bailleur dix piastres pour l'aider à le construction du dit chemin sus-mentionné."

"Il est convenu enfin que le présent bail n'affectera en rien la teneur des actes faits antérieurement entre les parties."

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" Cependant s'il arrivait quelques dommages causés à la propriété du bailleur par suite de la construction de la dite chaussée, le preneur en sera responsable, et iceux seront fixés à dire d'experts, si les parties ne s'entendent pas entre elles.'

" Au moyen des présentes le bailleur dessaisit de ce que dessus loué et affermé et en saisit le premier qui déclare en être déja en possession."

The plaintiff's demand was that he should be declared proprietor in possession of the lands, that defendant had no rights therein, and for an injunction against the defendant to prevent him from entering thereon or disturbing the plaintiff in his possession, and further, for damages, and that the defendant should be condemned to restore the premises to the plaintiff in the condition in which they were before his trespass and ordered to discontinue works begun on the property in dispute. The pleas, in themselves also cumulative, alleged a title in the defendant, denied any title in the plaintiff, and, alleging that the plaintiff was merely a tenant, contended that he had no right to bring his action as proprietor of the lands.

The trial court, District of Kamouraska, decided that the plaintiff had failed in making out title as owner of the lands, and, treating the action as petitory, dismissed it and vacated the interim injunction issued therein against the defendant. On appeal the Court of Review, at Quebec, affirmed the judgment of the trial court, on the ground that the instrument on which the plaintiff based his title was not a conveyance of the lands which gave him the right to institute the action as owner, but merely an ordinary lease under which he held as tenant only and without having acquired any real rights therein.

Stuart Q.C. for the appellants. The terms of the original lease operate as a conveyance or alienation

for rent (Art. 1593 C. C.); the parties intended thereby to convey ownership as well as possession during the term, and the instrument transferred *tous les droits de jouissance* of the lessor who was thereby "*dessaisit*" of all ownership and possession, and the lessee "*saisit*" with both; 4 Aubry & Rau, nn. 363, 365 (3); 2 Aubry & Rau, n. 189; Pothier, "Louage," nn. 3, 285; "Bail à Rente," nn. 3, 14, 35. 25 Demolombe, n. 36; 6 Toullier, n. 320; *City of Quebec* v. *North Shore Railway Co.* (1) at page 123.

The immediate title to the plaintiff, executed in 1885, is not an assignment of a lease, but actually a deed of sale of the property which constitutes a separate title under this conveyance by the executors of the former lessee to him, "of all the dams built on both sides of the river." At the time of this sale, the executors were in possession. The respondent never had any possession, and is himself without title, while plaintiff has a title under which he has had *bonâ fide* possession and public enjoyment from 1885 till the trespass complained of in 1899, and has acquired prescriptive rights. See Pothier, "Domaine de Propriété," nn. 292, 293, 322, 324, 325; *Lepère* v. *Leprovost* (1); *Commune de Lally* v. *Commune de Prebois* (2).

The Court of Review held that the right to a special action even as tenants belonged to the plaintiff by reason of his dispossession by the defendant, and that such right could not be enforced because the plaintiff had sued as proprietor and not as a tenant. But the rule is that misdescription, either of the remedy or of right claimed, cannot vitiate proceedings, provided no substantial injustice be done. None could be done in this case, because the title was fully set out and the plaintiff was entitled to such remedy as the title dis-

(1) 27 Can. S. C. R. 102. (2) Dal. 1864, 1, 413.
(3) Dal. 1865, 1, 473.

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closed. The granting of the injunction and the order for restoration of possession were rights which belonged to the plaintiff, whichever way his title be interpreted. Art. 567 C. C.; *Cossit* v. *Lemieux* (1). The defence waived any objections to the cumulative form of the action by filing cumulative pleas; (Art. 177, (6) C.P.Q.) and we are entitled to have the possessory conclusions in case our petitory claim should be rejected. *Gerbeau* v. *Blais* (2); *McGee* v. *Larochelle* (3).

L. A. Taschereau for the appellant. As to prescription, it has not been pleaded and cannot now be invoked, even if there was such a title in the plaintiff as might support such a contention. Arts. 2208, 2244 C. C.; *Gibson* v. *Wear* (4). The plaintiff's *auteurs* held only under an ordinary lease of lands for an extended term without any clause conveying real rights therein, and they could not transfer more than the rights they possessed as tenants. The plaintiff became merely a sub-tenant under the deed of 1885. Although called a *bail emphytéotique*, this original instrument does not affect the land, it merely hypothecates improvements, and has none of the characteristics either of emphyteusis or of a *bail à rente* or *bail à longues années.* 4 Pothier (ed. Bug.) p. 171, n. 1; Arts. 567, 1593, 1601 C. C.; 3 Nouveau Denisart, p. 49; vo. "Bail à Rente" par. 1, n. 1, par. 2, n. 2; *Duchesneau* v. *Bleau* (5); 1 Toplong "Louage" p. 169; *Crédit Foncier Franco-Canadien* v. *Young* (6); Guyot, Rep. de Jur. vo. "Bail" par. 4; *Dufresne* v. *Lamontagne* (7); 4 Aubry & Rau, n. 364, par. 1, and n. 365 par. 3; Ferrière, Dict. de Dr. vo. "Bail fait pour plus de neuf années"; *Fournier* v.

(1) 25 L. C. Jur. 317; 5 Legal News, 10.
(2) 7 Q. L. R. 13.
(3) 17 Q. L. R. 212.
(4) 6 L. C. Jur. 78.
(5) 17 Q. L. R. 349.
(6) 9 Q. L. R. 317.
(7) 8 L. C. Jur. 197.

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Talabot (1); 8 Laurent, p. 433; 1 Guillouard "Louage" n. 29, par. 4.

The plaintiff's action must be regarded as petitory; Bioche nn. 1131, 1132; Art. 1066 C. P. Q.; and until he proves prior title, which he has not done, the defendant can rest upon the fact that he is in actual possession under valid title deeds, which need not, however, be discussed in this case.

The judgment of the court was delivered by;

TASCHEREAU J.—Par sa déclaration, le demandeur appelant alléguant et titres et possession, et concluant et au pétitoire et au possessoire, réclame la propriété et la possession d'un certain lopin de terre situé en la Paroisse des Trois-Pistoles.

Le défendeur intimé, loin de prendre objection au cumul évident de l'action du demandeur, a lui-même cumulé par sa défense, et a plaidé lui aussi et titres et possession. Les parties ont réciproquement produit leurs titres, et fait une longue enquête sur la question de possession.

L'appelant ne peut réussir. D'abord, par ses propres titres, il n'appert être que sous-locataire du terrain en question. Il ne peut donc en être déclaré propriétaire, et le jugement qui le déboute de ses conclusions au pétitoire est inattaquable. Il a émis devant cette cour la proposition que le bail originaire sur lequel il appuie ses prétensions est un bail à rente transmissible de propriété, mais cette proposition n'est pas fondée. Ce bail n'est que pour seize ans, et il n'y a que le bail à perpétuité et le bail emphytéotique qui soient équivalents à la vente. Arts. 567, 572, 1593 C. C.

L'appelant a allégué un acte de vente du 17 novembre 1885 par lequel il appert avoir acheté un terrain qui, d'après lui, couvre la localité en litige, mais ce docu-

(1) S. V. 65, 1, 57.

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Taschereau J.

ment ne peut supporter son action pétitoire, vû qu'à sa face même, les vendeurs n'avaient d'autre titre à la possession de la propriété que le bail originaire. Cet acte a constitué l'appelant sous-locataire, et voilà tout. Ses vendeurs n'ont pu lui transférer un droit de propriété qu'ils n'avaient pas. Et il s'est d'ailleurs reconnu n'être que locataire en payant depuis le loyer annuel convenu par le bail.

Mais, nous a dit l'appelant, si je ne puis réussir au pétitoire, je dois du moins réussir au possessoire, et obtenir, même si je ne suis que locataire, un jugement en réintégrande, sans adjuger sur le pétitoire. Art. 1064 C. P. C.; Bioche, actions poss. Nos. 91, 710; Bioche, proc. vol. 1, vo. "Action poss." Nos. 45 *et seq.*; 2 Aubry & Rau, pp. 166, 167; 7 Boncenne procéd. nos. 284, 292, 334, 405; *Gerbeau* v. *Blais* (1); *McGee* v. *Larochelle* (2); 13 Duranton, nn. 466, 468. Inutile d'examiner cette prétension, car, dans l'espèce, en supposant qu'il serait possible d'éliminer de la déclaration tout ce qui lui donne la nature d'une action pétitoire, l'appelant n'y gagnerait rien. La preuve est tout à fait insuffisante pour justifier le maintien de ses conclusions en réintégrande fussent-elles fondées en droit. Il y a tellement de doutes et de contradictions sur le fait de la possession des parties que, sur une action possessoire pure et simple, la cour se serait trouvée dans la nécessité de les renvoyer au pétitoire.

L'appel est rejeté avec dépens.

The Chief Justice was prevented by illness from taking part in the judgment.

Appeal dismissed with costs.

Solicitors for the appellants: *Caron, Pentland & Stuart.*

Solicitors for the respondent: *Fitzpatrick, Parent, Taschereau & Roy.*

(1) 7 Q. L. R. 13.

(2) 17 Q. L. R. 212.

CLARA MICHAELS (PLAINTIFF).....APPELLANT;

AND

ABRAHAM L. MICHAELS (DEFENDANT) ..... } RESPONDENT.

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*May 1, 2.

*Oct. 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Husband and wife—Separate property of wife—Married woman's Property Acts, (N.S.)—Action by wife against husband.

Under the Married Women's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming, by an equal division, the judgment at the trial in favour of the defendant.

The only question raised by the appeal was whether or not the appellant could maintain an action against her husband as maker of a promissory note indorsed to the plaintiff by the payee. The provisions of the Married Woman's Property Acts affecting the question as set out in the judgment.

Mellish for the appellant. The note is not a contract between the parties such as is prohibited by the statute. It is in the hands of the plaintiff a chose in action. Independent of the statutes relating to the property of married women, a married woman was capable of having a chose in action conferred on her. The indorsement of the note was an assignment of a chose in action and it belonged to the wife so long as the husband did not reduce it into possession. See Williams on Executors (9 ed.) pp. 739 and 798; also

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

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Fleet v. *Perrins* (1), per Blackburn J. at p. 541-2,(1868), decided before the earliest Married Woman's Property Act; *Dalton* v. *Midland Counties Railway Co.* (2); *Gates* v. *Madeley* (3), per Parke B. at page 427; *Richards* v. *Richards* (4); *Sherrington* v. *Yates* (5); Anson on Contracts (7 ed.) p. 120; Eversley on Domestic Relations, p. 198.

This is property within the meaning of sec. 3 of ch. 94 R. S. N. S. (5 ser.) acquired when that statute was in force. The effect of the Act of 1898 was to make the plaintiff discovert, and enable her to sue her husband notwithstanding the note was indorsed to her long before its passage. Eversley 334, 424; *Weldon* v. *Winslow* (6); *Woodward* v. *Woodward* (7); *Lowe* v. *Fox* (8); Lush, Husband and Wife at p. 463; *Weldon* v. *Neal* (9); *Weldon* v. *DeBathe* (10); *Severance* v. *Civil Service Supply Association* (11); *James* v. *Barraud* (12); *Butler* v. *Butler* (13); *Spooner* v. *Spooner* (14); *Russ* v. *George* (15).

Borden Q.C. for the respondent. The plaintiff claims as indorsee against the maker. The action is *ex contractu* upon an implied promise arising from the fact of the plaintiff being the holder of a promissory note made by defendant. Stephens on Pleading (7 ed.) p. 11; 1 Comyns Digest, p. 284, 290; 1 Saunders on Pleading & Evidence (2 ed.) pp. 162, 447; Bullen & Leak's Precedents on Pleading (3 ed.) p. 94.

By the statute 3 & 4 Anne ch. 9, the indorsee is given the same right of action against the maker as the indorsee of a bill of exchange had by the custom

(1) L. R. 3 Q. B. 536.
(2) 13 C. B. 474.
(3) 6 M. & W. 425.
(4) 2 B. & Ad. 447.
(5) 12 M. & W. 855.
(6) 13 Q. B. D. 784.
(7) 3 DeG. J. & S. 672.
(8) 15 Q. B. D. 667.
(9) 51 L. T. 289.
(10) 14 Q. B. D. 339.
(11) 48 L. T. 485.
(12) 49 L. T. 300.
(13) 16 Q. B. D. 374.
(14) 155 Mass. 52.
(15) 45 N. H. 467.

of merchants against the acceptor and the same implied promise exists between indorsee and maker of a promissory note as between indorsee and acceptor of a bill of exchange. *Welsh* v. *Craig* (1); *Bishop* v. *Young* (2); *Powell* v. *Ancell* (3).

Between husband and wife at common law there could be no contract express or implied because they are one person. 1 Chit. Black, p. 442; Crawley on Husband and Wife, pp. 28, 29; *Phillips* v. *Barnet* (4); *Cahill* v. *Cahill* (5). This is the principle upon which conveyances from husband to wife are held to be void. Co. Litt. 112 *a.*; *Re Breton* (6); *Bliss* v. *Aetna Life Ins. Co.* (7). The result is that at common law the indorsement gave the plaintiff no cause of action against her husband, but the note when indorsed to her became extinguished. *Haley* v. *Lane* (8); *In re Price* (9); *Jackson* v. *Parks* (10); *Gay* v. *Kingsley* (11); *Chapman* v. *Kellogg* (12); *Abbott* v. *Winchester* (13); *Roby* v. *Phelon* (14).

Both the Nova Scotia and Ontario Acts are like the English Married Woman's Property Act, 1882, and the Massachusetts Act; they do not do away with the unity of husband and wife but only remove certain specific disabilities of the wife leaving all others untouched. *Butler* v. *Butler* (15), per Willes J. at page 835; *Lord* v. *Parker* (16); *Edwards* v. *Stevens* (17); *Ingham* v. *White* (18).

The Ontario and Nova Scotia Acts referred to created in married women no contractual capacity whatever.

(1) Str. 680.
(2) 2 B. & P. 78.
(3) 9 Dowl. 893.
(4) 1 Q. B. D. 436.
(5) 8 App. Cas. 420, 425.
(6) 17 Ch. D. 416.
(7) 19 N. S. Rep. 363.
(8) 2 Atk. 181.
(9) 11 Ch. D. 163.
(10) 10 Cush. 550.
(11) 11 Allen (Mass.) 345.
(12) 102 Mass. 246.
(13) 105 Mass. 115.
(14) 118 Mass. 541.
(15) 14 Q. B. D. 831.
(16) 3 Allen (Mass.) 127.
(17) 3 Allen (Mass.) 315.
(18) 4 Allen (Mass.) 412.

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Moore v. *Jackson* (1); *Foster* v. *Hartlen* (2); Neither does the New Brunswick Act. *Wallace* v. *Lea* (3).

