REPORTS

— OF THE —

SUPREME COURT

— OF —

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REPORTER

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

" " Henry Strong, C. J.

" " Henry Strong J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Christopher Salmon Patterson J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

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

MEMORANDA

On the 25th September, 1892, Sir William Johnstone Ritchie, Knight, Chief Justice of the Supreme Court of Canada, died at the City of Ottawa.

On the 13th December 1892, the Honourable Mr. Justice Strong, one of the Puisne Judges of the Supreme Court was appointed Chief Justice of the Supreme Court of Canada.

ERRATA.

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

Page 28. In caption note for "R.S.C. c. 135 ss. 32 and 52" read "R.S.C. c. 8 s. 32—R.S.C. c. 135 s. 52."

Page 69. In caption note for "R.S.C. c. 139 s. 29 *(b)*" read "R.S.C. c. 135 s. 29 *(b)*.

Page 219. Line 30. Instead of "with" read "without."

Page 339. Foot notes should be numbered (1) (2) and (3).

Page 342. In caption note and fourth line of head-note for "R.S.N.S. 5th ser. c. 74" read "c. 94."

Page 472. Line 16. Instead of "inclusive" read "exclusive."

ERRATA.

Page 283.—Line 17. Instead of "*que*" read "*ici.*"

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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.

THE CITY OF SAINT JOHN (DEFENDANTS). ..... } APPELLANTS; 1892

AND *Feb. 19, 22.

JAMES J. CHRISTIE (PLAINTIFF).....RESPONDENT. *May 2.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence not pleaded—34 V. c. 11 (N.B.)—25 V. c. 16 (N.B.)

The act incorporating the town of Portland (34 V.c. 11 [N.B.] gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By s. 84 the provisions of 25 V. c. 16 and amending acts, relating to highways, apply to said town and the powers, authorities, rights, privileges and immunities vested in commissioners and surveyors of roads in said town are declared to be vested in the council. By another act no action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, remaining subject to the said provisions, and eventually a part of the city of St. John.

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

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An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a side-walk in said city and breaking his leg. More than a month before the action was commenced plaintiff's solicitor wrote to the council notifying them of the injuries sustained by plaintiff, and concluding: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:" except this no notice of action was given, but want of notice was not pleaded. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said side-walk. After Portland became a part of St. John the latter city became defendant in the case for subsequent proceedings.

Held, Strong J. dissenting, that the city was liable to C. for the injuries so sustained.

Held, per Ritchie C.J. and Strong J., that the letter of the solicitor was not a sufficient notice of action under the statute.

Per Ritchie C.J. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.

Per Taschereau, Gwynne and Patterson JJ. Notice was not necessary; the liability of the city did not depend on s. 84 of 34 V.c. 11, but on the sections making it the duty of the council to keep the streets in repair; and the only privilege or immunity possessed by the commissioners and surveyors of roads was that of exemption from the performance of statute labour.

Per Strong J. One of the "immunities" declared to be vested in the council was that of not being subject to an action without prior notice and no notice having been given in this case C. could not recover.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial.

The action was originally brought against the city of Portland for injuries sustained by the plaintiff in walking along a plank side-walk in said city and stepping on a rotten plank which gave way whereby he broke his leg. The city of Portland subsequently became a part of the city of St. John and the latter city

appeared as defendants in the proceedings in the action after the union.

The action was twice tried, the verdict for the plaintiff on the first trial having been set aside and a new trial granted (1).

The main contention of the defendants is that they were entitled to notice of action which was not given, the notice relied on by plaintiff being, as they contend, insufficient. It was a letter from plaintiff's solicitor to the council as follows:—

JULY 9th, 1888.

The Council of the City of Portland:

Gentlemen,—In behalf of Mr. J. J. Christie, of the city of Saint John, dealer in shoe findings, and as his attorney, I have to notify you that on Friday last, in consequence of a defective side-walk in your city, he fell and received severe injuries from which he is now, and for weeks will be, confined to his bed. As it is Mr. Christie's intention to claim damages from you for such injuries I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to.

They rest this defence on statutes governing the town of Portland before it was incorporated as a city, which are as follows:—

The town was incorporated by 34 Vic. ch. 11 and the 84th section of that act provides that:—

"All the provisions of an act made and passed in the 25th year of the reign of Her present Majesty, intituled, 'An act in amendment and consolidation of the Laws relating to Highways and of the several Acts in amendment thereof,' except so far as the same are altered by or inconsistent with the terms of this act, shall extend and apply to, and are declared to be in force, so far as the same are applicable, within the said town of Portland; provided, that the several powers and authorities, rights, privileges and immunities by the said Acts of Assembly vested in the General Sessions

(1) 29 N.B. Rep. 311.

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of the Peace for the city and county of Saint John and Commissioner and Surveyors of Roads within the said town shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe."

Then 31 Vic. ch. 19 sec. 1, provides that: "The provisions of the first and second sections of the Revised Statutes, ch. 56, 'Of Actions against Officers and Recovery of Penalties,' * * * shall extend and apply to Commissioners of Highways for anything done in the execution of any office created or the duties of which are performed under any of the provisions of an act made and passed in the 25th year of the reign of Her present Majesty, intituled An Act in Amendment and Consolidation of the Laws relating to Highways or of any Act or Acts in amendment thereof or in relation thereto."

R. S. N. B. ch. 56 secs. 1 and 2 above referred to are as follows:—

"Sec. 1. No action shall be brought against any person for anything done by virtue of an office held under any of the provisions of this title, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county where the cause of action arose."

"Sec. 2. The defendant in any such action may plead the general issue and give any part of this title and the special matter in evidence. If it appear that the defendant acted under the authority of this title, or of any regulations made by the powers conferred thereby, or that the cause of action arose in some other county, the jury shall give him a verdict."

Under these statutory provisions the defendants claimed that one of the rights, privileges and immu-

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nities enjoyed by a Commissioner of Highways was that no action could be brought against him for anything done in the execution of his duties without a month's previous notice thereof, and that such right, privilege or immunity was vested in the Council of the town of Portland and is enjoyed by the defendants.

The defendants claimed, also, that the broken plank causing the accident was beyond the line of the street and on private property as to which they were not liable.

The jury found the questions of fact in favour of the plaintiff, certain questions being submitted which, with their answers thereto, were as follows:—

1. Was the side-walk properly constructed in the first instance?

Yes.

2. Were the two streaks of plank spoken of by Tomney placed by him on the vacant lot, and outside the line of the side-walk ordered by Supervisor Dunlap?

No.

3. Were those planks within the city line?

Yes.

4. Did the city use, or by their conduct invite the public to use, the whole side-walk, at this place, including the two streaks, next to or on the vacant lot?

Yes

Verdict for plaintiff—Damages $1.500.00.

The defendants moved for a nonsuit or new trial which the court refused, the majority holding that notice of action was not necessary. They then appealed to this court.

Jack Q.C., Recorder of St. John, for the appellants: The corporation is not liable for non-feasance. *Dwyer* v. *The Town of Portland* (1).

(1) 20 N.B. Rep. (4 P. & B.) 423.

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As to the general liability of a corporation for negligence see *Burns* v. *City of Toronto* (1); *Oliver* v. *Worcester* (2); *French* v. *City of Boston* (3); *Ross* v. *Fedden* (4).

As to limitation of action see *Burton* v. *Mayor, etc., of Salford* (5).

Pugsley, Sol.-Gen. of New Brunswick, for the respondent, referred to *Clarke* v. *The Town of Portland* (6); *The Town of Portland* v. *Griffiths* (7).

Sir W. J. RITCHIE C. J.—On the merits of this case I think the verdict of the jury is not open to objection and should not be disturbed, and therefore the simple point in the case turns on the question of notice of action. Were defendants entitled to notice of action? If so, was it given? If not, was want of notice pleaded or was it necessary to plead it? The statutes in England that require notice of action to be given make special provisions therefore as in 11 & 12 Vic. ch. 44 s. 9, which requires that the notice should be in writing, in which notice the cause of action and the court in which the case is intended to be brought shall be clearly and explicitly stated, and upon the back thereof shall be endorsed the name and place of abode of the party intending to sue, and also the name and place of abode or business of the attorney or agent, if such notice has been served by such attorney or agent. In the present case the statute simply states "that no action shall be brought unless within three months after the act committed and upon one month's previous notice in writing," but nothing as to the contents of notice.

(1) 42 U.C.Q.B. 560.
(2) 102 Mass. 496.
(3) 129 Mass. 592.
(4) L.R. 7 Q.B. 661.
(5) 11 Q.B.D. 286.
(6) 19 N.B. Rep. (3 P. & B.) 189.
(7) 11 Can. S.C.R. 333.

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Ritchie C.J.

In England it has been held that in construing notice of action under the various statutes requiring them the court will not subject them to too nice and narrow an examination, the object being that they should be plain and intelligible to plain men. See *Jones* v. *Nicholls* (1).

The notice in this case is as follows :—

JULY 9th, 1888.

THE COUNCIL OF THE CITY OF PORTLAND :

Gentlemen,—In behalf of Mr. J. J. Christie of the city of St. John, dealer in shoe findings, and as his attorney, I have to notify you that on Friday last, in consequence of a defective side-walk in your city, he fell and received severe injuries from which he is now, and for weeks will be, confined to his bed. As it is Mr. Christie's intention to claim damages from you for such injuries I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to. I remain,

Yours truly,

MONT. McDONALD,

Attorney-at-Law.

I cannot think this a sufficient notice; there is nothing whatever to convey to the Council of the City of Portland an intention to bring an action.

If it was necessary to plead want of notice this was clearly not done, the only pleas being :

1. That it was not the duty of the defendants to keep the said streets and highways, and the side-walks thereof, in a safe and proper condition for the passage to and fro over and along the same of the city of Portland and other good and worthy subjects of our lady the Queen, as alleged.

2. That the defendants were not bound to keep the said Straight Shore Road and the side-walks thereof in repair as alleged.

3. That the defendants did not undertake to repair and keep in repair the said Straight Shore Road and the side-walks thereof as alleged.

4. That the defendants did not construct upon and along the said street, road and highway, upon one side thereof, a plank side-walk for the public to walk upon, as alleged.

5. That the defendants did not negligently and improperly construct

(1) 13 M. & W. 361.

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the said side-walk and afterwards negligently and improperly repair the same, and that in consequence of such neglect and improper construction, and also of such negligent and improper repairing thereof, the said side-walk became and was dangerous and unsafe for persons walking along and upon the same as alleged.

By statutes, 1 R.S.N.B. cap. 56, ss. 1 and 2; 31 Vic. cap. 19 ss. 1 and 2; 34 Vic. cap. 11 s. 84.

And the said defendants, by E. R. Gregory, their attorney, say they are not guilty.

That it was necessary the following cases would seem clearly to establish, there being no statute authorizing the general issue to be pleaded and the special matter to be given in evidence under it. The general issue merely denies the fact of the commission of the injury complained of. In *Davey* v. *Warne* (1) where an act provided that plaintiff should not recover in an action for anything done in pursuance of the act unless 21 days' notice of action was given, it was held that the defendant must plead the want of such notice or he could not avail himself of it. This case seems to be directly in point. In this case Alderson B., delivering the judgment of the court says, "as to the notice of action, we are of opinion that the want of it ought to have been pleaded as a defence to the action. It is an important point, but I do not entertain any doubt about it."

See also *Richards* v. *Easto* (2) and *Law* v. *Dodd* (3) which are equally in point.

STRONG J.—I can come to no other conclusion than that this appeal must be allowed for the reason that the appellants were entitled to notice of action and that no such notice was given. This was the opinion of Mr. Justice Tuck on the first application for a new trial in this cause. The 1st and 2nd sections of 31 Vic. cap. 19 made the 1st and 2nd secs. of cap. 56 of

(1) 14 M. & W. 199.
(2) 15 M. & W. 244.
(3) 1 Ex. 848.

the Revised Statutes of New Brunswick applicable to Commissioners of Highways, and by the provisions of the last mentioned enactment one month's notice of action was required to be given to public officers to whom the statute applied.

By 34 Vic. ch. 11 sec. 84 the provisions of an act passed in 25 Vic., amending and consolidating acts relating to highways, were made applicable to the town of Portland, and it was provided that the powers, authorities, rights, privileges and immunities vested in the commissioners and surveyors of roads "within the said town" were vested in the town council of Portland. Subsequently these powers and immunities were successively transferred to the city of Portland and to the present appellants.

The first question raised is whether the right to notice of action is included within the word "immunities," and differing with great respect from the learned Chief Justice of New Brunswick I am of opinion that it is. The exceptional right not to be sued as an ordinary individual without a preliminary notice according to the course of the common law is surely a privilege and immunity. I can think of no general and comprehensive word by which such a right could be better expressed than this word "immunity."

It is said however, (and it was the ground on which Mr. Justice King in his judgment on the first motion for a new trial held that notice was not requisite), that the right to notice under the provision mentioned does not apply to the surveyors of roads but is confined to the commissioners of roads, and that the negligence imputed to the city in the present case was a neglect imputable to it in its character of surveyor of roads rather than in that of commissioners of roads. With great respect I am unable to agree in this distinction. As commissioners of roads the city were bound to re-

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pair, and the accident for which the action is brought arose from a neglect to repair. I regard the surveyors as executive or subordinate officers to carry out the duties imposed on the commissioners, but I take it that the commissioners are bound to repair and to see that the surveyors properly perform their duties in executing repairs of the streets and side-walks. Further, it appears to me that the duties of the two offices of commissioners and surveyors transferred to the city have become so blended that any distinction between them in respect of such a matter as that of repairing cannot be any longer maintained, and that the city is entitled in all matters relating to streets to the immunities of the commissioners.

That the letter of Mr. Macdonald on the 9th of July, 1888, addressed to the Portland Council and received by the mayor, was not a sufficient notice of action to meet the requirements of the statute can scarcely be doubted. The case of *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1), referred to by Tuck J. is conclusive on this head (2).

The appeal should be allowed.

TASCHEREAU J. – I would dismiss this appeal. I do not think a notice of action was necessary. Mr. Justice King fully demonstrates it in his judgment in the court below on the first motion. On the second ground taken for a new trial, that there was no evidence of such negligence as would make the appellants liable, I think they also fail. The defect was not a latent one; on the contrary, the evidence shows that this side-walk, which was built of plank and raised about two feet above the level of the ground, had been allowed to go to decay so that it had become dangerous. The

(1) 9 App. Cases 365.

(2) And see also cases collected in Clerk & Lindsell on Torts, pp. 86 to 88.

other grounds for their motion taken by the appellants have been disposed of by the judgment appealed from against their contentions. I see no ground of appeal in any of them.

GWYNNE J.—The town of Portland was incorporated by a statute of the legislature of the province of New Brunswick, 34 Vic. ch. 11. By the 57th section of that act the town council was empowered to make by-laws, among other things :

To provide for making, paving, flagging, planking and repairing the streets, side-walks, crossings, roads, &c.

Also, by subsec. 17 :

To cause lands lying along and below the level of any way, side-walk, street or thoroughfare to be properly inclosed and fenced at the cost and expense of the owners, and to recover such expenses with costs in a summary manner, provided that the said town shall not be in any way liable for any injuries or damages whatsoever occasioned by the neglect of such owners to erect and maintain any such fence, but the said owners shall be liable therefor.

Then by the 83rd section it enacted that :

The town council shall have the sole and exclusive management and control of all roads, bye roads, highways, streets, side-walks, &c., &c., within the said town, and power to repair, amend and clean the same, &c., &c., and shall control the expenditure of all moneys assessed and collected or expended from the general revenues of the said town, for and on account of the making, repairing and improvement of any such roads, bye roads, highways, streets, side-walks, &c., &c.

Then by section 117 it is enacted that the town council shall have power at their first meeting after the annual election of councillors in each year, or so soon thereafter as may be, to determine and direct what sum of money to the amount of fifteen thousand dollars shall be raised and levied in the town for, among other purposes named, "making and repairing the roads, streets, &c., &c., within the said town." Then by section 128 it is enacted that :

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All assessments which now are or hereafter may be required to be levied in the said town for town or county purposes, shall be levied and assessed and collected under the provisions and according to the principles of this act, anything in any law or statute contained to the contrary notwithstanding.

Then the statute defines the provisions and principles upon which assessments are to be made, in the sections from 129 to 141 inclusive. By the 129th section it is enacted that:

All rates, taxes or assessments levied or imposed upon the said town shall be raised as follows:—

1st. One-tenth of the whole amount of such rate, tax or assessment shall be assessed and levied by an equal tax on the poll of every male inhabitant of the said town above the age of 21 years.

2nd. The remaining nine-tenths of the whole amount of such rate or assessment shall be assessed and levied in due proportion upon the whole value of all real estate situated in the said town of Portland, and upon the personal estate of the inhabitants thereof wherever the same may be, after deducting from such personal estate the just debts of such inhabitants respectively, and also upon the amount of annual income or emoluments of such inhabitants derived from any office, profession, trade, business, place, work, labour, occupation or employment whatsoever within the province, and not from invested real or personal estate of such inhabitants, and also upon the capital stock, income or other thing of joint stock companies or corporations, &c.

Now it cannot be doubted, I think, that by the above sections alone, without any other, exclusive power to make and repair the streets and side-walks in the town was vested in the corporation, and that, to enable them effectually to exercise the power, they are empowered to pass by-laws for raising and levying all rates, taxes and impositions which can be levied, collected and enforced for that or any other purpose. Under these powers they did in 1878 construct the side-walk where the plaintiff sustained the injury of which he complains. That side-walk was suffered to fall into and was in a very defective condition when the plaintiff sustained his injury: it therefore, upon the authority of the *Borough of Bathurst* v. *Macpherson*,

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(1) became a duty imposed upon the corporation to maintain the structure supplied by them for public use in a fit state of repair, the neglect to discharge which duty would subject them to an action at the suit of a person injured thereby whatever might be their liability to put their streets and side-walks into, and to keep them in, a good state of repair. It is not, perhaps, necessary in the present case, for the reason above given, to determine what is the full extent of the obligation imposed upon the appellants generally in relation to the streets, &c., placed under their exclusive control and management. But the general impression I think is, and for my part I am prepared to express the opinion, that when such exclusive powers are vested in municipal corporations as they are constituted in this Dominion the correlative obligation to exercise the powers is imposed, and that neglect to discharge such obligation gives to a party injured a right of action. The provision made by subsection 17 of the 57th section of the act, which exempts the corporation from liability for injury sustained by any person from the neglect of the owners of lands lying along and below any side-walk to fence their property from the side-walk, would seem to imply that the legislature entertained the view that for injuries ensuing from a defective side-walk within the limits of streets which by the statutes are placed under the sole and exclusive management and control of the town council, the corporation are liable. Evidence was given by the defendants for the purpose of establishing that, and it was strongly insisted that the evidence so given did establish that, the place where the plaintiff sustained injury and the cause of such injury arose outside of the line of the street, with the view of claiming the benefit of exemption from liability under the pro-

(1) 4 App. Cas. 256.

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vision of the said 17th subsection of section 57, as the land adjoining did lie along and below the level of the side-walk; but the jury, with all the evidence upon that subject before them, have found that the injury was sustained within the limits of the street, and for defect of a very grave description within the limits of the side-walk on the street, and I cannot say that this finding was not warranted by the evidence. Moreover it is to be observed that the particular plank, the defective condition of which was the immediate cause of the injury, had been laid by the defendants or under their authority, and extended, as by the defendant's own contention is claimed, beyond the limits of the street. However the jury have found that the injury occurred within the limits of the street, and by defect in the side-walk within such limits.

For the purpose of determining the question as to the liability of the defendants, apart from the question whether or not they were entitled to notice of action, there is no necessity whatever, in my opinion, to refer to the 84th section of the act at all. The liability of the defendants rests wholly upon the other sections of the act above quoted, and the fact that they had constructed the sidewalk where the injury was sustained. However the defendants contended that under that section they were entitled to notice of action. But this contention appears to me to involve the assumption that the liability of the corporation, if any there be, arises under the provisions of this 84th section, the object and utility of which, as affecting an action like the present, I confess I have been unable to see. The section enacts that:

All the provisions of an act made and passed in the 25th year of the reign of Her present Majesty intituled, "an act in amendment and consolidation of the laws relating to highways and of the several acts in amendment thereof" except so far as the same are altered by or inconsistent with the terms of this act, shall extend and apply to and are

declared to be in force, so far as the same are applicable, within the said town of Portland: Provided that the several powers and authorities, rights, privileges and immunities by the said acts of Assembly vested in the General Sessions of the Peace for the City and County of St. John, and commissioners and surveyors of roads within the said town, shall be and the same are hereby vested in the town council to be exercised in such manner and through such officers, agents and persons as they shall prescribe.

The act above referred to as passed in the 25th year of Her Majesty's reign is ch. 16 of the statutes of that year. The powers and authorities vested in the commissioners and surveyors of highways by that act were designed solely to enable them "to enforce and superintend the performance of the statute labour for such districts as they should be assigned to by the justices in general sessions," as appears by the 2nd section of the act. By the 11th section they were required and empowered "carefully to mark out all the roads laid out, altered or extended under their direction by the provisions of this act," in the manner described in the section. By the 15th section it was enacted that:

All the public roads, streets and bridges in each county shall be cleared, maintained and repaired by the male inhabitants thereof being twenty-one years of age (with certain exceptions) who shall work, either in person or by sufficient substitutes, with such instruments as the surveyors shall direct, the number of days as follows, namely, all persons of twenty-one years of age and above—three days; and for any real or personal estate he may possess not exceeding four hundred dollars—one day; exceeding four hundred and not exceeding twelve hundred—two days; exceeding twelve hundred and not exceeding two thousand dollars—three days—and so on in like manner for every eight hundred dollars one day additional for any real or personal estate he may possess not to exceed thirty days in any one year.

Then by section 16 it was enacted that the estates of females and minors should be assessed in the same manner as the estates of residents, but that any assessment upon their property might be paid for in labour by substitutes. Then by section 18 the commissioners in each parish were required:

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By the 1st day of May in each year to make a list of the inhabitants of such parish and assess the number of days to be performed by them respectively according to the best of their judgment, &c., &c.

Then by the 19th section they were empowered:

Previous to the commencement of the labour to receive from any person assessed to perform such labour 50 cts. for each days' labour required in lieu of the labour.

And in such case they were required to let out the work by public auction to the lowest bidder and to apply such commutation in payment of the work performed by the persons to whom it should be so let. By section 20 the surveyors were required when directed by the commissioners:

To summon at the most suitable time between the 1st day of May and the 1st day of August in each year the inhabitants, giving at least six days' notice either by personal service, or by leaving the notice at the place of residence, or by publishing the same in writing in three of the most public places in the district which shall contain the names, the number of days' work to be done by each person respectively, and the instruments to be used by each, the labour to be expended in making or improving the roads and bridges in the best manner, subject to the orders of the commissioner.

In short, the whole duty imposed by the act upon commissioners and surveyors of highways is that of providing for the distribution of statute labour under the above sections, and a few others relating to roads in the snow in winter, and the only "privilege and immunity" conferred by the act upon the commissioners and surveyors of highways is contained in the 36th section, which enacts that:

All commissioners and surveyors of roads shall be exempted from the performance of statute labour.

By the 42nd section for any neglect of duty imposed upon them by the act, they are subject:

For every offence to a penalty of not less than eight dollars nor more than twenty dollars to be recovered on the complaint of any freeholder, one-half to be paid to the person suing for and recovering the same and the other half to be applied for the improvement of the roads in the district where the offence was committed.

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Now the provision which is made for the repairing of the streets, side-walks, &c., of the town of Portland by the act 34 Vic. ch. 11, and for raising the funds necessary for that purpose by a poll tax upon every male inhabitant, and rates and taxes levied upon all real and personal property in the town, is so essentially different from the method by statute labour as provided by 25 Vic. ch. 16, that the provisions of this latter statute can more properly, in my opinion, be said to come within the exception contained in the words "except so far as the same are altered by or inconsistent with the terms of this act" in the 84th section of 34 Vic. ch. 11; for the repairing of roads by statute labour as provided by 25 Vic. ch. 16 is wholly inconsistent with the other clauses of 34 Vic. ch. 11, whereby the repairing of the streets, side-walks, &c., in the town of Portland is otherwise provided for. How section 84 came to be inserted in the act at all is, to my mind, inconceivable unless it was hastily and inconsiderately and unobservantly inserted while the bill was passing through the legislature.

The argument addressed to us on behalf of the appellants assumed that this action, if it lay at all, did so under and by force of this 84th section, and further, for which no authority was cited, that an action of this nature would have been, under the circumstances appearing here, against commissioners of highways before the incorporation of the town, and that therefore the appellants were entitled to notice of action which was a privilege conferred upon commissioners of highways by 31 Vic. ch. 19. Whether a commissioner of highways would or would not be at all liable in an action of the nature of, and under the circumstances of, the present one we need not determine, for the liability of the appellants depends not at all, in my opinion, upon this 84th section, but upon other sec-

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tions of their act of incorporation which places all the streets, side-walks, &c., in the town under their absolute control, and gives them power to provide the funds to make them and keep them in repair. I am of opinion that no notice of action was necessary, and that the appeal must be dismissed with costs.

PATTERSON J.—I agree to the appeal being dismissed on the grounds stated by Mr. Justice Gwynne.

Appeal dismissed with costs.

Solicitor for appellants : *I. Allen Jack.*

Solicitor for respondent : *Mont. McDonald.*

J. BUCKLEY PEERS (PLAINTIFF).. .....APPELLANT; 1892

AND *Feb. 18,19.

JAMES A. ELLIOTT AND JAMES N. BENJAMIN (DEFENDANTS)..... } RESPONDENTS. *May 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Practice—Misdirection—New trial ordered by court below—Interference with order for—Negligence—Damage by fire—Spark arrester.

On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside by the court *en banc* and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada :

Held, Strong J. dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering a new trial.

The plaintiff had employed the defendants to press his hay by means of a steam engine, and while the defendants were engaged in doing the work the plaintiff's barn was set on fire, as he alleged, by sparks from said engine and was destroyed with the hay and other property in it at the time. The plaintiff brought an action for the loss of said property in which he charged

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

(1) 23 N. S. Rep. 276

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defendants with negligence in not having the engine provided with a spark arrester and in the manner of working it in pressing the hay. The defendants denied the negligence charged and on the trial the case mainly turned upon whether or not the spark arrester, which it was proved the defendants possessed, was in its place in the engine when the fire occurred, and if it was whether or not it was effective to prevent the escape of sparks. The judge directed the jury, among other things, that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable," and submitted to them certain questions, some of which, with the answers thereto, were as follows:—

"1. Did the fire which destroyed plaintiff's property originate from defendants' engine? Yes.

"2. Did defendants in the use of the engine take all such reasonable and necessary precautions against fire as prudent men should have done under the circumstances? No.

"3. Was defendants' engine fitted with appliances for preventing the escape of sparks from the engine, such as were most effective and approved generally for that purpose? No.

"4. Was the spark arrester made by Hewson in the engine at the time of the fire? No.

"5. Was the spark arrester made by Hewson effective for the purpose of preventing the escape of sparks? No.

Upon these findings a verdict was entered for the plaintiff. The defendants moved the full court to have such verdict set aside and judgment entered for them, or a new trial ordered. The court held that the learned judge at the jury had misdirected the jury in telling them that the want of a spark arrester was in itself negligence and ordered a new trial. From this decision the plaintiff appealed.

Dickie Q.C. for the appellant. As to what will constitute negligence see *Pickard* v. *Smith* (1); *Scott* v. *London Dock Co.* (2)

The findings of the jury fully warranted the verdict and they could not have been influenced by the direction of the judge. *Freemantle* v. *London & North Western Railway Co.* (3)

W. B. Ritchie for the respondent referred to *Nash* v. *Cunard Steamship Co.* (4); *New Brunswick Railway Co.* v. *Robinson* (5); *Canada Atlantic Railway Co.* v. *Moxley* (6); *North Shore Railway Co.* v. *Mc Willie* (7).

Sir W. J. RITCHIE C.J.—The judge stated that the want of a spark protector was in point of law negligence (8). It cannot be denied that this was misdirection which may have had an influence on the jury.

The court having granted a new trial we should not interfere. I am of opinion that the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be allowed. I agree that if the court had been confined exclusively to the findings of the jury they would not warrant the entering of a judgment for the plaintiff; but it was competent for the court under the Judicature Act (9) to take the evidence into consideration; and if that clearly established a case of negligence to direct a verdict to be entered entirely irrespective of the findings of the jury. Having read the evidence I think it does establish a very clear case of negligence and that a new trial will probably not result in any other conclusion by a jury. Under these circumstances it seems to me useless to send the case to another trial because those findings are not sufficiently comprehensive or because

(1) 10 C. B. N.S. 470.
(2) 3 H. & C. 596.
(3) 2 F. & F. 337.
(4) 7 Times L.R. 597.
(5) 11 Can. S.C.R. 688.
(6) 15 Can. S.C.R. 145.
(7) 17 Can. S.C.R. 511.
(8) See *Nash* v. *Cunard S.S. Co.*, 7 Times L. R. 597.
(9) R.S.N.S. 5th Ser. c. 104.

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the judge is to be taken to have misdirected the jury by expressing himself too strongly on a question of fact which was for their consideration.

The case seems to be just one of those to which the provision of the Judicature Act before referred to was intended to apply.

For these reasons, which are the same as those of Mr. Justice Graham in the court below, I think the appeal should be allowed and judgment entered for the plaintiff in the Supreme Court of Nova Scotia.

TASCHEREAU J.—I am of opinion that we cannot interfere with the judgment of the court below ordering a new trial in this case for the reasons stated in Mr. Justice Meagher's judgment in the court below.

GWYNNE J.—I do not think we can interfere with the judgment of the court below in ordering a new trial. There was some evidence given pointing to the possibility of the fire having originated from fire escaping from the ash pan, in which case they might not, it may be, have found the defendants chargeable with negligence. The attention of the jury should, I think, have been drawn to this point. In view also of the divers alternative suggestions of negligence causing the fire alleged in the statement of claim it would have been better if the jury had been simply asked to say from what cause, in their opinion, the fire did in fact take place, and whether it was attributable to any, and if any, what negligence of the defendants.

PATTERSON J.—I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Townshend, Dickey & Rogers.*

Solicitor for respondents: *Charles R. Smith.*

JAMES A. HATHEWAY, *et al.*, (CLAIMANTS)..... } APPELLANTS;

AND

EDWARD CHAPLIN (CONTESTANT).....RESPONDENT;

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*Mar. 9.

*May 2.

In re THE EXCHANGE BANK OF CANADA IN LIQUIDATION.

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

Letter of guarantee by bank—Claim for loss—Proof of claim—Account sales.

H. *et al.* upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S. with guarantee against loss shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of $7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss.

Held, affirming the judgment of the court below that assuming that there was a valid guarantee given by the bank, upon which the court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover.

Per Taschereau J.—That the guarantee was subject to a delivery of the cattle to M. S. and that H. *et al.* having shipped the cattle in their own name could not recover on the guarantee.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming the judgment of the Superior Court, which maintained the respondent's contestation of a claim filed by the appellants for the sum of $7,968 on the estate of the Exchange Bank of Canada in liquidation. The grounds upon which the appellants

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(1) M. L. R. 7 Q. B. 317.

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based their claim and which are stated in the report of the case in M. L. R. 7 Q. B. 317, are for alleged losses on two shipments of cattle made, as they alleged in September, 1883, at the request of James McShane, junior, and which shipments they contended were guaranteed from loss by the Exchange Bank of Canada, which, on the 15th September, 1883, suspended payment and went into liquidation. The following letter of credit, cheque and telegram were annexed to the claim, viz.:—

(Copy Letter of Guarantee.)

EXCHANGE BANK OF CANADA.

HEAD OFFICE, MONTREAL, 11th Sept., 1883.

Messrs. HATHAWAY & JACKSON,

Boston, Mass.

DEAR SIRS,—This letter will be presented by Jas. McShane, Jr. M. P. P., whose cheque on this bank to the amount of forty thousand dollars will be good.

Yours truly,

(Signed) JAMES U. CRAIG.

(Copy of cheque.)

$36,375.00— BOSTON, Sept. 17th, 1883.

Cashier of the Exchange Bank of Canada. Pay to the order of Hathaway & Jackson, on demand, thirty-six thousand three hundred and seventy-five dollars.

(Signed) J. McSHANE, JR.

329 Head Cattle
Insurance & feed
SS. Bavarian.

(Copy of Telegram.)

Sept. 18th, 1883.

Dated Montreal.

To Hathaway & Jackson.

Load steamer next week for McShane we guarantee you against loss.

T. CRAIG,
Exchange Bank.

This claim was contested by the respondent, a creditor of the bank, and the principal grounds relied on were that the said bank could not legally become surety against loss on a contract of the character alleged by the claimants;

That at the time the said cattle were delivered to McShane, if at all, said bank had suspended payment to the knowledge of the claimants;

That the pretended transaction upon which claimants rely was not the act of the bank, but merely the personal act of Thomas Craig.

The cattle were consigned to appellants' agents in Liverpool, and at the trial the only witness examined to prove the alleged loss was one Arthur E. Jackson, a clerk in the employ of the appellants, who stated he knew nothing personally whatever about what the cattle realized, the only knowledge that he had at all was from the accounts or statements which he produced and filed.

Laflamme Q C. and *Brown* for appellants.

MacMaster Q.C. and *Greenshields* for respondent.

Sir W. J. RITCHIE C.J.—I was of opinion at the close of the argument in this case that this appeal should be dismissed, and I have seen no reason since to change that opinion.

Assuming plaintiff had a cause of action, which I am by no means, as at present advised, prepared to affirm, he has shown no legal evidence of any loss and therefore the courts below were right in dismissing the claim. The appeal will therefore be dismissed.

STRONG J.—I entirely agree with the judgment of the Court of Queen's Bench.

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HATHAWAY v. CHAPLIN.

In re THE EXCHANGE BANK OF CANADA.

Taschereau J.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The appellants base their claim against the liquidators of the bank on their losses on two shipments of cattle, which they allege to have made at the request of James McShane, which shipments were guaranteed from loss, as they contend, by the bank. The bank went into liquidation on the 15th of September, 1883. The appellants rely upon a letter dated the day before the suspension of the bank, addressed to them and signed by Craig, the accountant of the bank in the following words: "This letter will be presented by James McShane, whose cheque on the bank to the amount of $40,000 will be good." The appellants rely also upon a telegram dated on the 18th day of September, three days after the suspension of the bank, signed by the said Craig, and addressed to the appellants in the following words: "Load steamer next week for McShane; we guarantee you against loss."

It seems to me unquestionable that this guarantee simply meant that the appellants should deliver over to McShane the cattle that they had sold him, but not that they would ship them in their own name. Now, the appellants never delivered the cattle to McShane, but shipped them themselves on their own account, in their own name to their own order, and for their own benefit. Assuming that there ever had been any valid contract with the bank they themselves put an end to it. On the 18th of September Craig could not bind the bank by his telegram he sent to the appellants.

The Court of Queen's Bench, however, without entering into the consideration of any of the other questions raised in the case, dismissed the appellants' claim on the ground that they had failed to prove the alleged loss on the said shipments. And upon that ground alone this appeal must be dismissed. The

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only witness examined to prove their loss was their clerk, who knew nothing personally of anything connected with it. His evidence amounts to nothing else but hearsay evidence. The appellants seem to be under the impression that the respondent filed no general denial to their claim; but that is an error. The plea contains an allegation "that all, each and every the allegations, matters and things set forth and contained to the said claim are false, untrue and unfounded in fact and each and every of them is and are specially denied by the said contestant."

They contend that the respondent's right to contest their claim has not been established; but they joined issue with him without questioning his right, and it is now too late for them to raise that objection.

GWYNNE J.—It is unnecessary to determine whether or not the guarantee under consideration was one which it was competent for the Exchange Bank to have entered into, or whether the contract against loss in respect of which the guarantee upon its face appears to have been given was determined by the mutual agreement of the parties to that contract as was sworn by James McShane one of the parties thereto; for, assuming the contract not to have been determined and the guarantee to be valid and binding, there was no evidence whatever offered of the claimants having sustained any loss in the performance by them of the contract.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Chapleau, Hall, Brown & Sharp.*

Solicitors for respondent: *Greenshields & Greenshields.*

1892
*May 9.

CONTROVERTED ELECTIONS FOR THE ELECTORAL DISTRICTS OF BAGOT AND ROUVILLE.

FLAVIEN DUPONT (RESPONDENT).....APPELLANT;

AND

LOUIS PAUL MORIN (PETITIONER) .....RESPONDENT.

—§—

LOUIS P. BRODEUR (RESPONDENT).....APPELLANT;

AND

JOSEPH CHARBONNEAU (PETITIONER) RESPONDENT.

ON APPEAL FROM THE JUDGMENTS OF THE SUPERIOR COURT FOR LOWER CANADA.

Election petition—Judgment voiding election—Trial—Commencement of—Six months—Consent to reversal of judgment—R.S.C. ch. 135 *ss.* 32 & 52.

APPEALS from the judgments of the Superior Court for Lower Canada.