There is a further ground as to the claim for interest, that inasmuch as plaintiff and defendant were living together as man and wife during all the time for which interest is claimed and plaintiff was receiving money from defendant from time to time, their transactions are of a character that it is impossible to go into to find out how much of the interest he has paid, and therefore none should be allowed.

We refer also to *Fitzgerald* v. *Fitzgerald* (5); *Turnbull* v. *Foram* (6); *Conolan* v. *Leyland* (7); *In re Roper*, *Roper* v. *Doncaster* (4); *Weldon* v. *DeBathe* (8).

The judgment of the court was delivered by:

SEDGEWICK J.—The plaintiff, appellant, is the wife of the defendant, respondent, and sues her husband upon a promissory note, dated 6th June, 1892, for $1,000, made by the husband and payable on demand to the order of one Jenny Levi, who gave valuable consideration therefor. Jenny Levi subsequently indorsed the note to her sister, the plaintiff, as a present. It is admitted that the whole transaction as between all parties was a perfectly *bonâ fide* one, and the only question in controversy in this suit is whether or not the plaintiff, being the defendant's wife, can recover on the note in question.

At the time of the making of the note section three of chapter 94 of the Revised Statutes of Nova Scotia, 5th series, was in force. It is as follows:—

Every married woman who shall have married before the nineteenth day of April, 1884, without any marriage contract or settlement, shall and may, from and after the said date, notwithstanding her coverture,

(1) 22 Can. S. C. R. 210.
(2) 27 N. S. Rep. 357.
(3) 28 Can. S. C. R. 595.
(4) L. R. 2 P. C. 83.
(5) 15 Q. B. D. 234.
(6) 27 Ch. D. 632.
(7) 39 Ch. D. 487.
(8) 14 Q. B. D. 344.

have, hold and enjoy all her real estate, not on or before such date taken possession of by her husband, by himself or his tenants, and all her personal property, not on or before such date reduced into possession of her husband, whether such real estate or personal property shall have belonged to her before marriage or shall have been in any way acquired by her after marriage, otherwise than from her husband, free from his debts and obligations contracted after such date, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

Section 81. Nothing herein contained shall authorise any married woman to make a contract with her husband otherwise than in this chapter expressly mentioned. * * *

This chapter 94 and subsequent Acts on the subject of married women's property were by chapter 22 of the Acts of 1898 consolidated and amended; secs. 12 and 23 being as follows:

12. Every woman, whether married before or after this Act, shall have, in her own name, against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained,) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. * * *

23. The Married Woman's Property Act, 1884, and the Acts in amendment thereof are hereby repealed; provided that such repeal shall not affect any act done or right acquired while such acts were in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue, or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

The case was tried before Mr. Justice Ritchie, who gave judgment for the husband, and his judgment was sustained by an equally divided court, the Chief Justice and Weatherbe J. dissenting.

Two questions arise, first, whether section 81 of ch. 94, above quoted applies to the case in question; and secondly, if it does not whether section twelve of

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the Act of 1898, can be taken advantage of in order to sustain the action.

Upon the first point Mr. Justice Ritchie held, as I understand him, that the plaintiff could not succeed, inasmuch as her claim was based entirely upon the contract specified in the promissory note or, in other words, that there was some contractual obligation between the wife and the husband in respect of it, and that in consequence her right to succeed was shut out by her incapacity to make a contract with her husband as provided in section eighty-one, above referred to.

This, I respectfully submit, is a fundamental error in the judgment appealed from. Section three gave her a right to hold and enjoy all her personal property, whether acquired before marriage or after marriage otherwise than from her husband. There can be no doubt but that the note in question is property, and that it had not been reduced into possession by the husband. It was, therefore, as much hers as if it had been a chattel, and she had a right to deal with it as the statute says "in as full and ample a manner as if she were sole and unmarried." Is she prevented from enforcing it because at common law she could not enforce it against her husband? Or because she is prohibited by chapter 94 from making a contract with her husband?

In my judgment, she is not. There is not here, in my view, any contractual relationship between the husband and the wife. The contract is between the maker and the payee only and the wife's right depends, not upon any promise made to her or on her behalf by the husband, or upon any contractual relationship between the two, but upon other principles altogether.

Now, it is elementary that as a general rule no one can recover in an action *ex contractu* except a person

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who is a party to the contract or his representative. There must in every case be privity of contract, a promise made by the defendant to the plaintiff. Even if that promise is to pay money to a third person or to do something for the benefit of that third person, it is settled that that third person cannot sue on the contract, he not being the promisee See *Tweedle* v. *Atkinson* (1).

And this principle has been laid down over and over again in this court as well as in England. *Cleaver* v. *Mutual Reserve Fund* (2); *Guerin* v. *Manchester Fire Assurance Co.* (3) at page 150.

There are, of course, exceptions to the rule, the most important exception being the case of Bills of Exchange, which, by the law merchant, were excluded from the operation of the principle. Promissory notes, as everybody knows, did not come within the operation of the law merchant, and the statute 3 & 4 Anne, ch. 9, was passed for that purpose. Covenants running with the land may be considered as forming another exception, and now, in most of the provinces of Canada as well as in England, all contracts are assignable and the assignee may sue thereon in his own name. But the maker of a promissory note makes his contract with the payee alone. It is by virtue of the statute of Anne, and subsequent legislation, and not by virtue of the contract, that a holder other than the payee is entitled to sue upon it. Although the action is an action *ex contractu*, the plaintiff obtains his title to sue upon the contract, not by virtue of a promise made to him, but of a promise made to the payee, which promise enures to his benefit as a legal consequence of the indorsation of the instrument to him by the payee or by any other indorser. It seems to me then clear that section 81 of chapter 94 does not apply to the present case.

(1) 1 B. & S. 393.
(2) [1892] Q. B.
(3) 29 Can. S. C. R. 139.

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Upon the other ground Mr. Justice Ritchie stated that:

If the Married Woman's Property Act, 1898, were in force, it would probably remove all the plaintiff's difficulties; but it has no application to this promissory note, the title to which accrued to the plaintiff, if at all, long before the comencement of that Act.

The Act referred to was passed before the institution of this action and, in my judgment, the plaintiff could avail herself of its provisions, notwithstanding that it was passed after the making of the note. Section 12 gives her, in express terms, in her own name, the right to sue her husband, and section 23 would seem to admit that even previously she had that right under the original Act. I have no doubt but that the statute has a retrospective operation. It is a provision relating to procedure and practice only, where the general principle that there is a presumption against retrospective construction does not apply. *Gardner* v. *Lucas* (1).

For these reasons I am of opinion that this appeal should be allowed and judgment entered for the plaintiff for the amount of the note sued upon, with interest and costs, the plaintiff to have her costs in all the courts.

His Lordship the Chief Justice took no part in the judgment on account of illness.

Appeal allowed with costs.

Solicitor for the appellant: *John M. Chisholm.*

Solicitor for the defendant: *H. C. Borden.*

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(1) 3 App. Cas. 603; and see Statutes, pp. 314 *et seq.* Maxwell on the Interpretation of

ALONZO D. COPLEN (DEFENDANT).....APPELLANT; 1899

AND

*May 21, 22.
*Oct. 8.

CHARLES CALLAHAN, ADMINISTRATOR OF THE ESTATE OF WILLIAM CALLAHAN, DECEASED (PLANTIFF) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining claim—Registered description—Error—Certificate of improvements—Adverse action—R. S. B. C. c. 135 *s.* 28.

If the description of a mining claim as recorded is so erroneous as to mislead parties locating other claims in the vicinity the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment of Mr. Justice Martin at the trial (1) in favour of the defendant.

The defendant, Coplen, in May, 1892, located the "Cube lode" mineral claim in the Slocan Mining Division of West Kootenay District and on no. 2 post as well as in the description of the claim as recorded the direction of the side line of the claim was given as south-easterly. William Callahan subsequently located the "Cody" and "Joker" fraction claims whereupon the defendant claimed that the "Cube lode" covered a part of the ground on which the "Cody" and "Joker" fractions were located. William Callaghan then brought an "adverse action" under the British Columbia Mining Act, R. S. B. C. ch. 135.

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

(1) 6 B. C. Rep. 523.

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At the trial the plaintiff's action was dismissed, the trial judge holding that a certificate recorded by Coplen of work done on the ground in dispute made his title thereto perfect under section 28 of said Act which reads as follows:

"28. Upon any disputes as to the title to any mineral claim no irregularity happening previous to the date of record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect except upon suit by the Attorney-General based upon fraud."

The irregularity in the case was as to the recorded description of the "Cube lode" claim the defendant alleging that the survey was erroneous and the direction of the side line, which was given as south-easterly should have been north-easterly.

The defendant's certificate of works was recorded before Callahan's.

The judgment of the trial judge was reversed by the court *en banc* and judgment ordered to be entered for the plaintiff with costs. The defendant then appealed to the Supreme Court of Canada.

Before the appeal to the court *en banc* the plaintiff William Callahan died and the action was revived in the name of his executor.

Aylesworth Q.C. for the appellant.

Sir Charles Hibbert Tupper Q.C for the respondent.

The judgment of the court was delivered by;

GWYNNE J.—That the description of the "Cube lode" claim as recorded by the appellant does not precisely conform to the provisions of the statute of British Columbia in force in that behalf is not disputed. The evidence indeed leaves no doubt in the matter, and it is in fact admitted. The only question

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therefore which, as it appears to me, is at all necessary to be decided in the present appeal is whether the deviation from the prescribed description was calculated to mislead, and did in fact mislead, William Callahan, now deceased, of whose estate the respondent is administrator, when subsequently recording the "Cody" and "Joker" fractions claims located by him on behalf of persons whose title was duly transferred to him in his life time. The "Cody" and "Joker" fractions claims as recorded cover portions of the "Cube lode" claim as claimed now by the appellant, but do not touch the "Cube lode" claim according to the description as recorded. The whole contention of the appellant is that all objection to the defect in his recorded description of the "Cube lode" claim is removed by his certificates of work done by force of sec. 28 of ch. 135, Revised Statutes of British Columbia; but whatever effect that contention might be entitled to in an action between the appellant and the Provincial Government, it has no application here where the contest is solely between the appellant and the respondent, in which the sole question is whether the owner of the "Cody" and "Joker" fractions claims as recorded have not by reason of the error in the "Cube lode" claim as recorded, acquired superior right to the claim of the appellant to so much of the land covered by the records of the "Cody" and "Joker" claims as the appellant asserts claim to as part of the "Cube lode" claim as now claimed by him, although such land is not within the description of the "Cube lode" claim as recorded. That the error in the description of the "Cube lode" claim as recorded was calculated to mislead and that in point of fact, the "Cody" and "Joker" fractions claims were located and recorded as they were by reason of such misleading error, have been found as facts by the learned judge

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who tried the case, and such his finding is well supported by the evidence, apart altogether from any question of fraud in any person whomsoever. The appeal, therefore, must be dismissed with costs.

The Chief Justice was prevented by illness from taking part in the judgment.

Appeal dismissed with costs.

Solicitors for the Appellant: *Martin & Deacon.*

Solicitors for the respondent: *Tupper, Peters & Gilmour.*

1900
*May 22,23.
*Oct. 8.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

THE CITY OF WINNIPEG (PLAINTIFF)..... } RESPONDENT.

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

Assessment and taxes—Exemption from municipal rates—School taxes.

By-law No. 148 of the City of Winnipeg, passed in 1881, exempted for ever the C. P. R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind."

Held, reversing the judgment of the Court of Queen's Bench, (12 Man. L. R. 581), that the exemption included school taxes.

The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. ch. 64, it was provided that by-law 148 authorising the issue of debentures granting by way of bonus to the C. P. R. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking * * * be and the same are hereby declared legal, binding and valid. * * *

Held, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures the whole by-law including the exemption from taxation, was validated.

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

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THE CANADIAN PACIFIC RAILWAY COMPANY v. THE CITY OF WINNIPEG.

APPEAL from a decision of the Court of Queen's Bench for Manitoba (1) affirming the judgment at the trial in favour of the plaintiff.

The question for decision on the appeal was whether or not the railway company was liable to be assessed for school rates by the city. The company claimed to be exempt under a by-law of the city validated by an Act of the legislature. The city claimed that the exemption in the by-law did not cover school taxes, and also that the portion of the by-law creating the exemption was not validated.

The material parts of the by-law and of the validating Act are set out in the above head-note, and in the judgment of the court.

Aylesworth Q.C. and *Aikins Q.C.* for the appellant.

Howell Q.C. and *Chrysler Q.C* for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—The original design of the Canadian Government in fulfilment of its obligations with British Columbia and of its successor in the enterprise, the present appellant company, contemplated the crossing of the Red River by the railway at Selkirk, some thirty miles down the river from the City of Winnipeg, thence westerly by the North Saskatchewan Valley, through the Yellow Head Pass of the Rocky Mountains and on to the Pacific Ocean. The City of Winnipeg, a few years before created by the legislature of the province a municipality, was anxious that the main line of the railway should pass through the city limits, and was prepared to offer very great inducements to secure that end. An agreement was consequently entered into between the city and the company, which was afterwards embodied in a

(1) 12 Man. L. R. 581.

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by-law passed by the city council on the 5th of September, 1881. This by-law, after various recitals, wherein it was declared that a line of railway south-westerly from Winnipeg towards the westerly limit of Manitoba, through the Pembina Mountain district, should be built; that it was desirable to secure the location of the workshops and stock-yards of the company at Winnipeg as a central point on the main line of the railway; that the company had agreed to construct such railway and to establish and continue their principal shops and stock-yards for the Province in Winnipeg; and further, that it was expedient for the city, in consideration of the premises to grant to the company, by way of bonus, debentures to the amount of two hundred thousand dollars with interest

and to exempt the property now owned or hereafter to be owned by the said railway company for railway purposes within the City of Winnipeg from taxation for ever,

enacted as follows:

Upon the fulfilment by the said company of the conditions and stipulations herein mentioned by the said Canadian Pacific Railway Company, all property now owned or that hereafter may be owned by them within the limits of the City of Winnipeg for railway purposes, or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind.

The company, within the proper time, carried out its part of the contract, the city doing the same, but inasmuch as there was a grave question as to whether the by-law above recited and a subsequent by-law, No. 195, slightly amending it, were *intra vires* of the city corporation, the Legislature of Manitoba, by chapter 64 of the Acts of 1883, passed an Act validating these by-laws, the enacting words being in part:

By-law No. 148 * * * and by-law No. 195, amending it, * * * are hereby declared legal, binding and valid.

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The chief question arising upon this appeal is as to the extent of the exempting privileges created by the by-law as confirmed by the Act of 1883. In other words, is the exemption sufficiently wide to embrace the moneys raised by the City of Winnipeg for public school purposes? Are school taxes included in the phrase "municipal taxes, rates and levies and assessments of every nature and kind?"

A question was discusssd at the argument as to whether the Act validating the by-law in question really made valid the exemption clause. I entertain no doubt upon this point. The whole and every part of the by-law was in express words confirmed, and it would be in violation of the plain meaning and express words of the enactment to hold otherwise. Exemption from taxation was as much a bonus to the company, as perhaps a larger one than, the two hundred thousand dollars issue of debentures, and it might just as well be argued that the Act, while validating the exemption, did not validate the debenture issue.

The main question, therefore, is this: Does the exemption include school taxes?

In order to reach a conclusion on the point in question, it will be well shortly to state the statute law in force in relation to common schools and to the authority of the municipal council in respect to taxation for public schools at the date of the passing of the by-law, inasmuch as the contracting parties must have had before their minds the then existing state of the law applicable both to the school corporation and to the city. The school trustees of the City of Winnipeg were incorporated before the incorporation of the city, and at first they were given statutory authority not only to impose school taxes but also to collect them. See the Act of 1876, (39 Vict. ch. 1, secs. 11 and 15).

This latter section (sec. 15), however provided as follows:

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In case the boards of school trustees of cities and towns deem it advisable so to do, they may make out an estimate of the sum required in any year for educational purposes, and on or before the first day of March in each and every year, they shall provide the clerk of the city or town with such estimate accompanied with a list of the names of the persons liable to be assessed for the support of the public school or schools of which the board applying are the trustees, and it shall be the duty of the council of such city or town to levy and collect the amount demanded with the corporation taxes and to pay over the same to the boards of school trustees when collected, or the council may from time to time advance to the boards of school trustees within their municipalities, any sum or sums which they may think proper, pending the collection of the school taxes; provided that nothing in this Act shall prevent the boards of school trustees from levying and collecting the school rates and taxes themselves, if they should think proper so to do.

That section was re-enacted in the school Act in force when the by-law was passed, (44 Vict. ch. 44, sec. 51), except in regard to the proviso at the end, which was eliminated, so that when the by-law was passed the school trustees of the city had no power to tax for school purposes. That duty was imposed, and wholly imposed, upon the municipal authorities. There were still left in the statute traces and indications that at a previous period the collection of school taxes was with the school trustees, and section fifty-one of the Act just referred to would seem to indicate that it was a matter of choice with the trustees whether they should collect the taxes or employ the civic machinery for that purpose, but their power of collection was gone, and in the case of the *Winnipeg School Trustees* v. *The Canadian Pacific Railway Co.* (1), Chief Justice Sir Thomas Taylor says, at page 166:

It is true that the fifty-first section of the Act now in force only says that an estimate is to be made out and sent to the council "if the board of trustees deem it advisable so to do," but practically the Legislature has given them Hobson's choice in the matter. If they do not deem it advisable so to do, the statutes do not, so far as I can find,

(1) 2 Man. L. R. 163.

confer upon them any power to assess, levy or collect taxes themselves, and they must go without a revenue.

The law, therefore, at the date of the by-law, would seem to be this: The school trustees had the right of determining without question the amount which was to be raised for public school purposes within the city limits and of authoritatively calling upon the city authorities to collect and hand over that amount, while the latter authorities were under an absolute obligation to obey the behests, in that regard, of the school trustees.

It may be well, too, here to state that the municipal council had legislative authority to pass by-laws

for encouraging manufactures within the limits of the city, by exempting from taxation, in the whole or in part, for a period of one or more years, such industrial establishments as are now or may hereafter be carried on in said city, and which, in the public interests, may by said council seem advisable. (38 Vict. ch. 50, sec. 107, as amended by 42 Vict. ch. 4, sec. 20.)

Also for granting bonuses to any railway or bridge company (sec. 4, ch. 42); 44 Vict. ch. 21 (1881) enacted that it should be lawful for any incorporated city

to exempt from all taxes assessments and Municipal imposts whatsoever for a period not exceeding twenty years any manufactory. * * *

It is evident from these statutes that the city had, at the time of the passing of the by-law, the power to exempt property from taxation for certain purposes, and I do not doubt but that these powers were before the minds of the contracting parties at the time the by-law was passed, as well as the general law in regard to the collection of school taxes.

The question then is: Are schools taxes exempt under this phrase "exempt from all municipal taxes, rates and levies and assessments of every nature and kind?"

Apart from the main inquiry, the words themselves are not altogether free from ambiguity. I think,

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according to the rules of grammatical expression, the adjective "municipal" applies only to "taxes, rates and levies," and does not qualify "assessments." If the first conjunction "and" were not there, the adjective would qualify "assessments," but it is there, and, according to the literal construction of the sentence the property is exempt not only from all "municipal taxes, rates and levies." but also from "assessments of every nature and kind." If this literal construction is to be given, and I think it should be given, the case is at an end.

But we much prefer to rest our judgment upon the main ground that municipal taxes include school taxes, and that the property of the company is exempt from any liability to contribute towards the support of the city schools.

Mr. Justice Bain, in his judgment in this case, states as follows:

> The widest definition I could give to the expression "municipal taxes" would be that they are taxes imposed by the governing body of a municipality for the purposes of the municipality.

And this definition is approved of by Killam C.J.

I accept this definition. Taxes imposed for the support of schools in a municipality, in my view, are taxes for the purposes of the municipality. The promotion of education in a community is as much a municipal purpose as the promotion of health in a community, or of physical training, or of any other object having in view the well being of the citizens. Many cities have statutory authority to impose taxes for the support of hospitals, or public libraries, gymnasiums and athletic associations of all kinds. Are these any more municipal purposes than education? There is not, in my view, any difference in principle between them.

There is another view, however, which so far has not been put forward. I submit that any taxation by

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a municipal body for the purpose of raising money to relieve itself from a municipal obligation, is taxation for a municipal purpose. The obligation of imposing this tax and of collecting it was one of the city's legislative burdens. Relief from that burden must therefore necessarily be a municipal purpose, and the moneys raised therefor a municipal tax.

With the greatest possible deference, we have come to the conclusion that the judgment appealed from is wrong.

The appeal will be allowed with costs in all the courts and the action dismissed.

Owing to illness, the Chief Justice was prevented taking part in the judgment of the court.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. M. Aikins.*

Solicitor for the respondent: *John Stanley Hough.*

1900

*May 2.

*Oct. 8.

LORD CLAUD JOHN HAMILTON AND EDWARD LAWRENCE (PLAINTIFFS) .... } APPELLANTS;

AND

SOPHIA GRANT AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Company—Judgment creditor—Action against shareholder—Transfer of shares—Evidence.

Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the court below gave judgment in favour of G.

Held, affirming such judgment, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.

Held, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.

The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to consolidate and amend" the former company, but authorising additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the later Act came

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

into force. The judgment against the company was recovered in 1895.

Held, that G. was never a shareholder of the company against whom such judgment was obtained.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs.

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

Cahan for the appellants. The evidence fully supports the finding of the trial judge that J. E. Dickie was an original shareholder for five hundred shares in the Stewiacke Valley & Lansdowne Railway Co. which were validly transferred to Donald Grant in September, 1887, in the form required by R. S. N. S. (5 ser.) ch. 53, sec. 22, and, though no entry thereof was made in the transfer-book Grant became the legal owner and holder of the shares; *Spackman* v. *Evans* (1) at page 238; *Nanney* v. *Morgan* (2); because all necessary conditions had been fulfilled to give him an absolute and unconditional right to have the transfer entered in the books of the company. *Roots* v. *Williamson* (3); *Moore* v. *Northwestern Bank* (4); *Powell* v. *London and Provincial Bank* (7), at page 799; and further, the resolution by the directors in September, 1887, approving and accepting the transfer to Grant is a sufficient entry on the books of the company.

If Grant did not become a legal shareholder, the plaintiffs are entitled to judgment against the estate of Dickie, as holder of the shares. Even admitting Holmes had an agreement or transfer from Grant, giving him an equitable right to the shares, nevertheless such

(1) L. R. 3, H. L. 171.
(2) 57 L. J. Ch. 311; 37 Ch. D. 346.
(3) 57 L. J. Ch. 995; 38 Ch. D. 485.
(4) 60 L. J. Ch. 627; [1891] 2 Ch. 599.
(5) [1893] 1 Ch. 610.

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equitable right did not constitute Holmes a legal shareholder as the company did not approve and accept him as a shareholder or, if in this company shareholders may transfer shares at will, unless and until such transfer had been brought to the notice of the company, as provided by secs. 22, 23, ch. 53, R. S. N. S. (5 ser.) by being filed with the directors. *Copeland* v. *North Eastern Railway Co.* (1); *The Queen* v. *General Cemetery Co.* (2).

This company created by statute is not a corporation at common law, and common law rules as to transfers of shares do not apply; see remarks by Bowen L.J. in *Baroness Wenlock* v. *River Dee Co.* (3), in the note at page 684. The statutory provisions with respect to sales and transfers of shares must be complied with in order to make an effectual transfer as against creditors. *In re Wrysgan Slate Quarrying Co., Humby's Case* (4). A person once a shareholder remains so unless he has in some lawful way got rid of his liability. See remarks by Gifford L. J. in *Re Patent Paper Mfg. Co., Addison's Case* (5), at p. 297; Buckley on Companies (7 ed.) at pp. 44, 148. There is no evidence that the alleged transfer from Grant to Holmes was accepted or received by the transferees or either of them, or filed with the directors, or even brought to their notice.

The contention that the company sued is not the company organized by ch. 155 of 1886, in which Grant and Dickie were shareholders, but another company incorporated by ch. 63, of 1890, is not open to the respondents, because the 1st and 2nd paragraphs of the claim are not specifically denied in the defence, and must be taken as admitted. It has no foundation, in fact, inasmuch as both statutes apply to one and the

(1) 6 E. & B. 277.
(2) 6 E. & B. 415.
(3) 36 Ch. D. 674.
(4) 5 Jur. N. S. 215; 28 L. J. Ch. 875.
(5) 5 Ch. App. 294.

same company:—the Stewiacke Valley and Lansdowne Ry. Co., incorporating Act, ch. 155 of 1886, was amended by ch. 84 of 1888, authorized by the company, and the Act, ch. 63 of 1890, was a consolidation of the original Act, and amendments. The contention that the plaintiffs have recovered no judgment against the S. V. and L. Ry. Co., because it had ceased to exist when the judgment was recovered is not now open to the defendants as the 1st paragraph of the claim is admitted. The defendants are estopped from raising any question in this action as to the validity of the judgment or the existence of the corporation. Lindley on Companies (5 ed.) pp. 283, 284; *Ray* v. *Blair* (1); *Casey* v. *Galli* (2).

As to the contention that ten per cent on the capital was not expended within three years, and that the corporate existence ceased under R. S. N. S. (5 ser.), ch. 53, s. 27 s s. 6, "ten per cent *on* the capital" does not mean ten per cent *of* the capital. By sec. 2, ch. 155 of 1886, the capital was fixed at $160,000; by sec. 6, ch. 84 of 1888, the capital was increased to $400,000; by sec. 6, ch. 63 of 1890, the capital of $400,000 was confirmed, and the evidence is that $40,000 and over was expended before 31st, December 1889. Chapter 53 does not apply to this company when inconsistent with the special act; and sub-sec. 6 of sec. 27 is expressly varied by sec. 16 of ch. 155 of 1886. The words "null and void" there should be construed as "voidable;" and the charter could only be annulled in a direct proceeding by the Attorney-General. *New York and Long Island Bridge Co.* v. *Smith* (3); *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, (4). The corporate existence was recognized after the alleged expiration of the charter by ch. 63 of 1890; ch. 87 of 1892; and even if the charter had expired it is no defence to a creditor's action such

(1) 12 U. C. C. P. 257.
(2) 94 U. S. Rep. 673.
(3) 148 N. Y. Rep. 540.
(4) 29 Can. S. C. R. 211

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as this. *Ray* v. *Blair* (1); *Edwards* v. *Kilkenney and G. S. & W. Railway Co.* (2); *City of Toronto & Lake Huron Railroad Co.* v. *Crookshank* (3), at p. 317.

The appellants are entitled to recover from the estate of Grant, or in the alternative from the estate of Dickie.

Mellish for the respondents, Grants. Grant's name was never entered in the books as shareholder, and the pretended transfer to him was void because a previous call had not been paid at the time. If he ever could be considered a shareholder, he ceased to be so in 1887, when he transferred to Holmes, who was then president of the company, received the transfer and handed it to the secretary whose duty it was to keep the records and make the proper entries. Holmes qualified upon these shares, and Grant is not shewn to have been at a meeting or taken any interest in the company. See *Page* v. *Austen* (4).

If Grant was a shareholder it was in the company incorporated by the Act of 1886, which for the reasons given by Townshend J. ceased to exist when the Act of 1890 was passed. The judgment was null and void, because that company had ceased to exist under sec. 27 (R. S. N. S., 5 ser., ch. 53) of the Railway Act, not having expended 10 per cent of its capital stock on the construction of the railway, (*a*) within three years after the passing of the Act of 1886, or (*b*) within three years after the passing of the Act of 1890. *Sturges* v. *Vanderbilt* (5); *In re Brooklyn, W. & N. R. Co.* (6); *In re Brooklyn, W. & N. R. Co.* (8).

Newcombe Q.C. for the other respondents, executors of J. E. Dickie. Mr. Justice Ritchie, at the trial, found

(1) 12 U. C. C. P. 257.
(2) 3 C. B. N. S. 787.
(3) 4 U. C. Q. B. 309.
(4) 10 Can. S. C. R. 132.
(5) 73 N. Y. 384.
(6) 72 N. Y. 245.
(7) 81 N. Y. 69.

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that in September, 1887, the late James E. Dickie made a valid and effectual transfer to Grant. The executors of Dickie rely upon the reasons of Townshend J. for the holding that Grant made a valid transfer in which Meagher J. concurred. If Grant made a valid transfer, *a fortiori*, Dickie did. We further rely upon the argument of Weatherbe J. that he who can be said to be "the holder of the said stock" is the person liable. Under the words of the statute the holder is liable for "the stock held by him." The question is not who has registered or delivered or of filing and registration but who holds the stock or in other words owns it. Dickie ceased to be the "holder of the stock" when he executed a transfer and delivered it both to Grant and to the company to be registered. He did everything in his power to divest himself of the stock. The minute of the resolution accepting Grant as a shareholder was a literal compliance with sec. 155. At the time of the transfer there was no legal call outstanding, all calls were satisfied, and sec. 20 of the N. S .Ry., Act, under which an alleged call was made, has no application between shareholders and creditors, but only as between shareholders and the company. The call in question was not legal because thirty days' notice was not given by publication, and the resolution did not appoint a place and time for payment as required by R. S. N. S. (5 ser.) ch. 53, sec. 20.

It is not open to the appellants as creditors of the company to take the objection that a call was unpaid at the time of the transfer from Dickie to Grant, the directors accepted Grant as a shareholder in place of Dickie; that ended the matter; the creditors cannot complain. *Ex parte Littledale* (1). Any irregularity was waived by the company and the transferee; the transferee was recognized and treated by the company

(1) 9 Ch. App. 257.

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as the holder of the shares; and both company and transferee acted upon the transfer as valid and effectual. The non-entry was only an irregularity and was waived. *Straffon's Executors' Case* (1); *Murray* v. *Bush* (2); *In re Manchester and Oldham Bank* (3); *Royal Bank of Indias' Case* (4); *Sheffield, etc. Railway Co.*, v. *Woodcock* (5).