In these two cases the trials were commenced on the 22nd day of December, 1891, more than six months after the filing of the petition, and subject to the objection taken by the respondents that the court had no jurisdiction, more than six months having elapsed since the filing of the petition and no order made enlarging the time for the commencement of the trial; the respondents consented that their elections be voided by reason of corrupt acts committed by their agents without their knowledge.

On appeal to the Supreme Court upon the question of jurisdiction the petitioner's counsel signed and filed

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

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BAGOT AND ROUVILLE ELECTION CASES.

a consent to the reversal of the judgment appealed from without costs, admitting that the objection was well taken.

Upon the filing of an affidavit, as to the facts stated in the respondent's consent, the appeal was allowed and the election petition dismissed without costs. R. S. C. ch. 135 sec. 52.

Appeal allowed without costs.

In the Bagot Case, *Ferguson* Q.C. for appellant.

Belcourt for respondent.

In the Rouville Case, *Belcourt* for appellant.

Code for the respondent.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF L'ASSOMPTION.

1892

*May 10.

JOSEPH GAUTHIER (RESPONDENT).....APPELLANT;

AND

ALBERT BRIEN (PETITIONER).....RESPONDENT

Election appeal—Discontinuance—Effect of—Practice—Certificate of registrar—New writ.

APPEAL from the decision of the Superior Court for Lower Canada.

By a judgment of the Superior Court in the Controverted Election for the Electoral District of L'Assomption, the appellant was unseated by reason of corrupt acts committed by agents, and upon an appeal being taken by him to the Supreme Court the case was inscribed for hearing for the May sessions for 1892. When the appeal was called, no one appearing for the

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

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L'ASSOMPTION ELECTION CASE.

appellant, counsel for respondent stated that he had been served by appellant's solicitor with a notice of discontinuance, and the Supreme Court ordered that the appeal be struck off the list of appeals.

The notice of discontinuance having been filed in the registrar's office, the registrar certified to the Speaker of the House of Commons that by reason of such discontinuance the decision of the trial judges and their report, were and are left unaffected by the proceedings taken in the Supreme Court. The Speaker subsequently issued a new writ for the Electoral District of L'Assomption.

Appeal discontinued.

Code for respondent.

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*May 16.

SCOTT *v.* THE BANK OF NEW BRUNSWICK.

Appeal—Order for new trial—Interference with.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action was brought to recover from the Bank of New Brunswick the amount of a special deposit by the plaintiff, and the defence was that such amount had been already paid to an agent of the plaintiff who had endorsed plaintiff's name upon and given up the deposit receipt. As against this defence it was contended that no such authority was given to the agent and that plaintiff's name had been forged on the receipt. The jury found the facts in favour of this contention, and plaintiff obtained a verdict which was set aside by

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

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SCOTT
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the full court and a new trial ordered. Plaintiff sought to appeal.

The court held that a new trial having been ordered to try certain questions of fact in the case, such order should not be interfered with by an appellate court.

Palmer Q.C. for appellant.

Barker Q.C. for respondent.

Appeal dismissed with costs.

1892

*June 1, 2.

THE CORPORATION OF THE TOWN OF LÉVIS

v.

THE QUEEN.

Expropriation of land—Value of land taken—Award by Exchequer Court Judge—Appeal.

APPEAL from the decision of the Exchequer Court of Canada assessing the compensation to be paid to the appellants at $6,966 for land taken at Lévis for the use of the Intercolonial Railway.

On appeal the Supreme Court held that it would not interfere with the award of the Judge of the Exchequer Court as to the value of land expropriated for railway purposes, where there is evidence to support his finding and such finding is not clearly erroneous.

Appeal dismissed with costs.

Bethune Q.C. for appellants.

Angers Q.C. for respondent.

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

1892

*June 2.

JOHN IRA FLATT, *et al.*

v.

F. F. FERLAND, *et al.*

Fraudulent conveyance—Action to set aside by a creditor—Amount in controversy—Appeal—Jurisdiction—R.S.C. ch. 135 *s.* 29.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side).

In December, 1889, F. F. Ferland, a trader, sold to Gauthier one of the respondents, certain real estate in Montreal which was mortgaged for $7,000, for $8,000 with a right of *reméré* for one year.

In January, 1890, F. F. Ferland made an assignment and Ira Flatt *et al.* creditors of Ferland in the sum of $1,880 brought an action against Gauthier to have the deed of sale of the property which was valued at over $11,000 set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of $1,000 which he had advanced to F., and the courts below dismissed F. *et al.'s* action. On appeal to the Supreme Court of Canada :

The court held that as the appellants' claim was under $2,000 and that they did not represent Ferland's creditors, the amount in controversy was insufficient to make the case appealable. R. S. C. ch. 135 s. 29.

Appeal quashed with costs.

Brosseau for appellants.

Belcourt for respondents.

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

WILLIAM MILLER AND ROBERT MILLER (PLAINTIFFS)..... } APPELLANTS;

AND

JOHANNA DUGGAN, PATRICK M. DUGGAN, AND CHARLES COGSWELL (DEFENDANTS)..... } RESPONDENTS.

1891
*May 5.

1892
*April 4.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Registry Act—R. S. N. S. 5th ser. c. 84 s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.

By R. S. N. S. 5th ser. c. 84, s. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment.

A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure judgment was registered against the mortgagor and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditor from so levying.

Held,—affirming the judgment of the court below, Strong and Patterson JJ. dissenting, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage which, by the statute, was void as against the registered judgment of the creditor. *Grindley* v. *Blakie* (19 N. S. Rep. 27), approved and followed.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the defendant.

On the 1st day of September, 1878, the respondent, Johanna Duggan, executed to the appellants two mortgages to secure the sum of $20,000, which was then due and owing by her to them. The time for payment

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

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was extended by the mortgage and the rate of interest was reduced.

One of the properties which the said Johanna Duggan had agreed to so mortgage had been conveyed to her late husband, through whom she claimed, by four different deeds. Three of these deeds conveyed each a one undivided sixth interest in that lot of land, and the fourth deed conveyed a one-half interest. The conveyancer who prepared the mortgages had before him one of the deeds which conveyed a one-sixth interest in this lot. By mistake and from inadvertence a one-sixth interest in that lot instead of the entire interest therein was described in and conveyed by the mortgage. Neither Johanna Duggan nor the appellants knew of the mistake until after the mortgage had been foreclosed in 1887.

On the 3rd day of December, 1887, the property was sold under foreclosure, and by sheriff's deed bearing that date the lands and premises covered by the mortgages were conveyed to the appellants. On the 27th September, 1887, the respondent, Charles Cogswell, recovered judgment upon a mortgage bond against Johanna Duggan, and the said judgment was on the same day duly recorded in the office of the registry of deeds at Halifax. On the 3rd of July, 1889, the said Charles Cogswell caused to be issued out of the Supreme Court upon the said judgment a writ of execution, whereby the sheriff was commanded to levy on the real property of the said defendant, Johanna Duggan. Under the said execution and the instructions thereon endorsed the sheriff of the County of Halifax attempted to levy upon five undivided sixth parts of the lot already mentioned. On the 3rd of July, 1889, the said sheriff, by the direction of the said respondent Charles Cogswell, advertised the said five undivided sixth parts for sale at public auction.

Thereupon this action was brought to have the mortgage rectified, and to restrain the said Charles Cogswell from levying upon or selling the said undivided sixth parts.

The Chief Justice, before whom the action was tried, gave judgment in favour of the defendants upon the ground that the defendant, Charles Cogswell, had by the registry of his judgment acquired a legal lien upon these lands at the date of such registry.

The plaintiffs appealed and the appeal was heard before the Chief Justice, Mr. Justice Weatherbe and Mr. Justice Townshend. Mr. Justice Townshend delivered a judgment dismissing the appeal, which was concurred in by the Chief Justice. Mr. Justice Weatherbe delivered a dissenting judgment.

From this judgment of the Supreme Court of Nova Scotia the present appeal is taken.

Borden Q.C. for the appellants referred to *Eyre* v. *McDowell* (1); *Kinderley* v. *Jervis* (2); *Barrow* v. *Barrow* (3); *Murray* v. *Parker* (4); *In re Boulter* (5); Kerr on Frauds (6).

Ross Q.C. for the respondents relied on *Grindley* v. *Blakie* (7) and *Ross* v. *Hunter* (8).

SIR W. J. RITCHIE C.J.—The statute upon which this case depends is chapter 84 of the Revised Statutes of Nova Scotia, 5th series, the material sections of which are the following:—

By section 8 of the said act it is enacted as follows:

All deeds, judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie.

Section 18 of said act enacts as follows:

(1) 9 H. L. Cas. 619.
(2) 22 Beav. 1.
(3) 18 Beav. 529.
(4) 19 Beav. 305.
(5) 4 Ch. D. 241.
(6) 2 ed. p. 491.
(7) 19 N. S. Rep. 27.
(8) 7 Can. S. C. R. 289.

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Ritchie C.J.

Deeds or mortgages of lands, duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such lands.

Section 21 of said act enacts as follows:

A judgment, duly recovered and docketed, shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment.

If a mortgage of these five undivided sixth parts of this land had been actually given, but not registered, can it be contended that the registered judgment would not cut out such unregistered mortgage? That it would is abundantly clear from the express words of chapter 84, section 21, which I have just read. If so, in what better position is a party who has no mortgage but merely an unregistered agreement to give a mortgage, than a party with an actual unregistered mortgage? In this last case Mrs. Duggan was at the time of the registration of this judgment at law the legal owner of these five-sixths; in the former she had parted with both the legal and equitable estate. The statute has declared the deed void against the judgment creditor. Does not the voiding of the deed, as against the judgment creditor, leave the property in the judgment debtor as if the deed had never been made? The difference between the English and Irish statutes and the statute of Nova Scotia is most material, as the former do not declare the deed void as the latter does. I cannot conceive how the court could have held differently from what they did in *Grindley* v. *Blakie* (1) which

(1) 19 N. S. Rep. 27.

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Ritchie C.J.

decision they have followed in this case, unless they read out of the statute the 22nd section of ch. 79 R. S. 4th series, under which the question in that case arose.

It seems to me to be reducing the registry statute to an absurdity to say the legislature could have intended that a mortgage, duly executed but not recorded, should be void as against a judgment creditor whose judgment is duly recorded, and that a mere parol agreement not recorded to give a mortgage should have priority over the duly recorded judgment, thereby giving greater effect to a mere parol unrecorded promise to give a mortgage than to the unrecorded mortgage itself: such a result the legislature could, in my opinion, never have contemplated.

Under these circumstances I think the judgment of the Supreme Court of Nova Scotia quite right and this appeal should be dismissed.

STRONG J.—The facts of this case are few and simple and are not seriously in dispute. The single question which has been argued before this court is one relating to the proper legal construction of the 21st section of the Nova Scotia Registry Act, chapter 84 of the Revised Statutes of Nova Scotia (5th series).

On the 1st of September, 1878, the respondent Johanna Duggan executed in favour of the appellants two mortgages to secure the sum of $20,000, the amount of a debt then due by her to them. These mortgages were so executed in pursuance of an agreement contained in a letter dated the 8th of July, 1878, written by Johanna Duggan to one of the appellants. The original letter has been lost, or destroyed, but it was satisfactorily proved by secondary evidence consisting of an examined copy of the letter. A proper foundation for the reception of this secondary evidence was established

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by proof of searches for the original letter. In this letter Mrs. Duggan wrote as follows:—

> In order to set your mind at rest I will give you a mortgage on my property at Mount Pleasant for £3,000, the property is worth £10,000, and a mortgage on my town property that I occupy for £2,000.

The Mount Pleasant property referred to in the letter and which Mrs. Duggan agreed to mortgage had been conveyed to her late husband, whose devisee she was, by four different purchase deeds. One of these deeds conveyed a one-half undivided interest in the property, and the other three deeds conveyed each a one-sixth undivided interest in the same parcel of land. The conveyancer who prepared the mortgages having these deeds before him by mistake and inadvertence took the description contained in the mortgage deed from one of the conveyances of a one-sixth undivided interest, instead of comprising the whole property in the mortgage as it was agreed by the letter referred to, and as it was the intention of all parties, should have been done. This mistake is clearly proved by indisputable evidence. It is proved not only by the letter referred to, but also by the testimony of Mrs. Duggan herself and by Mr. Justice Ritchie, who at the time of the execution of the mortgages was practising at the bar and as a solicitor, and who acted in the transaction as the solicitor of the appellants; by Mr. Justice Meagher who was also then in practice and who acted in the matter as the solicitor for the mortgagor, Mrs. Duggan; and by Mr. John Doull, who was the agent at Halifax of the appellants, a mercantile firm whose principal business establishment was in England. It is further proved that neither Mrs. Duggan nor the appellants discovered the mistake until some time after the mortgage had been foreclosed in 1887.

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On the 3rd December, 1887, the property was sold according to the practice prevailing in Nova Scotia by the sheriff under a foreclosure degree and was purchased by the appellants, and by the sheriff's deed bearing that date all the mortgagor's right, title and interest in the lands and premises comprised in the mortgages were conveyed by the sheriff to the appellants. This sale did not produce enough to satisfy the mortgages upon which a considerable balance still remains due.

On the 27th September, 1887, the respondent Charles Cogswell recovered a judgment upon a mortgage bond against Johanna Duggan, which judgment was upon the same day duly registered in the office of the registry of deeds at Halifax. On the 3rd of July, 1889, the respondent Cogswell caused a writ of execution to be issued upon his judgment whereby the sheriff was commanded to levy upon the real property of the respondent Johanna Duggan. Under this execution, and pursuant to the instructions of the execution creditor thereon indorsed, the sheriff of Halifax attempted to levy on the five undivided sixth parts of the Mount Pleasant property which had as before mentioned been intended to have been included in the mortgage to the appellants, but which had been inadvertently omitted therefrom by the error of the conveyancer. On the 3rd July, 1889, the sheriff, by the direction of the respondent Charles Cogswell advertised these five undivided sixth parts, upon which he had been directed to levy, for sale under Cogswell's execution. Thereupon, and on the 5th of August, 1889, the present action was brought for the purpose of having the mortgage deed rectified and for an injunction restraining the respondent Cogswell from proceeding to sell under his execution.

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The respondent Cogswell by his answer put the appellants to proof of their case, and pleaded the Statute of Frauds.

The respondent Johanna Duggan, and the respondent Patrick Duggan who claimed as her assignee under a deed of assignment for the benefit of creditors, did not dispute the appellants' allegations and set up no defence to the action.

The cause was tried before the Chief Justice who gave judgment dismissing the action.

From this judgment the plaintiffs appealed to the Supreme Court of Nova Scotia in banc. This appeal was dismissed, a majority of the court, composed of the Chief Justice and Mr. Justice Townshend, giving judgment for the respondent, whilst the third judge, Mr. Justice Weatherbe, was of opinion that the plaintiffs were entitled to relief, and therefore dissented from the judgment of the court.

From this judgment of the Supreme Court of Nova Scotia the present appeal has been taken.

There can be no doubt that as between the appellants and Johanna Duggan, the mortgagor, the appellants would have been entitled to the relief prayed; the proof of the mistake did not depend on mere oral evidence but was clearly established by the informal agreement to give the mortgage contained in the letter of the 8th of July, 1878, written by Mrs. Duggan to the appellants, which was supplemented by the oral evidence of Mrs. Duggan, and also by that of Mr. Justice Ritchie, Mr. Justice Meagher and Mr. Doull, showing how the mistake occurred. The contention of the respondent Cogswell is that the appellants are not entitled to enforce this equity against him, claiming as he does as an execution creditor under an execution issued upon a judgment, which had been duly registered pursuant to the 21st section of chapter 84 Revised

Statutes of Nova Scotia (5th series). In other words that this equity, even though it may have been an equity clearly enforceable against Mrs. Duggan, was cut out and annulled by the force of the registry law.

The statutory enactments material to be considered and upon which the decision of the appeal must depend are the following. Section 21 of the Revised Statutes chapter 84, (5th series) enacts that:—

A judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed from and after the registry thereof in the county or district wherein the lands are situate as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment.

Section 1 of chapter 124 of the same series, entitled "of the sale of lands under execution" provides that:

Any judgment recovered in the Supreme or County Courts, any final decree of the Supreme Court, in any matter or suit requiring payment of money by either party, shall bind the real estate of the debtor from the time said judgment or decree shall be recorded in the books of registry for the county or district wherein such real estate is situate, and the release from a judgment or decree of part of any lands or hereditaments charged therewith, shall not affect the validity of the judgment or decree as to the lands or hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of all persons interested in the lands, hereditaments or property remaining unreleased, and not concurring in or confirming the release, provided that no lands shall be levied upon until one year after the registry of the judgment or decree as aforesaid.

Section 6 of the same act is as follows:—

A judgment recorded shall bind the interest of any party or corporation benefically interested in lands held in trust for him or for said corporation, and the same may be taken in execution for the payment of his debts, or the debts of said corporation, in the same manner as if the said party or corporation were seized or possessed of such lands.

Section 12 provides for the sale by the sheriff of lands seized under execution, and section 13 requires

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the sheriff first to sell such portion of the lands seized as the execution creditor may require him to sell. Section 14 of the same act enacts that :

> The sheriff shall deliver to the purchaser, or his agent or nominee, a deed of such lands, which shall be sufficient to convey to the purchaser all the interest of the execution debtor in the lands therein described, whether situate in his bailiwick or in an adjacent county, as hereinafter mentioned, subject to prior incumbrances.

The court below have held that the appellants' equity to have their mortgage reformed as claimed in the action so as to make it comprise the whole of the Mount Pleasant property which Johanna Duggan agreed to mortgage to them instead of a mere undivided one sixth part was cut out and avoided by the registry of the respondent's judgment by force of that part of section 21 of chapter 84 which says that " deeds or mortgages of such lands duly executed but not registered shall be void against the judgment creditor who shall first render his judgment."

In so deciding the Supreme Court of Nova Scotia followed its previous decision in the case of *Grindley* v. *Blakie* (1), in which case Mr. Justice Weatherbe also dissented from the judgment of the court. In an unreported case of *Miller* v. *McKeen* the same question arose. That case was heard before Sir John Thompson, then a judge of the Supreme Court of Nova Scotia. In this case of *Miller* v. *McKeen* the facts were as follow :

Lands purchased with partnership monies and for partnership purposes had been conveyed by a deed made to one partner only. Judgment was afterwards recovered against him but not against the other partner. The partnership was dissolved and was wound up in a suit brought for that purpose. It was contended that the entire interest in these lands was bound by the

(1) 19 N. S. Rep. 27.

registration of the judgment, and that the individual creditors of the judgment debtor were entitled to the entire proceeds of those lands which had been sold under an order of the court, all persons interested being parties to the suit. Mr. Justice Thompson in giving judgment used the following language :

Finally, I have to deal with the contention that the attachment and judgment creditors are entitled to liens on all lands standing in the name of George McKeen, irrespective of the rights of plaintiff, or of the partnership creditors, by virtue of sec. 22 of ch. 79 R. S., 4th series, "Of the registry of deeds and encumbrances affecting lands." That section reads : "A judgment duly recovered and docketed shall bind the lands of the party against whom judgment shall have passed, from and after the registry thereof * * * as effectually as a mortgage," &c., &c. My reading of this section is that the judgment creditor can only take the interest which the judgment debtor had. The lands which the judgment binds are lands of and belonging to the judgment debtor, and the judgment is to bind as effectually as a mortgage which the debtor might have a right to make. I cannot treat the judgment as being as effectual as a mortgage made in fraudulent disregard of the rights of others in the lands, and taken by a mortgagee without notice. I cannot suppose that the legislature meant to take away the rights of those who are not parties to the judgment or to confer on the creditor, by the involuntary lien, a larger right than he could get by any voluntary lien which the debtor could lawfully give.

I am of opinion that the appeal should be allowed, for reasons the same as those which are given in the judgments of Mr. Justice Weatherbe in the present case and in *Grindley* v. *Blakie*, and by Mr. Justice Thompson in *Miller* v. *McKeen*.

It has always been considered that a judgment creditor stands in a different and less advantageous position than a purchaser acquiring title without notice of the prior equitable interest of a third party. In England judgments were originally not a specific lien on the lands of the debtor at all, but bound them for the purpose of an elegit under the Statute of Westminster. Subsequently under the statute of 4 & 5 W. & M. ch.

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20, it was required in order to have even this effect of binding lands as regards subsequent purchasers that the judgment should be docketed. Whilst this was the state of the law it was held that the elegit creditor could only take subject to the outstanding equities of third persons which had been acquired anterior to the docketing of the judgment (1). *In Benham* v. *Keane* (2).

Wood V.C. says:—

> The first thing to be considered is the exact extent of the rights of a judgment creditor irrespective of the Act 1 and 2 Vic., ch. 110. In order to give him any right against land, the primary requisite is that the land sought to be affected should be the property of the debtor, and accordingly one of the earliest questions which arose was, what was the position of a judgment creditor with respect to lands which the debtor had alienated by a contract effectual in equity, but not perfected at law? As to this it was settled by an early decision, *Finch* v. *The Earl of Winchelsea* (1), that the judgment creditor takes nothing. The court will restrain proceedings against the legal ownership at the suit of the person who is entitled in equity under the contract. In the view of a court of equity the judgment creditor has no interest in the land so situated.

Then by the 13th section of 1 & 2 Vic., c. 110 (English) a statute now repealed, a judgment creditor in England was for the first time placed in a position to acquire a specific lien by registering his judgment in the Court of Common Pleas. The statute provided that such registration should operate as a charge on all lands over which the judgment debtor should at the time of entering up judgment or afterwards have any disposing power which he might without the consent of any other person exercise for his own benefit. In cases which arose under this enactment it was contended that this provision gave a judgment creditor who had registered his judgment priority over equitable interests and charges, created or arising prior to

(1) *Finch* v. *Earl of Winchelsea*, 4 Price 99.
1 P. Wm. 277; *Prior* v. *Penpraze*, (2) 1 J. & H. 685.

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his judgment, of which he had no notice. In the case of *Whitworth* v. *Gaugain* (1), heard before Sir James Wigram, V.C., and subsequently before Lord Cottenham on appeal, this question of priority arose between an equitable mortgagee by deposit of title deeds and a subsequent registered judgment creditor. It was held, however, by both those eminent judges, that under the statute, as before, the charge of the judgment creditor was to be subordinated to all equities to which the land was subject in the hands of the judgment debtor at the date of the registration, and that the absence of notice was immaterial. In *Beaven* v. *Lord Oxford* (2), the decision in *Whitworth* v. *Gaugain* was approved and followed. *Kinderley* v. *Jervis* (3) was a decision to the same effect, and in *Benham* v. *Keane* (4) already referred to *Whitworth* v. *Gaugain* (1) was recognized as correctly expounding the law. In *Eyre* v. *McDowell* (5) an Irish appeal in the House of Lords heard before Lords Cranworth and Wensleydale, a case which is, in my opinion, a governing authority on the present question, and to which I shall have occasion to refer later on, this general principle that a judgment creditor is entitled to avail himself for the purpose of satisfying his debt of just what his debtor owns, subject to all equitable claims of third persons and no more, was recognized and acted on, and, indeed, formed the foundation of the judgment, and in this case both Lord Cranworth and Lord Wensleydale point out in strong language the fairness and justice of such a state of the law, and the grossly inequitable consequences which would follow if a judgment creditor were to be put on the same footing as a purchaser. Further this principle

(1) 3 Hare 416; in appeal 1 Ph. 728.
(2) 6 DeG. M. & G. 507.
(3) 22 Beav. 1.
(4) 1 J. & H. 685; and see S. C. in appeal 3 De G. F. & J. 318.
(5) 9 H. L. Cas. 619.

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has not been confined in its applications to questions of priority arising between judgment creditors and prior equitable charge holders and claimants under elegits or registered judgments, but when lands are sold under writs of *fieri facias*, as is the practice in all the provinces of the Dominion in which English law prevails (1) it has been held by the Privy Council that the sheriff can only sell and give a title to a purchaser subject to such prior equities as the land was bound by in the hands of the debtor. *Wickham* v. *The New Brunswick Railway Co.* (2). Again in the case of sales under execution of chattel interest the law is the same. *Langton* v. *Horton* (3). As regards the course of decision in the Province of Ontario the same doctrine has always been acted upon. As far back as 1853 in a case of *McMaster* v. *Phipps* (4) arising upon a statute which was a verbatim reproduction of the English act 1 & 2 Vic., c. 110, sec. 13, and which much resembled the present in the circumstances which gave rise to it, two of three judges before whom the cause was heard adopted this ground as one of the bases of their decision. It is true that in *Watts* v. *Porter* (5) in which the question for decision was as to the relative priorities of an equitable chargee of stock and a judgment creditor, the Court of Queen's Bench decided the other way, but Mr. Justice Erle dissented, founding his judgment on *Whitworth* v. *Gaugain* (6) and other kindred cases, and this dissenting judgment is said in *Beavan* v. *Lord Oxford* (7) to have proceeded on a correct view of the law. These authorities then are quite conclusive as to what the state of the law was when the enactment now embodied in sec. 21 of ch. 84 was passed. The founda-

(1) See Imp. Act 5 G. 2, c. 7.
(2) L. R. 1 P. C. 64.
(3) 1 Hare 560.
(4) 5 Gr. 253.
(5) 3 El. & Bl. 758.
(6) 3 Hare 416 ; 1 Ph. 728.
(7) 6 DeG. M. & G. 507.

tion of the principle on which the rule of law established by these cases proceeds is most forcibly pointed out in the cases before quoted, and is one which must commend itself to any one who reflects a little on the different positions of a purchaser or incumbrancer for valuable consideration and a judgment creditor. The first has contracted for a particular interest in the land; a judgment creditor originally placed his reliance on the personal credit and solvency of his debtor and his right against the land is not founded on any contract but is only part of his remedy. It may here be said that even as regards purchasers, those who have contracted not for the land itself but only for such right, title and interest as their grantor might have, are not, under the registry laws, entitled to priority over purchasers claiming under antecedent unregistered deeds. For this proposition that where a deed purports to convey only the interest of the grantor, in other words is a mere quit claim deed, registration of it will not cut out a prior unregistered deed and postpone the grantee claiming under it many decided cases, of which I refer to a few, may be cited. *Goff* v. *Lister* (1); *Bethune* v. *Caulcutt* (2); *Graham* v. *Chalmers* (3); *Rice* v. *O'Connor* (4); *Farrow* v. *Rees* (5); and *Jones* v. *Williams* (6) are all authorities to this effect. One of the points decided in *Benham* v. *Keane* (7) already referred to, well illustrates the position of a judgment creditor as distinguished from a purchaser; in that case one of the questions which arose was a contest for priority between two judgment creditors who had registered their judgments under the Middlesex Registry Act. The creditor who was second in order of date on the registry claimed priority over

(1) 13 Gr. 406 and on Re. Hg. 14 Grant 451.
(2) 1 Grant 81.
(3) 7 Grant 597.
(4) 12 Ir. Chy. 424.
(5) 4 Beav. 18.
(6) 24 Beav. 47.
(7) 1 J. & H. 685.

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the first registered judgment on the ground that the creditor under the latter had notice of his judgment. It was held that, as regards a judgment creditor, notice to him of a prior judgment or conveyance was immaterial. It must therefore follow, if the judgment under appeal is to be maintained, that a registered judgment creditor will be actually in a better position than a purchaser or incumbrancer for value, inasmuch as the latter would undoubtedly be postponed if it were proved that he had had notice of a prior mortgage or conveyance.

Such being the state of the law prior to the enactment we have to construe, and the rational ground on which the decisions establishing it proceeded, it is proper in proceeding to construe the enactment under which the respondent claims to have priority over the appellants' equity to consider what was the object the legislature had in view in providing, as it has done by section 21 of chapter 84, for the registration of judgments. It must be apparent that the only objects which, consistently with the general policy of the registry laws and with the rights of purchasers as distinguished from those of judgment creditors, the legislature could have had in view was the protection and security of purchasers under execution sales by enabling them to ascertain from the registry what incumbrances by way of judgment the lands were charged with, and possibly also the protection of judgment creditors not against prior purchasers, but against fraudulent conveyances intervening subsequent to their judgments and before execution. It never could have been intended to put judgment creditors on the same footing as purchasers unless we are to ascribe to the legislature the design of arbitrarily doing away with the distinction which, as justice and reason require, should always be made between a purchaser

or mortgagee who contracts to get the land itself and a mere creditor who allows the debtor to become liable to him, trusting to his personal credit, or in other words to what the debtor may voluntarily pay him, or to what, if forced to have recourse to his legal remedy, he may be able to get out of the debtor's exigible property. That I am fully justified in making these observations I shall show hereafter by some quotations from the opinion of Lord Cranworth in the case of *Eyre* v. *McDowell* (1).

In this case of *Eyre* v. *McDowell* (1), which arose under the Irish Registry Laws, a judgment creditor who had registered his judgment claimed priority over a prior unregistered charge created by an instrument which was clearly within the registry laws and ought as against a purchaser to have been registered. This claim of priority was based on the statute 13 & 14 Vic. ch. 29 (Ireland) ss. 6 and 7.

The material effect of section 6, as stated in the opinions of Lords Cranworth and Wensleydale in *Eyre* v. *McDowell* (1) from which I transcribe it, was as follows:

> Where any judgment shall be entered up or decree or order shall be made after the passing of the act and the creditor shall know or believe that the debtor is seized or possessed of any lands, or has a disposing power over any lands, it shall be lawful for him to make and file in the court in which the judgment has been entered up, or the decree or order has been made, an affidavit stating among other things the name of himself and the name of his judgment debtor, the amount of the sum recovered and the particulars of the lands of which the debtor is seized or possessed and to register such affidavit in the office for the registry of deeds by depositing there an office copy of the affidavit which shall be entered in the book and indexes of the office as if it were the memorial of a deed.

And the clause goes on to provide that for the purpose of such entries the judgment creditor shall be deemed the grantee, the judgment debtor the grantor and the amount of the debt the consideration. By section 7 it

(1) 9 H. L. Cas. 619.

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was enacted that the registration shall operate to transfer to and vest in the creditor "all the lands mentioned in the affidavit for all the estate which the debtor had therein, subject, however, to redemption on the payment of the amount of the judgment debt, and that the creditor shall in respect of such lands have all such rights as if an effectual conveyance to him of all such estate and interest had been made, executed and registered at the time of registering the affidavit." Section 5 of the Irish Registry Act (1) is in the judgments in *Eyre* v. *McDowell* (2) epitomised as follows:—

> Deeds unregistered shall be deemed to be fraudulent and void not only against registered deeds, but also as against creditors by judgment claiming against the party so registering.

This section 5 of the Irish Act is rather clumsily expressed and a hasty and superficial reading of it might convey the impression that unregistered conveyances were thereby avoided as against judgment creditors of the grantor, as it is contended here section 21 of chap. 84 has avoided them, but on an attentive consideration of its terms it will appear clearly enough that what was meant was only that which Lord Cranworth, in the summary of it which he gave in his judgment, and which I have just extracted, says was its effect, namely, that an unregistered deed should be void not only against a grantee claiming under a subsequent registered conveyance but also against the judgment creditors of such grantee. The words "lands contained or expressed in such memorial registered as aforesaid," show this to be the proper construction, the only memorial registered being that of the subsequent deed. At all events the very fact of the controversy which the House of Lords was called upon to decide in *Eyre* v. *McDowell* (2) having arisen implies that this was the proper construction of the 5th section of the

(1) 6 Anne ch. 2.

(2) 9 H. L. Cas. 619.

6th Anne, since there would otherwise have been no necessity for the judgment creditor to resort to the later statute in order to support his claim to priority.

Then under section 7 of 13 & 14 Vic. cap. 29, the registry of the affidavit operating to transfer to and vest in the judgment creditor all the lands mentioned in the affidavit registered for all the estate which the debtor had therein, and it being declared thereby that the judgment creditor should have in respect of such lands the same rights as if an effectual conveyance to him of all such estate and interest had been made, executed and registered at the time of registering the affidavit, this enactment, taken in conjunction with the prior statute, (the General Registry Act, of the 6th Anne cap. 2, sec. 5,) by which the rights of a purchaser registering a conveyance subsequent in date to a prior unregistered conveyance by the same grantor are declared to be that he shall have priority over such antecedent unregistered deed, and that it shall be avoided in his favour, we have presented by these Irish enactments, the construction of which was in question in *Eyre* v. *McDowell* (1), exactly the same question which is presented in the present case in which we are called on to construe the Nova Scotia Act, cap. 84, sec. 21. The two enactments are equivalent in their terms unless, indeed, it may be said that the Irish statutes were stronger in favour of the contention of the judgment creditor than the Nova Scotia statute since the former clearly pointed out in the 5th section of the earlier act that the unregistered deeds to be avoided were deeds prior in date, whilst the Nova Scotia act leaves it doubtful whether by the words, "deeds or mortgages duly executed but not registered" prior or only subsequent deeds and mortgages were intended to be referred to.

(1) 9. H. L. Cas. 619.

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In *Eyre* v. *McDowell* (1) the Irish Court of Appeals had held the judgment creditor entitled to priority, thus overruling a prior decision of the same court in a former case of *McAuley* v. *Clarendon* (2).

Now I would call attention to a general observation with which Lord Cranworth prefaces his speech in *Eyre* v. *McDowell* (1); he says:

> It it hardly possible to suppose that the legislature could have intended so to alter the relative positions of debtor and creditor as to enable the latter to satisfy himself out of property in which the former had no disposing power. If for any reason such a change had been contemplated we should surely have had some recital indicating an intention to make such an unusual deviation from principle.

Again in *McAuley* v. *Clarendon* (2), in the Irish Court of Appeals, Lord Justice Blackburn, whose judgment was in all respects approved by the House of Lords, had expressed the same opinion in even more forcible language. The Lord Justice there, after adverting to the principle that the judgment creditor was in justice and equity and according to the authorities prior to the statute entitled to make available for his satisfaction only the beneficial interests of his debtor, thus proceeds:

> This is all plain according to the settled principles of equity and being so it is sought to be subverted by an Act of Parliament under whose provisions the judgment is registered. If such were the effects of that act I have no hesitation in saying that never was there any enactment so essentially unjust or subversive of the established rules of law and the rights of parties.

And we find Lord Wensleydale, of whom it may be said (as many of his decisions indicate) that no judge in modern times was more inclined to a strict and literal construction of acts of parliament, calling indeed the rule of strict construction, "the golden rule," joining in these denunciations of a construction which would put a judgment creditor on an equal footing

(1) 9 H. L. Cas. 619. (2) Dru. Cases Temp. Nap. 442.

with a purchaser. The actual *ratio decidendi* in *Eyre* v. *McDowell* (1), is thus tersely put by Lord Cranworth:—

> These enactments [referring to sections 5 and 8 of the 6 Anne ch. 2 (2)] will be found not to affect the question in dispute. By the joint operation of this act (3) and the act 13 & 14 Vic. ch. 29 the registered affidavit gives to the judgment creditor priority over all prior unregistered deeds. Be it so. It gives him, however, only the same priority as he would have had if the debtor had executed to him a mortgage of the lands enumerated in the affidavit, *i.e.*, a mortgage of such interest as was enjoyed by the debtor beneficially, such interest as might have been taken in execution; the debtors' interest in the lands after satisfying the equitable claims of the unregistered mortgage. The registration of the affidavit gives to the respondent a right against all persons claiming subsequently to the registration; and by the effect of the 8th section against all voluntary settlements executed subsequently to the date of the judgment or order.

I am of opinion that this decision exactly applies to the enactment which is involved in the present case. In the first place what is it that section 21 (4) says shall be bound by the judgment when registered? It is "the lands of the party against whom the judgment shall have passed." This, interpreted according to the general law and in the light of the numerous judicial decisions before referred to, can only mean the beneficial interest of the debtor in those lands subject to all outstanding interests, charges or liens whether constituted by instruments susceptible of registration or not. This would sufficiently appear from the clause itself construed in the way I have just mentioned, but it is further borne out by the context of the Revised Statutes contained in other chapters *in pari materiâ*. For what purpose are the lands to be so bound? Clearly for the purpose of the execution to be issued

(1) 9 H.L. Cas. 619.

(2) The N. S. Registry Act contains no section similar to section 8 of the Irish act. Mr. Justice Townshend says section 18 of the N. S. Act is the same, but this is a mistake, section 18 is identical with section 5 of the Irish act.

(3) 6 Anne ch. 2.

(4) Rev. Stat. N.S. 5th ser. ch. 84.

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on the judgment. Lands in Nova Scotia are not extended under a writ of elegit but for the purposes of satisfying a judgment are sold by the sheriff under a writ of *fieri facias* pursuant to a statute which applies to all the colonies (1). Then in chap. 124 of the same series (5th) of the revised statutes which is entitled "of the sale of lands under execution," we find contained in sections 1 and 6 (which I have set out *in extenso* in the early part of this judgment) provisions material to the present question. Section 1 declares that the lands to be bound shall be the real estate of the debtor, and section 6 shows that what is to be bound by a registered judgment in the case of lands to which the judgment debtor's title is equitable is his beneficial interest. Then section 14 of the same chapter provides that the sheriff having sold the lands

> shall deliver to the purchaser, or his agent or nominee, a deed of such lands which shall be sufficient to convey to the purchaser all the interest of the execution debtor in the lands therein described.