For the reasons given by Townshend J. in the court below we contend that the company in which Dickie took stock ceased to exist and a new company was incorporated with the same name. It is against the new company and not the company of which Dickie was a member that the appellants recovered the judgment upon which this action was founded. The charter expired under sec. 9, ch. 78, R. S. N. S. (5 ser.), and nothing has been done under secs. 10 and 11 to revive it.

The judgment of the court was delivered by:

SEDGEWICK J.—I think this appeal should be dismissed for the reasons stated by Mr. Justice Townshend, in so far as they relate to the ownership of the shares in question. It appears to me that the evidence conclusively establishes that Mr. Holmes and his associates, and not the defendants Grant, were owners of the shares, the calls upon which this action seeks to enforce. It would seem that an action had been brought against him which failed in consequence of what the court thought to be insufficient proof of a transfer to him of the shares, but that defect in the present case was fully removed by the evidence of Mr. McGillivray, evidence upon which the trial judge acted and which the appellate court accepted to the fullest possible extent. At first blush it would seem that in

(1) 1 DeG. M. & G. 576.
(2) L. R. 6 H. L. 37.
(3) 54 L. J. Ch. 926.
(4) L. R. 7 Eq. 91.
(5) 7 M. & W. 574.

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this case there is a failure of justice inasmuch as both the original shareholders, and the two subsequent transferees have escaped liability. It is rather, however, a failure of evidence to meet the exigencies of a particular case, a failure for which the plaintiff himself must, in the present case, be held responsible. His misfortune in not being able to prove his case in the first action must not affect the rights of the defendants in the second, or tempt a court of justice to sacrifice them on that account.

One other observation may be made. There was no express evidence that the transfer from Grant to Holmes was approved by the company, or that the latter's name was ever upon any list of shareholders. In my view, we must assume, under the special circumstances of this case that the transfer was approved, and that the list existed. Almost all the immediate parties connected with the transaction are dead, except Mr. Holmes, who appears to possess a very defective, if also a very convenient memory, but Mr. Holmes was the principal officer of the company; general meetings of the company without number were presided over by him as president of the company; for several years he was its principal executive officer, and is still, so far as I know. The only title which he had to interest himself in the affairs of the company or to act as director or president, or to execute the mortgages and bonds referred to in the evidence, was based and depended upon the transfer of Grant to him. In fact the plaintiff's rights to obtain his original judgment against the company were in effect based upon the assumption that Mr. Holmes was a shareholder, because it was by virtue of the company's contracts executed by him that their rights arose. Under the circumstances the maxim *omnia præsumuntur rite esse acta* applies.

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Sedgewick J.

I have also considered Mr. Justice Townshend's view in regard to the identity of the defendant company in the plaintiff's original action against it, and entirely agree with it. Neither Dickie nor Grant was ever a shareholder in the new company.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harris, Henry & Cahan.*

Solicitor for the respondents, the Grants: *John McGillivray.*

Solicitors for the respondents, the Dickies: *Drysdale & McInnis*

1900

*May 9, 10.

*Oct. 8.

THE CITY OF MONTREAL.....APPELLANT;

AND

ELZÉAR BÉLANGER AND OTHERS..RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Municipal institution — Expropriation — Assessment—Local improvement —Rating in proportion to benefit—Trivial objections first taken in appeal—52 *V. c.* 79, *ss.* 209, 213, 243 (*Que.*)—54 *V. c.* 78, *s.* 2 (*Que.*) —55 *&* 56 *V. c.* 49 *s.* 22 (*Que.*)—57 *V. c.* 57 (*Que.*)

Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively and the rate levied in proportion to the special benefit each parcel has derived from the local improvement.

Where an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the courts upon an application to have the assessment roll set aside.

Judgment appealed from, (Q. R. 9 Q. B. 142) reversed; judgment of the Superior Court, (Q. R. 15 S. C. 43) restored; Gwynne J. dissenting.

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

1900

THE CITY OF MONTREAL v. BÉLANGER.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, appeal side (1), reversing the judgment of the Superior Court, District of Montreal (2), which dismissed the respondent's petition to set aside an assessment roll for the cost of widening a street in the City of Montreal.

Under the provisions of "The Charter of the City Montreal," the commissioners named in 1891 for the purposes of expropriations and assessments necessary for the widening of a portion of Notre-Dame Street reported, in April, 1892, as to expenses in connection with the works and their report was duly homologated by the court. In June, 1893, their assessment roll apportioning the cost of the improvement between the city and riparian proprietors was confirmed and deposited in the City Treasurer's Office for collection, all in conformity with 55 & 56 Vict. chap. 49, s. 22. In January, 1894, the Act 57 Vict. chap. 57, came into force providing that five-eights of the cost of this work should be borne by the city and the remaining three-eights by riparian owners to a depth of fifty feet. The commissioners, on a consideration of the special advantages accruing to and consequent increased values of the several properties in the area affected by the statute, made a new roll and imposed a larger portion of the three-eights of the cost, chargeable to owners, upon the properties on the north side of the street, than was imposed upon assessable properties situate on the south side which they considered to derive less benefit from the works.

The respondents, by petition to quash the assessment roll, contended that the commissioners had no right to impose a larger proportion of the cost on the north side, and that they had unjustly assessed Bélanger's property partly as an intermediate and partly as

(1) Q. R. 9 Q. B. 142. (2) Q. R. 15 S. C. 43.

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a corner lot, on account of the opening of Beaudry Street since the widening of Notre-Dame Street, thereby increasing the portion of the cost of the expropriation chargeable to his property under the new valuation by several hundred dollars.

The Superior Court, Gill J., dismissed the petition and this decision was reversed by the judgment appealed from.

Atwater Q.C. and *Ethier Q.C.* for the appellant. The fullest weight and importance must be given to the report of the commissioners in preference to the opinions of witnesses chosen by parties interested in matters of expropriation. The award of commissioners chosen on account of their fitness and integrity and given discretion as a statutory tribunal should receive the same favour as the verdict of a jury, which has viewed the locality and adjudged personally as to benefits accuring.

As to the objection of excessive assessment, the amount is only of a few hundred dollars on a roll covering over half a million dollars and too trivial to be noticed. At any rate the objection ought to have been taken on a contestation of the roll at the time it was under revision and comes too late on an application to quash. The following authorities are cited:— Angell on Highways (2 ed.) pp. 215-226; *In re William and Anthony Streets* (1); *In re John and Cherry Streets* (2); *In re Pearl Street* (3); *Morrison* v. *Mayor of Montreal* (4); *Lemoine* v. *City of Montreal* (5); *Benning* v. *Atlantic & Northwest Railway Co.* (6); *Atlantic & Northwest Railway Co.* v *Wood* (7).

Béïque Q.C. for the respondents. The respondents object to the present roll, first, on the ground that both

(1) 19 Wend. 678.
(2) 19 Wend. 659.
(3) 19 Wend. 651.
(4) 3 App. Cas. 148.
(5) 23 Can. S. C. R. 390.
(6) 20 Can. S. C. R. 177.
(7) [1895] A. C. 257; Q. R. 2; Q. B. 335; 18 Legal News 140.

sides of the street should have been treated as one single territory, and each property taxed according to its proportionate assessed value; as was done by the first roll; and for the further reason, peculiar to Bélanger, that the value put upon his property for the purposes of the assessment should have been its value when the expropriation was made, unaffected by subsequent improvements such as the extension of Beaudry Street. The increase is illegal and unjust. The proceedings in connection with the improvement, constitute one single operation, and it required but one single valuation. The change in the situation of the property had nothing to do with the improvement to which the roll related, and was due to another improvement, to the cost of which Bélanger contributed; so that he is made to pay twice for the same thing. The valuation made for the first roll should not have been changed; it was not necessary to re-value the properties on which the assessment was to be levied.

The judgment of the court was delivered by:

TASCHEREAU J.—This is an appeal from a judgment of the Court of Queen's Bench granting the respondents' petition to quash an assessment roll relating to the expropriation required for the widening of Notre-Dame Street east in Montreal. The Supreme Court had dismissed it. The respondents' main ground of complaint against the said assessment roll is that it puts on the north side of the street upon which their lots are situated a larger proportion of the cost of this local improvement than on the south side of it.

After a minute consideration of the divers and much confused statutory enactments bearing on the question, I have come to the conclusion that the Superier Court was right in holding that the respondents' claim is unfounded and that the proprietors on the

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south side should not be taxed for this improvement at the same rate as those on the north side, when, it is not denied, they do not benefit from it at the same rate. The policy of taxation of this nature rests upon the enhancement of the value of the properties resulting from the local improvement that necessitated it, and there is nothing in this case to justify a departure from that fair and equitable policy. Cooley, on Taxation, 448-459.

The widening in question of Notre-Dame Street East was authorised in 1890 by 54 Vict. ch. 78, sec. 2, and the cost of it was by that Act to be levied and paid by the proprietors on each side of the street to a depth of fifty feet, one half by the city and one half by the said proprietors in accordance with sec. 243 of the charter of the city, 52 Vict. ch. 79. An amendment passed in 1892, 55 & 56 Vict. ch. 49, sec. 22, restricts that division of the cost of the improvement to a certain part of the street, without otherwise altering it, and authorises new assessment rolls to give effect to the said amendment. But by 57 Vict. ch. 57 the apportionment of the cost thereof was altered, and five-eighths are now to be paid by the city and the other three-eights by the proprietors on each side of the street. It is on this last enactment that the respondents base their contention that both sides of the street have to pay in the same proportion the cost of the improvement, though both sides are not improved in the same proportion.

I fail to see any foundation whatever to support the proposition that this last statute can be so construed. All that it does, and all that it purports to do, is to make the city pay five-eights instead of one half, without altering in any way the usual mode of assessing amongst the proprietors the three-eighths that are left to be paid by them, and to use the very words of sec.

243 of the charter, expressly extended to this work by the Act of 1890, "the rules regulating assessments in general." Now these rules are (by sec. 209 of the charter) that the city when it orders that the cost of a local improvement shall be paid in whole or in part by the parties interested shall be assessed upon their properties proportionately to the benefit that the improvement brings to them; secs. 209, 213. And says sec. 228:

> It shall be the duty of the commissioners to determine the proportion in which the proprietors * * * * shall be respectively assessed, and to assess and apportion, in such manner as to them may appear most reasonable and just, the compensation accorded by them for the land taken and the costs and expenses incurred in and about such expropriation * * * * upon all the immoveable properties declared to be benefited by such improvement * * * * taking into account the benefit to be derived from the improvement in the proportions so determined by the commissioners.

Now, why the benefit to be derived from the widening of Notre-Dame Street should not likewise be taken into account, and the north side be made to pay more than the south side if it benefits more from it, is what I entirely fail to see. In the absence of a clear and express enactment to support it, the respondents' proposition to the contrary cannot be countenanced. What has been declared by the legislature and all that has been so declared in the matter is that 50 feet of the properties on each side of the street are specially benefitted by this widening of the street, and that three-eighths of the cost thereof should be borne by the owners of the said properties, but there is nowhere to be found the enactment that the assessment of these three-eighths should be made regardless of the benefit that accrues to each of these properties from this improvement, or, what the respondents' contention amounts to, that the south side proprietors should pay more than the north side ones, for, as they benefit less than the north side, it is obvious that to make them

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pay at the same rate would be to make them pay more. Special benefits to the property assessed, that is benefits received by it in addition to those received by other properties liable to the assessment, is the true foundation upon which these local assessments rest; Dillon Mun. Corp. 761. Here, the legislature has declared what are the properties generally benefited by the widening of this street, and to what extent as between them and the corporation of the city the cost of it should be borne, but it has left with the assessors, as usual in such cases, to apportion the burden according to the benefit and to determine what part of that benefit each parcel of these properties actually and separately receives, and for that purpose, by sec. 3 of 57 Vict. ch. 57, the assessors are specially empowered to give effect to the alterations introduced by the Act. The fact that by the previous roll both sides of the street had been assessed at the same rate cannot affect the case. That roll having been set aside, the assessors had the right by the new roll to act as they did, if, as a fact, not open to review here, they found that the north side had benefited more than the south side from this improvement.

Another ground of complaint against this assessment roll is made by one of the respondents, Bélanger, based upon the fact that he is charged $381.60 more by this roll than he was by the preceding roll which was set aside by the legislature. He contends that the subsequent increase in value of his property should not have been taken into account by the new roll. The *considérants* of the judgment of the Court of Appeal do not notice this objection, and there is nothing in it. There is no evidence that the respondent urged this ground of complaint before the Board of Revisors; the assessment was duly confirmed by the statutory tribunal; and for him now to ask that a roll on a valuation

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of over half a million dollars should be set aside because he is assessed $381 more than he thinks he ought to have been, seems to me a preposterous demand.

The appeal is allowed with costs and the judgment of the Superior Court restored.

GWYNNE J. (dissenting).—I entirely concur in the judgment of the court below to which I cannot usefully add anything. I must therefore dissent from the present judgment.

THE CHIEF JUSTICE was prevented by illness from taking part in the judgment.

Appeal allowed with costs.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitors for the respondents: *Béïque, Lafontaine, Turgeon & Robertson.*

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*May 8.

*Oct. 8.

THE CITY OF MONTREAL (DEFENDANT)..... } APPELLANT;

AND

CASSIE McGEE (PLAINTIFF).....RESPONDENT.

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

Prescription—Arts. 2188, 2262, 2267 *C. C.—Waiver—Failure to plead limitation—Defence supplied by the court of its own motion—Reservation of recourse for future damages—Judicial admission—Interruption of prescription—Novation—Costs.*

The prescription of actions for personal injuries established by article 2262 of the Civil Code of Lower Canada is not waived by failure of the defendant to plead the limitation but the court must take judicial notice of such prescription as absolutely extinguishing the right of action.

The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code.

When in an action of this nature there is but one cause of action damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury.

APPEAL from the judgment of the Court of Queen's Bench, (appeal side), affirming the judgment of the Superior Court, District of Montreal, in favour of the plaintiff.

On 9th August, 1895, plaintiff sustained bodily injuries through an accident due to negligence on the part of the city and brought an action thereupon for the sum of $2,000 in which she recovered judgment on

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

the 12th June, 1896, for $1,000 damages, recourse being therein reserved for any further action she might have for future damages which might result from the same accident, not included in that first action. On 3rd December, 1897, she brought a second action for further damages said to have been ascertained since the institution of her first action and recovered $5,000 additional damages. The appeal is from the judgment of the Court of Queen's Bench at Montreal affirming this decision. The questions at issue on this appeal are stated in the judgments reported.

Atwater Q.C. and *Ethier Q.C.* for the appellant. This action is for bodily injuries, and was prescribed by the lapse of one year, Art. 2262 C. C., at the time of its institution, and falls within Art. 2267 C. C. The right of action is denied, and under Art. 2188 C. C. the court must of its own motion, supply the defence. *Breakey.* v. *Carter* (1); *Dorion* v. *Crowley* (2). It becomes a question of costs if judgment turns upon this point. *Canadian Pacific Railway Co.* v. *Robinson* (3).

The first action did not interrupt prescription of the damages now claimed. There was no continuing *cause* of damage, although the *effect* of the accident might have been continuing. *St. Marie* v. *City of Montreal* (4).

For all over the $1,000 awarded by the first judgment the limitation has operated. Art. 2262 C. C. No complacent reserve by the court can prevent the defendant claiming prescription accorded by the law or extend the plaintiff's right of action; Art. 2247 C. N.; S. V. 77, 1, 147; 2 Aubry & Rau (5 ed.), sec. 215; *Janes* v. *Sun Mutual Ins. Co. of New York* (5).

(1) Cass. Dig. (2 ed.) 463.
(2) Cass. Dig. (2 ed.) 709.
(3) M. L. R. 5 S. C. 225; 6 Q.B. 118; 19 Can. S. C. R. 292; [1892] A. C. 481.
(4) Q. R. 16 S. C. 140.
(5) 20 L. C. Jur. 194.

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Bisaillon Q.C. and *Mignault Q.C.* for the respondent. Arts. 2264 and 2265 C. C. must be read together, and the effect of the judgment in the first suit was to furnish a new title prescriptible by thirty years only. Art. 2265 C. C.; Pothier, Obl. No. 701; Beaudry-Lacantinerie and Tissier, Prescription, No. 552; Leroux de Brétagne, Prescription, No. 507; Aubry & Rau (5 ed.) pp. 528, 529; Liège, 1st April, 1896, Pasicrisie, 1896 (Appel), 261, 262; *Almour* v. *Harris* (1). The first suit interrupted the prescription against the second. See Baudry-Lacantinerie and Tissier, Prescription, Nos. 574 to 578; Leroux de Brétagne, Prescription, No. 539; Laurent, Vol. 32, Nos. 89, 90, 139, 140, 141, 142, especially the case referred to at No. 90: Cass. 6th Dec. 1852. Dal. '53, 1, 50; Rolland de Villargues, cited by Troplong, Prescription, (ed. Belge); (1) M. L. R. 2 Q. B. 439. No. 561 2o, Note 5.

The second suit is distinctly contained in the first, and does not constitute *une demande distincte* or *une demande nouvelle.* Cour d'App. Brussels, 23 juil 1885, Pasicrisie 1886 (Appel) p. 90.

The appellant acquiesced in the reserve in the judgment by pleading to the second suit exactly in the terms of the reserve, and a judicial contract intervened which was subject to the thirty years prescription, same as a judgment; Merlin, Rép. Vo. Contrat judiciaire; Pand. Fr. Vo Contrat judiciaire, Nos. 1, 6, 12, 17; Fuzier Herman, Rép. Vo. Contrat judiciaire, Nos. 1, 7, 14; and Vo. Jugement et Arrêt No. 2944. Prescription does not run again for the same period where there is novation; Art. 2264 C. C. Appellants have renounced the prescription set up by them as stated by art. 2185 C. C. by silence in the first court.

In this case prescription was suspended. Art. 2232 C. C. is an absolute rule as to its first paragraph. The medical evidence shows that it was impossible to act

sooner. *Contra non valentem agere nulla currit prescriptio.* The words "*in fact*" of our article are important; *Kerr* v. *Atlantic & North-West Railway Co.* (1), qualified the rule by adding "when the damage results exclusively from that act, *and could have been foreseen and claimed for at the time.*" A case in point is cited by Muteau, Responsabilité Civile, p. 478, note, and, in our courts, we have a similar case in *Barette* v. *Les Commissaires d'Ecoles de St. Cyprien* (2).

TASCHEREAU J.—J'abonde dans le sens de Monsieur le Juge Girouard qui a bien voulu me communiquer ses notes. L'action de l'intimée est prescrite. La réserve que fait en sa faveur le jugement sur la première action n'a pu lui conférer un droit que la loi lui refuse. *Janes* v. *The Sun Mutual Insurance Company of New York* (3).

Si cette nouvelle action lui compétait, elle y aurait droit indépendamment de ce premier jugement. Elle ne peut étayer sa cause sur cette réserve, que d'ailleurs le savant juge n'a faite que conditionellement.

La cour lui réserve son recours pour dommages futurs, dit-il, si toutefois ces dommages ne sont pas inclus dans la présente demande.

C'est comme si le juge avait dit :—

Sous réserve de tout droit d'action qu'elle peut avoir.

La prescription annale contre l'intimée a commencé à courir, *ipso jure*, concurremment avec la cause de son action. Or la cause de son action, c'est la faute de l'appelante, la cause des souffrances et des blessures dont elle réclame compensation. C'est cette faute qui, sous l'article 1053 du Code, lui a donné son droit à une réparation le lendemain même de l'accident.

L'intimée voudrait ne faire courir la prescription que de la date où elle a éprouvé ses dommages. Mais

(1) 25 Can. S. C. R. 197. (2) 4 Thémis 49.
(3) 20 L. C. Jur. 194.

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c'est là vouloir changer le Code ou plutôt l'abroger, et en radier la prescription annale de l'action en dommages. La loi décrete, pour un motif d'ordre public, que depuis l'an expiré, elle est présumée avoir été payée pour tous les dommages qu'elle a pu subir par suite de cet accident, et c'est là une présomption *juris et de jure*, contre laquelle nulle preuve ne peut prévaloir. Elle est déchue de tout droit d'action ultérieur. Sa créance est absolument éteinte, (art. 2267, C. C.), et l'auteur de l'accident a droit de se considérer désormais à l'abri de toutes réclamations autres que celles déjà produites. Tous les dommages recouvrables lui ont été accordés par le premier jugement. Les autres, s'il y en a, ne sont pas recouvrables.

L'intimée invoque en vain l'article 2232 du Code et la maxime *contra non valentem agere non currit prescriptio*. Elle est censée avoir demandé par sa première action tous les dommages que l'appelante lui a causés, actuels et futurs.

Si ses prétentions étaient fondées, celui qui, par exemple, est obligé de se faire amputer le bras six mois après un accident imputable à la négligence d'un autre pourrait en tout temps avant le laps de dix-huit mois après l'accident instituer son action. Ou, si l'amputation n'a été déclarée nécessaire qu'après l'année expirée, il pourrait poursuivre pendant l'année subséquente quoiqu'il n'eut fait aucune réclamation durant l'année qui a suivi l'accident.

Mais telle n'est pas la loi. "Their Lordships" dit Lord Watson, en délivrant le jugement du Conseil Privé, dans la cause de *Canadian Pacific Railway Company* v. *Robinson* (1),

> see no reason to doubt that *any* claim competent to him, (the injured party), against the respondents, had been cut off by prescription, (of one year, since the date of the accident.)

(1) [1892] A. C. 481.

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C'est sur ce principe, qui domine le sujet dans le droit français comme dans le droit anglais, qu' Holroyd J. disait dan *well* v. *Young* (1).

> The statute of limitations is a bar to the original cause of action and to all consequential damages resulting from it. Subsequent damages do not constitute a fresh ground of action.

Mais, nous a dit l'intimée, ma seconde action peut être considérée comme une continuation de la première. Je n'ai pu saisir sur quoi elle a tenté d'appuyer cette prétention. La première était bien et dûment terminée à toutes fins que de droit quand cette seconde a été prise. Le jugement et le paiement par l'appelante du montant de la condamnation contre elle avait mis fin complète au litige. Si la première eut été portée devant la Cour de Circuit et la seconde devant la Cour Supérieure, l'intimée ne prétendrait pas que la dernière est la continuation de la première. Il doit en être ainsi quoique les deux aient été portées devant la même cour. La dernière est une demande nouvelle et entièrement distincte de la première.

Et la première n'a interrompu civilement la prescription que pour les mille piastres que le jugement lui a accordées. Il ne peut pas être question d'interruption de prescription de ce qui ne forme pas partie de l'acte interruptit.

Le jugement sur la première poursuite n'a pu produire novation, comme l'intimée l'a soutenu à l'audience, pour ce qui n'en formait pas partie. La novation suppose une dette pré-existante, une prescription commencée qui recommence à courir. Or, si sa créance était pré-existante, elle était incluse dans la première action, et dans ce cas, *cadit questio ;* l'intimée est hors de cour, et par la loi, et par les termes mêmes de la réserve que fait le premier jugement qui est expressément limitée aux dommages non compris dans

(1) 5 B. & C. 259.

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la première action. Et si sa créance n'était pas incluse dans la première action, alors elle a été annihilée par le laps d'une année après l'accident.

D'ailleurs, y eut-il interruption mais pas de novation, la prescription aurait recommencé à courir par le même temps qu'auparavant, (art. 2264 C. C.) et l'action de l'intimée n'en serait pas moins prescrite car elle a été instituée plus d'un an après ce jugement. Tant qu'à la partie de la première action dont l'intimée a été déboutée, il n'y a pas eu en loi d'interruption civile. Et il n'était pas au pouvoir du juge de décréter qu'il en serait autrement. L'effet du renvoi d'une action est que la prescription a continué à courir comme s'il n'y avait pas eu d'interruption.

Puis l'article 2265 C. C., cité par l'intimée, qui décrete qu'une poursuite forme un titre qui ne se prescrit que par trente ans, ne peut venir à son aide. Il n'a d'application, dans l'espèce, qu'à ce qui a été l'objet du jugement, aux mille piastres que ce jugement lui a allouées.

L'intimée a avancé la proposition que l'appelante était liée par la réserve faite dans le jugement sur la première poursuite, parcequ'elle n'en avait pas appelé. Mais je ne vois là rien qui justifie ses conclusions. D'abord, comment un défendeur pourrait-il appeler d'une telle réserve, lorsqu'il se soumet au jugement et en paie le montant?

Puis, pourquoi en appeler? Elle est inefficace et impuissante à faire revivre un droit d'action que la loi déclare absolument périmé, et une créance présumée *juris et de jure* avoir été complètement payée, même à l'encontre des mineurs et autres incapables en loi contre qui, par exception, *currit prescriptio* d'une telle action, quoique *non valentem agere*.

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Pour ces raisons, j'opine avec Monsieur le Juge Girouard que l'action de l'intimée doit être déboutée.

Mais j'irais plus loin. Je ne crois pas qu'elle eut droit à une seconde action, quand bien même elle n'aurait pas été prescrite, et c'est peut-être sur ce motif que devraient être basées nos conclusions. Elle a exercé la seule réclamation qu'elle eût en loi contre l'appelante. Sa présente action, basée comme elle l'est sur la première, aurait dû être renvoyée sur une défense en droit. Elle est censée avoir déjà demandé et avoir obtenu tous les dommages auxquels cet accident lui a donné droit.

Dans une cause de *Fetter* v. *Beal* (1) le demandeur alléguait que sur une action précédente il avait recouvré certains dommages pour un assaut commis sur sa personne par le défendeur, mais que depuis, une fracture du crâne des suites de cet accident s'étant déclarée, il réclamait les dommages additionels qu'il ignorait lors de sa première demande. Mais il fut débouté de sa demande,

for there was but one blow and that was the cause of action in both suits.

Cette décision date de loin, mais elle fait encore autorité dans la jurisprudence anglaise.

Dans une cause de *Hodsoll* v. *Stallebrass* (2); Littledale J., dit;

A fresh action could not be brought unless there were both a new unlawful act and fresh damage.

Dans *Serrao* v. *Noel* (3); Bowen L. J., dit;

The principle is that where there is but one cause of action, damages must be assessed once for all.

Et dans une cause comparativement récente *The Darley Main Colliery Company* v. *Mitchell* (4). Lord Halsbury disait dans la Chambre des Lords;

(1) 1 Ld. Raym. 339,692; 1 Salk. 11.

(2) 11 Ad. & El. 301.

(3) 15 Q. B. D. 549.

(4) 11 App. Cas. 127.

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No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and forever.

Lord Bramwell ajoutait :

It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must if he sues in respect of it do so once and for all. As, if he is bitten or wounded, if he sues, he must sue for all his damage, past, present and future, certain and contingent. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced his first action.

Vide Pollock on Torts, (5 ed.) 184; Mayne on Damages, (5 ed.) 102; Sutherland on Damages, vol. 1, par. 106; vol. 3, par. 1251; *Clegg* v. *Dearden* (1).

Aux Etats Unis la jurisprudence est unanime dans le même sens.

In actions for injury to the person * * * by accident on a highway or railroad,—dit Metcalf J., dans *Warner* v. *Bacon* (2)—; it is settled law that * * * when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effect of the original injury.

Vide *Curtiss* v. *Rochester & Syracuse R. R. Co.* (1); *Filer* v. *New York Central Railroad Company* (2); *City of North Vernon* v. *Voegler* (3).

Fresh damages merely will not give a fresh action and a judgment in a suit founded on a single act of tort will be a conclusive bar to a second suit for the same injury, although harmful consequences may have made themselves apparent subsequent to the first suit; as it will be held that in the first verdict the plaintiff recovered all that he was entitled to claim. Hence the statute of limitations runs from the time of the breach. Sedgwick on Damages, vol. 1, par. 84.

A la Louisiane, sous un Code calqué sur le droit français, on ne peut trouver un seul cas parmi le grand nombre de causes identiques que les rapports judiciaires contiennent, où un même accident ait donné lieu à deux ou plusieurs actions successives par la même personne. Comp. *Barksdull* v. *The New Orleans*

(1) 12 Q. B. 576.
(2) 8 Gray (Mass.) 397.
(3) 20 Barb. 282.
(4) 49 N. Y. 42.
(5) 103 Ind. 314.

and Carrollton Railroad Company (1); *Wardle* v. *The New Orleans City Railroad Company* (2). Et je puis en dire autant de la Province de Québec, si j'en juge par le factum de l'intimée.

En Ecosse, où le droit romain guide directement la jurisprudence, il est aussi de règle qu'une seule action, sous ces circonstances, peut être portée.

"I am of opinion," dit le Lord President Inglis, sur un appel dans la cause de *Stevenson* v. *Pontifex & Wood* (3),

> that a single act * * * * cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods but caused by the same act.

Et Lord Adam ajoutait;

> There was only one wrongful act on the part of the defenders, and, in my opinion, as soon as the act was committed, the right of action to recover *all* damages arising from it arose. * * * * It is always impossible to ascertain accurately what sum of damage will cover the injury, but although the amount of damages awarded may be to some extent speculative, yet the evil thus resulting is far less than would be the evil of allowing successive actions of damages from time to time arising from the same originating cause.

Et le jugement de la cour inférieure par lequel les défendeurs avaient été "assoilzied from the action," fut confirmé à l'unanimité.

Cette jurisprudence est basée sur la maxime "*Nemo bis vexâri dèbet pro eâdem causâ*," *Wood* v. *Gray & Sons* (4),

qui prévaut dans le droit français comme dans le droit anglais, et n'est d'ailleurs que la conséquence logique de l'extension libérale adoptée par nos tribunaux, à l'instar de ceux d'Angleterre et des Etats Unis, des règles dominantes sur l'appréciation et la mesure des dommages résultants d'injures corporelles.

L'on rencontre en France des décisions dans le sens

(1) 23 La. Ann. 180.
(2) 35 La. Ann. 202.
(3) 15 Sc. Sess. Cas. (4 ser.) 125.
(4) [1892] A. C. 576.