And section 15 declares that:

> The sheriff's deed shall be presumptive evidence of the execution debtor's title having been thereby conveyed to the purchaser.

Now even without the high authority of the decision in *Eyre* v. *McDowell* (2), and without going beyond the statute book of Nova Scotia, it must surely be apparent from these enactments that there could have been no object in providing that the judgment should bind anything more than the judgment creditor would have had a right to have sold by the sheriff under execution, and what the sheriff may so sell, it is clearly enacted, shall be only the interest of the execution debtor. These enactments seems to me to make the case one much stronger in favour of the appellant than was the case of *Eyre* v. *McDowell* (2).

(1) British Act 5 George 2, cap. 7. (2) 9 H. L. Cas. 619.

If it be said in answer to this that the effect of a mortgage attributed by section 21 to a registered judgment was not merely to bind the lands for the purpose of legal execution, but also to give the creditor a right to equitable execution and therefore the equitable charge might be larger than the legal charge for the purpose of legal execution, a twofold reply may be given to such arguments.

First inasmuch as by section 124 the sheriff can sell equitable interests there would be no necessity to resort to equitable execution, and indeed the very first allegation of a bill in equity for such relief, that the plaintiff could not have execution at law, would, having regard to section 124, be untrue.

Next, if a court of equity should have jurisdiction, and if that jurisdiction were to be invoked for the purpose of having the charge of the judgment raised by a sale of the lands bound by it, the inquiry would still be the same. What lands were bound by that charge? The answer to this question would clearly be that which courts of equity have so often given in such cases, only the debtor's beneficial interest.

It is said, however, that the last paragraph of section 21, "And deeds or mortgages of such lands duly executed but not registered shall be void against the judgment creditor, who shall first register his judgment," enlarges the effect of the former part of the section, and gives the same effect to a recorded judgment as regards prior unregistered deeds and mortgages as is attributed by section 18 to the registration of a purchaser's conveyance. I am clearly of opinion that this construction is inadmissible. As I have already pointed out these words are not so strong as were the conjoined provisions of the two statutes under consideration in *Eyre* v. *McDowell* (1). The words are not "prior deeds and mortgages of such lands," but deeds

(1) 9 H. L. Cas. 619.

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and mortgages generally, which is quite consistent with an intention on the part of the legislature to avoid only subsequent deeds and mortgages, a construction which would have the effect of showing clearly that conveyances or mortgages intermediate between the registry of the judgment and the sale under execution should be void. Without this declaration the provision that the lands should be bound would probably have been sufficient for the purpose, but still the legislature may have deemed it better to give a clear expression to this consequence, which would, as I have said, have probably followed without more by the enactment that the lands should be bound by the registry.

The decided cases and the principles established by those authorities already fully referred to require the adoption of this construction, and, as was held by Mr. Justice Thompson in his judgment in the case of *Miller* v. *McKeene*, I consider it inevitable, even if we should confine ourselves to section 21 alone interpreting it in the light of the general law and the principles of justice, and with a due regard to that which is manifestly the general policy of all registry laws.

There is, however, what I must repeat appears to me a conclusive argument in favour of this view, deducible from the provisions relating to the sale by the sheriff and the restricted effect of his deed to pass only the debtor's beneficial interest.

It is further said, however, that the words "but not registered" in section 21 show that what was meant was to avoid deeds and mortgages executed anterior to the registry of the judgment and preclude the construction I have just indicated restricting these words to instruments which might be executed subsequent to the registry.

I cannot think there is any force in this; at most the restriction to unregistered deeds gives rise to an inference or implication, or I might rather say to speculation, as to the intention of the legislature in thus confining the avoidance to unregistered deeds, but I think this wholly insufficient to overcome the arguments in favour of the construction I adopt, and here again, I say, that the difficulties to be overcome in *Eyre* v. *McDowell* (1) were far greater than any which are created here by this specification of unregistered deeds. The word "prior" is in no sense the correlative of the word "unregistered" so as to require us to supply it, and I can find no warrant, either in authority or principle, for interpolating the words "former" or "prior" or "antecedent" or some equivalent expression before the words deeds or mortgages merely from the use of this word "unregistered" when all reason, justice and authority require me to read the same words as limited in their application to instruments subsequently executed.

I admit that I can assign no rational meaning to a distinction between subsequent deeds which are unregistered and those which might happen to be registered, and that such a distinction appears to me to be purely arbitrary, but this consideration is quite insufficient to authorize a re-modelling of the statute by the introduction of words not expressed in it, and that in the very teeth of what, upon every just and reasonable presumption, we must conclude to have been the intention of the legislature.

For these reasons I come to the same conclusions as those which were arrived at by Mr. Justice Weatherbe in the present case and by the same learned judge in *Grindley* v. *Blakie* (2) and by Mr. Justice Thompson in *Miller* v. *McKeen*.

(1) 9 H. L. Cas. 619.

(2) 19 N. S. Rep. 27.

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It is right that I should notice another argument advanced on behalf of the appellants and state the reason why it does not appear to me to be admissible.

It was said that the appellants' equity to have their mortgage deed reformed by the insertion of the omitted parcels is one not within the registry laws at all, in other words that it was an equity insusceptible of registration, and therefore one which it must be presumed the statute was intended to apply to, and consequently one not liable to be avoided by the registration of a subsequent deed.

I concede that this argument ought to prevail in a case like *Miller* v. *McKeen* where there was a mere equity not arising directly from any written instrument which might have been registered. The authorities on this head are conclusive in a case properly arising within the principle. *Sumpter* v. *Cooper* (1); *Re Burke's Estate* (2); *McMaster* v. *Phipps* (3). But in a case like the present where the letter by which Mrs. Duggan agreed to give the mortgage was a writing which might have been registered, and which, however informal, was in equity equivalent to a mortgage, I cannot agree that such an argument should prevail.

On the whole, on the ground first stated, I am of opinion that the appeal should be allowed with costs and a judgment entered in the Supreme Court of Nova Scotia directing that the appellants' mortgage be reformed as claimed by them.

FOURNIER J.—was of opinion, for the reasons given by the Chief Justice, that the appeal should be dismissed.

TASCHEREAU J.—concurred in the appeal being dismissed.

(1) 2 B. & Ad. 223.

(2) 9 L. R. (Ir. Eq.) 24.

(3) 5 Grant 253.

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PATTERSON J.—Mrs. Duggan owed money to the appellant. On the 8th of July, 1878, she wrote to him proposing to give him a mortgage on her property at Mount Pleasant for £3,000 and a mortgage on other property for £2,000. The mortgage was made on the 1st of September, 1878, but although the solicitor who prepared it understood that all Mrs. Duggan's property was to be covered, a mistake was made in describing a part of the Mount Pleasant property, by which it happened that one undivided sixth part of one parcel, in place of the entirety, was conveyed. It need scarcely be said that although the mortgagee failed to get by virtue of the deed the legal estate in the omitted five-sixths of the piece of land he became equitably entitled to the whole, and that as to that parcel, as well as to the other mortgaged lands, the title of Mrs. Duggan was in equity reduced to the equity of redemption.

That was the state of the affair on the 27th of September, 1887, when the respondent, Dr. Cogswell, recovered a judgment against Mrs. Duggan and registered it. The mortgage had, of course, been registered.

Under his judgment Dr. Cogswell was undeniably entitled to take in execution, by whatever process was appropriate, all the interest of Mrs. Duggan in the Mount Pleasant property and the other mortgaged property—that is to say her equity of redemption, for she had not at that date been foreclosed. But he insists that the effect of the registry law is to enable him to take also the legal estate which, nine years before the recovery of his judgment, had been in equity charged with the debt but had been by an oversight omitted from the mortgage deed.

For this he relies on a clause in the Registry Act (1) which says that:—

(1) R. S. N. S. 5th ser. ch. 84 s. 21.

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A judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed, from and after registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment.

That clause contains two enactments; let us look at them separately.

If Dr. Cogswell's judgment had happened to be against Mr. Miller instead of Mrs. Duggan he could have enforced it against Mr. Miller's interest in the Mount Pleasant property, which would have appeared, by proof of what has now been proved, to be the whole value of the property subject nominally to an equity of redemption, but only nominally because the property was not worth the amount of the mortgage. The lands of Mrs. Duggan included only this nominal equity of redemption and that was all that, as against her, the first part of the clause had to operate on.

Then we pass to the second enactment. "Deeds and mortgages of such lands—" What lands? "The lands of the party against whom the judgment shall have passed"—the lands that are bound as effectually as if, at the time of the registration of the judgment, the judgment debtor had made a mortgage of them. Not a mortgage to a purchaser for value without notice of the equity of Mr. Miller; nothing like that is said or implied; but a mortgage of the interest the mortgagor had power to convey, and which, if she had made a mortgage to the debtor, we must assume to be all that she would have professed to convey. "Deeds and mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment." That is not a very intelligible sentence even at first sight, and when we come to see, as

we have seen, what is meant by "such lands," the perspicuity is not thereby increased. We cannot hold the meaning to be that a man who has in good faith, and violating no rule of law or morals, bought a piece of land is to have his title divested or charged with another man's debt merely because the judgment creditor happens to get to the registry office before him without reading into the enactment something that is not found there. We need not complicate the question of construction by any of the considerations of equity which affect the titles of Mrs. Duggan or Mr. Miller. The contention is that an out and out sale of land leaves that land liable, if the deed is not registered, to be bound as the land of the person who has ceased to own it. It is impossible so to read the first enactment of the clause, and therefore that land cannot be "such land" under the second enactment. The necessity for finding a meaning for everything in an act of parliament is not absolute. The general rule is to find a meaning if possible, and further, that when one of two meanings would lead to an injustice which the legislature would seem not to have intended we should choose the other. An illustration of this rule is found in the case of *Ex parte Wicks* (1), where the Chief Judge in Bankruptcy adopted one meaning, a literal one, of a statutory provision, and the Court of Appeal adopted a different one, Brett L.J., observing "I think we have no right to reduce an act of parliament to a wicked absurdity."

In the court below the effect of the enactment under consideration has been discussed from opposite points of view by Mr. Justice Townshend and Mr. Justice Weatherbe. I agree with the latter learned judge in the result of his reasoning and probably in the reasoning itself, though I am not quite sure that I would put it in precisely the same way. We must

(1) 17 Ch. D. 73.

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bear in mind that we are dealing not with a bankruptcy law, under which transactions are sometimes avoided for reasons of policy connected with the equal distribution of a bankrupt estate among the creditors, but with a registry law the object of which is to afford to persons dealing with lands information as to the state of the title to the particular soil they are purchasing or taking as security. A judgment creditor is not a purchaser and he gets security, by virtue of this statute and of another which regulates the sale of lands under execution, upon the lands of his debtor, not upon any land or any interest in land that his debtor has parted with before the registration of the judgment. At least that is all he gets unless this second enactment gives him more. An earlier section of the registry act declares that "deeds or mortgages of lands duly executed but not registered shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed." It is to be noted that the effect now claimed for the registration of the judgment might have been appropriately provided for by inserting two or three words in this section, making the unregistered instrument void against any *judgment creditor*, or subsequent purchaser or mortgagee who should register his *judgment* or deed. That, however, was not said nor, as I should infer, was it intended. What was done was to frame this second enactment of the clause we are considering in terms generally similar to those of the earlier section, but with the important difference that it relates expressly to deeds of "such lands," or of the lands just declared to be bound by the judgment, viz., the lands that belong to the judgment debtor. Now what does it say of deeds of those lands which were still the property of the judgment debtor though liable to be taken in execution? It explains what is

meant by being bound by the judgment. The owner may deal with them but they may be followed by the execution. Deeds of them shall be void against the creditor who *first*, that is before the sale of them, registered his judgment. The obvious argument in reply to this is that *first* here does not mean before the conveyance but before the registration of it? If that is meant it is not so expressed as to exclude the other construction. "Shall first register" is, both in this and in the earlier clause to which I have adverted, a very loose expression. We understand the earlier section, in spite of its looseness, to mean that a subsequent registered deed is to prevail against a prior unregistered one, because we are aided by the policy of the registry law. The known object of registration is carried out by that understanding. But when it is sought to charge one man's property with the debt of another and to make it liable to be taken in execution for that debt, no principle of bankruptcy law intervening, we ought not so to construe the statute unless compelled to do so by the clear force of its language.

It will be said that by referring the word "first" to the making of a deed and not to the registration of it we silence the words "but not registered." Perhaps we do; but if those words are to be heard they should give no uncertain sound. If we let them speak, and read the enactment as declaring that a judgment shall prevail against an unregistered deed of land provided the judgment was registered before the deed was made, we give effect to every word of the sentence. An unexpected result that might follow would be that by registration before the land was seized in execution the deed would regain its priority, because a judgment prevails only by means of the execution, and to be void against a judgment practically means to be voidable by seizure of the land in execution. I do not suppose

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the legislature meant to say that the deed should be void against the execution only in the event of its being allowed to remain unregistered until the land was seized, and I do not advocate the adoption of that rendering as giving the true effect of the statute. I merely point to it as more consistent with the language as we find it, and as a construction that would do less injustice than the other reading which requires us to supply by intendment what the enactment falls short of expressing. I am inclined to think that the confusion may have arisen from following too literally the wording of the earlier section by using the words "duly executed but not registered," which, unprecise as they are in the one clause, seem out of place in the other.

On these grounds, and for the reasons fully given in the judgment of Mr. Justice Weatherbe, I think we ought to adopt his conclusions rather than the view acted on by the learned Chief Justice at the trial and ably supported in the judgment of Mr. Justice Townshend, and should allow the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Borden, Ritchie, Parker & Chisholm.*

Solicitors for respondents: *Gray & MacDonald.*

JULES DUBOIS *et al.* (DEFENDANTS).....APPELLANTS; 1892

AND *May 31.

LA CORPORATION DU VILLAGE DE STE. ROSE (PLAINTIFF)..... RESPONDENT.

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

Appeal—Road repair—Municipal by-law—Validity of—Right in future—Supreme and Exchequer Courts Acts, sec. 29 (*b*).

In an action brought by the respondent corporation for the recovery of the sum of $262.14 paid out by it for macadam work on a piece of road fronting the appellants' lands, the work of macadamising the said road and keeping it in repair being imposed by a by-law of the municipal council of the respondent, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the appellants' plea:

Held, that the appellants' obligation to keep the road in repair under the by-law not being "future rights" within the meaning of section 29 (*b*), the case was not appealable. *County of Verchères* v. *Village of Varennes* (19 Can. S. C. R. 365) followed and *Reburn* v. *Ste. Anne* (15 Can. S. C. R. 92) distinguished. Gwynne J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) rendered on the 26th December, 1891, affirming a judgment of the Superior Court for the district of Montreal, by which the appellants were condemned to pay to the respondent the sum of $262.14, for money paid out by respondent for the performance of macadam work imposed upon the appellants by a municipal by-law passed by the council of the respondent.

On appeal to the Supreme Court the respondent's counsel moved to quash the appeal on the ground of want of jurisdiction.

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Geoffrion Q.C. for respondent cited and relied on *Verchères* v. *Varennes* (1).

Fortin for appellants *contra* cited *Reburn* v. *Ste. Anne* (2) and contended that in the case of *Verchères* v. *Varennes* (1) the question was as to the validity of a *procès-verbal*, whilst in the present case as in the case of *Reburn* v. *Ste. Anne* (2) the validity of the municipal by-law was denied.

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

TASCHEREAU J.—This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court for the district of Montreal by which the appellants were condemned to pay to the respondent the sum of $262.14. The respondent moves to quash for want of jurisdiction.

The action was for the recovery of said sum of $262.-14, being for money paid out by respondent for the performance of macadam work imposed upon the appellants by a municipal by-law passed by the council of the respondent. To this action the appellants pleaded the nullity of the said by-law.

This case is clearly not appealable to this court. The appellants' right in future as to the obligation to keep this road in repair may be bound by the judgment of the Court of Queen's Bench, but these rights do not fall under the denomination of any of those mentioned in section 29 of the Supreme Court Act.

The appellant attempted to base his claim to an appeal upon the authority of the case of *Reburn* v. *Ste. Anne* (2), but that case, as we intimated at the argu-

(1) 19 Can. S. C. R. 365. (2) 15 Can. S. C. R. 92.

ment, is no authority on the question of jurisdiction, two of the judges being of opinion that the appeal in that case did not lie, and His Lordship the Chief Justice assuming jurisdiction without deciding the point, as on the merits he was of opinion that the appeal should be dismissed. *Verchères* v. *Varennes* (1), and *Wineberg* v. *Hampson* (2), determined since *Reburn* v. *Ste. Anne* (3), are authorities precluding us from entertaining this appeal.

GWYNNE J.—To an action for debt upon a by-law it is, in my opinion, competent for a defendant to defeat the action by showing the by-law to be *ultra vires* and void, and so that the debt never existed in law. The by-law in question affects to impose upon the lands of the appellants the obligation of bearing the expense of macadamising and maintaining macadamised during all time a piece of road extending about 20 arpents along the extent of his lands; this obligation, if the by-law should be maintained, would operate as a burthen upon the land during all time, and no one can say that the pecuniary damages resulting from the imposition of such a burthen on the appellants' land does not amount to the sum of two thousand dollars, so as to deprive the appellants of their right to question upon this appeal the validity of the by-law which affects to impose such a burthen on their lands, and of the judgment rendered upon the basis of the validity of the by-law. The matter in controversy in the present action is not merely the sum for which, as the cost of constructing but a small portion of the road, the judgment has been recovered, but the validity of the by-law upon which alone that judgment can be sustained and which affects to impose so serious a

(1) 19 Can. S.C.R. 365. (2) 19 Can. S.C.R. 369.
(3) 15 Can. S.C.R. 92.

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burthen for all time on the appellants' land. In short the controversy is whether the title to their land can be so injuriously affected. In my opinion this is a matter which is appealable in the present action notwithstanding the small amount for which the judgment has been rendered, and which is but a fraction of the burthen which the by-law affects to impose; and that the case is appealable is, in my opinion, concluded by the judgment of this court in *Reburn* v. *Ste. Anne du Bout de l'Isle* (1).

Appeal quashed with costs.

Solicitors for appellants: *Bastien & Fortin.*

Solicitors for respondent: *Ouimet & Emard.*

(1) 15 Can. S.C.R. 92.

DAME M. J. BLANCHE RODIER *et vir* (PLAINTIFFS) ..... } APPELLANTS;

AND

DAME ANGÉLIQUE LAPIERRE, *ès qual.*, (DEFENDANT.)..... } RESPONDENT.

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*May 31.

*June 15.

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

Appeal—Monthly allowance of $200*—Amount in controversy—Annual rent—R. S. C. ch.* 139 *sec.* 29 *(b)—Jurisdiction.*

B. R. claimed, under the will of Hon. C. S. Rodier and an act of the legislature of the province of Quebec (54 Vic. ch. 96), from A. L. testamentary executrix of the estate the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada, and on an appeal to the Supreme Court it was

Held, that the amount in controversy being only $200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in section 29 (*b*) of the Supreme and Exchequer Courts Acts, the case was not appealable.

Annual rents in subsec. (*b*) of sec. 29 of R. S. C. ch. 135 mean "ground rents" (*rentes foncières*) and not an annuity or any other like charges or obligations.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court for Lower Canada.

The appellant by her action alleged that she was entitled to receive $100 monthly out of the revenues of the estate of her father the late Honourable C. S. Rodier under his will, which monthly allowance had been increased to $300 by an act of the legislature of

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

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the province of Quebec (54 Vic. ch. 16) and claimed from the respondent as testamentary executrix the additional $200 for the month of February, 1891.

The respondent pleaded that the act of the legislature, 54 Victoria chap. 96, imposed no obligation on her, but simply an authorization to pay whenever she might deem proper to do so.

The Superior Court for the province of Quebec, district of Montreal (Davidson J.) held that the respondent was bound to pay, but this decision was reversed by the Court of Queen's Bench for Lower Canada (appeal side) (Wurtele J., dissenting.)

On an appeal to the Supreme Court the respondent objected to the jurisdiction of the court on the ground that the case was not appealable under sec. 29 of the Supreme and Exchequer Courts Act.

Geoffrion Q.C., and *Beaudin* Q.C., for respondent, cited and relied on *Gilbert* v. *Gilman* (1); *Dominion Salvage Co.* v. *Brown*, (2) and art. 1241 C.C.

Lash Q.C. and *DeMartigny* for appellants contended that the claim was for rent within the meaning of that word in subsec. (*b*) sec. 29 of the Supreme and Exchequer Courts Act, and that this case was distinguishable from that of *Gilbert* v. *Gilman* (1) and other cases since decided.

The judgment of the court was delivered by:—

TASCHEREAU J.—This appellant claims from the respondent by her action, a sum of $200 for an instalment of a monthly allowance due to her as she alleges in virtue of her late father's will, and of the act 54 Vic. ch. 96 of the province of Quebec passed in relation to that will. Her action has been dismissed and she now appeals.

(1) 16 Can. S.C.R. 189. (2) 20 Can. S.C.R. 203.

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Taschereau J.

The respondent moves to quash the appeal for want of jurisdiction. This motion must be allowed. This is clearly not an appealable case. The appellant argued that her appeal could be entertained on the ground that as the judgment dismissing her action, if allowed to stand would be *resjudicata* between her and the respondent, and a bar for ever of her claim, her appeal came within the words "where the rights in future might be bound" of section 29 of the Supreme Court Act. But that contention cannot prevail. We have in numerous cases determined that these words of the statute are governed by the preceding words of the clause "fee of office, duty, rent, revenue or any sum of money payable to Her Majesty or any title to lands or tenements, annual rents, or such like matters or things." The words "annual rents" cannot support the appeal. They mean ground rents (*rentes foncières*), and not an annuity or any other like charges or obligations.

Neither can the appeal be entertained on the ground that the appellant's claim, being for a monthly allowance of $200, should be considered as being for an amount exceeding $2,000. The only amount actually in controversy in the present case is $200. The consequences of the judgment and its effect on the appellant's future rights in the matter cannot render the case appealable as being a case of $2,000. This monthly allowance is liable to be extinguished at any time by the death or re-marriage of the respondent for instance, according to the terms of the will in question.

Appeal quashed with costs.

Solicitors for appellants: *Beïque, Lafontaine & Turgeon.*

Solicitors for respondents: *Beaudin & Cardinal.*

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*Mar. 7, 8, 9.
*June 28.

DOMINION SALVAGE & WRECKING COMPANY (Limited) (DEFENDANT) AND MATTHEW LEGGATT, (INTERVENANT IN THE SUPERIOR COURT) ..... } APPELLANTS;

AND

THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF). ..... } RESPONDENT.

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

Public Company—Act of incorporation—Forfeiture of—44 Vic. c. 61 (D.)—Attorney-General of Canada—Information—R.S.C. c. 21 s. 4—Scire Facias—Form of proceedings—Arts. 997 et seq. C.C.P.—Subscription to capital stock—Condition precedent.

The appellant company by its act of incorporation 44 Vic. c. 61 (D.) was authorized to carry on business provided $100,000 of its capital stock were subscribed for, and thirty per cent paid thereon, within six months after the passing of the act, and the Attorney-General of Canada having been informed that only $60,500 had been *bonâ fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. *in trust*, who subsequently surrendered a portion of it to the company, and that the thirty per cent had not been truly and in fact paid thereon, sought at the instance of a relator by proceedings in the Superior Court for Lower Canada to have the company's charter set aside and declared forfeited.

Held, affirming the judgment of the court below:

1. That this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada.
2. That such proceedings taken by the Attorney-General of Canada under arts. 997 *et seq.* C. C. P. if in the form authorized by those articles are sufficient and valid though erroneously designated in the pleadings as a *scire facias*.
3. That the *bonâ fide* subscription of $100,000 within six months from the date of the passing of the act of incorporation, and the

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

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payment of the 30 per cent thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited. Gwynne J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court and declaring forfeited the charter of the Dominion Salvage and Wrecking Company, one of the present appellants.

This was a proceeding in the name of the Attorney-General at the instance of John McDougall, the relator, under arts. 997 *et seq.* of the Civil Code of Procedure, to set aside and declare forfeited the charter of the Dominion Salvage and Wrecking Company created a corporation by the Dominion Statute 44 Vic. cap. 61. The grounds of complaint were that the company did not in organizing conform to the conditions of their charter which required a *bonâ fide* subscription of stock to the amount of $100,000 and a deposit of 30 per cent thereon in a chartered bank within six months after the passing of the act of incorporation before being able to call a meeting of shareholders for the election of directors, it being alleged that only $60,000 had been subscribed and that a fraudulent subscription of the additional $40,000 had been made by one of the directors in trust, not for himself but actually for the company, with the understanding that he would not be called upon to pay it; and that the deposit of $30,000 in a chartered bank was not real but only simulated, being borrowed from the bank by three of the directors, and after the deposit was made and notified to the authorities at Ottawa, immediately withdrawn, which it was contended was a fraud on the public justifying the interference of the Attorney-General, and involving the forfeiture of the company's charter, the relator claim-

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ing that he and others who had taken stock on the faith of a *bonâ fide* subscription of $100,000 being obtained were threatened to be sued and could not make their defence available until the charter should be declared null and forfeited.

The company pleaded :—

1st. By demurrer, on the ground that if any such cause of complaint existed the prosecution should be by the Attorney-General of the province of Quebec, and not by the Attorney-General of the Dominion.

2nd. That all the proceedings had been in good faith and were valid. The relator had been a promoter of the company, took part in their proceedings and acquiesced therein. The business of the company was for a time prosperous, the relator made no objection to the proceedings for several years, nor until the company were unfortunate, and then, with others in like position, to avoid payment of their subscriptions. The company having become insolvent were put in liquidation and a liquidator appointed, and that the present suit could by reason thereof be of no utility.

3rd. That the Attorney-General had no right or quality to set aside a parliamentary charter.

Matthew Leggatt, one of the appellants, a shareholder, intervened, and he took the same grounds as the company had taken and concluded by praying that the charter should be sustained; that the action of the Attorney-General should be dismissed and the liquidator ordered to proceed with the liquidation.

The evidence as to the manner in which the $100,000 were subscribed, of which $40,000 were subscribed for by one Gregory *in trust* who subsequently transferred $35,000 of it as paid up stock to one Merritt after the six months had expired and surrendered the balance of $5,000 to the company, and the device used to comply with the statutory condition of paying

thirty per cent on the $100,000 of subscribed stock, is reviewed at length in the judgments hereinafter given, and also in the report of the case of *Brown* v. *The Dominion Salvage and Wrecking Co.* (1).

Mr. Justice H. T. Taschereau, in the Superior Court, dismissed the plaintiffs' action and maintained the intervention. The Court of Queen's Bench for Lower Canada (appeal side), reversed the judgment of the court below, and declared the company's charter forfeited.

Before the institution of this suit proceedings were taken to wind up the company. The proceedings to wind up were dated 6th June, 1884. The proceedings to annul the act of incorporation at the instance of the Attorney-General were commenced on the 17th June following. On 20th June, 1884, the winding-up order was made.

Christopher Robinson Q.C. and *Goldstein* for the appellant company.

An act of the parliament of Canada cannot be declared forfeited, annulled, set aside or repealed except by the same parliament which passed it, and the Attorney-General had no right or quality to take the action in question. Grant on Corporations (2); Lindley on Partnership (3); Stephens on Joint Stock Companies (4); Beach on Corporations (5); Morawetz on Corporations (6); *Canada Car and Manufacturing Co.* v. *Harris* (7).

With reference to the nature of the present action and proceedings instituted against the company, the petition of John McDougall prayed for the issue of writ of *scire facias*. The *fiat* of the Attorney-General granted permission to issue a *scire facias*. The order

(1) 20 Rev. Lég. 557.
(2) P. 42 and note, and pp. 307-8.
(3) 3 ed. vol. 1 p. 246.
(4) Pp. 374-391.
(5) Secs. 45-46.
(6) Secs. 113, 402, 408.
(7) 24 U. C. C. P. 380.

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of the judge was to like effect, the writ is specially termed a *scire facias*, and the conclusions of the declaration pray for the issue of a writ of *scire facias*. Proceedings concerning suits by *scire facias* are governed by arts. 1034 and 1035 of the Code of Civil Procedure, and it is the only remedy by *scire facias* provided by the laws of the province of Quebec, but it will be seen that they only apply to letters patent. We also submit it is the only case in which *scire facias* is applicable at common law. Stephen's Commentaries (1); Chitty on Prerogatives of the Crown (2); Grant on Corporations (3).

This company was incorporated by special act of the parliament of Canada, consequently these provisions of the Code of Procedure are not applicable.

At the argument in the court below the respondent contended that the proceedings were brought under art. 997 *et seq.* of the Code of Procedure, referring to corporations illegally formed or exceeding their powers. It is questionable whether these articles can be enforced by any officer other than the Attorney-General of Quebec as they are local provisions, but it is clear that the action has not been entered in virtue of these articles, their special provisions not having been complied with, nor can they be interpreted to apply to the annulling of an act of parliament. We have been unable to find any precedent applicable to this case, in the case of *Sarazin* v. *La Banque de St. Hyacinthe* (4) where the Attorney-General refused to issue his *fiat*. See also Angell & Ames on Corporations (5).

But admitting the right exists our next point is that the respondent has wholly failed to establish any such irregularity or violation of the act incorporating

(1) 10 ed. 3 vol. p. 700. 1 vol. p. 625.
(2) P. 330.
(3) P. 42 and note p. 307.
(4) 20 Rev. Lég. 580.
(5) 11 ed. sec. 83.

the appellant company which would justify a declaration of forfeiture.

The courts do not favour forfeiture and a reasonable and substantial performance of the conditions is all that is required to defeat a claim of forfeiture. Field, ultra vires (1); Abbott Digest of Corporation Law Supp. (2); *Harris* v. *Mississippi Valley Railroad Co.* (3); Morawetz on Corporations (4); Boone on Corporations (5); *McDougall* v. *Jersey Imperial Hotel Co.* (6); Cook on Stock Holders (7); *In re Scottish Petroleum Company* (8); *The Sanitary Commissioners of Gibraltar* v. *Orfila* (9).

Then again these proceedings could not be taken after the presenting of a petition for a winding-up order.

D. Macmaster Q.C. for the intervenant—appellant, followed.

To admit the remedy by *scire facias* against a corporation created by act of parliament is to admit that in the Crown lies the right to attack, cancel and repeal an existence created by parliament.

The writ in the present case is a *scire facias*. But *scire facias* cannot lie against a company incorporated by act of parliament. The plaintiff cannot elude this issue, as he has sought to do by means of the contention that it is a proceeding under art. 997 C.C.P.

Whatever may be the rights of the Attorney-General for the province of Quebec to proceed by special information under art. 997 C.C.P. it certainly seems established that the Attorney General of Canada has no right to proceed against this company by *scire facias* in the face of the fact that the provisions of our Code of

(1) P. 337.
(2) Forfeiture no. 2.
(3) 51 Miss. 602.
(4) Par. 1028.
(5) Pp. 292-3.
(6) 34 L. J. (N. S.) Eq. 28.
(7) Sec. 154.
(8) 23 Ch. D. 413.
(9) 15 App. Cas. 400.

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Civil Procedure limit that remedy to the cancellation of letters patent. It is for him to show the extraordinary right at common law to take any such proceedings.

When we find that no such proceeding has ever been taken in England against a corporation created by act of parliament the claim to any such extraordinary common law right disappears.

Nor is this a mere matter of form. In addition to the guarantee which the attacked corporation has, under procedure by information, of having the party who put the Attorney-General in motion joined in the proceedings as a relator, and to the further fact that the right to proceed by special information belongs not to the Attorney-General for the Dominion but to the Attorney-General for the province, it must be remembered that a writ of *fscire acias* is a Crown writ, issuing not by permission of the legislature but as a part of the royal prerogative.

On the merits we submit that no forfeiture has taken place. By the 7th section of the act of incorporation the provisions of the Canada Joint Stock Companies' Clauses Act, 1869, are made to apply to the company so far as they are not inconsistent with the provisions of this act.

Section 12 of this act, is *in pari materiâ* with section 5 of the act of incorporation, and all their provisions according to the general rules of statutory interpretation should be construed together. Wilberforce on Statute Law (1). If so it must be concluded that the provisions as to subscription and payment are merely directory.

Section 5 contains nothing to indicate that non-observance of its terms involves the nullity of the incorporation. On the contrary section one uncondi-

(1) P. 260.

tionally constitutes the persons therein named a corporation.

The learned counsel then reviewed the evidence and contended that the conditions precedent had been complied with, and that the relief sought by McDougall, the relator, was barred by gross laches in prosecuting his claim, and by acquiesence in the transactions now impugned by him.

S. H. Blake Q.C. and *G. Lajoie* for respondent.

As to the status of the Attorney-General of Canada we contend that the law which respondent seeks to enforce is a Dominion law; the charter which it is sought to have declared forfeited a Dominion charter, and the proper officer to enforce the same is the Attorney-General for the Dominion (1), and once the Attorney-General grants the use of his name, the courts cannot look at the interests of the relator in the proceedings, but must decide whether there has been a good use or an abuse of the charter. Com. Dig. on Forfeiture (2); *Hamilton Road Co.* v. *Townsend* (3).

Now is the action brought the proper proceeding in the present case? The plaintiff has taken his proceedings under article 997 and following articles of the Code of Civil Procedure. Those articles provide for the case where a corporation violates any of the provisions of the acts by which it is governed, or becomes liable to a forfeiture of its rights, and enact that it is the duty of the Attorney-General to prosecute such violations of the law. Whenever any corporation has forfeited its rights, privileges and franchise the judgment declares it to be dissolved and to be deprived of its rights.

The formalities imposed by the Code of Civil Procedure have been substantially complied with, and if

(1) R. S. C. ch. 21 sec. 4. (2) P. 886.
(3) 13 Ont. App. R. 534.

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anything were wanting in this respect the appellants, not having filed an exception to the form of the respondent's procedure, are now too late to take advantage of any informality. The declaration annexed to the writ declares facts sufficient in law to justify the forfeiture of the charter. The fact that the writ is called a writ of *scire facias*, even if this appellation were improper would not nullify the procedure. It is a well established rule of procedure that a wrong name given to a writ or other procedure will not alone have the effect of voiding it. *Bourgoin* v. *Montreal Northern Colonization Railway Co.* (1).

The writ issued under articles 997 and following is in the nature of a writ of *scire facias;* it seeks to have the charter of the offending corporation declared forfeited and the corporation deprived of its rights. Under the common law of England such a writ undoubtedly exists under the name of *scire facias* to cancel the charters of companies incorporated by letters patent but it may be questioned whether the same remedy could be applied in England in the case of companies incorporated by act of parliament. However this may be in England, in the province of Quebec the Attorney-General has the right to ask that the charter of a company incorporated by act of parliament be declared forfeited; and those proceedings being of the same nature as those taken to have letters patent cancelled, it does not seem proper to style the writ one of *scire facias*. Moreover articles 997 and following are general and include corporations created by act of parliament. It cannot be contended that they only apply to corporations created by letters patent, there being special provisions for the charter of those corporations under articles 1034 and following articles in the same code.

(1) 19 L. C. Jur. 57.

The learned counsel then contended on the evidence that the conditions imposed by the charter had not been complied with, and that the respondent was entitled to a judgment declaring the charter set aside; and cited and relied on Endlich on Interpretation of Statutes (1); Maxwell on Statutes (2); Morawetz on Corporations (3); Angell and Ames on Corporations (4); *Cass* v. *Ottawa Agricultural Co.* (5); *The Eastern Archipelago Co.* v. *The Queen* (6).

As to the proceedings taken to wind up the company they cannot affect the right of the Crown. *Banque Hochelaga* v. *Murray* (7); Brice ultra vires (8).

The judgment of the majority of the court was delivered by

TASCHEREAU J.—The controversy in this case arose before the Superior Court in Montreal, upon proceedings taken by the Attorney-General of Canada under arts. 997 *et seq.* of the Code of Procedure to have the appellants' charter declared forfeited. The information dated the 17th June, 1884, alleges in substance: :

That the appellant, the Dominion Salvage Company, was incorporated by act of parliament, 44 Vic. ch. 61, with a capital of $300,000.

That certain provisional directors were appointed by the act to collect subscriptions and organize the company.

That the act provided that as soon as one hundred thousand dollars should have been subscribed and thirty per cent paid thereon, a meeting of shareholders might take place for the election of directors.

(1) Nos. 354, 355.
(2) Pp. 333, 334.
(3) 2 ed. par 140.
(4) No. 146.
(5) 22 Grant 512.
(6) 2 El. & B. 856.
(7) 15 App. Cas. 414.
(8) 2 ed. p. 907.

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That it was also provided that the subscription and deposit in question should be made within six months from the passing of the act.

That the act was assented to on the 21st March, 1881.

That there was not a duly *bonâ fide* subscribed capital of one hundred thousand dollars, nor a deposit as required within the six months.

That only $60,000 had been subscribed within that time, and nothing paid thereon.