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contraire, Dal. 62, 1, 123; Dal. 71, 2, 241; (voir 20 Laurent 527 et Fuzier-Hermann, Rep. vo. "Chose jugée," nos. 439 *et seq.*) mais à mon avis, elles s'écartent des vrais principes. Un dommage seul ne peut être la base d'une action. Il faut une faute, sans cela pas d'action possible; or, si cette faute a déja été la base légale, la cause juridique d'une action en réparation, elle ne peut être la base, la cause d'un nombre illimité d'actions du même genre contre le même défendeur.

D'ailleurs, ces décisions fussent-elles correctes en France, (elles n'y sont pas reçues sans hésitations, Dal. Rep. supp. vo. "Chose jugée," n. 122), seraient inadmissibles ici, non seulement parce que la mesure des dommages en pareils cas est, dans l'application, plus large ici qu'en France, mais encore parce que, en décrétant la prescription absolue d'une seule année, et en autorisant les tribunaux à la suppléer d'office, notre Code s'est tellement écarté de la loi française sur la matière que le but évident du législateur a été de restreindre ici à des limites plus étroites le recours aux tribunaux sur ce genre de réclamations et de rendre dorénavant impossible la multiplicité d'actions successives basées sur une seule et même faute, si toutefois elle a jamais été permise.

SEDGEWICK and KING J.J. concurred in the judgment allowing the appeal without costs, for the reasons stated by Taschereau and Girouard JJ.

GIROUARD J.—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec, rendered on the 30th of September, 1899, which confirmed a judgment of the Superior Court rendered on the 23rd of December, 1898, and which condemned the present appellant to pay to the respond-

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ent the sum of $5,000 with interest and costs, as damages for bodily injuries sustained by her on the 9th of August, 1895, owing to the alleged bad condition of a sidewalk in the City of Montreal.

On the 2nd of December, 1895, the respondent instituted a first action in damages against the appellant by which she demanded that the city be condemned to pay her the sum of $2,000 at which amount she assessed all her damages, past and future. She alleged in her declaration:

Que la démanderesse, à raison des faits ci-dessus, a éprouvé et éprouvera des dommages s'elvant à au moins deux mille piastres.

On the 12th of June, 1896, the Superior Court having heard the parties and their witnesses, condemned the appellant to pay $1,000:

Considérant que, pour ces raisons, il nous parait qu'une somme de mille dollars est suffisante pour indemniser la démanderesse des suites de cet accident qui est du à la négligence des employés de la défenderesse;

A maintenu et maintient l'action de la demanderesse pour la dite somme de mille dollars, et condamne la défenderesse à payer à la demanderesse la dite some de mille dollars avec intérêt à compter du 4 décembre dernier, date de la signification du bref et de la déclaration, et les dépens distraits à Mm. Bisaillon, Brousseau et Lajoie, avocats de la demanderesse. *La demanderesse ayant demandé de lui réserver son recours pour les dommages futurs qui peuvent lui résulter de cet accident, la cour lui réserve ce récours, si toutefois ces dommages ne sont pas inclus dans sa présente demande, ce que le tribunal n'entend pas préjuger.*

On the 3rd of December, 1897, the respondent instituted a second action against the city by which, after setting up her previous action and the judgment thereon, she states that she has ascertained since the said judgment that her injuries were far more serious than she then realised, and, in consequence of the same accident, she claims additional damages of $10,000.

She alleges:

7. Qu'a la suite de cet accident, la maladie qui l'accable et les soins assidus que son état exige de sa soeur, seule, l'académie que toutes deux

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t enaient à Montréal est désertée, et la demanderesse est réduite à la plus profonde misère ;

8. Que le dit accident, les lésions, les douleurs et l'état delabré de santé qui s'en est suivi et se continue et a compromis les jours de la demanderesse sont dus exclusivement à la négligence, l'incurie et la faute de la défenderesse et à ses employés, et ont causé des dommages irréparables à la demanderesse, qu'elle réduit à la somme de $10,000.

It does seem that, by this second action, the respondent demands damages accrued both after and before the rendering of the first judgment. It is not surprising therefore that the appellant met this second action by pleading that the damages claimed by the second suit were covered by the first judgment, and at all events that the $1,000, which the city was condemned to pay and did pay, was a sufficient compensation for any damages resulting from the same accident ;

une compensation suffisante et une indemnité raisonnable pour tous les dommages que la demanderesse prétend avoir soufferts à raison du susdit accident, et qu'elle n'a pas droit à aucune autre somme de deniers, tel et suivant que reclamé en son action.

A copy of the evidence adduced in the first case was filed by consent in support of the second demand, and some six or seven fresh witnesses were also heard, *viva voce*, before Mr. Justice Charland, who on the 23rd of December, 1898, condemned the appellant to pay to the respondent the further sum of $5,000 and costs of suit. In appeal this judgment was confirmed purely and simply with costs.

The city appeals to this court and for the first time urges prescription of the second action under Arts. 2261, 2262, 2267, 2183, 2188 C. C

Art. 2261. The following actions are prescribed by two years :

2. For damages resulting from offenses or quasi-offenses, whenever other provisions do not apply ;

Art. 2262. The following actions are prescribed by one year :

2. For bodily injuries, saving the special provisions contained in article 1056 and cases regulated by special law ;

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Art. 2267. In all cases mentioned in articles 2250, 2260, 2261 and 2262, the debt is absolutely extinguished and no action can be maintained after the delay, for prescription has expired.

Art. 2183. Extinctive or negative prescription is a bar to and in some cases precludes any action.

Art. 2188. The court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied.

It is conceded that the exception contained in the last paragraph of Art. 2262 does not apply to the present case.

It is clear that the present action is one for bodily injuries and comes within the provisions of article 2262 This court has held on several occasions that short prescriptions can be applied even in appeal, although not pleaded and set up for the first time in the factum or at the hearing. *Breakey* v. *Carter* (1); *Dorion* v. *Crowley* (2). In the case of *The Canadian Pacific Railway Co.* v. *Robinson* (3) the court added that

> by article 2188 the courts are bound, of their own motion, to dismiss any action brought after the expiration of one year, if limitation is not specially pleaded.

True, the decision of the Supreme Court was reversed by the Judiclal Committee of the Privy Council, (4) but upon another ground, and the above doctrine was not disturbed.

The respondent raised several objections to the contention that the second suit is prescribed. In the first place, she contends that not being able to ascertain exactly the extent of her injuries, she could not proceed sooner, and claims the application of the maxim laid down in Art. 2232 C. C. "*Contra non valentem agere, nulla currit prescriptio.*" But can this excuse apply to the first action? And, if no answer to that action, can it be to a second, third and possibly, I pre-

(1) Cass. Dig. 2 ed. 463.
(2) Cass. Dig. 2 ed. 709.
(3) 19 Can. S. C. R. 292.
(4) [1892], A. C. 481.

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sume, to a fourth one? Can the plaintiff say that, because she could not ascertain the extent of her injury within the year, she can take it after? Evidently not. But there is another answer to this contention. What prevented her from demanding by or in the first action a first condamnation *par provision* for the damages so far liquidated, and as many other interlocutory judgments in the same suit as circumstances would permit and a final condemnation when plaintiff would be satisfied that all the damages suffered have been ascertained, a course which seems to have been followed in the *arrêt* of the court of Brussels of the 23rd July, 1885 referred to by the respondent? Why did she not take her second action between the 12th of June, 1896, and the 9th of August, 1896, that is, within the year after the accident, and, if the full measure of damages could not then be ascertained, make a reservation of any further conclusions which might have been necessary, as above suggested?

In the second place the respondent submits that under Art. 2264 C. C., the prescription invoked against her has been interrupted. Art. 2264 lays down the rule that after interruption, except as to prescription by ten years, prescription recommences to run for the same time as before, if there be no novation. Taking for granted that interruption would apply to a case like the present one—a point open to much doubt, as the first action was dismissed for everything exceeding the $1,000 (C. C. 2226),—it seems plain to us, that at least the second action was taken six months too late, that is nearly eighteen months after the rendering of the first judgment. In fact the Superior Court could not reserve an action which is absolutely denied by the legislature. The reservation evidently

could not have any effect after the expiration of one year.

The respondent also contends that the appellant has tacitly renounced the benefit of prescription by not pleading the same, and she quotes Arts. 2184 and 2185 C. C. as supporting that contention. But as the well settled jurisprudence of this court is to maintain short prescriptions when not pleaded, even of its own motion when not even suggested, no such tacit renunciation can be presumed from the mere silence of the defendant.

Finally the respondent lays down the proposition that under article 2265 C. C. the effect of the first judgment was to furnish her a new title, prescriptible by thirty years. Art. 2265 says that

> any judicial condemnation constitutes a title which is only prescribed by thirty years.

As we read the first judgment, nothing was settled in her favour as to future damages; there is no "judicial condemnation" or adjudication of that matter within the meaning of Art. 2265; there was a mere reservation claimed by the plaintiff, but not adjudicated upon and forming no part of the condemnation. The reservation means that if a second action be properly taken, the defendant cannot plead *chose jugée*, and that was all the effect of the reservation. The recourse for future damages is not recognised; reservation is simply made of the plaintiff's declaration that she is entitled to such remedy, not purely and simply, but provided the future damages are not included in the first demand which the court did not intend to decide, *n'entend pas préjuger*.

For all these reasons we have come to the conclusion that the appeal must be allowed, and the action of the respondent dismissed without costs in all the courts,

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as the point of prescription was only raised before thi court.

His Lordship the Chief Justice was, on account of illness, unable to take part in the judgment.

Appeal allowed without costs.

Solicitors for appellants: *Ethier & Archambault.*

Solicitor for respondent: *F. J. Bisaillon.*

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*May 12,
*Oct. 8.

L'ASSOCIATION ST. JEAN-BAPTISTE DE MONTREAL (DEFENDANT) ..... APPELLANT;

AND

HENRI ALEXANDRE A. BRAULT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Constitutional law—Legislative powers—B. N. A. Act, 1867—*Criminal Code*, 1892—*R. S. C. ch.* 159—*R. S. Q. art.* 2920—53 *V. c.* 36 *(Que.)*—*Lottery—Indictable offences—Contract—Illegal consideration —Co-relative agreements— Nullity—Invalidity judicially noticed— Arts.* 13, 14, 989, 990 *C. C.*

The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted and it is the duty of the courts, *ex mero motû*, to notice the nullity of such contracts at any stage of the case and without pleading. Judgment appealed from reversed, Girouard J. dissenting.

Per Girouard J. (dissenting).—In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional.

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

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APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The respondent and his partner, (whose interests he subsequently acquired), entered into a written agreement, in 1890, with the appellant for the operation of a lottery scheme authorized to be carried on by the appellant under the provisions of a statute of the Legislature of Quebec, (53rd Vict. ch. 36), and an order of the Lieutenant-Governor-in-Council, passed in conformity therewith, and deposited $30,000 in a chartered bank as a continuing security for the operation of the lottery according to the terms of the agreement. The object of the scheme was to secure funds for the erection by the appellant of a national building, now known as the "Monument National," in Montreal, for the establishment of a public library and the organization of courses of lectures and practical instruction, in the edifice to be constructed upon lands belonging to the appellant. The lottery was carried on under the conditions stated in the agreement and in 1892, another agreement was entered into by the same parties whereby the $30,000, which had been so deposited, was to be utilized by the appellants to facilitate the continuation of the construction of the building, above referred to, which had already been commenced.

This second agreement referred to the agreement of 1890 and provided that, notwithstanding such use of the money, appellant would be deemed to continue to hold the same, and to be the depositary thereof, to secure the execution of the obligations undertaken in the first agreement. It also provided:—That if Brault should carry out the lottery operations during the whole term of the first agreement, appellants might apply the $30,000 on

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account of the last of the annual payment due them under its conditions; that appellant might also (should occasion arise) apply all or any part of said sum, in accordance with the provisions of agreement of 1890, to extinguish obligations towards appellant or holders of lottery tickets; that if the government withdrew the permit appellant was to repay said $30,000 or any part of it that might remain due in five years from the date of such revocation, or at the end of the time when the agreement was to run in the event of such time being not more than five years from such revocation; that so long as respondent should carry on the lottery operations, appellant was to pay them four per cent interest on the $30,000; that should he discontinue the lottery operations, appellant was thereafter to pay him five per cent instead of four, and that each interest instalment was to bear interest from its due date till paid; and, as security for the repayment of said deposit, appellant mortgaged certain property described in the deed. It was further provided that nothing in the second agreement should be construed as in derogation or novation of the conditions or obligations of the first agreement.

Subsequently, in 1892, the Government of Quebec revoked the permit by Order-in-Council and conferred the right to hold the lottery on other persons for the benefit of the appellant, and the respondent brought his action for $2,306.75, for instalments of interest at 5 per cent on the deposit of $30,000. The Superior Court maintained the plaintiff's action and the present appeal is asserted from the judgment of the Court of Review affirming that decision.

Fitzpatrick Q.C. (Solicitor-General), and *Beïque Q.C.* for the appellant. The action is an attempt to enforce a contract which appears from respondent's own declaration to be not only illegal, but an offence against the

criminal law; arts. 989, 990, 1062 C. C. The Quebec Act, 53 Vict. ch. 36, and the Orders-in-Council passed thereunder, cannot afford any justification. The holding of lotteries was made penal before Confederation, and these penal statutes remained in force till repealed or modified by parliament. Sec. 129 B. N. A. Act; *Dobie* v. *Temporalities Board* (1). The Dominion Acts, since Confederation, have re-enacted and extended the old law, and any Quebec statute, purporting to authorize a lottery such as here in question, was an attempt to repeal or suspend the operation of legislation upon criminal law by the Parliament of Canada or its predecessors and therefore *ultra vires*.

The deeds of 1890 and 1892 cannot be separated from the rest of the subject matter and treated as distinct contracts. The covenants in the deeds have but one object and form but one contract which, if illegal in one part, is wholly illegal. This constitutes absolute nullity which should be judicially noticed even in the absence of any plea to that effect. The principal covenants are null because they relate to operations opposed to public order and forbidden by the criminal law and the accesssory obligations must be equally null. Dal. '63, 2, 113; Dal. Rep. *vo.* "Obligations," n. 5531; *McKibbin* v. *McCone* (2). We refer also to *Cronyn* v. *Widder* (3); *Ex parte, Rousse* (4); *Reg.* v. *Lawrence* (5); *Pigeon* v. *Mainville* (6); *Kearley* v. *Thomson* (7); *Collins* v. *Blantern* (8); *Dawson* v. *Ogden* (9); Cass. Dal. '76, 1, 45; Pothier, "Nantissement" *n.* 6; 28 Laurent, *nn.* 426, 494, 495, 498; Guillouard "Depot" *n.* 65; *The Queen* v. *Lorrain* (10); Hawkins P. C. 733.

(1) 7 App. Cas. 136.
(2) Q. R. 16 S. C. 126.
(3) 16 U. C. Q. B. 356.
(4) Stu. K. B. 321.
(5) 43 U. C. Q. B. 164.
(6) 17 Legal News 68.
(7) 24 Q. B. D. 742.
(8) 1 Sm. L. C. (10 ed.) 355.
(9) Cass. Dig. (2 ed.) 797.
(10) 28 O. R. 123.

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Belcourt Q.C. for the respondent. The second agreement is separate and distinct from the agreement as to the operation of the lottery and is a mere contract of loan. The rate of interest is dependant on conditions mentioned, by reference, only as a matter of convenience.

The rate of five per cent per annum prevails on account of the Order-in-Council having been made for the cancellation of the permit according to the terms provided, in that event, by the agreement for the loan of the capital. The association, which procured the annullment of the permit and the substitution of other persons for respondent in the operation of the scheme, cannot be allowed to disregard the contract and retain the principal loaned without payment of any interest for the use of the money. These funds were not used for an illegal purpose, but for the erection of a national educational institution. The respondent would be, in any case, entitled to the legal rate of interest. Art. 1785 C. C.

The Quebec Acts in question are police regulations, properly within the legislative jurisdiction of the province, and caused no interference with Dominion Criminal Legislation at the time they were passed. The contracts are both anterior to the Criminal Code, 1892, and at their date the operation of such a lottery, under the control and permission of the provincial authorities was not, in any sense, criminal, nor against good morals or public policy. Even therefore if the agreement for the loan be held to have been based upon any such consideration and that the contracts are co-relative, there cannot be any ground for nullity.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Taschereau.

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TASCHEREAU J.—The respondent claims from the appellant by this action divers sums due to him, as he contends, in virtue of two deeds passed between them in 1890 and 1892 for the carrying on of certain lottery operations in the Province of Quebec purported to have been authorised by a statute of the provincial legislature. Had the provincial legislature the power under the British North America Act to so authorise a lottery which was then made an offence by chapter 159 of the Revised Statutes of the Dominion, as it is now likewise by the Criminal Code? There is, in my opinion, no room whatever to doubt that the legislature had no such power. The legislation in question was *ultra vires* and void, and an undue interference with the criminal law of the Dominion over which the federal legislature has exclusive authority under the Constitutional Act.

By the criminal law of England, as introduced in the Province of Quebec by the Royal Proclamation of 1763 and the Act 14 Geo. III. c. 83, all lotteries were prohibited and punishable as public nuisances; 10 & 11 Wm. III. c. 17; 8 Geo. I. c. 2, sec. 36; and 12 Geo. II. c. 28; *Ex parte Rousse* (1); *Cronyn* v. *Widder* (2). Under the French law previously in force in the province, though this is immaterial, they were likewise illegal. 4 Brillion, Dict. des Arr. vo. "*Lotterie*"; Frère-Jouan du Saint. *Jeu et Pari*, n. 185. In 1856, the legislature of the Province of Canada passed a statute (19 Vict. ch. 49; C. S. C., ch. 95), also prohibiting them under pain of penalties recoverable by summary conviction. That statute was in force as ch. 159 R. S. C. till it was superseded by sec. 205 of the Criminal Code. But the offence remained a misdemeanour as it previously was, and probably still continued to be an indictable one, as this statute did

(1) Stu. K. B. 321. (2) 16 U. C. Q. B. 356.

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not create a new offence, though, whether it did or not, would not make any difference in this case. Sec. 933 Criminal Code; 1st Russell, Crimes and Misdemeanors (6 ed.) 200 *et seq.*; *Rex.* v. *Gregory*(1); *Reg.* v. *Crawshaw* (2); *Reg.* v. *Hall* (3); *Hamilton* v. *Massie* (4); Bishop Stat. Cr. 250 *et seq.* By altering the punishment the nature of the offence was not altered. If it was a misdemeanor previously as it certainly was (Burbidge, Criminal Law, p. 181), it was not less a misdemeanor afterwards, which passed at Confederation under the exclusive control of the Federal Legislative authority. The provincial legislature therefore had not the power to authorise the lottery in question, and its legislation on the subject is null of a nullity *de non esse*.

The respondent, however, claims the right at common law, to recover back from the appellants what he has paid or loaned to them or deposited with them, notwithstanding the illegality of his contract. But that is a matter which cannot be determined here. His action is upon a contract; that contract is illegal and void, and his action must consequently be dismissed. Arts. 13, 14, 989, 990 C. C. He also in his factum invokes *res judicata*. But there is no such issue raised by the pleadings, could it affect the result of our decision upon the constitutional question.

His further contentions as to his good faith and the bad faith of the appellants are based upon a total misapprehension of the nature of the objection upon which his action must fail. Upon his own allegations, he has entered with the appellants into a conspiracy to commit an unlawful act. It is hardly necessary to say that courts of justice cannot sanction such dealings or give them any countenance whatso-

(1) 5 B. & Ad. 555.
(2) Bell, C. C. 303.
(3) 17 Cox, C. C. 278; [1891], 1 Q. B. 747.
(4) 18 O. R. 585.

ever. It is on the contrary their duty to notice illegalities of this nature *ex officio*, and allow them to be suggested without any plea at any stage of the case. Nor could the illegality of the respondent's claim be waived or cured by his adversary's pleas or conduct. And the fact that he may have believed that the Quebec legislature had the power to authorise this lottery is, in law, no ground to support his action. Sec. 14 Crim. Code.

Les nullités de droit public, c'est à dire celles qui ont pour cause principale et première, l'intérêt de tous (says Solon, 2 Nullités no. 345) ne se couvrent point par le consentement des parties directement intéressées à l'acte ; en pareil cas la loi résiste continuellement, et par elle-même à l'acte qu'elle défend ; elle le réduit à un pur fait qui ne peut être confirmé ni ratifié. *Privatorum conventio juri publico non deroget.*

Compare *The Manufacturers Life Ins. Co.* v. *Anctil* (1).

La loi qui interdit les loteries est une loi d'ordre public (says Frèrejouan du Saint, Jeu et Pari, No. 211), et elle frappe d'une pénalité ceux qui y contreviennent. La nullité des conventions qui ont la loterie pour base est donc une nullité radicale et absolute que peuvent invoquer toutes les parties intéressées indtistincement. Le promoteur de l'opération lui-même peut se retrancher derrière la prohibition légale pour se dispenser d'exécuter ses engagements, car nul ne peut être contraint de violer une loi pénale, sous prétexte qu'il s'y est obligé par contrat.

La loi ne peut admettre, (says Bédarride, Dol et Fraude, Nos. 1291, 1295), que ce qui a pour objet d'éluder les préceptes de la morale, l'exigence des bonnes moeurs ou les dispositions d'ordre public puisse jamais produire aucun effet. Tout ce qui a été fait en sens contraire doit donc s'effacer et disparaître.

Upon that principle, it was held in a case cited in Sirey, 69, 2, 53, that

les loteries étant prohibées par la loi francaise toutes conventions ou obligations relatives à leur organisation sont nulles comme ayant une cause illicite et ne peuvent donner lieu à une action devant les tribunaux.

(1) 28 Can. S. C. R. 103; [1899] A. C. 604.

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Other cases to the same effect are reported in Sirey, 67, 2, 86; 67, 2, 87; 65, 1, 77; 70, 1, 357; and Dalloz, 46, 2, 195.

In a Louisiana case, *Davis* v. *Caldwell, et al.* (1), the plaintiff claimed from the defendants a certain sum as remuneration for services rendered by him in aid of their project to organise a lottery. But his action was dismissed on the ground that

> the contract sued upon being intimately connected with a speculation reprobated and forbidden by law could not be enforced in a court of justice.

The respondent's attempt to separate the agreement of 1892 from that of 1890 cannot succeed. They are both in furtherance of an unlawful scheme, and the invalidity of the first vitiates the other collateral or auxiliary agreement springing from it. *Davis* v. *Holbrook* (2): *Fox* v. *New Orleans* (3); *Cummings* v. *Saux* (4); *Armstrong* v. *Toller* (5). *Fisher* v. *Bridges* (6), to which His Lordship the Chief Justice has called my attention, is a case in point.

Appeal allowed, and action dismissed. No costs in the three courts.

GWYNNE and SEDGEWICK JJ. concurred in the reasons given by Taschereau J.

GIROUARD J. (dissenting).—We have not to inquire whether or not a contract prohibited by law can have any effect; that point is formally settled by Arts. 989 and 990 of the Civil Code. On the other hand, it would not be sufficient to content ourselves with an inquiry as to whether lotteries are prohibited under the criminal laws of England. As a matter of fact,

(1) 2 Rob. (La.) 271.
(2) 1 La. Ann. 178.
(3) 12 La. Ann. 154.
(4) 30 La. Ann. 207.
(5) 11 Wheaton, 258.
(6) 3 El. & B. 642.

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when, in 1774, the latter were introduced into Canada, lotteries were forbidden in England as crimes or misdemeanors. Since the end of the 17th century, the British Parliament has declared that all lotteries, which until then had been permitted by the common law, should be *common and public nuisances*, that is to say, *indictable offences* (10 & 11 Wm. III, ch. 17). This statute was still in force at the time of the passing of the Quebec Act, which introduced the criminal laws of England as part of the law of Canada. *Ex parte Rousse* (1). This statute was subseqently modified in England by several Acts of Parliament, (19 Geo. III, ch. 21; 22 Geo. III, ch. 47; 27 Geo. III, ch. 1; 42 Geo. III, ch. 57 and ch. 119, sec. 27; 46 Geo. III, ch. 148; 6 Geo. IV, ch. 60).

All these statutes continued to define lotteries as being public nuisances, and finally, by 46 Geo. III, ch. 148, the penalties imposed could not be demanded except in the name of the Attorney-General before the Court of Exchequer, instead of before ordinary justices of the peace. *Reg.* v. *Tuddenham* (1).

Our ancestors considered that these provisions were not suitable to a new country, and they mitigated their rigour considerably by several statutes passed as well before as since confederation of the provinces in 1867, (19 & 20 Vict. ch. 49; C. S. C. ch. 95; 23 Vict. ch. 36; 46 Vict. ch. 36; R. S. C. ch. 159; 32 Vict. ch. 36 (Que.); R. S. Q. Arts. 2911-2920; 53 Vict. ch. 36 (Que.). Not one of these statutes declares lotteries to be crimes or public nuisances; all of them prohibit lotteries, it is true, except in certain cases, but an offender incurs simply a fine of twenty dollars to be recovered in a summary manner upon the suit of any person brought before a mayor, alderman or other justice of the peace, one-half of the fine being payable to the prosecutor and

(1) Stu. K. B. 321. (2) 5 Jur. 871.

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the other half to the municipality. (C. S. C., 1859, ch. 95, sec. 1). If the intention of the Canadian Legislature had been to make them crimes, it would have made use of the language of the section following for the punishment of "betting and pool selling," in which it is declared that the offender shall be guilty of a *misdemeanour* and liable to fine and imprisonment (R. S. C. ch. 159, sec. 9).

It is so clear that, up to that time, the Canadian legislature intended to consider lotteries merely as being of a purely local or municipal character, that several exceptions were made, in the first place in favour of bazaars for charitable purposes approved by municipal authority, and then in favour of art societies. The first time that lotteries were prohibited as crimes in Canada was when the Criminal Code of 1892 was brought into force, in 1893, and at the same time an end put to the jurisdiction of the provincial legislatures, for the Parliament of Canada may validly declare anything, even the most innocent, local or private matter, to be a crime. But in this case, the contracts which are attacked were signed before the coming into force of the Criminal Code, under the authority of a provincial law adopted with that precise object. In 1890 the legislature of Quebec passed a statute (53 Vict. ch. 36), which permitted the operation of a lottery for the purpose of establishing any institution of public interest, or for instruction, on the condition, however, that, if it should be of a permanent character, the sanction of the Lieutenant Governor in Council should first be obtained. This sanction was duly granted to the appellant on the 30th of June, 1890, modified on the 24th of September, 1892, and finally revoked on the 15th of October of the same year.

The contention of the appellant is that the legislation of the Province of Quebec is *ultra vires*, because,

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it is said, before Confederation, the laws concerning lotteries were part of the body of the criminal law of Canada, which, by the Confederation Act of 1867, became subject to the exclusive jurisdiction of the Parliament of Canada. I cannot accept the first part of this proposition. The law, prior to the Criminal Code, 1892, forbids lotteries, it is true, but not as a crime, either expressly or impliedly, by declaring, as did the Imperial Parliament and the legislatures of almost all the States of the American Union, and also the Penal Code of France, that all lotteries were public nuisances or *misdemeanours* or *délits* (Am. & Eng. Ency. of Law, 1 ed. vo. "lottery," p. 1172; Gilbert sur Sirey, Code Pénal, Arts. 410, 464, 475 and notes). They are simply prohibited and punishable in a summary manner in the same way as an infinity of other offences or breaches of regulations which are undoubtedly under provincial jurisdiction, for example, offences against municipal by-laws, against good order, public health and safety of the province, respecting constables, bailiffs and public officers in the province, and the laws relating to hunting and fishing, asylums for the insane, licenses, manufactures, mines, the practice of pharmacy, provincial and municipal elections and so forth, which are always punishable in a summary manner before justices of the peace. *Reg.* v. *Wason* (1).

In my humble opinion the distinction between penal offences or simple contraventions and crimes or indictable offences presents itself as a condition of our federal system, and from this point of view the promulgation of our criminal code was no doubt a national benefit. Before the code, the criminal law recognises three kinds of crimes, *treason*, *felony* and *misdemeanour*, but all were *indictable*. Owing to this, the code did not preserve the former distinction;

(1) 17 Ont. App. R. 221.

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to-day all crimes in Canada are indictable offences, even although a certain number may be prosecuted in a summary manner before justices of the peace. But, before the code, lotteries were not indictable, and consequently, in view of the codifier, were not crimes. It was necessary to have a special enactment to render them criminal.

A great number of English precedents have been cited to establish that, under the common law, all infractions of laws of public order were misdemeanours. As many can be cited to the contrary effect. Chief Justice Harrison has carefully analysed them all in *Reg* v. *Roddy* (1). The learned Chief Justice concludes that they cannot possibly be reconciled. It must be admitted that the English jurisprudence upon this point is in a deplorable state of confusion which cannot be overcome save by codification of the criminal law.

The tendency of the more recent decisions is that the old definition of crime by Blackstone is too large, and that a crime

> is more accurately characterised as a wrong, directly or indirectly affecting the public, to the commission of which the state has annexed certain punishments and penalties and which it prosecutes in its own name in what is called a criminal proceeding. (Am. & Eng. Encycl. of Law, (2nd ed.) 1898, vo. "Crime," pages 248 *et seq.*)

One of the last commentators of Blackstone adds that a misdemeanour does not include

> a multitude of unclassified offences of which inferior magistrates, such as justices of the peace, police magistrates and the like, have exclusive jurisdiction. (Lewis on Blackstone ed. 1897, pages 4 and 5, where a number of authorities are collected.)