That certain provisional directors then caused a fraudulent subscription of $40,000 to be made by S. E. Gregory, a man without sufficient means.

That this subscription was not a *bonâ fide* subscription and was made in trust for the company.

That a fraud was thus perpetrated upon the public and upon the *bonâ fide* subscribers of the company.

That it is the duty of the Attorney-General to protect the public against such frauds.

And the prayer is to the effect that a writ of *scire facias* issue, and that the court declare the charter of the company forfeited, null and void.

The point has been taken *in limine* by the appellants that no writ of *scire facias* lies to annul a charter granted by act of parliament. But it is not necessary here to consider that question.

The articles of the Code of Procedure under which the Attorney-General took out these proceedings apply by their very terms to all corporations whatsoever, and the fact that he has erroneously called a *scire facias* what is strictly not a *scire facias*, or might have called a *quo warranto* what is not a *quo warranto*, does not invalidate them. The conclusions he takes are those authorized by the code and that is sufficient. *Coté* v. *Morgan* (1). In the *Attorney-General*

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

v. *The Colonial Building Association* (1) the charter sought to be annulled, under the same articles of the code, was also a parliamentary charter, yet it was never doubted, in the Privy Council, that the Attorney-General had a right to proceed as he had done.

The appellants' other contention that the Attorney-General for the province of Quebec would alone have had the power, in 1884, under the code as it then stood, of taking out such proceedings is also unfounded. By the Revised Statutes of Canada, ch. 21 sec. 4, it is enacted that:

> The duties of the Attorney-General of Canada shall be as follows: He shall be entrusted with the duties which belong to the office of the Attorney-General of England by law or usage so far as the same powers and duties are applicable to Canada, and also with the powers and duties which by the laws of the several provinces belonged to the office of Attorney-General of each province up to the time when the British North America Act, 1867, came into effect, and which laws, under the provisions of the said act, are to be administered and carried into effect by the Government of Canada (2).

It seems to me unquestionable, as held by all the judges in the two courts below, that the Attorney-General of the Dominion has the right to impeach the legality or ask the forfeiture of a Dominion statutory charter. Whether, and in what cases, the Attorney-General for the province could also exercise that right we have not here to consider.

Now as to the merits of the case. The clause of the company's charter upon which the information is based is as follows:—

> When and so soon as one hundred thousand dollars of the said capital stock shall have been subscribed as aforesaid, and thirty per cent thereon shall have been paid in to some chartered bank to the credit of the company, such subscription and payment being made within six months after the passing of this act, the said provisional directors may call a general meeting of shareholders, at some place to be named in

(1) 9 App. Cas. 157.

(2) See also secs. 129, 130, 135 British North America Act.

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the city of Montreal, giving at least fifteen days continuous notice thereof in two daily newspapers published in the said city, at which general meeting the shareholders present in person or represented by proxy shall elect seven directors in the manner and qualified as hereinafter provided, who shall constitute a board of directors, and shall hold office as hereinafter provided; provided always, that no person shall be eligible to be or continue a director unless he shall hold in his own name and for his own use at least ten shares of the capital stock of the company, and shall have paid all calls thereon, and all liabilities incurred by him to the company; and the shareholders shall have power to increase the number of directors at any general meeting to any number not exceeding nine, or to reduce them to any number not less than five.

It seems to me plain that, under this clause, the company could not be organized and carry on any business unless one hundred thousand dollars were subscribed within six months and thirty per cent thereon paid into some bank, also within the same time. That was a condition subsequent to the incorporation itself; it could not but be so; but it was a condition precedent to the organization of the company, required for the protection of the public and, as such, imperative, and not merely directory.

The provisional directors having failed to get the $100,000 subscribed and the thirty per cent paid in within the six months their powers had lapsed; the provisional incorporation was gone, the conditional charter was effete. By the express terms of section 4 of the act they were appointed for the purpose of organizing the company, and for that purpose only. The appellants would expunge from the statute the words "such subscription and payment being made within six months." But that cannot be done. Such a construction would have given an unlimited time to organize the company. That was clearly not the intention of the statute.

Statutes creating corporations and granting them powers and privileges, subject to compliance with cer-

tain regulations or conditions, are to be construed strictly. The regulative provisions which are imposed in the exercise of the corporate powers for the protection of the public are essential and must be strictly submitted to. There were here those two principal conditions; $100,000 subscribed for within six months, and a deposit thereon of $30,000 within six months.

Now, it is in evidence that $60,500 only of *bonâ fide* subscriptions were taken in during the six months. When the delay was on the point of expiring some of the provisional directors, acting for the company, resorted to the following device to save the charter. They induced one Gregory, a man altogether without means, who had already held one thousand dollars of stock to subscribe forty thousand dollars more, in trust for the company, upon the understanding that he would never be called upon to pay anything on that subscription.

This subscription was clearly made for the purpose of saving the charter by a sham compliance with the statutory conditions. Herriman himself, the president, refuses to swear that it was a *bonâ fide* subscription. It was nothing else but a clumys evasion of the statute.

Some of the witnesses say that this stock was to be subscribed afterwards and Gregory relieved of his shares; others, and this is the contention of the appellants, that these shares were to be applied in part payment of two certain wrecking steamers concerning the purchase of which negotiations were then pending with one Merritt, but which the provisional directors had not the right to conclude. However, it appears from the evidence that only one of these steamers was bought, more than six months later, under terms and conditions totally different from those proposed in September, 1881, and under an entirely new

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agreement. But this is quite immaterial and could not in any case validate Gregory's subscription.

Of the $40,000 in question it seems that $35,000 were transferred as paid up stock to Merritt in May, 1882, and that the remaining $5,000 were surrendered to the company.

This subscription was clearly fraudulent, made only for the purpose of misleading the public and those who had then subscribed upon the faith of the requirements of the charter. In fact, it was not a subscription within the six months at all but the simulation of one only. These original subscribers had the right to rely upon the fact that the organization of the company would be made regularly according to its charter and that the conditions concerning the amount of the subscriptions and the deposit would be complied with. It was an implied condition of their contract with the company that if the necessary subscriptions and payment could not be got there was to be no company at all to carry on the business contemplated, as it was also under the implied condition that the company was lawfully organized that the subsequent subscribers consented to join it. Great care was taken to conceal the circumstances of that Gregory subscription from coming to the knowledge of the directors in good faith of the company. It bears date the 25th August, 1881, and had been made with the approbation of Herriman and Henshaw. The latter were present at a meeting of the board of directors held on the 9th of September, 1881. Brown, Alfred Masson and R. Cowans, three of the Montreal promoters, were also there. A letter from Gregory was read, dated 25th August, in which he said that he presumed by this time the required amount had been subscribed in Ontario. Not one word from him in that letter of his subscription of forty thousand dollars made on that

same date, nor from Herriman and Henshaw, who nevertheless knew all the circumstances.

Brown suggested that the secretary should write to Gregory, the future assistant manager of the company, in order to ascertain if really all the required subscriptions had been obtained and praying him to send the names and the amount of each subscription.

At the following meeting of the board of directors, held on the 18th September, no report had been received from Gregory and the coversation turned upon the necessity in which the company was to find subscriptions in order to avoid the loss of the charter. The delay was to expire on the twenty-first of that month.

Brown then notified the secretary that, in view of the non-fulfilment of the conditions of the charter within the required delay, he retired from the company and did not consider it regularly organized. The other promoters from Montreal did the same.

That there has been fraud, fraud against the law, cannot be denied. It is contended by appellants that the fraud was between a certain number of the directors only, and not by the shareholders of the company, and that Gregory's subscription was legal. Assuming, with the appellants, that Gregory would have been bound towards the other shareholders to pay the subscription in question, and could not have invoked the circumstances above related to escape liability, though that is to my mind very doubtful, it seems to me unquestionable that the company itself could not have claimed anything from him under the circumstances.

At all events, towards the promoters in good faith of the company, and the subsequent subscribers, this subscription was deceitful.

By accepting under these circumstances, for such a large amount, the subscriptions of a man without means, even if it had not been in trust for the com-

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pany, the provisional directors have not acted in conformity with the charter.

It is necessary that the required amount of capital be subscribed by persons apparently able to pay the assessments which may be made upon their shares. Fictitious subscriptions, or subscriptions made by persons unable to contribute their proportion of the capital, do not satisfy the requirements that the whole capital of a corporation shall be subscribed before its members can be assessed.

Says Morawetz on Private Corporations (1).

But the fraudulent organization of the company is made still more apparent by the contrivance which was resorted to in order to simulate a deposit of thirty per cent upon the capital subscribed. Not a dollar had been paid by the subscribers though they had bound themselves to pay thirty per cent on demand. In order again to save the charter, Herriman, Henshaw and Harvey, three of the directors, entered into the following agreement with Nash, the manager of the Union Bank of Montreal. Two of them, Herriman and Henshaw, made their promissory note on the 20th of September, the day before the expiration of the six months, for thirty thousand dollars, in favour of Nash, in his capacity of manager, said note payable on demand.

This note was then discounted for form's sake, and a deposit entry dated the same day of thirty thousand dollars was made to the credit of Herriman, Henshaw and Harvey, in trust for the company, with the understanding that the funds should not be withdrawn.

A certificate of this entry was thereupon given by Nash to Herriman and Henshaw, who sent the same to the Government. Then, on the 23rd, two days after, they gave their cheque to Nash for that same amount of thirty thousand dollars, and the entry to the credit of Herriman Henshaw and Harvey was thereupon can-

(1) 2nd ed. par. 141, 1023.

celled by the entry of the cheque to their debit. So little importance was attached to the transaction by Herriman and Henshaw that they even forgot to get their note returned. It remained in the bank and was produced at the trial by the manager, in 1888.

It is contended by the appellants that the thirty per cent need not necessarily have been paid by the shareholders upon the amount subscribed, and that the company could borrow the amount for that purpose. The words "thirty per cent thereon" they say, in section 8 of their charter, do not mean "thirty per cent thereof." But that contention is untenable. It was thirty thousand of the one hundred thousand dollars subscribed that must have been paid in within the six months.

The French version of the statute says:

Lorsque et aussitôt que $100,000 du fonds social auront été souscrites, et qu'il en aura été versé trente pour cent.

"of which 30 per cent shall have been paid." That makes it still clearer, if possible to make it clearer, that 30 per cent thereon in the English version means 30 per cent thereof. The appellants would contend forsooth that a liability for that amount of $30,000 was a compliance with the statute. That is a proposition that a court of justice will not sanction. The case of *The Eastern Archipelago Company* v. *The Queen*, in the Exchequer Chamber (1) is directly in point. There, a charter incorporating a trading company directed that the sum of £100,000 (one hundred thousand pounds) at the least should be subscribed for within twelve calendar months from the date of the charter; that the sum of fifty thousand pounds (£50,000), at the least, should be paid up within such period; and that the said corporation should not begin business until a certificate of such subscription and payment had been given to the President of the Board of Trade. The company had

(1) 2 E. & B. 856.

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commenced business before the required amount had been paid upon a certificate falsely stating that it had been paid. The court, affirming the judgment of the Court of Queen's Bench (1), declared the charter forfeited for a breach of the conditions and a misuser of the franchise.

Creswell J., said:—

Of these directions, (which in this charter must be treated as conditions), some appear to have been framed with the object of protecting the shareholders, others for the protection of the public. The clause prohibiting the commencement of business until capital to a certain amount had been paid up is of the latter description, and extremely necessary for that purpose, inasmuch as the creditors of this incorporated partnership would have no remedy against the members but against the corporate property only. If then the corporation, under colour of their charter, began to trade before they were authorized so to do, it was an abuse of their charter which worked a forfeiture, and rendered them liable to have it cancelled by means of a *scire facias*. And this is a matter in which the subject is interested; the abuse of the franchise is to his prejudice; and he, *ex debito justitiæ*, is entitled to a *scire facias* to procure the cancellation of it. Every franchise granted by the Crown is subject to the implied condition, that it shall be used according to the grant; and if it be used otherwise the franchise is forfeited. Here the franchise of being a corporation, and trading as a corporation was to be exercised when a capital of £50,000 had been paid up; without any express condition this would have been subject to an implied condition that they should not trade otherwise; and their trading as a corporation, when not authorized to do so, would be an abuse of their charter.

In a case from Ontario, *Niagara Falls Road Co.* v. *Benson* (2), where, as here, the directors had evaded the prepayment required of a part of the capital by the discounting of notes, Robinson C.J. for the court said:

We consider that it is only when these conditions have been truly and it fact complied with, that the persons associated can become incorporated, and that their setting up a delusive appearance only of their having been complied with will avail nothing, because fraud vitiates everything. They had no right to assume those powers till six per cent had been paid up, for, in that case, the public would have

(1) 1 E. & B. 310. (2) 8 U.C.Q.B. 307.

no security that the whole was not a scheme of adventurers possessing no real capital.

Upon these considerations there is, in my opinion, no error in the judgment of the Court of Appeal which granted the Attorney-General's conclusions, and declared this charter forfeited.

I can see nothing in the contention that this company, being now in liquidation under a winding-up order, the Attorney-General is thereby debarred from asking the forfeiture of its charter. The winding-up order itself, it is to be noticed, was subsequent to the service of the information, and its legality is in many respects doubtful. *Imperial Anglo-German Bank* (1). Then in *La Banque de Hochelaga* v. *Murray* (2), though the company whose charter was impeached was in liquidation under a winding-up order anterior to the Attorney-General's information, yet the Privy Council granted its conclusions.

As to Leggatt's intervention it was righly dismissed. His allegations are no answer to the Attorney-General's information. No ratification, waiver or acquiescence by any of the shareholders can validate, as against the crown, what is void, or be invoked against nullities of public order, or abuses of franchise, to hinder or defeat such an action by the Attorney-General taken in the public interest. Compare *Ashbury Railway Co.* v. *Riche* (3) ; *Coppell* v. *Hall* (4). The Attorney-General, in such proceedings under the code, whether he requires security to be given or not by the party applying for his fiat, is the plaintiff acting in lieu of the crown, and the only plaintiff. It is wholly immaterial whether such proceedings have been taken with or without a relator. The assent of the Attorney-General to the prosecution, in his name, by a private

(1) 25 L. T. 895 ; 26 L.T. 229.
(2) 15 App. Cas. 414.
(3) L.R. 7 H.L. 653.
(4) 7 Wallace 542.

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prosecutor, is of the same effect as if he had himself, on behalf of the crown, initiated the proceedings. Per Ld. Campbell, C.J., and Wightman J. in *The Queen* v. *Eastern Archipelago Co.* (1). I refer also to *Attorney-General* v. *Mayor of Galway* (2); *Attorney-General* v. *The Iron Mongers Co.* (3); *Attorney-General* v. *Wright* (4); *Attorney-General* v. *Haberdashers Co.* (5).

If he had the right, at the expiration of the six months, to have this charter declared forfeited, as I think it clear he had, I do not see upon what grounds it can be contended that he has now lost that right. With the consequences of such a forfeiture we have nothing to do. The court has not the power to inquire whether the Attorney-General has been well or ill advised in granting his fiat. Per Coleridge J. in *The Queen* v. *Eastern Archipelago* (1).

In view, however, of the assertion made by counsel at the bar that such contrivances, as have been proved to have been concocted in this case by the directors of this company to simulate a compliance with the conditions of their charter, are frequently resorted to, under similar circumstances, by those intrusted with the organization of similar companies, I deem it but right to say that, in my opinion, the Attorney-General, in duty bound as he is to check, as much as it is in his power to do it, such infractions of the laws of the country, could hardly have been expected, in the present instance, to withhold his fiat. The beneficial effect of these proceedings upon those who may in the future assume such organizations cannot but prove to be a powerful protection to the public. And were it for that consideration alone his intervention in the matter was clearly in the public interest.

(1) 1 E. & B. 310.
(2) 1 Molloy 97 n.
(3) 2 Beav. 328.
(4) 3 Beav. 447.
(5) 15 Beav. 401.

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When, in such cases, the promoters find it impossible to get the required amount subscribed and the deposit made within the time allotted by their charter, their only remedy, if they do not intend to desist from the undertaking, is to apply to the legislative authority for an extension of that time. In the grantor alone vests the power to modify, alter or enlarge the conditions of the grant.

I wish to add that when I used in the foregoing remarks the words "fraud" or "fraudulently," I meant "fraud or fraudulently" against the law, in *fraudem legis*, as a well recognized expression in legal parlance, and not fraud with the intention to cheat. There is no evidence whatever, on the record, of such intention, or of wrongful motives, against any of the parties connected with this company.

I am of opinion that we should dismiss the appeal with costs *distraits* to *Lacoste*, *Bisaillon*, *Brousseau* and *Lajoie* jointly and severally against the appellants.

GWYNNE J.—On the 17th March, 1881, four days before the royal assent was given to the act of incorporation of the Dominion Salvage and Wrecking Company, a meeting of the gentlemen named in the act as provisional directors of the company was held in the city of Montreal, which meeting was presided over by Mr. Alfred Brown, one of such provisional directors, and was attended by seven others of such directors including Mr. S. E. Gregory. The bill of incorporation had then already passed both Houses of Parliament and awaited only the assent of the Governor-General to become law. At this meeting a discussion took place as to the necessary vessels and plant which the company would require to enable them to commence operations and a stock subscription book was opened in which four of the provisional directors then present

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subscribed for stock, which they agreed to take to the amount of $25,000; and another of such stock subscription books was placed in the hands of Mr. S. E. Gregory, who undertook to get subscriptions therein in the province of Ontario. In the book subscribed by the four provisional directors Mr. McDougall, the relator in the present proceedings, on the 19th March, 1881, subscribed his name whereby he agreed to take $6,000 stock. On the 30th July, 1881, a Mr. Merritt, one of the provisional directors who resided at New York engaged in wrecking operations, addressed a letter to Mr. Henshaw at Montreal, who was acting as secretary of the provisional directors of whom he also was himself one, wherein Mr. Merritt offered to furnish the company with steamers necessary for their operations as follows:—

Steamer *Rescue* with wrecking material complete in good order and ready for sea. Three pumps, two cables, two anchors, two sets of blocks and falls, one hoister, two surf boats, two boilers, one diving apparatus, and sundry tools for the sum of $40,000, $25,000 cash, $15,000 stock. Steamer *Relief* same outfit as above mentioned for the sum of $50,000, $30,000 cash, $20,000 in stock. Both steamers with outfits as above mentioned for the sum of $90,000, $50,000 cash, $40,000 stock.

If both these vessels should be purchased by the company on the above terms it will be seen that Mr. Merritt had undertaken to become a subscriber of stock to the amount of $40,000. On the 17th August, 1881, a meeting of the provisional directors was held at Montreal to consider the above proposition which was attended by the relator, McDougall, and it was resolved that two of the provisional directors, namely Captains Donnelly and Herriman:—

Should proceed to New York and examine thoroughly the vessels and their equipment and report back to a meeting to be called by the secretary *pro tem.* after receiving the report of the gentlemen named.

Mr. Gregory attended this meeting, and upon the 25th August, 1881, entertaining a conviction that an

arrangement would be arrived at by the company for the purchase of the vessels on the basis of Mr. Merritt's proposition, and after consultation with Mr. Herriman he signed the stock subscription book for "$40,000 on trust," upon the understanding that the stock to be transferred to Mr. Merritt in the event of an arrangement being made with him for the purchase of his vessels, or either of them, should be taken from the stock so subscribed for by Mr. Gregory in trust. This transaction took place in the most perfect good faith and in the belief that it was quite regular and in point of fact the transaction, after continued negotiations carried on from the first offer in July, 1880, was completed by an agreement dated the 21st day of March, 1882, whereby Mr. Merritt sold to the company the steamer *Relief*, together with all her machinery, tackle and apparel complete for $50,000, of which $25,000 should be accepted in paid up stock of the company, and which was transferred to him by Mr. Gregory out of the said $40,000 subscribed by him in trust, and by the said agreement the said Merritt also sold extra plant to the company, at and for the further sum of $10,000 which he agreed to take also in paid up stock of the company, and which sum was also transferred to him by Mr. Gregory out of the said $40,000 stock, subscribed by him in trust. Now on the said 25th day of August, 1881, when Mr. Gregory signed the book for the said sum of $40,000 in trust there were actual subscriptions in the stock subscription books of the company to the further amount of $60,500. On the 2nd November, 1881, the provisional directors in the belief that the $40,000 subscribed for in trust by Mr. Gregory was well subscribed so as to form part of the $100,000 required by the act to be subscribed before the company should commence operations, and that a note for $30,000 made by two of the provisional direc-

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tors to the cashier of the Union Bank and deposited in that bank and discounted by that bank, and the amount deposited to the credit of the two upon the note and a third of said provisional directors "in trust" was a sufficient compliance with the act of incorporation, proceeded to organize the company by the election of directors. On that same day another of the provisional directors, Capt. Donnelly, signed the stock subscription book for $1,000. However irregular this proceeding was the evidence leaves no doubt, I think, that the parties thought all was right; and they were acting in the most perfect good faith and in accordance with a practice which appears to have been prevalent in Montreal and believed to be a compliance with the provisions of the act. From the nature of the operations contemplated by the act of incorporation it is apparent that wrecking operations were not intended by the company in November, 1881, to commence before the opening of navigation in the following spring, and in the interim between the 2nd November, 1881, including Donnelly's subscription of that date and the 3rd May, 1882, when the company had acquired plant to enable them to commence operations, subscriptions were made in the stock subscription books to the further amount of $43,500, or including the paid up stock transferred to Merritt as part of the purchase money of the necessary plant purchased from him, about $140,000. Between the 3rd May, 1882, and 25th March, 1883, further stock was subscribed for to the amout of $5,500. Upon this capital the company have been carrying on the operations for which they were incorporated until the month of May, 1884, when proceedings were taken against them under the Winding-up Act. Now of the stock so subscribed including the $35,000 transferred to Merritt for which the company received full value, $92,600

have been paid in full, leaving the only sum remaining unpaid to be $52,400. It is under these circumstances, and while the company is in liquidation under the Winding-Up Act where the rights of all persons having a just claim to exemption from liability to contribute to payment of the debts incurred by the company during the two years that it was in actual operation can be protected, that we are asked to declare or to maintain an adjudication declaring that the company never had any legal existence, or that there was no legal sanction for any contract they may have entered into, or for any debt they may have incurred with persons dealing with them in the *bonâ fide* belief that they were a company having legal existence and subject in case of insolvency to the provisions of the Winding-Up Act.

There can be no doubt that immediately upon the passing of the act the company's corporate existence commenced, and there is nothing in the act which declares that it shall cease at the expiration of six months from the passing of the act unless the one hundred thousand dollars of capital stock mentioned in the 5th section shall have then been subscribed for in the books opened under the fourth section of the act.

There is nothing in the act which, in my opinion, would justify a court of justice in pronouncing a judgment that for such default the act becomes forfeited in a case where, subsequently to the six months and before the company commenced the operations for carrying on which they were incorporated, the necessary amount was subscribed and the company carried on the business for which they were incorporated without interruption for years in the course of which they incurred debts. Now in the present case the company having, although not within the six months but before entering upon the operations for which they

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were incorporated, obtained subscriptions in their stock subscription books mentioned in the fourth section to an amount in excess of one hundred thousand dollars of which more than $90,000 was paid in full, and having for two years actually carried on as a company the business for carrying on which they were incorporated, and having in the course of such business entered into contracts with divers persons by which they incurred debts which they have been unable to pay and for non-payment of which they have been put into liquidation under the Winding-up Act, a judgment now rendered, to the effect that by reason of non-compliance with the provisions of the fifth section within six months from the passing of the act the act of incorporation ceased to have any effect and became and is forfeited, cannot, in my opinion be maintained. Such a judgment would be fraught with such infinite mischief and such injustice to parties who (during the two years that the company did *de facto* carry on the operations for which they were incorporated) became creditors of the company in the *bonâ fide* belief that they had *de jure* the existence of which *de facto* they appeared to have, that in my opinion the appeal in this case should be allowed with costs and the relator at whose instance the present proceeding was instituted, and all parties interested, should be remitted to the proceedings in liquidation instituted under the Winding-up Act where the rights of all parties having a just claim to exemption from liability to contribute to the payment of the debts of the company can be protected. The present case is very different from that of *La Banque d'Hochelaga* v. *Murray et al.* (1). There letters patent issued under the great seal of the province of Quebec, which had been obtained upon a false and fraudulent representation that the defendants and

(1) 15 App. Cas. 414.

others had petitioned for the same, were for that reason declared to be fraudulent, null and void. The application in the present case is not to avoid letters patent as fraudulently obtained, but to declare an act of parliament, not to have been fraudulently obtained but to have lapsed and become forfeited for non-subscription within the limited period of six months from the passing of the act of the amount required by the act to authorize the provisional directors to organize the company, and the proceeding is instituted upon the relation of and for the benefit of a gentleman, himself a provisional director and subscriber for stock in the books opened under authority of the act, and whose duty as such provisional director it was to prevent the organization of the company if the necessary amount had not been subscribed for, and the object of the proceeding is to relieve such relator from liability in the winding-up proceedings to payment upon the stock so subscribed for by him towards liquidation of debts due to divers persons who became creditors of the company in the *bonâ fide* belief that the company in which the relator was a subscriber for stock, and of which he was a provisional director, was legally organized, thus doing injustice also to divers persons who, some before and some since the expiration of the six months, had become subscribers for stock and had paid up in full upon the faith of the relator's position as a subscriber for stock and a provisional director, and in the *bonâ fide* belief that the company was legally organised.

Appeal dismissed with costs.

Solicitors for appellant company: *Carter & Goldstein.*

Solicitors for intervenant: *Macmaster & McGibbon.*

Solicitors for respondent: *Bisaillon, Brosseau & Lajoie.*

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IN RE CAHAN.

*May 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Security for costs—Final judgment—Admission of attorney.

An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the court. There being no person interested in opposing the application or the appeal no security for costs was given.

Held, Gwynne J. dissenting, that the court had no jurisdiction to hear the appeal.

Per Ritchie C.J. and Taschereau J.—Except in cases specially provided for no appeal can be heard by this court unless security for costs has been given as provided by s. 46 of The Supreme and Exchequer Courts Act (R. S. C. c. 135).

Per Strong and Taschereau JJ.—It was never intended that this court should interfere in matters respecting the admission of attornies and barristers in the several provinces.

Per Taschereau and Patterson JJ.—The judgment sought to be appealed from is not a final judgment within the meaning of the Supreme Court Act.

APPEAL from a decision of the Supreme Court of Nova Scotia refusing the application of the appellant for admission as attorney of the court.

By an act passed by the Nova Scotia Legislature in 1891, 54 Vic. ch. 22, special privileges were given to graduates of the Dalhousie Law School wishing to be admitted to practice the profession of the law in that province. The appellant, Cahan, applied to the Supreme Court of Nova Scotia for admission as an attorney and barrister of that court, presenting certificates which showed that he had taken the prescribed course at the law school and received the degree of LL.B. The Supreme Court refused his application on the ground

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that the act of 1891 had not repealed the statutes previously in force respecting such application, and that it was necessary for the applicant to comply with the conditions contained in such prior statutes. The applicant sought to appeal from the decision of the Supreme Court, and as his application had not been opposed there was no person to whom security for costs could be given and none was given.

Russell Q.C. for the appellant.

Sir W. J. RITCHIE C.J.—Section 46 of the Supreme and Exchequer Courts Act provides that "no appeal shall be allowed unless the appellant has given proper security," etc. In the face of that provision I cannot see what right we have to hear an appeal where no security has been given, and on this ground alone I am of opinion that the appeal should be quashed.

STRONG J.—I think we have no jurisdiction to hear this appeal, and I wish my judgment to rest solely on the ground that I do not think it was ever intended that we should interfere with the admission of attornies and barristers in the several provinces.

TASCHEREAU J.—In my opinion each of the grounds that have been suggested constitutes a valid objection to our jurisdiction to hear this appeal. Under section 46 of the act the want of security is fatal to the appellant; I do not think the judgment of the Supreme Court of Nova Scotia is a final judgment within the meaning of that term as used in the Supreme Court Act; and I agree with my brother Strong that the case is not one in which it would be proper for us to interfere.

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GWYNNE J.—I am not satisfied that we have no jurisdiction. In my opinion, section 46 is only intended to apply to cases where there is somebody to whom security for costs can be given and not to such a case as this. The judgment was certainly final as it disposed of the application, and that being so I do not see how we are precluded from hearing the appeal.

PATTERSON J.—I do not think that the judgment in this case was a "final judgment" from which an appeal would lie to this court.

Appeal quashed.

Solicitor for appellant: *B. Russell.*

SARAH ANN WILLIAMS AND CHARLES A. WILLIAMS (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF RALEIGH (DEFENDANTS) ..... RESPONDENTS.

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*Nov. 30.
*Dec. 1.
1892
*June 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—Mandamus.

By sec. 483 of the Ontario Municipal Act (R. S. O. [1887] ch. 184.) if private lands are injuriously affected by the exercise of municipal powers the council shall make due compensation to the owner, the claim for which, if not mutually agreed upon, shall be determined by arbitration.

Held, reversing the judgment of the Court of Appeal, that it is only when the act causing the injury can be justified as the exercise of a statutory power that the party injured must seek his remedy in the mode provided by the statute ; if the right infringed is a common law right and not one created by the statute remedy by action is not taken away.

By sec. 569 of the same act the council, on petition of the owners for drainage of property, may procure an engineer or surveyor to survey the locality and make a plan of the work, and if of opinion that the proposed work is desirable may pass by-laws for having it done.

Held, reversing the judgment of the Court of Appeal, that the council has a discretion to exercise in regard to the adoption, rejection or modification of the scheme proposed by the engineer or surveyor and if adopted the council is not relieved from liability for injuries caused by any defect therein or in the construction of the work or from the necessity to provide a proper outlet for the drain when made thereunder.

The act imposes upon the council, after the construction of work proposed by the engineer or surveyor, the duty to preserve, maintain

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and keep in repair the same. The township of R., in pursuance of a petition for draining flooded lands and a surveyor's report, constructed a number of drains and embankment. These drains were led into others formerly in use which had not the capacity to carry off the additional volume of water, but became overcharged and flooded the land of W. adjoining.

Held, that the municipality was guilty of neglect of the duty imposed by the act and W. had a right of action for the damage caused to his land thereby.

Held, per Strong and Gwynne JJ., Ritchie C.J. and Patterson J. contra, that the drain causing the injury being wholly within the limits of the municipality in which it was commenced, and not benefiting lands in an adjoining municipality, it did not come under the provisions of s. 583 of The Municipal Act and W. was not entitled to a mandamus under that section.

Per Ritchie C.J. and Patterson J. Sec. 583 applied to the said drain but W. could not claim a mandamus for want of the notice required thereby.

Held, per Strong and Gwynne JJ., that though W. was not entitled to the statutory mandamus it could be granted under the Ontario Judicature Act (R.S.O. [1887] c. 44.)

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiffs.

The facts are fully set out in the judgments hereinafter published.

Christopher Robinson Q.C., and *Douglas* Q. C. for the appellants, cited the following authorities: *Rowe* v. *The Township of Rochester* (1); *Mallot* v. *Township of Mersea* (2); *McGarvey* v. *Town of Strathroy* (3); *Coghlan* v. *City of Ottawa* (4); *Coe* v. *Wise* (5); *Geddis* v. *Proprietors of Bann Reservoir* (6).

Wilson Q. C. for the respondents. As to liability generally for negligence see *In re McLean and Township of Ops* (7); *Beer* v. *Stroud* (8).

(1) 29 U.C.Q.B. 590; 22 U.C.C. P. 319.
(2) 9 O.R. 611.
(3) 10 Ont. App. R. 631.
(4) 1 Ont. App. R. 54.
(5) L. R. 1 Q. B. 711.
(6) 3 App. Cas. 430.
(7) 45 U.C. Q.B. 325.
(8) 19. O. R. 10.

The by-law justified the council in the construction of the work. *Hopkins* v. *Mayor of Swansea* (1); *Heland* v. *City of Lowell* (2); *The Queen* v. *Osler* (3).

Plaintiffs are not entitled to a mandamus. *Scott* v. *Corporation of Peterboro'* (4).

As to necessity of notice see *Chrysler* v. *Township of Sarnia* (5); *Luney* v. *Essery* (6).

See also *Drummond* v. *City of Montreal* (7); *Preston* v. *Camden* (8); *Derinzy* v. *City of Ottawa* (9).

Sir W. J. RITCHIE C.J —I concur in the judgment prepared by Mr. Justice Patterson and in the conclusion at which he has arrived.

STRONG J.—I concur in the judgment of my brother Gwynne.

TASCHEREAU J.—I will not take part in the judgment.

GWYNNE J.—A drain known as government drain no. 1 in the Township of Raleigh was commenced in the year 1870 and completed in 1873, on the side line between lots 12 and 13 commencing in the 12th concession and extending northerly until it had its outlet into the River Thames in the 3rd concession of the said township. This drain was constructed under the provisions of the Ontario Drainage Act 33 Vic. ch. 2. By that act it was enacted that after the completion of a work made under the provisions of the act the arbitrators acting under the Ontario Public Works Act, 32 Vic. ch. 28, should make an award, which should be

(1) 4 M. & W. 640.
(2) 3 Allen (Mass.) 408.
(3) 32 U.C.Q.B. 332.
(4) 19 U. C. Q. B. 473.
(5) 15 O.R. 182.
(6) 10 P.R. Ont. 285.
(7) 1 App. Cas. 412.
(8) 14 Ont. App. R. 85.
(9) 15 Ont. App. R. 712.

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deposited with the Commissioner of Public Works and a copy with the registrar of the county in which the lands to which the award relates are situate, and another copy with the clerk of the township or other municipality in which such lands are situate, to remain forever deposited with the records of such municipality, in which award should be specified the proportions of the total amount of the sums expended in and about the works as executed and which should be payable in respect of the several parcels or lots of land drained or improved, and also the proportion in which the said several parcels or lots and the proprietors thereof should in future be annually charged towards the costs and expenses which might from time to time be incurred in maintaining, cleaning and keeping in repair the drains and drainage works executed under the provisions of the act. By an amendment of this act passed on the 15th February, 1871—34 Vic. ch. 22—it was enacted that the municipal council of any township, &c., whose roads might be benefited by the drainage or improvements referred to in the act or the works incidental thereto, and such roads, should be deemed to be within the provisions of the act. The effect of this clause was to make municipal councils and their roads liable to contribute to the original cost of a work and also to the annual charge for maintenance and repair equally as the lands of individuals benefited by the work and their proprietors were. By an act passed on the 29th of March, 1873—36 Vic. ch. 38—the act 33 Vic. ch. 2 was repealed, except as to drainage works executed thereunder in respect of which an award has been made, and new provisions were made enabling the Commissioner of Public Works to undertake drainage works, on the application of the council of any municipality, or on the petition of the majority of all the owners, or of a majority of the owners as shown by

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the last revised assessment roll in any municipality to be resident on the property described in the petition the whole or a part of which is to be benefited by the drainage, and to continue drainage works begun in one municipality into another; and making provision for charging the cost of constructing and maintaining such works upon the lands in both which are benefited by a drain begun in one municipality and continued into another, or by a drain constructed wholly within the limits of one municipality but along the town line separating it from another municipality.

The drain no. 1, when it reached the 6th concession of the township, crossed a small watercourse known now as the Raleigh Plains drain, which coming from an easterly and south-easterly direction crossed the side line between lots nos. 12 and 13, and crossing the 6th, 5th and 4th concessions in a north-westerly direction discharged its waters into a stream called Jeannette's Creek. The drain no. 1 was constructed on this side line, but on its eastern side, and the earth from the drain was thrown up and spread on the western part of the side line to form an embankment to the drain, whereby the part of the road reserved for travel was raised in height; where this watercourse known as the Raleigh Plains drain crossed the side line that watercourse was stopped up by the embankment of the drain no. 1, and the waters coming down from the east were conducted down the drain no. 1 into the Thames. This stopping up of the Raleigh Plains drain at its junction with drain no. 1 does not appear to have answered the purpose intended or expected to have been attained by it, for in 1875 the council of the municipality re-opened the Raleigh Plains drain there and deepened it and enlarged and strengthened it on the west of the side line between lots 12 and 13, under a by-law passed under the provi-

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sions of the Municipal Act 36 Vic. ch. 48, and thereby provided better means of carrying off the waters coming down the Raleigh Plains drain from the east and down the drain no. 1 from the south than had been provided by drain no. 1 as constructed.

By this act, 36 Vic. ch. 48, the provisions of which were consolidated in ch. 174 of the R.S.O. 1877, and re-enacted in 46 Vic. ch 18, and consolidated again in ch. 184 of the R.S.O. of 1887, it was enacted that upon a petition presented to the council as provided in the act, petitioning the council

> for the deepening or straightening of any stream, creek or watercourse, or for the drainage of any property, or for the removal of any obstruction, &c., &c., the council may procure an engineer or provincial land surveyor to make an examination of the stream, creek or watercourse proposed to be deepened or straightened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or surveyor and an assessment 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 surveyor the proportion of benefit to be derived by such deepening or drainage by every road and lot or portion of lot, and if the council be of opinion that the proposed work, or a portion thereof, would be desirable the council may pass a by-law for providing for the deepening of the stream, creek or watercourse or the draining of the locality.

The act then gave a form of by-law to be passed which contained a recital:

> That the council are of opinion that the drainage of the locality described, or the deepening of such stream, creek or watercourse, as the case may be, is desirable.

Then by sec. 586 of 46 Vic. ch. 18, as amended by 48 Vic. ch. 39, sec. 27, now sec. 585 of ch. 184 of R.S.O. of 1887, it was enacted as follows:

> In any case wherein the better to maintain any drain constructed under the provisions of the Ontario Drainage Act, 33 Vic. ch. 2, and amendments thereto, or of the Ontario Drainage Act of 1873, or of the revised statute respecting the expenditure of public money for drainage works, or to prevent damage to adjacent lands, it shall be

deemed expedient to change the course of such drain or make a new outlet or otherwise improve or alter the drain, the council of the municipality or of any of the municipalities whose duty it is to preserve and maintain the said drain, may, on the report of an engineer appointed by them to examine and report on such drain, undertake and complete the alterations and improvements specified in the report under the provisions of sections 570 to 583 (of the act of 46 Vic. ch. 18) inclusive, without the petition required by section 570.

That is to say without any petition for such alteration. Then by section 587 of 46 Vic. ch. 18 it was enacted that.

In any case wherein, after such work is fully made and completed, the same has not been continued into any other municipality than that in which the same was commenced, or wherein the lands or roads of any such other municipality are not benefited by such work, it shall be the duty of the municipality making such work to preserve, maintain and keep in repair the same at the expense of the lots, parts of lots and roads as the case may be as agreed upon and shown in the by-law when finally passed.

And by section 589, it was enacted that:

Where the repairs required to be made under section 587 are so extensive that the municipal council does not deem it expedient to levy the cost thereof in one year the said council may pass a by-law to borrow upon debentures of the municipality the funds necessary for the work, and shall assess and levy upon the property benefited a special rate sufficient for the payment of the principal and interest of the debentures, and the by-law shall not require the assent of the electors.

Then by 48 Vic. ch. 39, section 26, the provisions of these sections 587 and 589 of 46 Vic. ch. 18 are declared to apply to drains constructed under the provisions of the Ontario Drainage Act, 33 Vic. ch. 2, and amendments thereto, or of the Ontario Drainage Act, 1873, or of the revised statute respecting the expenditure of public money for drainage works, as well as to the work to which the said sections now apply; and, further, it was by the section enacted that:

The deepening or widening of a drain in order to enable it to carry off the water it was originally designed to carry off, shall be deemed to

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be a work of preservation, maintenance or keeping in repair within the meaning of sections 584 and 587.

These sections 587 and 589 of 46 Vic. ch. 18, as amended by 48 Vic., ch. 39, section 26, are now to be found in section 586 and 587 of ch. 184 of the R.S.O., 1887.

Lot no. 12, in the 4th concession of the township of Raleigh, was assessed for and contributed to the construction of the above government drain no. 1, and to the deepening, enlarging and straightening of the Raleigh Plains drain as made under the municipal by-law in that behalf in 1875. From the time of the completion of these two drains the lot no. 12 continued to be dry and capable of cultivation until year 1883; but in the interval between the completion of the Raleigh Plains drain improvement and the year 1883 the municipal corporation of the township of Raleigh, constructed, under divers by-laws passed by the municipal council under the provisions of the Municipal Institutions Act, divers other drains which were made to empty their waters into the said drain no. 1, the effect of which in progress of time was that by reason of the new drains bringing down more water, and at a greater speed, into the said drain no. 1 than that drain could retain the embankment of drain no. 1 was broken down and the lot 12 in the 4th concession of Raleigh, of which the plaintiff was tenant, became flooded and unfit for cultivation and continued so to be for some time. The defendants, upon a notice given to them on behalf of the plaintiff, proceeded to repair the breach so made but never restored the embankment to the height and efficient condition in which it was originally constructed. Like breaches from the same cause took place in divers places of the embankment in the years 1885-6 and 7, attended with like consequential flood-

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ing upon and damage to the plaintiff's land on said lot 12. In the year 1884 the municipal council of the township, under the provisions of the Consolidated Municipal Act of 1883, 46 Vic. ch. 18, passed a by-law for the construction of, and constructed thereunder in 1885,

a tap drain from a certain other drain called Government Drain no. 2 along the line of lots 10 and 11 in the 6th concession of Raleigh and along the line between the lands of Mr. Dunn and Mr. Huthnance in the 5th concession to the Raleigh Plains drain, and made a dam on lot 9 in the 7th concession to separate the waters of the Kersey drain from the water brought down the Buxton road.

This tap drain so constructed was little short of a mile in length, and is called the Bell drain. In the month of January, 1888, the plaintiff, then still being lessee of the lot 12 in the 4th concession of Raleigh, brought an action against the defendants for injury to her land occasioned by the waters coming down the said drain no. 1 breaking through the embankment of that drain on to the plaintiff's land in the years 1885-6 and 7 and by the waters brought down by the Bell drain into the Raleigh Plains drain in excess of what the Raleigh Plains drain in its then condition could carry off and which were thereby backed up the Raleigh Plains drain against the stream and caused to overflow the plaintiff's land in 1886 and 1887. The plaintiff's action was founded upon the contention that the drains which the defendants were under a statutory obligation from year to year to cleanse, preserve, maintain and keep in repair had been, by the negligence of the defendants and the disregard of their statutory duty, suffered to become so obstructed, choked up, impeded and out of repair as to be incapable of carrying off the extra waters brought into them by the said drains constructed since 1875 by the municipal council of the township, and that therefore the defendants were liable to the plaintiff for the injury thereby

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occasioned to her. She also made claim for a mandamus to compel the defendants to restore, clean out and repair the said drains so suffered to become obstructed, and to maintain the said drains and the embankments thereof in an efficient condition. This action was referred to the county judge of the county of Kent to take evidence and make his report thereon. The learned judge, after a careful inspection upon the ground and taking evidence upon the matters involved, made his report wherein he found among other things that the said government drain no. 1 was constructed in the years 1870 to 1873 inclusive along the easterly side of the road allowance between lots 12 and 13 in the said township of Raleigh, commencing in rear of the lake lots and ending the river Thames and lying immediately east of lot no. 12 in the 4th concession of said township, and that as part of the plan or scheme of said drain the earth taken thereout was to be thrown up and, as a matter of fact, was thrown up on the west side of the said drain as an embankment in order thereby to prevent the water from the said drain, and the water flowing into it from the easterly or south-easterly direction, from escaping westward on to the lands of said plaintiff and others; and that it was the duty of the said defendants to keep the said drain properly cleansed out and free from obstructions, and to keep the said embankment in a fit and proper condition; that for some years after the completion of the said drain no. 1 and of the said embankment the said land of the plaintiff was greatly benefited thereby and became more fit for cultivation, and that good crops were grown; that from time to time during the ten years next after the completion of the said drain the defendants constructed a number of other drains leading into said drain no. 1, and thereby brought down into the latter immense quantities of water far beyond its

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capacity to carry off, and that as a result it become surcharged, and from time to time overflowed the embankment on the west side thereof, and that particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of said years, the water thus brought down flowed on to and over the plaintiff's said land and damaged and injured said land and the crops thereon growing; and that the said drain no. 1 has been allowed to become, and has become and is, through the 6th, 5th and that part of the 4th concession lying south of the Grand Trunk Railway, badly filled up with earth and silt and badly over-grown with grass and willows, and that its capacity has thereby become much diminished and impaired, and is not and has not been for the last five years one-half of what it was when first completed, and that as a result of this condition the overflow of water on to and over the plaintiff's said lands, and the damage and injury thereto have been much increased; and that by the construction of the Bell drain a large body of water was brought down to the drain known as the Raleigh Plains drain that would not otherwise have come there, and that the Raleigh Plains drain was thereby over-charged with water, and that in time of high water every year except the year 1888, and in some years several times in the year, the water thus brought down has flowed into and over the plaintiff's land, or by raising the general level of the water has caused other waters to flow on to and over the plaintiff's land that would not otherwise have gone there, and the plaintiff's lands and crops have been thereby injured and damaged every year except the year 1888; and that for the water so brought down by the said drains into drain no. 1, and by the said Bell drain into Raleigh Plains drain, the defendants provided no sufficient or proper outlet; and that the defendants have not kept

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the embankment on the westerly side of the said drain no. 1 up to its original height, nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled; and when breaks have been made in the embankment by the water over-flowing as aforesaid the defendants have permitted these breaks to remain for a long time wholly unrepaired, and when repaired they were repaired in an inefficient and inadequate manner and still left lower than the road-bed on the north-west or south-east of said breaks, thereby enabling or permitting water to escape on to and flow over the plaintiff's said land, causing damage and injury to the crops thereon, that would otherwise have been carried down no. 1 drain to the river Thames; and he assessed the plaintiff's damage at the sum of $850.00, which sum he found that the plaintiff was entitled to receive and he found also that the plaintiff was entitled to a mandamus directing the defendants to properly repair the said drain no. 1, and to enlarge it sufficiently to provide for the additional water brought down as aforesaid or to provide a proper and sufficient outlet by some other method and to stop the additional flow of water brought down by the Bell drain as aforesaid or provide for its escape by some other sufficient method and to maintain the embankment on the west side of no. 1 drain at its original and proper height. Mr. Justice Ferguson affirmed this report and finding of the learned county judge and rendered judgment thereon in favour of the plaintiff for the said sum of eight hundred and fifty dollars and for the said mandamus, but directed that said mandamus should not issue until further order on a subsequent application or until the defendants should have an opportunity to make such improvements as they may deem sufficient.

The Court of Appeal for Ontario reversed this judgment and ordered judgment to be entered for the defendants upon the grounds that the court were of opinion that the plaintiff had no cause of action against the defendants unless upon default committed after a notice in writing under sub-sec. 2 of sec. 583 of ch. 184 R.S.O. of 1887, and that no sufficient notice had been given; that the defendants are not liable for damages arising from their not providing a sufficient outlet for the waters carried through a drain constructed by them under the statutes relating to the drainage of lands; that when a surveyor has devised a scheme of drainage work it is for the corporation simply to construct it as designed without incurring any responsibility in so doing. In effect the judgment of the Court of Appeal was that the evidence disclosed no wrongful act, neglect or default of the corporation subjecting them to an action at suit of the plaintiff, whose only remedy, if any she had, was confined to an arbitration under the Municipal Institutions Act. Mr. Justice Ferguson had expressed the opinion that if a municipal corporation passed a by-law for the construction of drainage work upon a report of an engineer or surveyor employed by them under the statute to examine a proposed work, and constructed the work thereunder, and if the effect of such drainage work should be to deposit the waters carried off from one man's land upon another man's land and there leave them without providing any outlet, or means of carrying the waters from the land upon which they were so deposited, this would constitute such wrongful conduct as would render the corporation liable in an action for damages at the suit of the person injured by such conduct. From this proposition the Court of Appeal expressed their unqualified dissent.

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The question raised by this difference of opinion seems to be simply: Do the drainage clauses of the Municipal Institutions Act require or authorize municipal corporations to carry off the waters on lands proposed to be drained under the statute and to deposit such waters upon lands in a lower position belonging to other persons from which they cannot be removed at all, unless it may be by evaporation, or at least at great cost for which no provision is made? If the drainage sections of the statute do not require or in any express terms authorize that to be done the proposition as stated by Mr. Justice Ferguson seems to me to be well founded in law, and applying it to the present case the only question would be whether the evidence establishes that what was done in the present case was equivalent to the condition of things stated in the proposition of Mr. Justice Ferguson. Now it is to be observed that the drainage clauses under consideration do not require the corporation or its municipal council to do anything whatever for the purpose of draining drowned lands. They simply empower the council of the corporation to employ an engineer or surveyor to make an examination of the lands proposed to be drained, and to make a plan and to report as to whether, and in what manner, in his opinion, the lands proposed to be drained can be drained; and if the council shall be of opinion that the work as proposed by such engineer or surveyor is desirable they may pass a by-law for the purpose. There is no compulsion whatever imposed upon the council to adopt the plan as proposed by their engineer or surveyor. The person so employed is their servant. He may be an ignorant and unskilled person, and if he be, or whether he be or not, the council cannot shirk the responsibility cast upon them of exercising their own judgment in determining whether they shall

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or shall not adopt the plan as suggested by their servant. If they do adopt it it is their own work for all the consequences attending which they must be responsible, except in so far as they are protected by the statute authorizing them to use their discretion in the matter. I cannot concur, therefore, in the opinion expressed by the Court of Appeal to the effect that when the surveyor suggests the scheme of a drainage work it is for the corporation simply to carry it into execution. They must distinctly exercise their judgment as to adopting or refusing to adopt the scheme suggested, and if they do adopt it it becomes their work and scheme and not their servant's. We must, I think, in the language of Lord Watson in *Metropolitan Asylum District* v. *Hill* (1) hold that:

> Where the terms of a statute are not imperative but permissive, when it is left to the discretion of the persons employed to determine whether the general powers committed to them shall be put into execution or not, the fair inference is that the legislature intended the discretion to be exercised in conformity with private rights, and did not intend to confer a license to commit nuisance in any place which might be selected for the purpose.

And again:

> The justification of the defendants depends upon their making good these two propositions: In the first place that such are the imperative orders of the legislature:
>
> That they should do what they have done and is complained of:
>
> And in the second place that they could not possibly obey those orders without infringing private rights
>
> of the plaintiff as they have done.
>
> If the order of the legislature can be implemented without nuisance they cannot plead the protection of the statute, and it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance unless they are also able to shew that the legislature has directed it to be done.

(1) 6 App. Cas. 213.

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As laid down also by Lord Blackburn in the same case (1) we must hold that:

> What was the intention of the legislature in any particular act is a question of the construction of the act.

Now what is the plain inference to be drawn as to the intention of the legislature in enacting the drainage clauses of the Municipal Institutions Act? The clauses are permissive, not imperative. They do not require or direct any works to be executed at all; whether they shall be executed or not is left to the untrammelled judgment and discretion of the municipal councils. The object of the clauses is to enable lands to be drained for the purpose of cultivation and to provide means of paying the expense of doing so, and of preserving and maintaining them when constructed in an efficient state of repair to perform the purpose for which they designed. There is nothing whatever in any of those clauses to justify the inference that the legislature contemplated or countenanced the idea that water taken from the lands of one person should be so conducted as to be deposited upon the lands of another person. The rational and natural inference is that the intention of the legislature was that the water taken from the lands proposed to be drained should be conducted either directly into some lake, or into some natural or artificial water course having an outlet in some lake which the waters taken from the drained lands could reach without any injury being done to the lands of anyone. Such, as I think, being the manifest intention of the legislature to be gathered from there drainage clauses, if a municipal corporation while professing to act under the provisions of the statute should, by a drain or drains constructed by them, conduct such a body of water and at such a rate of speed into a natural or artificial water course that

(1) P. 203.

such last mentioned natural or artificial water course could not resist the rush of the extra water so brought into them and had not sufficient capacity to retain such extra waters so brought down, and to carry them off, and if the consequence should be that the sides of such artificial or natural water courses into which such extra waters should be so conducted should be broken down or overflowed by the rushing waters and adjacent lands should be thereby flooded with water which there were no means of carrying off, doing thereby injury to owners of the lands so flooded, I cannot doubt that such conduct would constitute a private nuisance not at all warranted by the statute, and would be an actionable wrong which could not be justified under the statute.

In the present case the plaintiff's right of action stands, as it appears to me, upon a still firmer foundation for the statute imposed an imperative duty upon the defendants to preserve, maintain and keep in an efficient state of repair the said drain no. 1 and the Raleigh Plains drain into which they conducted the waters brought down by the several drains constructed by them since 1875. For the purpose of keeping these drains, no. 1 and Raleigh Plains drain, in a thoroughly efficient state they were given most ample power annually to levy upon the lands and roads benefited by these respective works a sufficient sum to discharge the imperative duty so imposed upon them. We have seen that to prevent damage to adjacent lands they were empowered, if they should deem it expedient, to change the course of any drain whether constructed u der 33 Vic. ch. 2, or under the Ontario Drainage Act of 1873, or under any other act, or to make a new outlet, or otherwise improve, extend or alter any such drain (on the report of the engineer appointed by them under sections 569 to 582 of the said ch. 184,

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R.S.O. of 1887), without the petition required by said section 569, and the deepening, extending or widening of a drain in order to enable it to carry off the water it was designed to carry off was, by sub-section 4 of section 586 of the said ch. 184, declared to be a work of preservation, maintenance and keeping in repair of the drains which the statute made it the imperative duty of a municipality, making a drainage work within their own limits without benefiting lands or roads in an adjoining municipality, to discharge. Now the finding of the learned County Court Judge, and the evidence upon which that finding proceeds, establish beyond all controversy that the drain no. 1, and the Raleigh Plains drain, which the defendants were by statute imperatively bound to preserve, maintain and keep in repair, had by the mere neglect of the defendants to discharge such their imperative duty been suffered to fall into and continue in such a state of disrepair and inefficiency to do the work required of them that they had respectively lost about two-thirds of their original capacity and were utterly incapable of carrying off the quantity of water brought down to them respectively by the drains constructed by the defendants. This was the cause of the injuries sustained by the plaintiff on her lands, and not the mere construction of the said last mentioned drains by the defendants since the year 1875, and this conducting by the defendants into the drain no. 1 and the Raleigh Plains drain so become inefficient, and deprived of their original capacity by the utter neglect of the defendants to discharge the statutory duty imposed upon them, of a greater body of water than the said drains in such their inefficient condition had capacity to retain was, in my opinion, an unlawful act not at all warranted by the statute, and constituted an actionable wrong for the injuries resulting from which

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the plaintiff is entitled to recover in the present action. To injuries arising from such a cause the arbitration clauses of the statute have, in my opinion, no application; they apply only to injuries consequential upon the mere construction of drains authorized by the statute and not to injuries which, as in the present case, as already shown, arise from acts in themselves unlawful which constitute a private nuisance, and which the statute has not only not directed but has not authorised to be committed. The defendants have not attempted to excuse themselves nor can they excuse themselves on the ground of ignorance of the fact that drain no. 1 and Raleigh Plains drain had become quite incapable of receiving and carrying off the waters conducted into them by the drains or some of the drains constructed by them since 1875. As to drain no. 1 the contention of the defendants is that they did repair it annually, but the evidence is that they did not, and that whatever work they did upon it was done in such an imperfect and inefficient manner as to be quite useless; moreover, it was not pretended that the defendants had done anything to remove the obstruction and damage done to either of the above drains by reason of their being filled up, choked and incapacitated by silt and dirt brought down to them by the other drains constructed by the defendants, and by earth from embankments washed away. That the defendants were, in point of fact, made aware of the utter inefficiency of the drains from such causes there was abundant evidence to show; there was also abundant evidence to show that the drains could have been made efficient and at reasonable cost, ("that" says G. H. Dolsen, who has been a member of the council almost every year since 1871, "is a fact generally conceded";) and that the drains are wholly inadequate, in the condition into which they have fallen by reason

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of the neglect of the defendants to discharge their statutory duty, to carry off the extra waters brought down into them by the defendants, was clearly established. J. C. McNab, a surveyor employed by the defendants to examine Raleigh Plains drain and drain no. 1, says that both of them are altogether inadequate to the work now required of them ; that the Raleigh Plains drain is in a very bad condition, and that it should be very much improved. In 1887 the defendants employed their surveyor McGeorge to make an inspection and report upon that drain, and he reported to them that the improvement and enlargement of the Raleigh Plains drain was a pressing necessity and demanded the best attention of the council. They, however, did not act upon his report.

The liability of the defendants in the present case cannot, in my opinion, be held to depend upon their having or not having had given to them the notice mentioned in sub-section 2 of section 583 of ch. 184 R. S. O. of 1887, which is identical with sub-section 2 of section 584 of 46 Vic. ch. 18 as amended by 47 Vic. ch. 32 section 18. The Raleigh Plains drain is a drain coming under the provisions of section 586 of said ch. 184, which is identical with section 587 of 46 Vic. ch. 18, that is to say, a work completed within the limits of the municipality in which it was commenced and which did not benefit any lots or roads in another municipality. To such a case sub-section 2 of section 583 of said ch. 184 is not by the statute made to apply. That sub-section is limited to works constructed within the provisions of the preceding sections from section 575, which are identical with sections from 576 to 583 in 46 Vic. ch. 18, that is to say, works commencing in one municipality and continued into another, or benefiting lots and roads in another municipality. Drain no. 1 was constructed under 33 Vic. ch. 2 which had

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no such clause as sub-section 2 of section 583 of ch. 184, but by section 587 of the latter act section 586 of that act is made to apply to drains constructed under 33 Vic. ch. 2 while no such provision is made as to section 583. So that by this section 587 the legislature seems to me in an unequivocal manner to recognise the fact that that section 586, as its language seems in plain terms to convey, applies to cases quite different from those to which sec. 583 applies. But if sub-section 2 of section 583 did apply to the present case it could not, in my opinion, be construed as divesting the plaintiff of the common law right of action which every one has for injuries occasioned by a plain neglect on the part of the defendants to perform an imperative duty imposed upon them by statute. The section must rather be read as conferring a benefit additional to such common law right, and as providing that any person sustaining injury after such notice shall have a right to the mandamus besides the right to recover pecuniary damages for the injury consequential upon neglect after notice. The happening of such injury after such notice may well be held to be conclusive evidence of negligence, but such a provision cannot be construed as divesting a plaintiff of a right of action theretofore accrued by continued neglect of an imperative duty imposed upon the municipality by statute to preserve, maintain and keep in repair the drain when constructed, of the necessity of repairing which the council may have had abundant evidence while the party injured may have been wholly ignorant. However, for the reasons already given, I am of opinion that the plaintiff is entitled to recover apart from any question as to the notice referred to in said sub-section 2 of section 583. It was argued that the damages should be separated, namely, those arising from the Raleigh Plains drain having been surcharged from

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those arising from drain no. 1, upon the suggestion that the defendants are entitled to levy any damages recovered against them upon the lands chargeable with the maintenance of the said respective drains. It may be very questionable whether damages recovered by a plaintiff by reason of neglect of the defendants to maintain in an efficient condition the drains constructed by them, or by the wrongful introduction into them of more water than in their neglected and inefficient state they are capable of retaining, can under section 592 of ch. 184, R.S.O., 1887, be levied upon the lots chargeable with assessment for the maintenance of the drains. That section would rather seem to be limited to damage occasioned by proceedings taken under the act and so authorized by the act by the parties engaged in the construction of the work authorized. It would seem to be an unnatural and a forced construction of the section to hold that a person made liable to contribute to the construction and maintenance of a drain authorized by the act, because of the benefit it confers upon him, should also be held to be liable to contribute to recompensing himself for damage and injury occasioned to his land by the illegal, wrongful conduct of the municipality and its officers by proceedings not authorized by the statute, or by negligence in the construction of a work which the statute did authorize, or by neglect to discharge the duty of maintenance in repair imposed by the statute. This, however, is a matter with which the plaintiff is not at present concerned. There is no law which makes it imperatively incumbent on a court or jury, where two causes may have contributed to occasioning the injuries complained of, to say how much they attribute to one cause and how much to the other, or which requires the verdict or judgment to be set

aside for default of such severance of the damages. In my opinion the appeal must be allowed with costs and the judgment of Mr. Justice Ferguson should be restored; the mandamus is, in my opinion, maintainable, not under section 583 of the Municipal Institutions Act, which, in my opinion, has no application in the present case, but under the provisions of the Ontario Judicature Act ch. 44 R. S. O. 1887.

PATTERSON J.—The government drain no. 1 was constructed between the years 1870 and 1873, and for some years thereafter the plaintiff's land was greatly benefited by it; but the defendant corporation from time to time during the ten years following the completion of that drain constructed a number of other drains leading into it, and thereby brought down into drain no. 1 immense quantities of water far beyond its capacity to carry off, with the result that drain no. 1 became surcharged and from time to time overflowed the embankment on its west side, particularly in the years 1885, 1886, 1887 and 1889, and frequently several times in each of those years and the water thus brought down flowed on, to and over the plaintiff's land and damaged her land and crops. The defendants provided no sufficient outlet for the additional waters so brought down.

Those are facts found by the learned referee, whose findings of fact were acquiesced in by the High Court and the Court of Appeal, although those courts differed as to the legal result.

Similar facts were found with respect to the Bell drain, viz., that by its construction by the defendants in 1884, and particularly by the construction, as part of the plan of the drain, of an embankment on the westerly side of the drain, a large body of water was brought down to the Raleigh Plains drain that would

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not otherwise have come there; that the Raleigh Plains drain was thereby overcharged with water; and that in time of high water in the years 1885, 1886, 1887 and 1889, and in some of those years several times in the year, the water thus brought down flowed on to and over the plaintiff's land, or by raising the general level of the water caused other waters to flow on to and over the plaintiff's land that would not otherwise have gone there, damaging the land and crops; and for the additional waters so brought down the defendants provided no sufficient outlet.

We are not expected to go behind these findings. The same facts were substantially embodied in the following extract from a formal statement agreed upon, for the purpose of avoiding a certain amount of printing, when the case was before the Court of Appeal:

> It is now admitted by all parties that the drains so constructed at or after the dates of the respective by-laws put in, since no. 1, have not and never had a sufficient outlet to drain the plains and carry the waters running down in their courses past the plaintiff's lands and other lands in the plains, so as to protect them and the crops thereon from injury, and that the drains constructed since no. 1 was made have increased the flow of water brought down.

The drainage clauses as now found in the Municipal Act, R.S.O. 1887, ch. 184, do not differ in any respect at present material from those in force when the drains were made. We shall have to glance, though as rapidly as may be, at some of them.

Sec. 569 enacts that in case the majority in number of the owners of the property to be benefited in any part of any township, &c., petition the council for, *inter alia*, draining the property (describing it) the council may procure an engineer or provincial land surveyor to make an examination of, *inter alia*, the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or surveyor, and an assessment to be made by such en-

gineer or surveyor of the real property to be benefited by such work, and if the council is of opinion that the proposed work or a portion thereof would be desirable the council may pass by-laws:

1. For providing for the proposed work, or a portion thereof, being done, as the case may be;

2. For borrowing on the credit of the municipality the funds necessary for the work.

3. For assessing and levying on the real property to be benefited a special rate to pay for the work;

4 to 21. For purposes which we need not now stop to notice.

Section 570 gives a form of by-law which is to recite the prayer of the petition, the examination by the engineer or surveyor of the locality to be drained, or as the case may be, his report thereupon, and the opinion of the council that the work is desirable, and to enact that the report, plans and estimates be adopted and the drain (or as the case may be) and the works connected therewith made and constructed in accordance therewith, and to provide for the borrowing of the money and the levying of the special local rate.

The by-laws for the construction of these drains followed the statutory form. The one that related to the Bell drain has been printed as a specimen of the whole. It recited a petition, not for the draining of a locality in the mode which the council may be advised by its engineer to adopt but for a specified work.

Whereas, a majority in number of the owners as shown by the last revised assessment roll of the property hereinafter set forth to be benefited by the construction of the Bell drain, have petitioned the council of the said township of Raleigh praying that the government drain no. 2 be closed up at a point east from and near to the outlet of the Kersey drain, and that a tap drain be constructed from said government drain no. 2 at or near to the line between lots 10 and 11 in the 6th and 5th concessions to the Raleigh Plains drain. Also, that the Dyke drain he closed up west of said proposed drain.

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The report of the engineer, also recited, states that he has made an instrumental examination over the route of proposed drain, and reports that the work will comprise the making of a tap drain, &c., &c., adding "The tap drain will greatly benefit lands assessed," and giving estimates, with schedule of lands and roads benefited which are to be assessed for the work.

If the Raleigh Plains drain, into which the council thus, at the request of William Bell and others the petitioners whose property was to be benefited, ran the tap drain called the Bell drain, had been sufficient to carry off the water thus poured into it no harm would have been done. It was not sufficient, and the consequence was the flooding of the plaintiff's land which lay beyond the Raleigh Plains drain.

I am not able to see on what principle the intervention of the engineer, whose advice as to the propriety of running the Bell drain into the other seems neither to have been asked or given, affects the liability of the council to the persons, strangers to the work, who were injured by it. The engineer's report merely shows how the waters may most effectually be turned into the Raleigh Plains drain, and takes no account of what is then to become of them. The capacity of the Raleigh Plains drain, and of Jeannette's Creek into which it ran, to receive the waters and carry them to the Thames, which was the outlet, appears to have been assumed without examination. I do not understand the defendants to contend that upon any construction of their statutory powers they had a right to drain any locality by merely conveying the waters to a lower level, without providing an outlet by which they would ultimately be carried to a river or lake. It is plain that the drainage authorised by the statutes is drainage by way of such an outlet. In the case of

Malott v. *Township of Mersea* (1), the question was incidentally discussed before the Court of Appeal in 1886. The judgment of that court does not appear in the reports but it was before us in Mss. on the argument of this appeal. The council may have honestly taken it for granted that the Raleigh Plains drain afforded a sufficient outlet for the waters brought down by the Bell drain in addition to the waters with which it was already charged. They may be credited with having honestly thought so if they gave any thought to the matter, but all the same they were creating the nuisance from which the plaintiffs suffered. They brought the water there without providing an outlet for it, and it matters little to the plaintiffs whether that was due to miscalculation, or to the assumption without any calculation that the drain would carry the water, or even to simple recklessness. The general rule of law on the subject seems to me to be well expressed by Mr. Justice Denman in *Humphries* v. *Cousins* (2), when speaking of the right of every occupier of land to enjoy that land free from invasion of matters coming from the adjoining land.

> Moreover, he said, this right of every occupier of land is an incident of possession and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.

The divisional court (Denman and Lindley JJ.,) considered these rights of an occupier established by the cases of *Smith* v. *Kenrick* (3); *Baird* v. *Williamson* (4); *Fletcher* v. *Rylands* (5) and the older authorities there referred to; and the then recent decision of *Broder*

(1) 9 O.R. 611.
(2) 2 C.P.D. 239, 244.
(3) 7 C. B. 515.
(4) 15 C. B. N. S. 376.
(5) 3 H. & C. 774: L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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v. *Saillard* (1). The first three of these cases were, seven years earlier, commented on by the late Sir Adam Wilson in his judgment in *Rowe* v. *Corporation of the Township of Rochester* (2), the head note of which case is as follows :—

The defendants, in order to drain a highway, conveyed the surface water along the side of it for some distance by digging drains there, and stopped the work opposite the plaintiff's land which was thus overflowed. Held that the defendants were liable even without any allegation of negligence.

The facts which are, thus far, in discussion resemble those in the case of *Coghlan* v. *Ottawa* (3) where the city corporation, adopting an existing sewer as part of the drainage system, connected with it two others of greater capacity which brought more water than the first could carry away, in consequence of which water escaped and injured the property of the plaintiff. The city was held liable.

In *Furlong* v. *Carroll* (4) I had occasion to examine the law with more particular reference to fire communicated from one man's land to that of another man, but the principle of liability is the same when damages are caused by water. I refer to my judgment in that case.

I shall not refer to further authority on the subject of the plaintiff's right of action upon the facts as I have stated them, beyond a quotation, which I may adopt as expressing my own conclusion on this branch of the present case, from the language of the present Chief Justice of Ontario in *McGarvey* v. *Strathroy* (5).

The defendants have in the exercise of their municipal powers caused a larger quantity of water to flow on the plaintiff's land to her injury than would naturally have flowed thereon. From the early days of our municipal system I think it has been uniformly held that such proceedings give a cause of action.

(1) 2 Ch. D. 692.
(2) 29 U. C. Q. B. 590.
(3) 1 Ont. App. R. 54.
(4) 7 Ont. App. R. 145.
(5) 10 Ont. App. R. 631, 635.

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What I have said with respect to the Bell drain and its effects applies equally to the various other drains that discharge into and overcharge the government drain no. 1.

The common law right of the plaintiff against these defendants has not, in my opinion, been taken away by anything in the statute.

The argument to the contrary is that when drainage works are authorized by a by-law passed in accordance with the statute the corporation incurs no liability to an action for damage caused by the work unless there has been negligence in the execution of it, but that if damages are claimed the procedure to recover them must be by arbitration. The question is not the soundness of the principle thus relied on, which may be conceded, but its bearing upon the facts of the case. The provision of the statute which enables disputes to be settled by arbitration does not of itself cut off the remedy by action when, as in this case, the right infringed is a common law right and not one created by the statute; but if the act that injures you can be justified as the exercise of a statutory power you are driven to seek for compensation in the mode provided by the statute, or if (as has sometimes happened) no such provision is made you are without remedy. But the justification, if otherwise capable of being established, may be displaced, and the right of action maintained, by proof of negligence which caused the damage. The law is stated in terms at once comprehensive and concise in a passage which I shall read from Lord Blackburn's judgment in *Geddis* v. *Proprietors of Bann Reservoir* (1).

> For I take it, he said, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although

(1) 3 App. Cas. 430, 455.

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it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers.

I do not doubt that the learned Chief Justice of Ontario correctly applied this principle to the statute before us, considered with reference to the general scope of the drainage provisions, when he said in this case :

> I am of opinion that a corporation, adopting and carrying out a drainage scheme duly presented to them by a surveyor under the statute. cannot be held responsible in damages because the scheme may prove erroneous and inefficient in some important particular, *e.g.*, the not providing a sufficient outlet for the waters which it is designed to carry off. They are held responsible by action for negligence in the execution of the work; but having duly executed it according to its provisions it is not negligence in them that it turns out to be wholly inefficient or useless.
>
> In other words, the statute does not make them responsible for the errors or unskilfulness of the drainage scheme duly adopted by them.

But I do not think the facts bring this case within the rule so enunciated. The council has obviously a discretion to exercise with regard to the adoption, rejection, or modification of any projected scheme of drainage. The initiative is taken by the owners of real property who may petition for the execution of the kind of work they desire, within the classes enumerated in section 569, some of which works do not, while others do, involve the diversion of waters from their natural channels. The petition may be for the deepening or straightening of any stream, creek or watercourse, or for the draining of property (describing it), or for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse, or for the lowering of the waters of any lake or pond for the purpose of reclaiming flooded land

or more easily draining any lands. The council on receiving the petition may procure an engineer or surveyor to make an examination of the stream, creek or watercourse, or of the lake or pond, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by the engineer or surveyor, and an assessment of the property to be benefited; and then, if of opinion that the proposed work, or a portion thereof, would be desirable, may pass the by-law.

To what extent or upon what information the discretion of the council as to the adoption of the report of the engineer is to be exercised we need not exhaustively consider. They must at least be satisfied that the scheme is one which the statute authorizes. When the drainage of described property is to be undertaken it is the clear intention of the statute that the waters shall be carried to some river or lake, or to a waterway by which they may reach that destination. Large powers are given to engineers and councils with the object of securing in every case a proper outlet. The corporation may not be responsible for the mistake of an engineer respecting the sufficiency of the outlet designed or selected by him, but the report and plans which may be procured for the information of the council, when the drainage of a described area is proposed, would be incomplete if they did not indicate an outlet which, in the judgment of the engineer, was sufficient.

We know from the Bell drain by-law, which is before us as a specimen of the by-laws relied on, that the petition, though it may have been practically sufficient, was not in terms for any of the works specified in section 569, inasmuch as it asked, not for the draining of certain lands, though that was really the object aimed at, but for doing specified work, viz.:

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making a tap drain from one existing drain to another; and we know further that the engineer's report merely set out the works that would be required in order to turn the waters from the one drain to the other. We cannot say, from anything that is before us, that the council acted upon any skilled advice of the engineer as to the sufficiency of the Raleigh Plains drain as an outlet for the water proposed to be diverted into it.

Similar remarks may be made concerning the overcharging of government drain no. 1.

I am of opinion that these drainage works cannot properly be held, under the circumstances, to be such a reasonable exercise of the statutory powers of the council as to free the municipality from actions for damages for injuries caused by the waters, but that the action can be maintained on the grounds stated in the passage I have quoted from the judgment of Chief Justice Hagarty in *McGarvey* v. *Corporation of Strathroy* (1).

I am further of opinion that it was undoubted negligence to discharge the waters collected from the areas newly drained into the inadequate waterways, called the Raleigh Plains drain and government drain no. 1, without examination of their condition and capacity.

On these grounds I think the judgment of the court of first instance, sustaining the award of damages for flooding the lands occupied by the plaintiff, was correct.

I have now to consider the other branch of the case, which relates to the embankment on the west side of government drain no. 1, which embankment constitutes the travelled part of the road allowance along which the drain is constructed.

It is found as a fact that the earth taken from the drain when it was first dug was thrown upon the road

(1) 10 Ont. App. R. 631, 635.

so as to form this embankment as part of the plan of the drain, and not merely by way of making a better road. The embankment has been worn down and perhaps washed away in some places, permitting water to run over which ought to have been kept in the drain. In the High Court a writ of mandamus was awarded to compel the corporation to restore the embankment to its original height, by way of enforcing the duty cast upon the municipality to maintain the drain. The drain is wholly within the municipality in which it is commenced, and does not benefit the lands or roads in any other municipality. Sec. 586 declares that it shall be the duty of the municipality making "such a work" to preserve, maintain and keep in repair the same at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shown in the by-law when finally passed.