In *Attorney-General* v. *Radloff* (2) Baron Martin said:

> There are many crimes properly so called which are liable to be punished on summary conviction. But there are a vast number of

(1) 41 U. C. Q. B. 291. (2) 10 Ex. 84.

acts which in no sense are *crimes*, which are also so punishable; such for instance as keeping open public houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act, but the requirements of the public revenue, which induce the legislature to impose a very high duty upon the article, probably render it a matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a 'crime,' according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of 'crime' is an indictable offence.

It is true that the opinion of Baron Martin did not prevail, the judges being equally divided. But it was recently approved by the English Court of Appeal in the celebrated case of the *Attorney-General* v. *Bradlaugh* (1). Lord Justice Brett said at page 688:

If I had been a member of the court at that time, I should have seen no answer to the reasoning of Martin B. in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding.

At page 686 His Lordship also says:

It has been at different times during this argument contended before us on both sides, for different purposes, that the third section of the Parliamentary Oaths Act, 1866, imposes on every member a legal obligation to take and subscribe the oath, and that if a member does not take and subscribe the oath in the manner therein set forth, an indictment will lie against him on that section alone as for a misdemeanour, and that the penalty in the fifth section is cumulative * * * * Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member, without having taken the oath in the manner appointed, is that the member becomes liable to a penalty. If that be so no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. The recovery of

(1) 14 Q. B. D. 667.

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a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament, I should on that ground alone say that no crime is enacted by this Act.

The head-note dealing with this part of the judgment is as follows:

An information at the suit of the Attorney-General to recover penalties under sec. 5 of the Parliamentary Oaths Act, 1866, from a member of parliament, for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a 'criminal cause or matter' within the meaning of the Supreme Court of Judicature Act, sec. 47.

It is contended that the mere fact of having inserted in the Consolidated Statutes of 1859 the Act concerning lotteries under the title "Criminal law," in effect constitutes it a crime. Text writers have often said that the preamble of a statute may remove certain doubts as to the text, but this is the first time that it has been pretended that the title or classification of a statute is to be construed as part of it. Who would contend seriously that a public statute included by error or otherwise among the private statutes bound separately at the end of each volume of the statutes of each session of parliament, could become, merely on this account, a private statute. For a similar reason, the insertion of statutes actually in force in a schedule of repealed Acts is of no consequence. (22 Vict. ch. 29, sec. 11, 1859; 49 Vict. ch. 4, sec. 10, 1886). Classifications are never absolute any more than marginal notes or references to formerly existing laws. Notwithstanding classification, we find an infinity of criminal offences outside the chapter relating to criminal law, and in them we find a great number of simple breaches of municipal and

police regulations, and even provisions in respect to civil and municipal law. See C. S. C. 1859, ch. 6, ss. 85, 86, 88; ch. 17, s. 55; ch. 29, s. 8; ch. 31, s. 55; ch. 92, s. 80; ch. 93, ss. 25, 26, 27, 28; ch. 95, s. 3; ch. 96, ss. 1, 13, 14.

A statute must be construed by considering the import of the context. 22 Vict. ch. 29, ss. 8 and 9. In the present case, at least, the classification is a mere matter of form, a work of secondary consideration and simple convenience.

But even if the classification of the Consolidated Statutes of 1859 could have the effect which is claimed for it, it has not been continued in those of 1886, and it is under these latter that the nature of the offence of operating a lottery must be determined.

It has further been objected that the Interpretation Act of Canada, 1867, 31 Vict. ch. 1, s. 7, par. 20, has the effect of completing the statutory provisions relating to lotteries by declaring that the breach of any statute which does not constitute an offence of any other nature shall be a misdemeanour and punishable as such:

> Any wilful contravention of any Act, which is not made any offence of another kind shall be a misdemeanour and punishable accordingly.

This provision refers only to legislative acts of the Dominion of Canada (s. 3), and consequently cannot apply either to the statutes of the late Parliament of United Canada, nor to those of the provincial legislatures. It does not even effect ch. 159 of the Revised Statutes of Canada of 1886, which practically reproduces ch. 95 of the Consolidated Statutes of Canada, 1859, because it was not reproduced in the Interpretation Act of the Revised Statutes.

But, supposing that this provision is still in force, does it apply to a lottery? Is the offence of operating a lottery an undefined and unknown one? If

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the Revised Statutes had simply prohibited lotteries, if they had said nothing more, it might perhaps be contended that this simple prohibition made it a misdemeanour. But it is provided that the offender will incur a fine of $20 to be recovered in a summary manner before a justice of the peace, and this, in effect, defines the offence as being a simple contravention. If the fine is paid there cannot even be imprisonment.

Finally, by paragraph 21, the Interpretation Act of 1867 declares that offences exist that are not misdemeanours.

> Whenever any wilful contravention of any Act is made an offence of *any particular kind or name*, the person guilty of such contravention shall on conviction thereof be punishable in the manner in which such offence is by law punishable.

The offence of holding a lottery has not perhaps any particular designation or name, but it is of a special nature or kind and is known under the general name of a simple penal offence or contravention.

It appears to me evident that the offence of operating a lottery was not a crime before the criminal code, neither under the old statutes of Canada, nor in virtue of the laws enacted after Confederation, and that consequently it was a subject matter in respect to which the Provincial Legislature had authority to legislate.

I cannot discover in it any of the characteristics of crime. I cannot see that a lottery in a municipality or even within a province can affect or be of interest to the whole country. Neither can I see any necessity for intervention by public authority for its prosecution and punishment. No infamy is attached to conviction, not even simple incarceration, much less imprisonment with hard labour. It is a matter, in my humble opinion, of a simple breach of regulations of a police

or local nature, punishable by a light fine—like an infinity of other offences within the jurisdiction of the province—before local magistrates, for the advantage of the prosecutor who alone undertakes the responsibility of the prosecution, and who might even abandon it or make a compromise. I cannot conceive how I can declare criminal the commission of an act permitted by the common law at least until constrained to do so by precise and positive statutory enactments. Crimes cannot be presumed; it is necessary to have a clear text of law to create them, and particularly so when in derogation of the common law.

I am therefore of opinion that the legislation of the Province of Quebec concerning lotteries is constitutional, and consequently that the contract upon which the respondent bases his action is valid. I find less difficulty in arriving at this conclusion inasmuch as the appellant has not thought proper to question the legality of that contract in his defence. Judging from the record it is only before this court that the appellant has seen fit to raise the question for the first time. And if it is true that a defence of this nature ought not to be received with favour, as the courts have declared upon many occasions, much more ought it to be so in a matter in which it has never been pleaded. *Wallbridge* v. *Becket* (1); *Evans* v. *Morley* (2).

The appellant's only serious plea is an exception of compensation which very properly was rejected; but the mere production of such an exception constitutes an admission on the part of the defendants that the action and the contract upon which it is based are well founded.

And further still, the appellant's claim for compensation is based upon the very deeds and contracts

(1) 13 U. C. Q. B. 395. (2) 21 U. C. Q. B. 547.

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which are now complained of as illegal in the factum and oral pleadings before this court. The appellant actually alleges:

17. Que les dits Brault et Labrecque, a partir du deux de novembre mil huit cent quatre-vingt-douze (1892) jusqu'au premier juillet mil huit cent quatre-vingt-treize (1893), exploité la dite loterie appelée "La loterie Mont-Royal," comme agents et mandataires de la dite défenderesse et notamment le dit demandeur, tant en vertu du dit acte de conventions, en date du vingt sept (27) décembre mil huit cent quatre-vingt-dix (1890) et du dit acte de conventions en date du dix-neuf mars (19) mil huit cent quatre-vingt-douze (1892), qu'à l'occasion de ces actes et en continuation de leur mandat résultant de ces dits deux actes, pour le bénéfice et avantage de la dite défenderesse.

Then the appellant prays that the court may declare the demand of the respondent more then compensated, reserving for the surplus, still in virtue of the same deeds and contracts, the right of taking such furthur action as may be deemed proper.

Finally, even supposing that the lottery in question was not authorised by competent authority, I am far from entertaining the opinion that the deed of the 19th March, 1892, which formed the basis of the present action, is affected by the illegality of the lottery. It is not this deed which provides for its organization or for its operation, but the other deed of the 27th December, 1890, which is not mentioned in the latter, except in an incidental manner. The deed of 1892 is an ordinary contract of loan, distinct from the first agreement, the duration of the lottery organised by virtue of the first deed being merely mentioned for the purpose of fixing the date for the repayment of the loan and the rate of interest. There is no question of a loan "by any lottery, ticket, card or other mode of chance whatsoever," which the laws of Canada have in view. (C. S. C. 1859, ch. 95, s. 3; R. S. C. 1886, ch. 159. s. 4). The appellant received from the respondent $30,000 in one sum in current money which was the property of the respondent and his partner, before the

commencement of the lottery operations, and simply promised to return this sum with a rate of interest varying from four to five per cent, according to the duration of the lottery. That is all. Before the loan, this sum was on deposit at interest in a bank to the credit of the respondent and Labrecque, his partner, (from whom he subsequently acquired all rights) as a guarantee for the due execution of the obligations stipulated in favour of the appellant. It is to-day contended that the appellant should keep this sum during a term of years without interest. It is even suggested in the factum that perhaps the appellant need not return the capital, except on the principle of the moral obligation—which is not always true in law—" that no one may enrich himself at another's expense." Common honesty should at least require the appellant to offer to the respondent the interest that he and his partner were receiving from the bank upon these same funds at the time they were borrowed by the appellant, not for the purpose of operating a lottery, but to complete the construction of the " Monument National."

It matters not whether the appellant and the respondent have or have not operated an illegal lottery; that could not prevent one of the parties from lending his own monies to the other at any legal rate of interest which might be stipulated. *Clark* v. *Hagar* (1); 15 Am. & Eng. Encycl. of Law, (2 ed.) p. 992, vo. " Illegal contract."

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

Appeal allowed with costs.

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Lamothe & Trudel.*

(1) 22 Can. S. C. R. 510.

1899

BIRKS *v.* LEWIS.

*May 25.
*June 5.

Practice—Incomplete assignment for benefit of creditors—Seizure of immovables—Stay of execution—Art. 772 C. C. P. (old text).

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), affirming the judgment of the Superior Court, District of Ottawa (2), which dismissed the appellant's opposition with costs.

After hearing counsel for the parties the court reserved judgment, and on a subsequent day, dismissed the appeal for the reasons stated in the judgment appealed from,

Appeal dismissed with costs.

Aylen Q.C. for the appellant.

George C. Wright for the respondent.

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

1899

THE CONSUMERS' CORDAGE COMPANY *v.* CONVERSE, *et vir.*

*Oct. 11, 12.
*Oct. 24.

Donatio mortis causa—Future succession—Illegal consideration—Ratification by will—Power of executor—Seizin.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side (3), affirming the judgment of the Superior Court, District of Montreal which maintained the plaintiffs' action.

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

(1) Q. R. 8 Q. B. 517. (2) Q. R. 13 S. C. 125.
(3) Q. R. 8 Q. B. 511.

After hearing connsel on behalf of the parties the court reserved judgment, and on a subsequent day, dismissed the appeal with costs, for the reasons stated by Sir Alexander Lacoste C.J. in the court appealed from.

Appeal dismissed with costs.

Trenholme Q.C. and *Ryan* for the appellant.

Lafleur Q.C. and *Cross Q.C.* for the respondents.

MACDONALD *v.* RIORDON, *et al.*

1899

*Oct. 4, 5.
*Nov. 7.

Constitutional law—Powers of Canadian Parliament—Prohibited contract —The Consolidated Railway Act 1879.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), which affirmed the judgment of the Court of Review, at Montreal reversing the decision of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs, and also dismissing, but without costs, an intervention filed by the Attorney-General for the Province of Quebec.

After hearing counsel on behalf of the parties the court reserved judgment, and, on a subsequent day, dismissed the appeal with costs for the reasons given in the court appealed from.

Appeal dismissed with costs.

Fitzpatrick Q.C. and *Beaudin Q.C.* for the appellant.

Lafleur Q.C. and *Campbell Q.C* for the respondent.

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

(1) Q. R. 8 Q. B. 555.

1900

*Oct. 2.
*Oct. 8.

BRIGHAM v. THE QUEEN.

Ferry license—Interference—Tortious breach of contract—Bridges within ferry limits—R. S. C. c. 97.

APPEAL from the judgment of the Exchequer Court of Canada (1) which dismissed the appellant's petition of right.

After hearing counsel for the parties, the court reserved judgment and on a subsequent day, dismissed the appeal for the reasons given in the judgment appealed from.

Appeal dismissed with costs.

Aylen Q.C. for the appellant.

Newcombe Q.C. for the respondent.

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

1900

*May 29, 30.
*Oct. 8.

DUNN v. PRESCOTT ELEVATOR CO.

Warehouseman—Negligence—Damages—New trial.

APPEAL from the judgment of the Court of Appeal for Ontario (2), ordering a new trial.

After hearing counsel for the parties the court reserved judgment and on a subsequent day, dismissed the appeal, for the reasons given in the judgment from.

The Chief Justice was prevented by illness from taking part in the judgment.

Appeal dismissed with costs.

Leitch Q.C. for the appellant.

Shepley Q.C. and *French Q.C.* for the respondent.

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

(1) 6 Ex. C. R. 414. (2) 26 Ont. App. R. 389.

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assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for a machine described in the caveat referred to in the agreement; and that as the evidence showed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover. *Held* further, Gwynne J. dissenting, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit and solid rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. BINGHAM *v.* MCMURRAY. — — — — 159

4——*Oral agreement—Evidence—Withdrawal of questions from jury—New trial.*] D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent on the selling price, such commission to include all expenses. H. failed to effect a sale. *Held*, affirming the judgment appealed from, that in an action by H. to recover expenses incurred in an endeavor to make a sale, and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contracts, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury. DUNSMUIR *v.* LOWENBERG, HARRIS & CO. — — 334

5——*Condition as to inspection—Sale of lumber.*] A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final." *Held*, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector the contract was satisfied and the inspection final and binding on the parties. THOMSON *v.* MATHESON — — — — 357

6——*Offer and acceptance—Telegrams—Completion—Mutuality.*] S. a grain merchant in Truro, N. S., telegraphed to C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day, "White oats 32 half," Truro, bags two cents bushel extra." S. wired same day, "How much less can you do mixed oats for? Might work white at thirty-two, but not any more. Answer." C. answered. "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in four bushel bags, Truro." Next day S. wired, "I confirm purchase 20,000 bushels oats, white at thirty-two; mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asked half a cent for bagging. Bags extra." S. replied, "All right: Book order. Will have to pay for bagging." C. wired same day, "Too late today. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired, "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered and S. brought an action for damages. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover. COLE *v.* SUMNER — — 379

7——*Principal and agent—Sale by agent—Commission—Evidence.*] The appellant company deal in electrical supplies at Halifax and have at times sold goods on commission for the defendant, a company manufacturing electric machinery in Montreal. In 1897 the appellant telegraphed the respondent as follows:—"Windsor Electric Station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was:—"Can furnish Windsor 180 Killovatt Stanley two phase, complete exciter and switchboard, $4,900, including commission for you. Transformers, large size, 75 cents per light." * * * The manager of appellant company went to Windsor but could not affect a sale of this machinery. Shortly after a