The question whether the duty of keeping in repair drains which do not extend into, or benefit, the lands or roads of another municipality is created by this section 586, or by section 583, is of importance, because section 583 gives the right to a mandamus to compel performance of the duty it imposes only after a reasonable notice to repair, and also, as I read it, makes the notice essential to the liability of the municipality to pecuniary damages for injuries caused by neglect or refusal to repair, while section 586 is silent on those subjects.

Section 583 is wide enough in its terms to include both classes of drains, those extending into or benefiting more than one municipality and those to which section 586 relates. The language is:—

> After such work is fully made and completed it shall be the duty of each municipality, &c.

What is meant by "such work"? I understand those words to mean any of the works authorized by

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section 569. We find the same expression in section 586 which commences thus:—

> In any case wherein after such work is fully made and completed, the same has not been continued into any other municipality, &c.

In both sections the term "such work" means the same thing, and that is, as seems to me very evident, any work done under section 569.

Section 583 casts upon each municipality the duty of preserving, maintaining, and keeping in repair the work 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. Now, this discretion as to the apportionment of the cost of maintenance and repair was not considered necessary in the case of works that were entirely local in their effect as well as in their situation. Section 586 accordingly declares by whom the expense of maintaining works of that class is to be borne, giving the council no discretion in the matter.

The office of section 586 I take to be, not to impose the duty or declare what shall be the consequence of neglecting it,—those things being already done by the earlier section,—but to declare at whose cost the duty is to be performed. In the case of *White* v. *Gosfield* (1), in the Court of Appeal, I gave my reasons for so reading the statutes as they stood at the date of that decision, and I do not think the effect of the clauses as now found in the R.S.O., 1887, even with a slight amendment made in 1889, is different from what I then considered it to be, notwithstanding some ambiguities that have been allowed to creep in. The most serious of these ambiguities occurs in sub-section 9 of section 569, in the last part of the sub-section, which

(1) 10 Ont. App. R. 555.

represents an amendment made in 1886 (1). If I am right in my understanding of the effect of those sections 583 and 586, the provision of sub-section 9 to which I refer may perhaps fail in its intended effect, while, if I am wrong, an unexpected and not very creditable anomaly will appear. It would have to be held that a person complaining of the want of repair of a drain lying wholly within his municipality is free from the restrictions prescribed for his neighbor, whose drain is in all respects like the other but happens to benefit some land across the township line, while the first has not that effect.

No such an anomaly can have been intended, nor does it, in my opinion, arise upon the proper reading of the statute.

The duty to repair thus arising under section 583 the plaintiffs are not entitled to their mandamus unless they gave a reasonable notice to repair as required by that section. I cannot agree with the learned arbitrator that the notice given in 1883, and which was at that time complied with, whether sufficiently or not, can support the claim now pressed, and I agree with the Court of Appeal that the mandamus ought not to have been ordered. Other objections to the writ, or to the terms of the order granting it, I need not consider.

Sec. 583, as I understand it, further makes the notice a necessary preliminary to the liability of the municipality to pecuniary damage to any person who or whose property is injuriously affected by reason of neglect or refusal to repair according to the notice, but this does not, in my opinion, affect the right of the plaintiff to the damages now awarded to her.

The work of preservation, maintenance and keeping in repair, under secs. 583 and 586 includes (by the express terms of those sections) the deepening, extending

(1) 49 V. c. 37 s. 21.

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or widening of a drain in order to enable it to carry off the water it was originally designed to carry off. *A fortiori* the duty to maintain according to the original plans and dimensions of the drain is to enable the drain to carry off the waters it was originally designed to carry off. But this Government drain no. 1, which is a work to the cost of which the plaintiff contributed, was not originally designed to carry off the waters that in later years were turned into it. Those are the waters which, if I correctly understand the findings, overflowed from the drain. The duty of the council towards the plaintiff was to prevent those waters from injuring her land. Whether or not that could have been done by clearing out or enlarging or otherwise repairing the drain, the purpose of the repairs not being to enable the drain to carry off the waters it was originally designed to carry off, sec. 583 does not stand in the way of the recovery of the damages in question.

In my opinion the appeal should be allowed and the judgment of the High Court restored as to the award of damages, and the appeal should be dismissed as far as it asks for a restoration of the writ of mandamus.

I think the plaintiff should have her costs in this court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for appellants: *Douglas, Douglas & Walker.*

Solicitors for respondents: *Wilson, Rankin, McKeough & Kerr.*

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BRENTON H. COLLINS, EXECUTOR OF ENOS COLLINS DECEASED, DONALD KEITH AND ARTHUR DRYSDALE AND ARTHUR B. MITCHELL, EXECUTORS OF JOSEPH SEETON, DECEASED (PLAINTIFFS).... APPELLANTS; *Feb. 24, 25. *June 28.

AND

FRANCIS W. CUNNINGHAM, ADMINISTRATOR, ETC., AND OTHERS, (DEFENDANTS)..... RESPONDENTS.

FRANCIS W. CUNNINGHAM, ADMINISTRATOR, ETC., AND OTHERS, (DEFENDANTS)..... APPELLANTS,

AND

ARTHUR DRYSDALE AND ARTHUR B. MITCHELL, EXECUTORS OF JOSEPH B. SEETON AND DONALD KEITH (PLAINTIFFS), AND MARY I. SHERATON (DEFENDANT)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mortgagor and mortgagee—Foreclosure of mortgage—Practice—Addition of parties—Lessee of mortgagor—Protection of interest of—Staying proceedings—Order for sale of mortgaged lands.

In an action for foreclosure of mortgage defendants were the administrator and heirs at law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the Queen Hotel, part of the mortgaged property, under lease from some of the heirs, were not made parties. None of the defendants appeared and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed and the lands ordered to be sold on a

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

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day named. On that day, on application of the lessee of the Queen Hotel, an *ex parte* order was made by the Chief Justice directing that on payment into court of $37,019 by S. & K., further proceedings by plaintiff should be stayed until further order and that plaintiff should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K. which direction was complied with.

On Dec. 26th, 1889, defendants moved to rescind this order. The motion was refused and the order amended by a direction that the lessee should be made a defendant to the action and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On Jan. 4th, 1890, a further order was made directing that the Queen Hotel property be sold subject to the rights of the lessee. From the two last mentioned orders defendants appealed to the full court which affirmed that of Dec. 26th and set aside that of Jan. 4th. Both parties appealed to this court.

Held, that the order of 26th Dec., 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of fi-fa, and being made at the instance of a lessee, and as such a purchaser *pro tanto*, of the mortgaged lands who had a right to redeem it was in the discretion of the Chief Justice so to order. To the direction that plaintiff should convey the lands to S. & K. defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor had defendants a right to object to the removal of the stay of proceedings and any right subsequent incumbrancers not before the court might have to complain would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal to the full court the property having been sold under the decree the purchaser not being before the court was a sufficient ground for dismissing the appeal.

Held further, that the order of Jan. 4th, 1890, should also have been affirmed by the full court. In selling the mortgaged property the court had a right to endeavor to preserve the rights of the lessee by selling first the portions in which she had no interest.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming an order of the Chief Justice made on December 26th, 1889 in an action for foreclosure of mortgage and rescinding another order made on January 4th, 1890.

(1) 23 N. S. Rep. 350.

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The material facts are fully stated in the judgment of the court delivered by Mr. Justice Strong.

Ross Q.C. for the appellants in *Collins* v. *Cunningham* appeals from the judgment rescinding the order of January 4th, 1890.

W. B. Ritchie for the respondents.

W. B. Ritchie for the appellants in *Cunningham* v. *Drysdale* argues that the order of December 26th, 1889, should also have been rescinded.

Ross Q.C. for the respondents.

The judgment of the court was delivered by:—

STRONG J.—These are appeals from two orders made by the Supreme Court of Nova Scotia on the 10th of July, 1891, by one of which an appeal from an order made by the Chief Justice of that court on the 26th of December, 1889, was dismissed, and by the other, an appeal from another order of the same judge, made on the 4th January, 1890, was allowed and the order last mentioned was reversed, rescinded and set aside. The first mentioned order was made with the concurrence of the three learned judges, Weatherbe, Ritchie and Townshend JJ., who heard the appeals; from the judgment on the secondly mentioned appeal Mr. Justice Townshend dissented.

The action was originally instituted by Brenton Collins as the surviving executor of the Honourable Enos Collins for the foreclosure and realization of certain mortgages which had been made by one Bernard O'Neil to secure a large sum of money and interest to Enos Collins. The defendants in the action were Francis Cunningham, the administrator of the mortgagor, Bernard O'Neil, who had died intestate, and the heirs at law of O'Neil, and certain devisees in trust of some of the heirs who had died. None of the subse-

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quent incumbrancers claiming charges against the estate as judgment creditors in respect of judgments recovered against the heirs of the mortgagor were originally made parties to the action, nor was Mrs. Sheraton, who claims to be a lessee of part of the property known as the Queen Hotel in Halifax, under a lease to her made upon the 15th of April, 1886, by Ellen O'Neil, Ellen Cunningham and Rose Cunningham, three of the heirs of O'Neil, the mortgagor.

The writ, which was specially endorsed, was issued on the 18th of July, 1888, and the statement of claim was filed on the 30th July, 1888.

None of the defendants having appeared, on the 31st of July, 1888, an order in the nature of a decree was made whereby, after ascertaining and settling the amount due to the mortgagee for principal and interest, it was ordered that the equity of redemption of Bernard O'Neil, and of all persons claiming title under him or under the defendants, should be barred and foreclosed; that the mortgaged lands and premises should be advertized for sale in a newspaper published at Halifax for at least 30 days and by hand bills posted in the County of Halifax for at least 10 days before the day appointed for the sale, and that "a copy of said hand bills be mailed to each of the subsequent incumbrancers of said lands and premises at least ten days before such sale." And by the same order it was also ordered that "unless before the day appointed for such sale the amount due to the plaintiff with his costs be paid to him or his solicitor the said lands and premises be sold at public auction by the sheriff of the County of Halifax to the highest or best bidder. And that upon payment of the purchase money the sheriff do make a good and sufficient deed to the purchaser thereof." And it was further ordered "that the said

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sheriff, out of the proceeds of such sale, do pay to the plaintiff or his solicitor the amount due him for principal and interest on the mortgages sought to be foreclosed with his costs to be taxed, and the balance, if any, to the accountant general to abide any further order that may be made herein."

On the 9th of August, 1888, Mr. Justice Townshend made an order that William McGibbon and David McGibbon, who were mortgage incumbrancers claiming as such under mortgages made by the heirs of Bernard O'Neil, or by some of them, should have leave to enter an appearance and becomes parties defendant in the action. On the 16th of August, 1888, the Chief Justice in chambers made an order that the mortgaged lands should be sold in two separate lots, that the Queen Hotel property should be sold first, and that the order of foreclosure and sale should be amended by engrafting thereon the order then made. On the 15th September, 1888, which was the day fixed by the sheriff and advertised for the sale, another order was made by the Chief Justice *ex parte*, on the application of Mary I. Sheraton, whereby it was ordered that upon payment into court in the cause by Joseph Seeton and Donald Keith of $37,019, all further proceedings on the part of the plaintiff should be stayed until further order, and it was also thereby ordered that within twenty days from the date of the order the plaintiff should assign, transfer and re-convey to the said Joseph Seeton and Donald Keith the mortgages sought to be foreclosed therein, and the lands and premises therein mentioned and described free and clear of all incumbrance by plaintiff or any person claiming through or under him, and also the above named suit and the benefit and advantage of all proceedings had and taken therein; and that upon compliance with this order by the plaintiff he should be entitled to be paid out of the

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said monies the full amount of his claim for debt, interest and costs.

Pursuant to this order Messrs. Seeton and Keith paid into court the amount mentioned in the order.

Subsequently, and on the 22nd of October, 1888, the Chief Justice made another order whereby it was ordered that the prothonotary should pay to the plaintiff's solicitor upon his written receipt the sum of $36,923.98 being the amount due the plaintiff herein, out of the monies paid into court under the order of September the 15th, 1888. And pursuant to this order the plaintiff was paid the amount specified, whereupon he assigned his mortgages and conveyed the mortgaged lands and premises to Messrs. Seeton and Keith.

Upon the 26th of December, 1889, a motion was made by the defendants other than the defendants the McGibbons to rescind the order of the 15th September, 1888, whereupon the Chief Justice refused the motion and further ordered that the order of the 15th September, 1888, should be and the same was thereby amended by adding a clause thereto directing that Mary I. Sheraton be made a party defendant in the action, and it was declared that the said Mary I. Sheraton was thereby made a party defendant accordingly. And after reciting that the order of the 15th of September, 1888, had been complied with by the plaintiff and that the mortgages sought to be foreclosed together with the benefit of the proceedings in the action had been assigned to Messrs. Seeton and Keith upon their application, and with their consent, it was ordered that they should be and they were thereby joined as plaintiffs and made parties plaintiffs in the action, and further that the stay of proceedings directed by the order of the 15th September, 1888, be removed. Mrs. Sheraton, having thus been made a party defendant, on the 31st December, 1889, filed her statement

of defence whereby she set up that she was entitled under a lease made by Ellen O'Neil, Rose Cunningham and Ellen Cunningham, dated the 15th of April, 1886, to a term of five years from the 6th of May, 1886, in the Queen Hotel property at the yearly rent of $2,400 payable in monthly payments of $200 each, with a right of renewal for a further term of five years; that she had entered into possession under the lease and made large repairs and improvements on the property, and that she had procured Messrs. Seeton and Keith to pay off the original plaintiff and take an assignment of the mortgages. Subsequently, and on the 4th of January, 1890, the Chief Justice made an order whereby it was ordered that the Queen Hotel property should be sold, subject to the rights of Mary I. Sheraton under the terms of the lease mentioned and set out in her answer, and subject to said lease, and that the order of sale granted on the 31st of July, 1888, as varied by the order of the 16th August, 1888, should be amended accordingly and by engrafting thereon the order now being stated, and that the said lands and premises in said mortgages described be sold as directed and provided in and by the order of sale of 31st July, 1888, and as the same is varied by the order of the 16th August, 1888, and by the order thus made, and that any amount received from the sale of the premises over and above the amount settled by the decree of 31st July, 1888, should be paid into the hands of the accountant general to abide the further order of the court.

From these two orders of the 26th December, 1889, and the 4th January, 1890, the defendants other than the defendants McGibbons appealed to the full court, which court as before mentioned on the 10th July, 1891, gave the judgments already stated dismissing

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the appeal from the first mentioned order and allowing that from the order secondly mentioned.

From these orders of the full court the present appeals have been brought.

As regards the whole of these proceedings I must take leave to remark that they appear to be somewhat out of the usual course of the proceedings in a simple foreclosure suit. It is, however, necessary to examine them separately and ascertain if there were any substantial grounds for displacing the orders made by the Chief Justice. First as to the order of the 26th December, 1889. That order in the first place refused to rescind, and thus indirectly confirmed, the order of the 15th September, 1888, which was made at the instance of Mrs. Sheraton, who, although having under the lease mentioned a very substantial interest in the equity of redemption of part of the lands in mortgage, being in fact a lessee, and as such a purchaser *pro tanto*, and having thus a clear and indisputable right to redeem, had not up to that time been made a party to the action. It was made *ex parte* on the very day of the sale. The first provision it contained was to stay the sale. I can see no greater objection to this than would have existed had the proposed sale been under a writ of *fieri facias*, and had the Chief Justice granted an *ex parte* injunction to restrain it, a proceeding which would clearly have been unobjectionable on the score of regularity. It was made at the instance of a person having a right to redeem and whose property was about to be sold behind her back as it were, and it being in the discretion of the Chief Justice to stop the sale we might well assume that it was in the interest of justice that it should be stayed, if it did not appear, as in fact it does, that such was the case. Moreover, the stay of proceedings was not to take effect until the redemption money should be paid into court, and the

sale directed by the decree of the 31st July 1888, was expressly contingent upon there being no redemption. The defendants, parties interested in the equity of redemption, could therefore have no absolute right to insist that that order was irregular, whatever right the original plaintiff in the action might have had to do so. No such objection is, however, made by the plaintiff. Further the proceedings were only to be stayed upon payment into court, by parties who intervened at the instance of Mrs. Sheraton, of a sum sufficient to cover the full amount of the mortgage debt and interest. I can see no objection to this part of the order. As regards its latter provision, that upon payment of the sum received into court the original plaintiff should assign the mortgages and convey the premises to the parties paying in the money, the defendants have no *locus standi* to raise any objection to this branch of it, whatever right the plaintiff might have had to do so. The plaintiff did not, however, so object, but acquiesced in it and took the benefit of it by receiving payment of his debt and interest out of the monies obtained by means of its provisions. Therefore, so far as the order of the 26th December, 1889, confirmed this order of September, 1888, by refusing to rescind it it appears to have been unobjectionable. The other directions contained in the order of the 26th December, 1889, relate to the addition of parties. It is provided that Messrs. Seeton and Keith, who had furnished and paid into court the funds to pay off the original mortgagee, should be substituted or added as plaintiffs, and further that Mrs. Sheraton should be made a party defendant. No prejudice whatever could possibly accrue to the present appellants from these directions. It was surely right that Mrs. Sheraton, a party having such an important interest in the equity of redemption as she appears to have had under the lease

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before referred to, should be a defendant in order to enable her to assert her rights. And as regards the substitution or addition of plaintiffs that must have been a matter of indifference to the present appellants who could not in any way be prejudiced by any transfer or assignment of his rights which the original plaintiff might think fit to make and the substitution of his assignees as parties, plaintiffs, in his stead. It could make no difference to them to whom the proceeds of any sale which might result from the proceedings should be paid to the extent of the mortgage debt and interest.

This order of the 26th December, 1889, also discharged so much of the order of the 15th September, 1888, as stayed the proceedings. This left the plaintiffs at liberty to proceed with the sale under the decree of the 31st of July, 1888, which they appear to have done. I can see no objection to this part of the order so far as the present appellants are concerned. Whatever rights persons not parties to the action, viz., subsequent incumbrancers who are judgment creditors, not of the mortgagor O'Neil but of his heirs, may have to object was a question not before the court. The rights of such persons cannot be prejudiced by what was done in their absence, nor by what is now done, and they are still at liberty to raise any objection to the proceedings which may be open to them. Further, inasmuch as it appears from the judgment of Mr. Justice Townshend that in the interval between the date of this order and the appeal to the full court the property was sold under the decree, the purchaser under that sale, which was warranted by the decree of the 31st of July, 1888, which itself was not impeached, ought to have been before the court, and on this ground alone the appeal should have been dismissed. It is true that the facts

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of this sale, and of the execution of a conveyance by the sheriff carrying it out, do not appear from the affidavits, yet inasmuch as Mr. Justice Townshend refers to it as a fact before the court it is right to presume that it was brought in some way to its judicial notice, and at all events it is a fact before this court inasmuch as it was alleged and admitted by counsel on the argument of the present appeal. The appeal from the order of the 26th December, 1889, was therefore, in my opinion, rightly held by the full court to be unfounded and was properly dismissed.

The principal objection to the order of the 4th of January, 1890, was that it directed the Queen Hotel property to be sold subject to Mrs. Sheraton's rights, whatever they were, under the lease made to her in April, 1886, of that property. Whatever her rights under that lease were is a point we are not called upon to consider, but whether she merely obtained a lease from three of the heirs at law of their undivided interests, or whether these lessors were entitled under some partition to that property in severalty, or whether the lease had been confirmed by the other heirs by receipt of rent, are matters all beside the present question. Whatever rights Mrs. Sheraton had acquired under the lease she had so acquired as a purchaser for valuable consideration of the equity of redemption *pro tanto* and as such it was entirely in the discretion of the court in selling, and quite right that they should endeavour to preserve these rights by selling, the other properties in which she had no interest in priority to the property demised to her. In my experience it was always the practice of the master's office in selling different parcels of land embraced in the same mortgage, in some of which the equity of redemption had been sold by the mortgagor to a *bonâ fide* purchaser, to sell in such order of priority as if possible to conserve the rights of the

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purchaser. And this was done without any special direction in the decree. The soundness of such a mode of procedure is obvious if we consider that it is an established rule of equity that when some of several parcels of land subject to a common charge have been sold by the owner of the equity of redemption to purchasers for value, as between such purchasers and the mortgagor, and subject, of course, to the rights of the mortgagee which remain unaffected by such a sale, the different parcels are liable to the charge of the mortgage debt in the inverse order of their alienation. I am of opinion therefore, that the order of the 4th of January, 1890, was warranted—the mortgagees not objecting—by this consideration. I must therefore agree with Mr. Justice Townshend in holding that the appeal from the order last mentioned ought also to have been dismissed by the full court.

It is to be observed that the disposition we now make of this appeal cannot in any way affect the rights of subsequent incumbrancers not before the court. The decree of the 31st of July, 1888, by which an immediate sale was ordered was not impugned. It may still be open to those incumbrancers to object that such a decree ought not to have been made in their absence, and if they are able to do so in other respects the orders pronounced on these appeals cannot prejudice their right to impugn not only that decree but also the sale made under it. Further, I would repeat what has been already said, that it is not now assumed to define what Mrs. Sheraton's rights under the lease may be. This uncertainty may no doubt have prejudiced the sale and have had a depreciating effect upon it, if indeed anything could be considered depreciatory under a system in which mortgage sales are conducted by the sheriff like a sale under an execution without, as far as can be seen, any conditions of sale being

settled by the court or its officers, or any investigation of the title had. No objection on this score has been raised by the appellants. As regards subsequent incumbrancers it must, I repeat, be distictly borne in mind that the orders now made are entirely without prejudice to their rights to impugn either the decree or the sale under it, or to ask satisfaction out of Mrs. Sheraton's interest if they can shew that their rights are paramount to hers, if they prefer doing this instead of having recourse to the fund remaining in court derived from the proceeds of the sale for the satisfaction of their judgments.

The appeal from the order of the Supreme Court of Nova Scotia dismissing the appeal from the order of 26th December, 1889, must be dismissed, and that from the order allowing the appeal against the order of the 4th January, 1890 must be allowed; both with costs.

Appeal dismissed with costs as to order of December 26th, 1889, and allowed with costs as to order of January 4th, 1890.

Solicitors for appellants, plaintiffs:
Ross, Sedgewick & McKay.

Solicitors for respondents, defendants:
Borden, Ritchie, Parker & Chisholm.

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*Feb. 26
*June 28.

THE SYDNEY AND LOUISBURG COAL AND RAILWAY COMPANY (LIMITED) (DEFENDANTS)..... } APPELLANTS;

AND

JANE SWORD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Foreshore of harbour—Grant from local government—Conveyance by grantee—Claim of dower by wife of grantee—Objection to—Estoppel—Act of local legislature—Confirming title—Validity of—Pleading.

After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C. B. S. conveyed this lot, through the C. B. Coal Co. to the S. & L. Coal Co. S. having died his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion government.

Held, affirming the judgment of the court below, Strong and Gwynne JJ. dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.

Per Strong and Gwynne JJ. dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants.

After the conveyance to the defendant company an act was passed by the legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co.

Held, that if the legislature could by statute affect the title to this property which was vested in the Dominion government it had not done so by this act in which the crown is not expressly named. Moreover the statute should have been pleaded by the defendants.

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

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiff at the trial.

The facts are sufficiently stated in the above headnote and the judgments of the court hereinafter given.

W. B. Ritchie for appellant referred to *Gaunt* v. *Wainman* (2) and *Small* v. *Procter* (3) on the question of estoppel.

Drysdale for the respondent cited *Hitchcock* v. *Harrington* (4) and Bigelow on Estoppel (5).

Sir W. J. RITCHIE C.J.—Inasmuch as the defendants claim title to the premises in question from the Cape Breton Co. limited, who obtained title to the same from Wm. Sword and entered into possession under such title, I think they, the defendants, are estopped from saying that no title passed to Sword or from questioning the title of Wm. Sword under his grant from the crown by the Lieutenant-Governor of Nova Scotia to Sword who entered into possession under the grant to him and the Glasgow and Cape Breton Railway Co. under Sword's deed to them, and the Sydney and Louisburg Coal Co. under the Glasgow and Cape Breton Co. with no better or other title than the Glasgow and Cape Breton Co. obtained from Sword.

How can it be urged that the defendants did not claim through Sword when the Glasgow and Cape Breton Co., whose only claim to the lot was through Sword, as defendants' factum admits, "made a conveyance to the defendant company which, among other things, purported to convey the land in question."

It is not shown or pretended that the defendant company had or claimed to have any other title to the

(1) 23 N.S. Rep. 214.
(2) 3 Bing. N. C. 69.
(3) 15 Mass. 494.
(4) 6 Johns, 292.
(5) Pp. 344 & 346.

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land in question. It must be borne in mind that this is not a controversy between the Government of Nova Scotia and the Government of Canada in respect to the title to this lot. Nor are the defendants claiming under the Government of Canada; nor is the Government of Canada in any way assuming or claiming title to this land. Therefore, I think the title of the Government of Canada is not involved in the discussion of the rights of the parties in this case.

The grant from the Government of Nova Scotia to Wm. Sword is a grant in fee simple. I think Sword had such a seizin under the grant from the Government of Nova Scotia, as that dower would attach against all persons claiming under such seizin, until such seizin should be avoided by the entry or action of the person having right. No paramount title in defendants is set up, or asserted, still less proved by defendants against the widow, and therefore in my opinion she is entitled to her dower. What could be more unjust than that defendants should claim the land under Sword's title and repudiate the title of Sword's wife, claimed under the same title?

No question arises as to improvements made on the land by the company subsequent to the death of Wm. Sword, because the judgment only decrees that:

> It is ordered that the plaintiff do recover against the defendant her dower in the lands described in the writ of dower herein, the same to be assigned and laid off to her according to the value of said lands at the date of the death of William Sword, mentioned in said writ of dower, and that the plaintiff do recover against the defendant her costs to be taxed.

And plaintiff has not appealed against this.

But it is said the act of the local legislature, cap. 73 of the acts of 1881, bars her claim for dower in the property and restricts her claim to the recovery of compensation only for her right of dower.

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In the first place this statute has not been pleaded as I incline to think it should have been. But assuming it was not necessary to plead the statute, I cannot think it can in any way avail as an answer to this action.

I refrain from expressing any opinion as to the power of the local legislature to legislate in reference to Dominion Crown lands, because, in my view of this case, it is unnecessary to do so inasmuch as I think the local legislature has not done anything of the kind. I agree with the plaintiff's counsel that the act in question must be strictly construed, and I think it must be confined in its operations to lands other than Dominion Crown lands over which the local legislature had clearly power to legislate.

I think there is not any pretence for saying that the local legislature intended to interfere with Dominion land, and it may be admitted, under the authority of *Holman* v. *Green* (1), that the property in question at the passing of British North America Act belonged to the Dominion government. But assuming the local legislature had power to pass this act, what does it enact?

> The purchase by and conveyance to the Sydney and Louisburg Coal and Railway Company made, &c., * * * are hereby absolutely ratified and confirmed, and the title to said leases and said real and personal estate and to the line of railway hitherto operated, &c., * * * and the lands whereon the same is situated, are vested in the Sydney and Louisburg Coal and Railway Company.

How can this apply to Dominion Crown lands? No mention whatever is made of the crown or the rights of the crown. If this statute was to operate at all, it would in the words of the statute absolutely ratify and confirm the purchase by and conveyance to the Sydney and Louisburg Coal Company and would vest the title to the lands, &c., in the Sydney and Louis-

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burg Coal Company, but how could this act have this operation if the title to this land was in the crown. The crown is in no way named or referred to in the act, and without express words how is it possible the rights of the crown could be interfered with, and if the act could not have the operation which its clear unambiguous language indicates does this not show that the legislature did not intend to deal with property situate as this was, but only to property in which it had the right to vest an absolute title or estate.

Under all these circumstances I am very clearly of opinion that the widow of Wm. Sword is justly and legally entitled to her dower in the lands in question.

STRONG J.—This is an action of dower *unde nihil habet* in which the respondent claimed to recover legal dower out of certain land being part of the foreshore in the harbour of Sydney in Cape Breton. The defence insisted upon was that the husband was never seized. The writ alleges that William Sword, the demandant's huband, was seized of these lands in his demesne as of fee during the coverture. There is no formal plea traversing the allegation of seizin in the established form of a plea of *ne unques seisiè que dower*. The third plea denies possession, but that is not equivalent to a traverse of the averment of seizin. The fifth plea, however, may be treated as substantially such a plea, though informal. It alleges that the lands covered with water described in the writ are part of the navigable waters of Sydney harbour and were held by the demandant's husband under a grant from the province of Nova Scotia made since the 1st July, 1867, and contrary to the British North America Act. In the case of *Holman* v. *Green* (1) this court determined that the foreshore in harbours on the sea coast of the Dom-

(1) 6 Can. S.C.R. 707.

inion was vested in the crown in right of the Dominion and therefore could not pass under a provincial grant made since confederation. The law then declared has since been altered by statute, but in 1888 at the time this action was commenced and the plea referred to was pleaded it had not been so altered, and the statute in question has no retrospective effect. Therefore, although under the rules of special pleading this would be an argumentative traverse, yet as no objection was (even if it could have been) taken to the form of the plea, I am of opinion that it is an equivalent to a traverse of the seizin alleged by the demandant. The reply of the demandant took issue upon all the pleas and also replied an estoppel to the fifth plea.

Now upon the evidence it appears quite clear that the respondent's husband never was rightfully seized of the lands in question. The paper title proved consists of a grant from the crown to William Sword the respondent's husband under the great seal of the province of Nova Scotia, made upon the 22nd October, 1867, a conveyance by way of bargain and sale from W. Sword to the Glasgow and Cape Breton Coal and Railway Co., and a subsequent conveyance by the latter company to the present appellants the Sydney & Louisburg Coal and Railway Co. (Limited).

Apart from estoppel and from the statute to be afterwards mentioned, it is clear that no seizin is thus proved. The provincial grant was void *ab initio* and consequently no seizin passed by it to the grantee William Sword, the demandant's husband. We could not hold otherwise without either overruling *Holman* v. *Green* (1), or giving to the Dominion statute mentioned a retroactive effect against the crown which its language does not in any way warrant. The demandant's husband was therefore never seized of right. As re-

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gards seizin in fact, or wrongful seizin, that is out of the question, since the title was in the crown which cannot be disseised.

Then the replication to the fifth plea sets up an estoppel in this that the appellants claiming under and deriving title from the respondent's husband are estopped from denying his seizin. This defence is attemped to be supported by a reference to some Ontario cases by which we are not in any way bound and the soundness of which is, moreover, in my opinion open to question. The conveyance by William Sword to the Glasgow and Cape Breton Coal and Railway Company was what is technically termed an innocent conveyance, that is a conveyance not having any violent or tortious operation, such as a fine or feoffment formerly had; it follows that William Sword the grantor would not himself have been estopped by it. *Bensley* v. *Burden* (1); also in note to *Doe Irvine* v. *Webster* (2).

Therefore as all estoppels must be mutual, the grantor not being estopped the grantees would not be estopped either; consequently there was not, so far as appears upon the face of the paper title, any estoppel binding on the appellants. Had the deed contained recitals alleging that the grantor was seized in fee it would have been different, for a grantor conveying even by an innocent conveyance is estopped by recitals, but no such recitals appear to have been contained in the deed in question. The deed did, it is true, contain covenants, and I am not unmindful that the court of Queen's Bench for Ontario in the case of *Doe Irving* v. *Webster* (3) decided that an estoppel could be created by the covenants in a purchase deed, but whatever effect this decision may have in the pro-

(1) 2 Sim. & Stu. 519; S. C. 4 L. J. Ch. 164.

(2) 2 U. C. Q. B. at p. 260.

(3) 2 U. C. Q. B. 224.

vince of Ontario it is not binding upon us in deciding a Nova Scotia appeal, and since Jessel M. R. in the case of the *General Finance Mtge. & Disct. Co.* v. *Liberator Permanent Benefit Bg. Socy.* (1) decided exactly the reverse, and that for reasons which must commend themselves to every property lawyer, I do not see that we can properly disregard his great authority on such a point in the present case. A grantor, who purports to convey land to which he has no title, if he afterwards acquires title will, no doubt, be restrained by a Court of Equity from setting up his paramount title against his own grantees and will be compelled to make good out of the title so subsequently acquired the title which he had previously purported to convey. But this equity is one which is only enforced on proper terms and is something wholly different from legal estoppel.

I am, therefore, of opinion that the respondent entirely failed in making out the title by estoppel.

It is, however, lastly urged that the statute of Nova Scotia 1881, ch. 73 sec. 15, cures all defects in the conveyance and is conclusive in favour of the demandant. There are several objections to this. In the first place the statute is not pleaded. Next, although its effect should be to vest a title in the appellants, it has no retroactive effect so as to confer a seizin on the husband of the demandant. Thirdly, even granting that it was within the powers of the Nova Scotia legislature, under the authority to legislate regarding property, to vest a title in lands the seizin of which was in the crown, in right of the Dominion, in private owners, (a point on which I withhold any expression of opinion) yet on well established principles of construction this statute could not have any such operation. It has been repeatedly laid down that no statute

(1) 10 Ch. Di. 15.

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shall be construed as affecting the crown or its property unless the crown is expressly named in it. Then no reference to the crown is to be found in the provincial act under consideration.

For these reasons I am of opinion that this appeal must be allowed with costs.

Gwynne J.

GWYNNE J.—The plaintiff by writ of dower claims dower in a piece of land described in the writ as a piece of land covered with water, situate in Sydney Harbour in the county of Cape Breton, of which piece of land, particularly described by metes and bounds in the writ, the plaintiff alleges that her deceased husband was during the coverture seized in his demesne as of fee. To this writ the defendants among other defences plead in substance that the land in the writ mentioned constituted part of the navigable waters of the Harbour of Sydney in the county of Cape Breton, and had been held by the plaintiff's husband only under a grant from the province of Nova Scotia since July 1st, A.D. 1867, contrary to the provisions of the British North America Act, 1867. The object of this plea and its substantial effect was to assert that the plaintiff's deceased husband never had any estate in the piece of land covered with water, nor any thing more than a bare possession devoid of title for that the grant under which he had possession was null and void under the British North America Act as was adjudged by this court in a similar case in *Holman* v. *Greene* (1), and that Her Majesty in right of the Dominion of Canada was and is seised in right of her crown in the land in question as part of the harbour of Sydney. To this defence the plaintiff replied that she would object that the defendants ought not to be admitted to say that the said land covered with water

(1) 6 Can. S. C. R. 707.

mentioned and set forth in the plaintiff's writ is part of the navigable waters of the harbour of Sydney in the county of Cape Breton, and was held by plaintiff's deceased husband by through or under a grant from the province of Nova Scotia since July 1st, A.D. 1867, and contrary to the provisions of the British North America Act, 1867, because the defendant company acquired their title by or through the plaintiff's deceased husband, and said defendant company should be estopped from pleading his want of title as a defence. Now it is to be observed that the plaintiff in her writ of dower averred that the land in question was situate in Sydney harbour and by the above replication she in effect insists that the defendants should not be admitted to aver:

1st. That the land in respect of which the plaintiff claimed dower was situate in the harbour in which the plaintiff herself in her writ alleged it to be situate; and

2nd. That her deceased husband had held the land under a grant from the province of Nova Scotia since the 1st July, 1867.

Now supposing the question involved in this pleading to have been raised by a demurrer to the above replication, the question would simply be: Could the fact that those under whom the defendants claim received possession of the premises in question from the plaintiff's deceased husband operate as an estoppel in law to their insisting that the land out of which the plaintiff claims dower, as being a part of a public harbour of the Dominion of Canada, is by the constitutional act constituting this Dominion vested in Her Majesty in right of her crown for the public use and benefit of the subjects of the Dominion? So to hold would, in my opinion, carry the doctrine of estoppel beyond anything that is warranted by any decided case. But the question does not arise upon a demurrer to the above replication, for the case went

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down to trial upon several issues joined between the parties, and the plaintiff as part of her case produced in evidence a certified copy of an instrument purporting to be a grant of the land in question by the government of the province of Nova Scotia to the plaintiff's deceased husband, dated the 22nd October, 1867, for the sum of $50.00. The plaintiff thus asserted her claim upon the very instrument upon which by her replication she insisted that the defendants should be estopped from averring that her husband in his life time held the possession which he had of the land in question. She herself proved as part of her case what she insists the defendants should be estopped from averring. Upon her production of that instrument its construction and effect became matters submitted by the plaintiff herself to the judgment of the court which was bound by the judgment of this court in *Holman* v. *Green* (1). The court could not be estopped from construing nor could the defendants be estopped from calling upon the court to construe, an instrument put in evidence by the plaintiff as part of her case and in virtue of which she claimed. The moment she put that instrument in evidence it became the duty of the court to construe it and to declare what effect it had as part of her case and her subsequent production of certified copies of an instrument purporting to be a deed of bargain and sale of the same land to the Glasgow & Cape Breton Coal and Railway Company, and of a deed executed by the Cape Breton Railway Company in liquidation to the defendant company could not withdraw from the court the duty of construing the first instrument which had been put in evidence by the plaintiff. The defendants, while admitting that the deed of bargain and sale executed by plaintiff's deceased husband to the Glasgow & Cape Breton Railway Company passed

(1) 6 Can. S.C.R. 707.

to that company what possession he had, may well call upon the court to construe the effect of the instrument purporting to be letters patent from the province of Nova Scotia which the plaintiff has put in evidence, and may insist that having herself shown that the land in question is still vested in Her Majesty in right of her crown as the property of the Dominion of Canada, she has shown that the land is not land out of which she can have dower assigned to her. The doctrine of estoppel does not, as it appears to me, apply to such a case. If the doctrine did apply the plaintiff could, however, not claim dower but only damages under ch. 73 of the acts of the legislature of Nova Scotia in 1881 for such interest or such claim for dower which she had in the premises according to their value at the time of the execution of the deed of bargain and sale by her husband in 1871, for she could not while estopping the defendants from disputing her husband's title in the land under the provincial letters patent, being such as to give her a right to dower, insist herself that the provincial letters patent passed no title, and that the estate is still vested in Her Majesty in right of her crown for the purpose of insisting that the act of 1881 did not affect her.

In my opinion the appeal should be allowed with costs.

PATTERSON J.—I do not think that the Nova Scotia statute on which the appellants place so much reliance stands in the way of the recovery of her dower by the plaintiff.

The reasoning of Mr. Justice Meagher shows, conclusively to my mind, that the proper effect of the statute is to confirm what the deed of the tenth of January, 1881, professed to do, and that the right to compensation to which it restricts persons claiming any

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interest in or lien on the leases and real and personal estate at the time of the conveyance, is confined to compensation out of the fund set apart for that purpose in respect of properties in the second part of the schedule described, and does not touch the land now in question which the deed includes among the properties to which the title is recited as absolute.

But if this construction were not to prevail I still do not think the deed need interfere with the plaintiff's right to recover her dower. "Compensation" as it would then have to be read, would not be a very precise expression, and it would be given sufficient effect to by holding that the dower, in place of being set off by metes and bounds, should be commuted into a money payment, which is not an unusual mode of assigning dower.

Upon the main question I am of opinion, for the reasons given in the court below where upon this point the judges were unanimous, and now given by his lordship the Chief Justice, that the plaintiff is entitled to recover. She proves that the defendants hold under the grantees to whom her husband conveyed by deed professing to grant the land in fee, and whom he put in actual possession of the land. That by itself is sufficient proof of title as against the defendants. But it is said that because the plaintiff put in evidence a grant of the land to her husband from the province of Nova Scotia, and because the land, being part of the foreshore of the harbour, belonged to the Dominion under the British North America Act, the plaintiff herself proved that her husband was not seized. I do not agree with that idea. In strictness all that is necessarily to be inferred is that immediately after confederation the land had been the property of the Dominion. But if the fact is taken to be that the land is still legally vested in the crown in right of the Dominion, the result is that a

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paramount title is shown which might be asserted against the defendants, and of course against the doweress, but which the defendants have no right to assert. There is abundant authority for this. Mr. Justice Townshend cites a passage from Park on Dower (1) in which the proposition is laid down, and refers to an English case and an Upper Canada case which are in point. In *Gaunt* v. *Wainman* (2) the evidence relied on to prove the demandant's right to dower was proof of a conveyance of the premises to the defendant by the assignees in bankruptcy of the husband. It was held that that deed did not estop the defendants from proving that the husband's estate was a leasehold, but the mode of proving the *primâ facie* title was not questioned. The report of the case is very short. There was a fuller discussion in the Upper Canada case of *Haskill* v. *Fraser* (3) where the question was not complicated by anything corresponding to the fact in *Gaunt* v. *Wainman* (2) that the deed was not from the husband, though conveying his estate, and which case on the other hand turned chiefly on a question of pleading, it being held that the demandant ought to have pleaded the estoppel on which she relied—a point not raised in the present case and which under the existing system would be less formidable than it was thirty years ago. The decision was that the defendant was not estopped from showing that the husband was a joint tenant of the land and that his co-tenant had survived him.

Draper C.J. stated the general proposition that a person who accepts a grant is not estopped from saying that it does not pass so great an estate as it purports to convey, but only from saying that it passes no estate.

(1) P. 37.

(2) 3 Bing. N. C. 69.

(3) 12 U. C. C. P. 383.

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In Roper on Husband and Wife (1) the law is thus laid down:—

> Although it be generally necessary, as before appears, that the husband's seizin should be that of an estate of inheritance, yet it may happen that his widow may be entitled to dower when he was in fact seized of an estate for life or possessed for years only. But such title is defective since it springs out of the tortious act of the husband, as by his making a feoffment in fee. In such cases, however, the widow's right to dower will, it is presumed, be complete against the feoffee and the persons claiming under him; for the feoffee by accepting the conveyance admits that the husband was seized in fee and entitled to pass it; and the feoffee and such claimants are estopped from showing that the husband had a less estate, but as against the persons lawfully entitled to the lands upon the expiration of the husband's life estate or term for years the widow cannot claim dower, since they are not prevented from showing what interest the husband had in the premises.

I quote another passage (2) following a discussion of the effect of the husband's estate being subject to a condition:

> In truth, in all other cases, if the husband's seizin be defeated by a lawful title existing prior to the marriage, his wife's initiate title to dower will determine with it; for when the person so entitled recovers the estate it will have relation back beyond the marriage, and be attended with the like consequences as the entry of a donor for condition broken.

It is true that the conveyance by Sword was not a feoffment and did not create a fee by wrong. The estoppel created by it had not so large an effect as to do more than, as shown by Draper C.J. in *Haskill v. Fraser* (3), prevent the grantees and those claiming under them from denying that some estate passed. *Primâ facie* the estate was in fee, but if it were in fact a less estate that might have been shown. No such thing, however, is attempted. The assertion is that no estate whatever passed, and that assertion is forbidden by the estoppel. I am not pressed by the objection that the

(1) P. 368. (2) P. 379.
(3) 12 U. C. C. P. 383.

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plaintiff herself proves that her husband took under a title, ostensibly a grant in fee but liable to be defeated by a paramount title. The existence of a paramount title not, by itself, defeating the right to dower as against the husband's grantee, I do not see that it makes any difference whether the fact is shown by the plaintiff or the defendant. The plaintiff does no more than she would have (under the old system) done by her pleading, if as said in *Haskill* v. *Fraser* (1), the estoppel had to be pleaded. Her replication would admit the plea that her husband was not seized, and would aver that the defendant took under him, submitting that therefore the defendant should not be allowed to set up the truth.

I refer also to chapter 31 of Mr. Malcolm G. Cameron's very useful treatise on the Law of Dower.

I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Gillies & MacEchen.*

Solicitor for respondent: *E. J. Moseley.*

(1) 12 U. C. C. P. 383.

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*Oct. 4.

*Nov. 2.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF RICHELIEU.

FRANÇOIS XAVIER ALCIDE PARADIS (PETITIONER) ..... } APPELLANT;

AND

ARTHUR AIMÉ BRUNEAU (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF GILL J., SUPERIOR COURT FOR LOWER CANADA.

Election petition—Status of petitioner—Preliminary objection — Lists of voters—Dominion Elections Act, R. S. C., ch. 8, sections 30 (*b*), 31, 33, 41, 54, 58 *and* 65—*The Electoral Franchise Act, R. S. C., ch.* 5 *section* 32.

Held, affirming the decision of Gill J., that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election or a copy thereof certified by the clerk of the Crown in Chancery (R. S. C., ch. 8, sections 41, 58 and 65, R. S. C. ch. 5, section 32), and the production at the *enquête* of a copy, certified by the revising officer, of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof. Gwynne and Patterson JJ. dissenting.

APPEAL from a judgment of the Superior Court for Lower Canada, District of Richelieu, (Gill J.) maintaining the preliminary objections filed by the respondent to the election petition.

The respondent by a preliminary objection to the election petition filed against his return as a member of the House of Commons of Canada, for the Electoral Division of Richelieu, specially denied the qualification of the petitioner (appellant) as an elector who had a right

PRESENT.—Strong J. Fournier, Taschereau, Gwynne and Patterson JJ.

to vote at the said election and alleged that he had no right to be a petitioner, not being, at the time of the election, an elector for the county of Richelieu, and that said petitioner had lost his right to vote at said election on account of corrupt practices during said election.

The case having been fixed for proof and hearing on the preliminary objections on the 23rd July, 1892, the returning officer, one J. N. Mondor, was heard as a witness, and produced as petitioner's exhibit "A" the voters' list for 1891, on which the said election had been held, duly certified by the revising officer. The respondent objected to the production of this list and all proof therefrom, claiming that the copies of the lists which had been placed in the hands of the deputy returning officer and which had been returned to the Clerk of the Crown in Chancery were the only lists which could be put in evidence.

After hearing counsel on both sides the presiding judge dismissed this objection.

The returning officer then stated that the list produced was the one on which the election had been held, and that petitioner, whom he identified and declared he well knew, was a voter and his name was on such list and further that he had got such list certified by the revising officer for the purpose of its being put in as evidence.

An adjournment was asked for by the respondent to prepare his evidence and on the 27th July the case was resumed, the petitioner with the permission of the judge once more examining the returning officer to correct an omission made by the clerk in writing down his deposition, and added that the list he had produced had not been used at the said election.

On this evidence the case was submitted and adjourned to the 10th August, 1892.

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After the argument the petitioner, on the 10th August, while protesting he waived no right and was not bound so to do, in order to remove all cause of doubt made a motion to be allowed to re-open his *enquête* in order that he might produce the list returned to the Clerk of the Crown in Chancery.

The learned judge refused to grant this motion, and on the 13th August dismissed the petition on the sole ground that the list produced was no evidence, and that the lists returned to the Clerk of the Crown in Chancery alone could have been put in as evidence.

Morgan and *Gemmill* for appellant contended that under the statute and the law of Lower Canada, the copy of the list produced by the appellant, certified by the revising officer, makes equal proof and is as good evidence as the original in the hands of the revising officer, and is binding as evidence, under the Electoral Franchise Act, cap. 5, sec. 22 R.S.C., of the right of petitioner to vote at the election in question, and is sufficient for all purposes of election petitions, and cited and relied on R.S.C. ch. 8 sec. 13; 52 Vic. ch. 9 sec. 8; arts. 1207 and 1211 C.C.; *Magnan* v. *Dugas* (1); *The Megantic Election Case* (2); *The Prescott Election Case* (3).

This coupled with the rejection of petitioner's motion to be allowed to make such further proof would be quite valid ground for the allowance of the present appeal were it not fully justified by the evidence adduced and the law and jurisprudence on the subject.

Belcourt and *Plamondon* for respondent contended that it was not proved that the copy of the list which had been produced was a copy of the list which had been used for the election in question in this case, and that such evidence could have been

(1) 12 Rev. Leg. 226. (2) 9 Can. S.C.R. 279.
(3) 20 Can. S.C.R. 196.

easily given, and that by law and the decision of this court in the *Stanstead Election Case* (1), the petitioner was obliged to prove his quality of elector when such quality was denied by preliminary objection, and that by law he was obliged to make such proof by the best possible evidence; viz. in this case by the production of the list used for the election, or a copy thereof duly certified by the Clerk of the Crown in Chancery, and cited and relied on sections 41, 65 and 67, ch. 8 R.S.C.; Greenleaf on Evidence (2); Powell Law of Evidence (3).

STRONG J.—This is an appeal from a judgment of Mr. Justice Gill of the Superior Court of the province of Quebec, dismissing the petition of the appellant against the return of the present respondent as a member of the House of Commons for the electoral division of Richelieu.

The election was held on the 4th and 11th of January, 1892. The petition of the appellant François Xavier Alcide Paradis was filed in due time after the return.

In the third paragraph of the petition the petitioner alleged that he was an elector qualified to vote and having a right to vote at the election, and that his name was inscribed on the list of voters which was used as well as on those which ought to have been used at the election.

The petition alleged various corrupt acts on the part of the sitting member (the present respondent) and his agents, and prayed that the election might be set aside and the respondent disqualified.

The respondent filed preliminary objections, one of which was that the petitioner had not the right of

(1) 20 Can. S.C.R. 12. (2) 15 ed. sec. 82.
(3) Ed. 1868 p. 51.

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voting at the election, and that "he was not and is not" inscribed on the list of electors in force at the said election, and that he has not the quality required for maintaining the petition.

On the 23rd of July, 1892, an *enquête* on the preliminary objections was opened before the Honourable Mr. Justice Gill, and the returning officer, Mr. Mondor, was called as a witness on the part of the petitioner, who proved that he was returning officer at the election, and he produced a copy of the list of electors for 1891 for the polling district No. 1, of the electoral division of Richelieu, certified by the revising officer, the certificate being dated the 20th of July, 1892, and being in the form prescribed by the the statute 32 Vic. ch. 9 s. 8. The witness further said that he knew the petitioner, and that he was the person of the same name who was entered on the copy of the list produced.

On the 27th of July, 1892, the *enquête* was continued and the same witness was re-called, and upon being examined again on behalf of the petitioner added that the copy of list produced was a copy of that which had been used at the election. He was further asked if he knew that the exhibit had been examined with the original but the question being objected to was withdrawn. On cross-examination the witness was interrogated as follows:—

"Q. De sorte que cette liste exhibit A n'a pas servi à l'élection?" To which he answered: "Non."

On the 10th of August, 1892, the petitioner moved before the same judge to open the *enquête* in order that he might put in evidence the list of electors in the hands of the Clerk of the Crown in Chancery which had actually been used at the election.

This motion the learned judge refused to grant.

On the 13th August, 1892, the hearing on the preliminary objections took place when the judge con-

sidering that the petitioner had not proved his quality of elector, which was expressly denied by the preliminary objections, rendered a judgment dismissing the petition.

From that judgment the present appeal has been brought.

By section 5 of the "Dominion Controverted Elections Act" it is enacted that an election petition may be presented either by a candidate, or by a person who had a right to vote at the election to which the petition relates. Section 41 of the Dominion Elections Act 49 Vic. ch. 8 enacts that "subject to the provisions "hereinafter contained, all persons whose names are "registered on the lists of voters for polling districts in "the electoral division, on the day of the polling at any "election for such electoral divison, shall be entitled to "vote at any such election for such electoral district "and no other person shall be entitled to vote thereat."

By section 13 of the same act the returning officer is required to obtain at least two copies of the list of voters as finally certified by the revising officer and then in force, for each of the polling districts in such electoral division.

By section 30 (b) on a poll being granted the returning officer shall furnish each deputy-returning officer with a copy of the list of voters in the polling district for which he is appointed, such copy being first certified by himself or by the revising officer.

By section 54 of the same act, a person representing himself to be a particular elector named in the list of voters, applying for a ballot paper after another has voted as such elector, is required to take the oath set forth in Form Y in the first schedule to the act.

Form Y is as follows: "I solemnly swear that I am "A. B., of....., whose name is entered on the "list of voters now shown me."

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By section 58 the deputy-returning officer at the close of the poll is to enclose in the ballot box with ballots and other papers, the list of voters used by him and the ballot box having first been locked and sealed is to be forthwith delivered to the returning officer or his election clerk.

By section 65 the returning officer is to transmit to the Clerk of the Crown in Chancery with his return, the ballot papers, the original statements of the deputy-returning officers "together with the lists of voters used in the several polling districts," and all other lists and documents used or required at said election or which have been transmitted to him by the deputy-returning officers.

By section 32 of the Electoral Franchise Act as amended by sec. 8 of 52 Vic., ch. 9, "Every copy of a list of voters supplied by the revising officer, the Clerk of the Crown in Chancery, or the Queen's Printer, and certified by any one of such officers as correct in the form E in the schedule to the act shall be deemed to be an authentic copy of such list."

From these provisions of the statute I am of opinion in the first place that no person has an actual right to vote unless his name appears in fact to be entered upon the list of voters furnished, pursuant to the statute by the returning officer to the deputy-returning officer, for the polling district in which the vote is tendered.

It is apparent from the whole scope of the act, and especially from the oath required to be tendered to a voter who claims that another person has wrongly voted in his name, that no person has a right to vote unless his name appears upon the list so furnished to the deputy-returning officer, either as a voter whose vote has been allowed and against whom there is no appeal, or as a voter whose vote has been allowed but has

been appealed against, or as a person who has claimed to vote but whose claim having been disallowed is the subject of a pending appeal.

The oath Y in the schedule of the act has this pertinence to the question, it shows that the deputy-returning officer is to be guided exclusively by the list delivered to him by the returning officer. This oath, which is to be tendered to a voter who claims that he has been personated by another who has already wrongfully voted in his name, requires that the list of voters shall be actually exhibited to the claimant, the list referred to being manifestly the only official list in the hands of the deputy-returning officer, namely, that which had been delivered to him by the returning officer. This demonstrates that the right to vote depends upon a voter's name being upon the list delivered to the deputy-returning officer. In short the officer in allowing or refusing claims to vote is to be guided by the list before him and is to be restricted to that.

The very object of registration would be defeated by any other construction of the act.

If then a person whose name does not appear upon the list furnished to the deputy-returning officer claims to vote his claim must be at once disallowed, and he cannot be permitted to sustain it by referring to the list as originally revised.

Can it then be said that such a person has a right to vote? The answer must be certainly in the negative, for although the name of such a claimant may by a misprision of the officer who certifies the list or otherwise have been omitted therefrom, and he may thus be wrongfully deprived of his right to vote, still it cannot be said that he has a right to poll a vote which the officer to whom it is tendered could not, without a gross dereliction of duty, receive.

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It may be that this consideration is a reason why statutory precautions greater than the act actually provides for should been acted to insure accurracy in the lists used in the polling, but this is nothing to the purpose of the present inquiry. As the law at present stands no one can have a right to vote whose name does not appear on the list according to which the poll is to be taken.

To hold otherwise and permit deputy-returning officers to enter upon inquiries as to the right of persons whose names do not appear on the lists to vote, would be to set at naught the whole scheme of the statute and to restore the evils and inconveniences which it was the especial object of the legislature to obviate by providing for a system of registration.

It is to be observed that the words of the 41st section, which says that all persons whose names are registered on the lists as revised shall be entitled to vote, are not absolute, but that the enactment is expressly declared to be subject to the other provisions of the act. Then one of these provisions of the act, if not expressed yet to be derived from necessary implication, is that the vote of a person whose name does not appear on the list furnished to the deputy-returning officer for the purpose of the poll shall not be received.

Therefore section 41 must necessarily be read subject to this provision just as much as if it was in so many words inserted in that section itself.

Having thus ascertained the fact required to be proved, the next inquiry must be: How is that fact to be established? This fact is susceptible of very easy and inexpensive proof. By section 58 of the Dominion Elections Act before set out the deputy-returning officers are to return the lists used by them to the returning officer who in his turn is by section 65, sub-

section 3, to transmit the same to the Clerk of the Crown in Chancery, in whose hands they are to remain deposited.

Then by a copy certified by the last named officer under sec. 32 of the electoral Franchise Act the proof required may be made without subpœnaing the Clerk of the Crown in Chancery to produce the original list returned to him.

No such proof was, however, made by the appellant in the present case.

It does not follow that because the name of the appellant appeared as a voter duly registered, or on the original list as revised, that it is to be presumed that it was also on the list furnished to the deputy-returning officer by which alone he could legally be guided.

In dealing with questions of evidence courts do not permit facts in themselves susceptible of easy proof to be established by mere inference from other facts from which they are not necessary consequences.

This was the point insisted upon by Mr. Belcourt at the argument, but I did not see the force of it until I had examined the several provisions of the statute. I am, however, now of opinion that there was no evidence before the court below from which the fact essential to be proved appeared.

It is to be remembered in connection with this point that the appellant does not prove, nor does he even allege in his petition, that he actually voted at the election.

Further, it is to be observed that as regards the fact which he had to prove the petitioner himself in his petition takes the view of the law now enunciated, for in the third paragraph he distinctly avers: "Que son nom était inscrit sur les listes des électeurs qui ont servi à la dite élection."

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As regards the motion to open the *enquête* for the purpose of letting in proof of the list of voters returned to the Clerk of the Crown in Chancery, proof which as I have said could easily have been made and which need not have occasioned any serious delay, it is not for me to pronounce upon the course the learned judge thought fit to pursue.

The statute has made him the final judge upon that incidental proceeding. No appeal lies to this court from that decision, and we have no authority in any way to review it. I may, however, be permitted to add that the appellant suffers a severe penalty for having made a slip in his evidence, and for that reason I very much regret to be compelled to come to the conclusion that it is impossible to say the court below was wrong in dismissing the petition.

This appeal must be dismissed with costs.

FOURNIER J.—La seule question à décider en cette cause est celle de la légalité de la preuve de la qualité d'électeur du pétitionnaire que l'intimé a soulevée par le moyen de ses objections préliminaires.

D'après la loi concernant les élections parlementaires, (1).

Toutes personnes dont les noms seront inscrits sur les listes d'électeurs pour des arrondissements de votation, dans tout district électoral, alors en vigueur sous l'empire des dispositions de l'Acte du cens électoral, ou de l'acte passé durant la session tenue dans les quarante-huitième et quarante-neuvième années du règne de Sa Majesté et intitulé : "Acte concernant le cens électoral," le jour de la votation à toute élection pour ce district électoral, auront droit de voter à cette élection pour ce district électoral ; mais ce droit n'appartiendra à nul autre.

Par la sec. 5, ch. 9, 49 Vic. toute personne qui avait droit de voter à l'élection d'un membre du parlement a droit de se porter pétitionnaire, pour en contester la

(1) R. S. C. ch. 8 sec. 41.

validité,—ou un candidat à telle élection. Dans le cas actuel le pétitionnaire est un électeur.

Le défendeur a allégué dans ses objections préliminaires que le pétitionnaire n'avait pas le droit de voter à l'élection dont il s'agit dans la dite pétition, et qu'il n'était pas et n'est pas inscrit sur la liste des électeurs en force, lors de la dite élection, et qu'il n'a pas la qualité requise pour se porter pétitionnaire.

Le premier devoir de l'officier-rapporteur en recevant un bref d'élection est tracé dans la section 13 du chapitre 8, 49 Vic:

> L'officier-rapporteur de chaque district électoral devra immédiatement après avoir reçu le bref d'élection, se procurer du reviseur ou des reviseurs du district électoral pour lequel il est officier-rapporteur, au moins un exemplaire de la liste des électeurs alors en vigueur, telle que définitivement revisée et attestée par le reviseur ou les reviseurs, pour chacun des arrondissements de votation de ce district électoral, ainsi qu'une copie de l'ordre du reviseur ou des reviseurs divisant le district électoral en arrondissements de votation ; et il établira immédiatement dans chacun de ces arrondissements un bureau de votation à un endroit central et convenable.

Après l'accomplissement des prescriptions indiquées dans cette section, il doit transmettre à ses députés officiers-rapporteurs, avec leurs commissions comme tels les listes d'électeurs qu'il a obtenues du reviseur. Ses députés sont ensuite obligés d'après la section 58 en lui faisant rapport de leurs procédés à l'élection, de lui rendre les listes électorales qu'ils en ont reçues.

L'élection terminée, l'officier-rapporteur redevenu en possession des listes d'électeurs qu'il avait confiées à ses députés, doit, d'après la 65e section, faire au greffe en chancellerie le rapport exigé par cette section, et il doit spécialement, d'après le paragraphe 3, transmettre au greffier de la couronne en chancellerie, avec son retour, les bulletins, l'original des états des divers députés officiers-rapporteurs ci-dessus mentionnés, avec les listes de voteurs et les livres de poll et autres

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documents qui ont servi à la dite élection, ou qui ont été transmis par lui aux députés officiers-rapporteurs. On voit d'après les dispositions ci-dessus citées que la liste électorale qui a servi à l'élection, obtenue du reviseur d'abord par l'officier-rapporteur et ensuite par lui remis à son député qui, après l'élection, l'a retournée à l'officier-rapporteur, est transmise par l'officier-rapporteur avec son rapport et tous les documents ayant rapport à l'élection, au greffier en chancellerie. C'est dans le bureau de ce dernier qu'elle est déposée comme record.

Au jour fixé pour la preuve sur les objections préliminaires, le pétitionnaire, au lieu de faire produire par le greffier en chancellerie la liste de record chez lui, qui avait servi à l'élection, le pétitionnaire a fait entendre comme témoin J. N. Mondor qui a produit une copie de liste d'élection du comté de Richelieu.

Après cela la cause ayant été ajournée pour la preuve du défendeur, le pétitionnaire fit motion pour rouvrir son enquête et appela comme témoin le même J. N. Mondor qui déposa que la liste produite par lui était une vraie copie de la liste des électeurs du comté de Richelieu, qui avait servi à la dite élection. Le défendeur fit objection à cette preuve.

Le pétitionnaire ne produisit aucun des documents publics par lesquels il aurait pu prouver légalement l'élection, tels que le bref d'élection, les proclamations de l'officier-rapporteur, les livres de poll, les listes électorales, le retour de l'élection, etc. Il prétendit pouvoir remplacer cette preuve par la production de la copie de la liste électorale produite par Mondor. Celui-ci, quelques jours auparavant, s'était procuré cette liste de l'honorable juge Gill, qui avait été officier reviseur. Mondor dans son témoignage, en réponse à la question. "De sorte que cette liste exhibit A n'a pas servi à l'élection?" Répond, "non." Mais il avait déjà

corrigé son témoignage sur le principe que sa réponse n'avait pas été correctement consignée dans sa première déposition, en ajoutant à sa réponse les mots suivants :

Qui est une copie de la dite liste qui a servi à l'élection du 11 janvier 1892, dont le retour est contesté dans la présente cause.

La production de la liste par Mondor et son témoignage sont-ils suffisants pour prouver que la liste en question est une vraie copie de la liste qui a servi à la dite élection ? Non, certainement.

D'abord, la liste à sa face ne comporte aucun indice, aucune déclaration qu'elle a servi à la dite élection. Le juge Gill comme reviseur pouvait certainement donner une copie authentique de la liste qu'il avait faite lui-même, et elle fait preuve complète de son contenu, mais seulement de son contenu. Il n'y est nullement fait mention qu'elle est la liste qui a servi à l'élection dont il s'agit, il certifie seulement qu'elle est la liste des électeurs de l'arrondissement de votation n° un, Richelieu, dans le district électoral de Richelieu, telle que définitivement revisée pour l'année 1891, en vertu de l'acte du cens électoral. Il ne dit pas que c'est la liste qui a servi à la dite élection. La simple production de cette liste ne prouve pas le fait essentiel, qu'elle est celle qui a servi à la dite élection. Il faut aller chercher cette preuve ailleurs. C'est pour cette raison que le pétitionnaire a fait revenir Mondor, pensant pouvoir faire preuve par lui de ce fait.

Mais loin de faire cette preuve il dit que ce n'est pas une copie de celle qui a servi à la dite élection. En effet, celle-là est chez le greffier en chancellerie, et la copie donnée par le juge Gill n'a pas même été comparée avec celle qui avait servi à la dite élection.

Le fait que la liste a servi à la dite élection doit nécessairement être prouvé par une preuve en dehors de la liste ; mais est-ce par témoignage ou par écrit qu'elle doit être faite ? Cette preuve ne peut résulter

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que de l'ensemble de la production des documents publics, comme le bref d'élection, les proclamations, les livres de poll, les listes électorales, et le retour de la dite élection. En effet, la liste qui a servi est celle qui a été rapportée au greffier en chancellerie avec tous les autres documents, et cette preuve ne peut être faite que par la production de ces documents.

C'est en vain que l'on voudrait invoquer les inconvénients qu'il peut y avoir à faire voyager le greffier en chancellerie dans tous les comtés où il peut y avoir des contestations, pour la production de ses documents. La chose a été faite depuis plusieurs années, sans que les plaideurs en aient souffert. D'ailleurs cet argument n'a aucune valeur légale, et ne peut justifier la violation d'une des premières règles concernant la preuve qui est que les parties doivent fournir la meilleure preuve possible, et cette preuve est la preuve écrite lorsqu'elle peut être produite. Elle le peut dans ce cas-ci. Le greffier en chancellerie, par la production de ses documents concernant la dite élection, aurait fait la preuve complète de la liste qui a servi à la dite élection. Ce n'est pas pour dispenser de cette preuve qu'un amendement à la loi a permis au reviseur et à l'imprimeur de la Reine, de donner des copies de listes électorales qui ont certainement toute la force probante de celles que peut donner le greffier en chancellerie. Mais ces copies ne feraient aucune preuve du fait qu'elles ont servi à la dite élection,—sans la production en même temps de celles déposées chez le greffier en chancellerie, il y aurait toujours une lacune dans la preuve. C'est uniquement pour la commodité du public qu'il a été permis à ces officiers d'en donner des copies,—car en temps d'élection il en est fait un grand usage.

L'objection faite à la liste produite n'est pas parce qu'elle vient du reviseur, mais parce qu'il n'est pas

prouvé légalement qu'elle est celle qui a servi à la dite élection. Le témoignage de Mondor ne pouvait faire légalement cette preuve qui existait dans les documents écrits du greffier en chancellerie. Leur production était indispensable.

Mais on fait l'objection que si l'élection a lieu par acclamation, il n'y aura pas de liste qui aura servi à l'élection, puisqu'il n'y a pas eu de votation, et partant personne de qualifié à attaquer une telle élection. On en conclut que la liste qui a servi à l'élection n'est pas indispensable puisque dans ce cas même il y a toujours des électeurs qualifiés qui ont droit de prouver leur qualification. A cela je réponds que, même dans le cas d'une élection par acclamation, qu'il y a toujours une liste qui a servi à l'élection. Comme on l'a vu par la section 13 du chapitre 8, citée plus haut, le premier devoir de l'officier-rapporteur, en recevant le bref d'élection, est de se procurer du reviseur la liste électorale. Ce n'est qu'après cela qu'il procède à la publication de ses proclamations pour la tenue de l'élection, la nomination des députés officiers-rapporteurs. Lorsque l'élection a lieu même par acclamation, l'officier-rapporteur est déjà en possession des listes électorales—et il doit les renvoyer au greffier en chancellerie avec son retour de l'élection. C'est cette liste qui a servi à l'élection et que le pétitionnaire doit produire, ou une copie d'icelle donnée par le greffier en chancellerie, (1) pour faire la preuve de sa qualification. Il est facile de voir que cette objection n'est d'aucune force et ne peut dispenser en aucun cas de la production de la liste du greffier en chancellerie.

Je suis d'avis que le jugement doit être confirmé et l'appel renvoyé.

(1) 49 Vic. ch. 5, s. 32.

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TASCHEREAU J. concurred in dismissing the appeal for the reasons given by Strong and Fournier JJ.

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GWYNNE J.—In the month of January, 1892, an election took place for a member of the House of Commons, for the electoral district of Richelieu, at which the respondent was returned as duly elected. The appellant filed a petition in the Superior Court for the province of Quebec, in which the electoral district of Richelieu is situate, and therein complained that the return of the respondent was obtained by means of bribery and corruption committed by the respondent and his agents, and that the said election and return of the respondent might be declared null and void. To this petition the respondent filed certain preliminary objections and among them—

That the petitioner had no right to vote at the said election and that he was not and is not inscribed on the list of voters in force at the time of the said election and that he has not the quality entitling him to be a petitioner against the election and return of the respondent.

The question raised by this preliminary objection came down for trial on the 23rd day of July, 1892, before Mr. Justice Gill, when the petitioner produced in evidence a list of voters qualified to vote at the said election, in the form prescribed by the statute in that behalf, signed and certified by the revising officer for the said electoral district, who was the judge himself before whom the question raised by the said preliminary objection was being tried, by which it appeared that a person bearing the name of the petitioner was a duly qualified voter entitled to vote at the said election, and evidence was given which established that the person whose name was so entered on the list was the petitioner. Counsel for the respondent objected to the reception in evidence of this certified list upon the contention that the said list could not be used as tend-

ing to the proof or for the purpose of proving that the petitioner was an elector and so qualified to be a petitioner. The learned judge disallowed the objection, "l'objection renvoyée," and received the list in evidence. Afterwards the learned judge, upon the 10th of August, 1892, in giving judgment upon the preliminary objection, dismissed the election petition upon the ground that the certified list of voters, qualified to vote at the said election, which had been produced by the petitioner, and so received by the learned judge, was not "the best proof possible," and he refused to extend time to the petitioner to enable him to produce the evidence, whatever it might be, which the learned judge deemed to be the best proof, of the last revised list of voters in the said electoral district. It is from this judgment of the learned judge dismissing the election petition that this appeal is taken.

As the list produced by the petitioner was received by the learned judge after an objection to its reception had been disallowed by him, it certainly appears to me that if upon further consideration he formed the opinion that it was not sufficient proof of the fact in proof of which it was offered and received, he, in common justice, should have extended the time to have enabled the petitioner to produce whatever the learned judge deemed to be the requisite and only sufficient proof instead of dismissing the petition. But, as it appears to me, the learned judge's first ruling when he disallowed the objection to the reception of the list as evidence and received the list in evidence was quite right; for in my opinion it is plainly enough made, by the statute, sufficient evidence of the fact in proof of which it was offered, and I cannot conceive what better evidence of any fact can be required than that which a statute makes sufficient.

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The petitioner had the status which qualified him to be a petitioner if he was a person whose name was registered on the list of voters for the electoral district of Richelieu in force under the provisions of the Electoral Franchise Act, on the day of the polling at the election held for such electoral district in January, 1892 (1). The only question raised by the preliminary objection of the respondent that the petitioner had not the status qualifying him to be a petitioner was whether or not the petitioner was a person whose name was upon the last revised list of voters for the said electoral district in January, 1892, when the election under consideration took place. If it was the petitioner's status was established, whether he voted at the election or not. Now by the 21st section of the Electoral Franchise Act, as amended by 53 Vic. ch. 8, s. 7, it is enacted that every list as finally revised, and a duplicate copy thereof, shall be forwarded to the Clerk of the Crown in Chancery, at Ottawa, who shall cause such list so forwarded to him to be printed by the Queen's Printer, and after verification of the printed copy by the revising officer who has prepared such list, he shall transmit a sufficient number of such printed copies to such revising officer.

Then by section 22, it was enacted that every list of voters so finally revised should remain in force until other lists in a future year should be revised and brought into force in their stead as in the act provided; and that the persons whose names are entered upon such lists as revised should alone be entitled to vote at any election in the polling districts and electoral districts for which such lists are respectively made; and it is thereby expressly enacted that—

The said lists shall be binding on every judge and other tribunal appointed for the trial of any petition complaining of an undue elec-

(1) 49 Vic. ch. 8 s. 41.

tion or return of a member to serve in the House of Commons of Canada.

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What is here made binding upon courts of justice is the "last revised list of voters" in force at the time of the election which is complained of being held, and not the copy of such list which was used at such election and which itself was a list of the same character precisely as the one which the learned judge at first received, and after having received rejected, in the present case, as appears by the 31st section of the Electoral Franchise Act, which enacts that—

> The revising officer shall furnish to the returning officer for his electotal district, or portion of an electoral district, within forty-eight hours after demand of the returning officer therefor "one copy" of the list of voters then in force for each polling district in the electoral district, or portion of an electoral district, with a copy of the description of each such polling district as contained in the order of the revising officer constituting the same and then in force, "each of which copies shall be duly certified by the revising officer."

That list, if produced, would have proved no more than the one produced, having been itself but a copy certified by the same revising officer in the same manner as the one which was produced; both of them were equally authentic, and either one or the other was equally sufficient to be received in proof of, or to assist in proof of, the fact in issue, namely: whether the petitioner was on the last revised list of voters in force in the electoral division, not whether he was on the copy of that list supplied by the revising officer to the returning officer. If the petitioner's name was on the last revised list his status was proved and that a person of his name was on that list was proved, by the certified list produced, and that he was such person was also proved. Then immediately follows the 32nd section which, as amended by 53 Vic. ch. 8, sec. 9, enacts that

> The revising officer, the Clerk of the Crown in Chancery and the Queen's Printer shall supply certified copies of the said lists finally

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printed and verified as hereinbefore provided to any person or persons applying for the same and paying therefor * * * and 2nd. Every copy of a list of voters supplied by the revising officer, the Clerk of the Crown in Chancery or the Queen's Printer, and certified by one of such officers as correct in the form E in the schedule to this act shall be deemed to be an authentic copy of such list.

Now, for what purpose should a list so certified be deemed to be "authentic" unless it be for the purpose of "being binding" (as specified in the 22nd section) on every judge and other tribunal appointed for the trial of any petition complaining of an undue election or return of a member to serve in the House of Commons in Canada. The meaning of the term "authentic" as given in Webster's dictionary is :—

Having a genuine original or authority; being what it purports to be—genuine—true; as applied to things—"an authentic paper or register"; and in law—"vested with all due formalities, and legally attested."

Now the form of the certificate prescribed by the act in order to qualify it to be received as an "authentic," genuine and true list or register of voters, legally attested is as follows:

CERTIFICATE OF LIST OF VOTERS.

I , the undersigned revising officer for the Electoral District of , or Clerk of the Crown in Chancery, or Queen's Printer for Canada (as the case may be) do hereby certify that the foregoing list, consisting of pages, and containing names is a true copy of the t of voters for Polling District number , as finally revised (or as finally, revised and corrected on appeal, as the case may be) for the year under the Electoral Franchise Act, 54-55 Vic. ch. 18, sec. 3.

The certificate which was given in evidence by the petitioner upon the trial of the preliminary objection to his petition that he had not the status to be petitioner was in the above form duly filled in and signed by the revising officer whose duty it was to sign it, and the effect of the certificate was (as is provided by the act, and by the prescribed form of the certificate

appears) that the list of names so certified is a genuine, true, authentic—legally attested, list or register of the names of persons entitled to vote at the election in question, and the name of the petitioner having been proved to be on the list his status as a petitioner was established. I find it difficult to conceive what better proof of the petitioner's right to be on the voters list in force at the time of the election than that his name appears on the list made by statute, an authentic list of such voters, legally attested and certified to be such by a duly authorized officer. The Clerk of the Crown in Chancery could have given no other. The law does not authorize him to give a certificate of a copy of the copy of the list used at the election, nor if given does it attach any value to such a certificate. The certificates of the Clerk of the Crown in Chancery and of the revising officer are both equally authentic and are certificates that the lists certified are authentic copies of the original revised lists. The law which declares the certificate of the revising officer or of the Clerk of the Crown in Chancery to be authentic would be wholly inoperative if it should be held to be so far useless that, notwithstanding its production, it would be necessary to call upon the Clerk of the Crown in Chancery to produce the original in his charge or the copy returned to him as used at the election as, in my opinion, would be necessary if the certificate produced by the petitioner in the present case was insufficient. For my part I cannot entertain a doubt that the object of the statute, in attaching authenticity to the lists certified by the revising officer as well as to those certified by the Clerk of the Crown in Chancery in the form prescribed by the act, was to give to lists so certified the authenticity and character of genuine originals, and that such authenticity was given to them

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to obviate the necessity, and the utter impracticability of the Clerk of Crown in Chancery attending under a subpœna *duces tecum* to produce the list or lists in his charge, as he might be subpœnaed to do at a dozen or more different electoral divisions at remote places throughout the Dominion upon the same day.

The result of the judgment of the learned judge which is appealed from in the present case being maintained, will be to prove how utterly defective the law is for the purpose of enabling electors of members for the House of Commons to call in question any election, however much the return of the member elected thereat may have been procured by the bribery, corruption and other illegal acts of himself and his agents; the simple process being for every person whose election is contested to question, by preliminary objection, the status of the petitioner. I cannot concur in the opinion that the law as it stands is so utterly defective that the status of a petitioner cannot be established otherwise than by subpœnaing the Clerk of the Crown in Chancery to reproduce the list in his custody and so insisting upon a mode of proof which is quite impracticable. In my judgment the appeal should be allowed with costs and the election petition should be remitted for trial upon its merits.

PATTERSON J.—By the Dominion Controverted Elections Act (1), an election petition may be presented by "a person who had a right to vote at the election to which the petition relates."

The election to which the petition now in question relates took place in January, 1892.

The persons entitled to vote at that election were those whose names appeared on the voters' lists revised in 1891.

(1) R. S. C. ch. 9 s. 5.

The petitioner resides in the city of Sorel in the electoral district of Richelieu.

The voters' list for that electoral district was revised by the Honourable Judge Gill as revising officer.

The petitioner in stating his qualification in his petition, unfortunately as I think, did not confine himself to the statutable form of words by simply alleging that he had a right to vote at the election (1).

He introduced those words, it is true, but he amplified them by additional verbiage which added nothing to their force, while probably suggesting the discussion of one or two topics not entirely relevant to the main inquiry, which is: Did the petitioner give sufficient evidence upon the trial of the preliminary objections to prove that he was a person who had a right to vote at the election for the electoral district of Richelieu on the 11th of January, 1892?

The persons who may present a petition under section 5 of the Dominion Controverted Elections Act, are "(*a*) A person who had a right to vote at the election to which the petition relates; or (*b*) A candidate at such election." This petitioner was not a candidate. He relies on his being a person who had a right to vote.

It happens that at this election for Richelieu there was a poll. The returning officer and his deputies had, as we may assume, lists of voters, and it is assumed that the returning officer transmitted those lists with his return to the Clerk of the Crown in Chancery as directed by section 65 of the Dominion Elections Act (2).

(1) The allegation is in these words:—Que le pétitionnaire était et est électeur à voter, et ayant droit de voter à la dite élection à laquelle la présente pétition se rapporte, et que son nom était inscrit sur les listes des électeurs qui ont servi à la dite élection ainsi que sur celles qui auraient dû servir à la dite élection, et qu'il est encore habile et qualifié à voter à l'élection d'un membre de la Chambre des Communes du Canada.

(2) R. S. C. ch. 8.

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At the trial of the preliminary objections the petitioner did not produce the list used at the polling and returned to the Clerk of the Crown, in order to show that his name was on it. The respondent contends that he ought to have done so.

The contention of the respondent is, in my opinion, founded upon a misapprehension of the law.

The right to petition is not confined to elections at which a poll is demanded.

It may be scarcely accurate, in view of our present mode of conducting an election, to use the old term election by acclamation, but a return under section 24 of the act comes to the same thing. Such a return may be petitioned against as well as a return made under section 65 after a poll. In each case, that is to say, whether there has been a poll and lists of voters used at it, or a return without a poll, the test of the qualification of a petitioner against the return is the same. The right to question the return by an election petition under section 5 does not depend on the accident of a poll being or not being demanded and held. Therefore the point touching the proof of the particular printed list which was in the hands of some one of the deputy-returning officers, which has been elaborated by the respondent in his factum and vigorously pressed in argument before us, cannot be entirely relevant unless there is something in the statutes which one is not prepared to expect.

The proceedings of the revising officer are regulated by various sections of the Electoral Franchise Act (1), ending with section 21. Under the second subsection of that section, as re-enacted by 53 Vic. ch. 8, after the lists for the several polling districts have been finally revised the revising officer prepares the final list of voters. For this some directions are given

(1) R.S.C. c. 5.

which we need not notice, and he "shall certify the original list as so corrected in form E in the schedule to this act."

I stop to notice this form E, in anticipation of something which I have to say further on.

In the original statute, as we have it in the Revised Statutes, the form was for a certificate by the revising officer, and by no one else, certifying that the list was a true copy of the list of voters for polling district number (blank) in the electoral district, as finally revised for the year. An amended form was substituted in 1889, by 52 Vic. ch. 9, not differing from the other in substance, but prepared not for the revising officer only but also for the Clerk of the Crown in Chancery and for the Queen's Printer.

The significance of this amendment will appear further on. In the meantime I remark that under subsection 2 of section 21 the revising officer is to certify the original list as corrected in that form, and, by subsection 3 he is to prepare copies in duplicate of such revised and amended lists, and is to retain one duplicate copy and send the other to the Clerk of the Crown in Chancery.

The original or certified list is retained, as I understand, by the revising officer.

By subsection 4 the Clerk of the Crown in Chancery, on receipt of all the lists for an electoral district—"the lists" here meaning the *copies* sent by the revising officer, the two expressions being used interchangeably —inserts in the Canada Gazette a notice that he has received *the lists* of voters finally revised for all the polling districts of the electoral district for the year, and thereupon the persons whose names are entered on the lists as voters are to be held to be duly registered voters in and for the electoral district, subject to an appeal given by section 33 in cases where the revising officer is not a judge.

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Subsection 7 directs that the Clerk of the Crown in Chancery shall, as such lists are received by him, cause them to be printed by the Queen's Printer, and after verification of the printed copy by the revising officer who has prepared such list he shall transmit a sufficient number of such printed copies to such revising officer.

Then we have section 22 which declares that after the lists of voters have been so finally revised or amended and corrected on appeal, if any such appeal takes place, and after they have been certified and brought into force as thereinbefore prescribed..... those persons only whose names are entered on such lists as so revised, or amended and corrected on appeal, if any, shall be entitled to vote at any election in the polling districts and electoral districts for which such lists are respectively made; and the said lists shall be binding on every judge and other tribunal appointed for the trial of any petition complaining of the undue election or return of a member to serve in the House of Commons for Canada.

Under these provisions it is plain that the task of the petitioner was to prove that he was a person named in the list for 1891 finally revised, certified and brought into force under section 21.

Subsection 6 of section 21 enacts that every such list shall be so finally revised and certified, and the duplicate copy thereof forwarded to the Clerk of the Crown in Chancery at Ottawa, on or before the thirty-first day of December in each year, and the notice in the Canada Gazette under subsection 4 is to be in the issue next after the receipt of all the lists for the electoral district by the Clerk of the Crown in Chancery.

No question has been made as to the regular proceedings having been taken by the revising officer and the Clerk of the Crown in Chancery, in the year 1891, or

as to the notice appearing in the first issue of the Gazette after the receipt of the lists. Those are things which I apprehend must be presumed to be properly done unless the contrary appears.

The ground on which the judgment appealed from is rested is that the petitioner had not given the best proof possible of his qualification.

The judgment does not intimate what proof the court regarded as the best proof which the petitioner had failed to produce, but I gather from the position taken before us, as well as from the notes of the position taken before the election court, that it was considered to be incumbent on the petitioner to prove that his name was on the printed list used by the deputy-returning officer of polling district no. 1 at the election, and that his failure was in being unable to prove that the paper he produced was the one so used. He in fact affirmatively proved the contrary. His witness, Mr. Mondor, the returning officer, produced a list of voters for the polling district containing the name of the petitioner and certified in statutory form E by the revising officer, but it had been procured long after the election, and apparently for the purpose of being produced in evidence as it was now produced.

I have shown why, in my opinion, it was unnecessary to produce or to give evidence of the particular paper used at the poll, and why I consider that the provisions of the Electoral Franchise Act are those to which resort must be had, and I have referred to some of those provisions. They contain no reference to the proceedings at a poll, and, as I have pointed out, the same rule must apply to all elections whether a poll has or has not been held.

I suppose the view which, if I correctly understand the grounds of the judgment, was acted on in the

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court below, is founded on a construction of some provisions of the Dominion Elections Act (1). Section 41 of that act declares that, subject to certain provisions, all persons whose names are registered on the lists of voters for polling districts in any electoral district in force under the provisions of the Electoral Franchise Act or of the act of 48 & 49 Vic. ch. 40, on the day of the polling at any election for such electoral district, shall be entitled to vote at any such election for such electoral district and no other person shall be entitled to vote thereat. So read the section agrees in effect with section 22 of the Electoral Franchise Act, and is not unlike it in terms. But when we look at the interpretation clauses of the two statutes we find that the expression "list of voters," when used in the Franchise Act, means "the list of voters to be revised and completed under the provisions of that act in each year for each polling district of an electoral district when finally revised, and includes a list corrected in appeal;" and that the same expression, when used in the Dominion Elections Act, means the certified copy of the list or corrected list of voters for a polling district furnished to the returning officer or any deputy-returning officer under the Electoral Franchise Act, or the act 48 & 49 Vic. ch. 40.

We have thus the one act declaring that every person whose name is entered as a voter on the lists as finally revised shall be entitled to vote, and the other apparently confining the right to those persons whose names appear on a particular copy of the list.

It is only at first sight that any discrepancy between these provisions suggests itself.

The copy of the list for the polling district furnished to the returning officer or deputy-returning officer is

(1) R. S. C. ch. 8.

one of those printed by the Queen's Printer after verification by the revising officer.

Under subsection 7 of section 21, the Clerk of the Crown in Chancery transmits a sufficient number of these copies to the revising officer, and section 31 provides for the revising officer supplying one copy for each polling district when the returning officer asks for them, which will, of course, be only in cases where a poll is demanded.

The copy in the hands of the deputy-returning officer is thus a verified copy of the list as finally revised.

Why then is the expression "list of voters" defined differently in the two statutes? The explanation may be that provisions of the Dominion Elections Act like section 41 being intended for the guidance of the officer conducting the poll he is instructed by that section, in connection with the interpretation of the expression "list of voters," that he has not to look beyond the paper in his hands, and is not to receive the vote of any one whose name does not appear on the paper.

The explanation of the legislation is not a matter that much concerns us at present, but one effect of it is that at an election at which a poll is not demanded there is absolutely no list of voters for the electoral district or the polling districts, within the meaning of the term "list of voters" as used in section 41 or any other section of the Dominion Elections Act, and, therefore, if we are to look to that statute for the test of a petitioner's qualifications, there is no one entitled to contest the validity of the election.

It is practically impossible, under the present methods, for the names on the copy to differ from those on the list; but suppose, for argument's sake, that at an election where a poll was held a name did happen to be dropped in making the copy, or suppose a copy of a wrong list to be inadvertently furnished—the list

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of 1889 for example which was continued in force till that of 1891 was finally revised (1),—the officer at the poll would of course reject any voter whose name was not on the paper in his hands; but can it be argued that a person whose name was on the true list, and who was therefore entitled to vote under the provisions of the Electoral Franchise Act, was disabled by the omission of his name from the copy used at the poll from contesting the validity of the election on any ground, even on the ground that his name was omitted from the copy of the list of voters used at the poll or that the list used was not what the statute required?

It is almost unnecessary to say that there is no conflict between the two statutes, regard being had to the scope and purpose of each of them; still I am clearly of opinion that it is to the Electoral Franchise Act which applies in all cases whether there is or is not a poll, and not to the Dominion Elections Act, that we must look to ascertain if the person who presents an election petition is a person who had a right to vote at the election to which the petition relates.

I think, moreover, that that opinion is supported by the unanimous decision of this court in the *Megantic Case* decided in 1884 (2).

Section 32 of the Electoral Franchise Act, as now framed in 53 Vic. ch. 8, reads as follows :—

32. The revising officer, the Clerk of the Crown in Chancery and the Queen's Printer shall supply certified copies of the said lists, finally printed and verified as hereinbefore provided, to any person or persons applying for the same and paying, &c.

2. Every copy of a list of voters supplied by the revising officer, the Clerk of the Crown in Chancery or the Queen's Printer, and certified by any one of such officers as correct in the form E in the schedule to this Act, shall be deemed to be an authentic copy of such list.

The expression "authentic copy" is adopted from the forensic vocabulary of the province of Quebec,

(1) By 53 Vic. ch. 8 s. 12. (2) 9 Can. S. C. R. 279.

and denotes a copy which is of such authority as to prove the contents of the original document from which it is taken.

The copy of the list of voters put in evidence at the trial was, under section 32, an authentic copy of the list as finally revised, and it proved the status of the petitioner as a person who had, under the Electoral Franchise Act, a right to vote at the election.

But I go further than that. I am of opinion that even if it were necessary to prove that the petitioner's name was on the list used at the poll sufficient evidence was given.

I have already adverted to the manner in which the terms "copy" and "list" are used interchangeably in the statute, and how what is in one place called a copy is in another called the list. For all practical purposes the copies made by the Queen's Printer, particularly when given authenticity by the certificate, are regarded as the lists of voters, each one being like every other, and the idea of there being an original to which the copies may be referred being apparently absent. I make no point at present on this view of the statute beyond noticing it as consistent in its effect with what I am about to argue.

The copy of the list for any polling district furnished by the revising officer to the returning officer under section 31 is obviously one of those printed by the Queen's Printer and transmitted to the revising officer under section 21, subsection 7. It is the *copy* of the list of voters which by force of the interpretation clause is denoted by the expression "list of voters" in section 41 of the Dominion Elections Act.

It is the law, at least as settled in English courts, that all printed copies struck off in one common impression, though they constitute only secondary evidence of the contents of the paper from which the year

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taken, are primary evidence of the contents of each other. That doctrine will be found stated and illustrated by reference to decisions in Taylor on Evidence (1).

On this principle the copy of the list procured by Mr. Mondor, being a print from the same type as the copy which was used at the poll, was primary evidence of the contents of the latter.

Looking therefore at the case from the respondent's point of view I am not prepared to affirm the decision. I think it proceeds on a fallacious conception of the nature of the document which it was held to be necessary to produce. It regards that document as an original document the contents of which must be proved by its production, whereas the document can have been nothing but one of the printed copies. The very definition of the term in the interpretation clause which introduces or includes the fact of the document being that which was in the hands of the returning officer, describes it as a copy.

I rely most strongly on the ground I have first discussed, but on both grounds or on either of them I think the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellant: *Ethier & Lefebvre.*

Solicitors for respondent: *Bruneau & Plamondon.*

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(1) P. 588 s. 418 of 8th ed.

DUNCAN McDONALD (PLAINTIFF).....APPELLANT; 1891

AND *May 29.

ALEXANDER McDONALD (DEFENDANT).....RESPONDENT. 1892

*April 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Sheriff's sale—Executor—Judgment against estate for debt of —Purchase by executor—Possession—Statute of limitations.

Judgment was recovered against the executors of an estate on a note made by D. M., one of the executors, and indorsed by the testator for his accommodation. In 1849 land devised by the testator to A. M., another son, was sold under execution issued on said judgment and purchased by D. M., who, in 1853, conveyed it to another brother, W. M. In 1865 it was sold under execution issued on a judgment against W. M. and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof and D. M. brought an action against him for possession.

Held, affirming the decision of the Court of Appeal, Strong J. dissenting, that the sale in 1849 being for his own debt D. M. did not acquire title to the land for his own benefit thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1865.

Held, also, that if D. M. was in a position to claim the benefit of the statute of limitations the evidence did not establish the possession necessary to give him a title thereunder.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in favour of the defendant which reversed the judgment of the trial judge.

The action was instituted to recover possession from the defendant of the west half of the east half of lot number 18 in the 7th concession of township of Cornwall in the county of Stormont, province of Ontario.

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

(1) 17 Ont. App. R. 192.

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The plaintiff's claim is under certain sheriff's deeds whereby the lands in question were with other lands conveyed to him in pursuance of sales under execution, and he also claimed that he had acquired title by possession.

The defendant claimed title to the lands as devisee under the will of his father, Lachlan McDonald, and alleged that the plaintiff merely held the lands for his benefit and was not entitled to any beneficial interest therein, and that the defendant was in possession thereof for his own use and benefit and was entitled to retain the same.

The following facts are clearly established and are now practically undisputed:—

"That Lachlan McDonald, the father of both the parties, was at the time of his death in 1846 the owner of the lands in question herein and other lands."

"By his will he devised the lands in question to the defendant and the other lands to other members of his family and appointed the plaintiff and two other persons the executors of his will."

"At the time of his death the Commercial Bank were the holders of a promissory note for the sum of £200, made by the plaintiff and endorsed, for his accommodation solely, by said Lachlan McDonald."

"After Lachlan McDonald's death the plaintiff having failed to pay the promissory note in question the bank took proceedings against the executors of Lachlan McDonald's will and (although they had not proved the will) judgment was recovered against them for the amount of the promissory note with interest and costs."

In 1849 the said lands were sold by the sheriff under execution issued on said judgment and were purchased by the plaintiff, who gave a mortgage thereon to the bank. He subsequently, in 1853, conveyed said lands

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to his brother William who paid off the mortgage, and in 1865 they were again sold under execution on a judgment against his said brother and again purchased by the plaintiff. The defendant took forcible possession of the land shortly before this action was brought.

At the trial judgment was given in favour of the plaintiff, the learned judge stating in giving judgment that he did not see his way clear, forty years after the transaction took place, to declare plaintiff a trustee for the devisees under the will as regarded his purchase under the judgment of the bank. He also stated that plaintiff could probably maintain his claim to the land by the length of possession since the death of his mother who had a life interest in the land. The Divisional Court reversed this judgment giving no reasons for their decision, and declared the plaintiff a trustee for the defendant of the legal estate in the land. The Court of Appeal having affirmed the decision of the Divisional Court the plaintiff appealed to this court.

McCarthy Q.C. and *Leitch* Q.C. for the appellant. The plaintiff can only be held to be a constructive trustee as to which the statute of limitations operates. Lewin on Trusts (1); *Petre* v. *Petre* (2); *Johnson* v. *Krœmer* (3); *Gibbs* v. *Guild* (4); *Clegg* v. *Edmonson* (5); *Churcher* v. *Martin* (6). As to what constitutes fraud see *Vane* v. *Vane* (7); *Des Barres* v. *Shey* (8).

Moss Q.C. for the respondent referred to *Rolfe* v. *Gregory* (9).

Sir W. J. RITCHIE C.J.—For the reasons given in the court below by the learned Chief Justice and Mr.

(1) 8 ed. pp. 180, 863.
(2) 1 Dr. 371.
(3) 8 O.R. 193.
(4) 9 Q. B. D. 64.
(5) 8 DeG. M. & G. 787.
(6) 42 Ch. D. 312.
(7) 8 Ch. App. 383.
(8) 29 L. T. 592.
(9) 4 DeG. J. & S. 576.

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Justice Maclennan, concurred in by the rest of the court, in which I entirely concur, I think this appeal should be dismissed. I should regret very much if the state of the law was such that the plaintiff could benefit by his own fraud and deprive his brother of the property in dispute which, on every principle of justice and equity, belonged to his brother. Mr. Justice Maclennan has gone so fully, and to my mind so satisfactorily, into the facts and law that I cannot with advantage add anything to his able judgment.

STRONG J.—I have extracted the following statement of the facts principally from the judgment of Mr. Justice Maclennan.

This is an appeal from a judgment of the Chancery Divisional Court, which reversed a judgment of Mr. Justice Falconbridge in favour of the plaintiff.

The action was brought for the recovery of fifty acres of land composed of the west half of the east half of lot number eighteen, in the 7th concession of the township of Cornwall.

The plaintiff and defendant are brothers the sons of one Lachlin McDonald, in his lifetime a prosperous farmer, who owned 300 acres of land, 200 of which, composed of the west half of 17 and the east half of 18 in the 6th concession, were his homestead on which he resided with his family and the other hundred of which lay in the 7th concession immediately in rear of the west half of the homestead. Lachlin McDonald's dwelling house and his cleared land and improvements were all upon the front 200 acres, and the rear 100 acres were in his lifetime and ever since, until a recent period, uncleared, unfenced, unimproved and unoccupied, with but a very slight exception.

On the 22nd December, 1845, Lachlin McDonald endorsed a note for £200 made by his son the plaintiff,

Duncan, for the accommodation of the latter, payable four months after date, and this note was held by the Commercial Bank unpaid at the time of Lachlin's death which occurred in or soon after April, 1846, about the time the note became due.

The plaintiff, Duncan, had been engaged in some kind of business in which he failed, and he was unable to pay the note at maturity.

On the 6th of April, 1846, Lachlin made his will by which he gave the westerly 100 acres of his homestead to his widow and his daughter Mary for life, with remainder in fee to his son William. He also gave all his stock, utensils and furniture to his widow and Mary and whatever might be left of it at their death to William. He gave the east half of the homestead to his son John in fee, with certain qualifications not material to this case.

Then he divided the rear one hundred acres, namely, east half of 18 in the 7th, between his sons William and Alexander, giving William the east half and the defendant Alexander the west half, the fifty acres in question.

He then appointed three executors of whom his son, the plaintiff, Duncan, was one, and requests "that they will be good enough to cause this, my last will and testament, to be duly executed."

This will was never proved but it was registered in the registry office for the county by a memorial signed by one of the executors, not the plaintiff, on the 3rd of October, 1846, and the plaintiff says in his statement of claim that he and the other executors took upon themselves the administration of the testator's estate, and his evidence is to the same effect.

About July, 1847, the Commercial Bank commenced an action on the £200 note against the three executors of the testator and the executors defended

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jointly, denying endorsement, presentment and notice of dishonour but not denying their executorship, and the action proceeded to trial and judgment was entered on the 6th of November, 1847, against the defendants, as executors, in the usual form for £236 8*s.* 1*d.*, for debt and costs.

It appears that some £50 of this judgment were recovered by execution against goods, and ultimately the sheriff, under a writ of *ven. ex.* and *fi. fa.* residue against the lands of the testator, put up for sale and sold thereunder the whole 300 acres of the testator's lands for the sum of £201 10*s.*

The plaintiff, Duncan, was the purchaser from the sheriff, and he obtained from him a conveyance dated the 4th of August, 1849, of the 300 acres, and this conveyance is the foundation of his paper title in the present action.

Immediately after obtaining the sheriff's deed the plaintiff made a mortgage of the land to the Commercial Bank for £259 12*s.* 6*d.*, and he says this was done in pursuance of an arrangement made with the bank before the sale that he was to buy the property at the sale and the bank would take a mortgage from him for the purchase money and would give him time for payment.

He says he bought the property for himself, adding "I bought it to protect the property." He admits that at the time of the sale the 300 acres were worth £1,000 and might be worth $6,000 or more in 1865, and there is other evidence to the same effect.

The mother and sister of the plaintiff remained in undisturbed possession of the homestead until their death, the sister having died in 1872 and the mother in 1883; but one Alexander Fraser, who lived in the neighbourhood, was looking after the land for the

plaintiff, and he had a written power of attorney for that purpose from March, 1875.

On the 15th of November, 1853, the plaintiff executed a conveyance of the 300 acres to his brother William for the expressed consideration of $2,000, out of which William was to pay the mortgage to the bank which was done, but William afterwards got into difficulties and the land was again sold by the sheriff under execution against William's lands and was bought by the plaintiff for $599. The plaintiff then obtained a second conveyance of the lands from the sheriff, dated the 15th day of April, 1865, and this conveyance constitutes his present paper title.

At or about the time of the death of the testator there appears to have been a small shanty upon the half of the north hundred acres, with a small clearing of an acre or a little more of the land about it. This shanty was soon afterwards pulled down, and from that time until three or four years before action there was no actual occupation of the fifty acres in question by any person. The land was covered by forest, with the exception of the small piece already mentioned, and that small piece was an unenclosed, open common growing up with a new growth of bush.

In 1876 the front 200 acres were let to one Alex. McGuire who occupied under the plaintiff until the time of the trial, as I understand, in common with the widow until the time of her death in 1883. McGuire says he had to pay taxes on the whole 300 acres; that in about three different years persons, by arrangement with him, tapped the maple trees on the north hundred acres and made syrup, sharing the produce with him; that three years ago he rented it to one Keefe, who put some fences upon it and cropped it. He further says that he took fallen trees for his firewood from the north hundred sometimes.

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That is all the use McGuire made of the north hundred acres, and he adds that after the first two years of his tenancy, which would be about 1878, until he let it to Keefe the whole place, that is the north hundred acres, was a common.

Keefe says he has known the property (the north hundred acres) since 1843, and that before he fenced it, three or four years ago, it had been a common and unenclosed for may be more than twenty years.

This evidence agrees altogether with that of Alexander Fraser, the plaintiff's agent, and that of the other witnesses who spoke on the subject.

I should add to the foregoing statement that the plaintiff appears to have contributed to the support of his mother and sister, for whose maintenance the profits of the farm seem to have been insufficient, from, at least, the date of the second sheriff's sale until their death in 1872 and 1883 respectively.

About December, 1888, the defendant took possession of the land and built a small shanty thereon, and this action was brought immediately by the plaintiff to recover possession.

In his statement of claim the plaintiff sets up title under the sheriff's sales and conveyances which have been referred to, and by length of possession, claiming that he and his brother William have been in possession ever since 1849.

The defendant sets up that the first sheriff's sale being for the plaintiff's own debt he became, and still is, a trustee for the devisees. He denies the possession of the plaintiff and William, and alleges that the land was vacant and unoccupied and that the legal possession was always in himself, and, by way of counter claim, asks for damages for timber lately cut and removed by the plaintiff.

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The action was tried at Cornwall and the learned judge gave judgment for the plaintiff with costs, saying that it was too late for the defendants to raise the objections he had taken to the plaintiff's title, and that the plaintiff could also probably maintain his claim by length of possession and that after forty years he could not see his way to declare the plaintiff a trustee for the devisees as regards his purchase under the Commercial Bank judgment.

The defendant appealed to the Chancery Divisional court from this judgment and the appeal was allowed.

The plaintiff then appealed to the Court of Appeal which court dismissed the appeal. The present appeal was then brought.

There can be no doubt that the appellant by his purchase at the first sheriff's sale acquired the legal title to the land. It is clear, however, that he so acquired it as a constructive trustee for those beneficially interested under his father's will. Aside altogether from the relationship of principal and surety which existed in respect of the execution debt between the appellant and his father, and the obligation resulting therefrom by which the appellant was bound to indemnify his father's devisees by paying off that debt, he was, as one of the executors of the will, disqualified from purchasing for his own benefit. If any authority for this proposition is required the case of *Fosbrooke* v. *Balguy* (1) is conclusive against the appellant.

Then the appellant being thus a constructive trustee the sole question remaining to be decided in the present action is, whether or not the respondent is barred by lapse of time from asserting this constructive trust, either by force of the Statute of Limitations or upon an application of the principles upon which courts of equity act in dealing with stale demands.

(1) 1 Mylne & K. 226.

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It appears from the case of the *Marquis of Clanricarde v. Henning* (1) that there is some question if the Statute of Limitations applies to a case of this kind in which, upon the principle of constructive trust, it is sought to set aside or get the benefit of a purchase of an estate by a person standing, in respect of it, in a fiduciary relationship towards the party making the claim.

Chapter 111 R. S. O. sec. 4 (which is taken from section 2 of the English act 3 & 4 W. 4 c. 27) enacts that no person shall bring an action to recover any land but within 10 years after the time at which the right to bring such action first accrued. By section 15 of the same act it is provided that at the determination of the period limited to any person for bringing an action the right or title of such person to the land shall be extinguished. This latter section is taken from, and is in substance identical with, section 34 of the Imperial statute 3 & 4 W. 4 c. 27.

Then section 31 of the R. S. O. c. 111 enacts that in every case of a concealed fraud the right of any person to bring an action for the recovery of any land of which he may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was, or with reasonable diligence might have been, first known or discovered. This section 31 is identical with the first part of section 26 of the English act.

By section 32 of R. S. O. ch. 111 it is declared that nothing in the last preceding section shall enable any owner of land to bring an action for the recovery of such land, or for setting aside any conveyance of such land on account of fraud, against a *bonâ fide* purchaser without notice. This is a re-enactment of the last clause of section 26 of 3 & 4 W. 4 ch. 27.

(1) 30 Beav. 175.

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Section 33 of the Ontario act is in these words:—

Nothing in this Act contained shall be deemed to interfere with any rule of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring an action is not barred by virtue of this act.

This re-produces section 37 of the English act.

Then the English act contains a section (24) as follows:—

No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity.

This was also contained in the original Ontario Statute of Limitations but was dropped from the revision for the obvious reason that since the fusion of law and equity brought about by the Judicature Act it had become superfluous. it being considered that section 4, referring to actions generally, embraced all actions, as well those claims which before the act would have been the subject of suits in equity as those which would have been the subject of ordinary actions at law.

If the Statute of Limitations applies it seems clear that it would be a bar to the equitable defence which the respondent opposed to the appellant's claim to recover on his legal title. We may consider the case as if, under the former practice of the courts, the appellant had brought an action of ejectment seeking to recover on his legal title and the respondent had then filed his bill asserting his equitable title and seeking to have the appellant declared a trustee for him and, as such, ordered to convey the land. To such a suit if the case comes with the Statute of Limitations at all that statute would, upon the facts in evidence, have undoubtedly constituted a bar. The right and

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title of the respondent, Alexander McDonald, to impeach the purchase at sheriff's sale made by the appellant accrued as far back as the 4th of August, 1849, nearly forty years before the respondent asserted his title, which he did not do in any way until he took possession in December, 1888. There is nothing in the point suggested that the appellant was during part of this time resident without the jurisdiction. The statute, as now applicable to all cases within its terms, recognizes no such disability. Further, there is no allegation, suggestion or pretence that there was any concealment practiced, or that there was concealed fraud bringing the case within section 31. Therefore, the statutory time began to run so soon as the purchase at the sheriff's sale was completed by the conveyance. Then, if the statute applies, at the expiration of the statutory period of time (formerly twenty now ten years) not only would the respondent's action be barred but under the express enactment of section 15 his right and title would then be extinguished.

The application of the statute depends upon the following consideration: If Alexander McDonald, the respondent, had brought a suit or action to have the appellant declared a trustee for him could that action have been properly described as an action to recover land within the meaning of section 4 of the present act? I have been careful to point out that section 24 of the original English statute, 3 & 4 W. 4, c. 27, contained a provision expressly making the statute applicable to suits in equity to recover land, just as the 2nd section of the same act had declared it a bar in the case of actions at law brought for the same purpose; and this was the state of the law in England when the *Marquis of Clanricarde* v. *Henning* (1) was decided.

(1) 30 Beav. 175.

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But for that decision I should have thought it clear that a suit in equity by a person equitably entitled to land, having for its object relief against a constructive trustee having the legal estate by compelling him to convey the legal title, was undoubtedly a suit for the recovery of land. The implied recognition by sections 24, 26 and 27 of the English act of a class of cases which would, under the former system of procedure, have been the subject of equitable jurisdiction, and which would be comprised in the description of "suits to recover lands," and in which class (as section 26 particularly indicates) a suit to set aside a conveyance for fraud would have been included, would, but for the authority I have referred to, be conclusive to show that a claim such as that set up by the respondent in his statement of defence would formerly have been within the definition of a suit to recover land. If this is correct it follows that such a claim set up by way of defence, as in the present case, is still in the nature of an action to recover land within the meaning of those words as used in the 4th section of the present statute and, as such a claim, liable to be extinguished at the end of ten years by the operation of the 15th section of R. S. O. cap. 111.

If, however, the statute does not apply, and the respondent's equitable title is consequently unaffected by it, I should in that case be of opinion that the respondent was barred by laches from asserting the equitable title he sets up in his statement of defence. I consider it to be clear that in cases not within the statute the courts will now, as courts of equity formerly did, act in analogy to the statute and give effect to that analogy by holding the lapse of a period of time, equal to that which would have been a bar if the case had been within the statute, fatal to a claim based upon an equitable title. And this, too, in cases where

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there has been only laches in the sense of an abstinence from suing with a mere knowledge of the right without further acquiescence. *Hovenden* v. *Lord Annesley* (1), and *Beckford* v. *Wade* (2), are old and well known authorities on this head.

In the last edition of Lewis on Trusts (3) I find the following passage which I think correctly states the law:

> How far knowledge of a right to sue in respect of a breach of trust, and the abstaining to sue, will without any other act constitute laches in the eye of a court of equity and disentitle the plaintiff to relief, as in the particular instances of purchases by trustees, &c., above referred to, was until lately very uncertain, but it seems to be now settled that gross laches as for twenty years will disentitle a *cestui que trust* to relief.

In *Lord Clanricarde* v. *Henning* (4), Lord Romilly, M.R., says:—

> In this case I assume that the transaction would have been set aside if a suit had been instituted within a reasonable time after the death of William Trenchard. The bar as to time is not imposed by any statute, it is only by analogy to the statute of limitations that the rule has been laid down as to the period from which time begins to run.

In this case of *Lord Clanricarde* v. *Henning* (4), it was sought to set aside a purchase made by a solicitor from his client. The sale had been made in 1807, and the purchaser had received the rents and profits from that date; the conveyance had been executed in 1823; the solicitor died in 1828; the vendor died in 1829; and the bill was filed in 1859.

In *Hodgson* v. *Bibby* (5), twenty eight years was held a bar to a suit for relief against a clear breach of trust by an express trustee. In *Bright* v. *Legerton* (6) it was held that though no statute of limitations ap-

(1) 2 Sch. & Lef. 617.
(2) 17 Ves. 97.
(3) Ed. 9 p. 1055.
(4) 30 Beav. 175.
(5) 32 Beav. 221.
(6) 29 Beav. 60.

plied the lapse of twenty years without more was a bar to a suit against a trustee (1).

I have therefore come to the conclusion that whether the respondent's equitable claim to this land set up in his statement of defence was in the nature of an action to recover land, and so within the statute or not, in either case the lapse of time was a bar, and that the primary judge, Mr. Justice Falconbridge rightly so held.

The appeal should consequently be allowed, and judgment in the action entered for the plaintiff, with costs.

FOURNIER and TASCHEREAU JJ.—Concurred in the opinion expressed by the Chief Justice.

PATTERSON J.—I have carefully read the report of the evidence in this case and I see no reason for doubting the correctness of the judgment of the divisional court which was affirmed by the Court of Appeal, much less for saying that the judgment is so decidedly mistaken as to make it proper for this court to reverse it. The question is one of fact, the fact of possession. It is not now disputed on the part of the plaintiff, who is the appellant, that his purchase of the farm, which included the fifty acres in question, when it was sold in 1849 under execution against his father's executors but for the plaintiff's own debt, constituted him a trustee for those beneficially interested in the different portions of the 300 acres under the father's will. The trust was constructive, not express, and the defendant was *cestui que trust* of the fifty acres in question. Nor is it disputed that after the conveyance of the land by the plaintiff to his brother William in 1853, and

(1) See also *Browne* v. *Cross*, 14 18 Eq. 356 ; *Re McKenna*, 13 Ir. Beav. 105 ; *Payne* v. *Evens*, L.R. Ch. 239.

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the repurchase of it by the plaintiff in 1865 when it was sold under execution against William, the same constructive trust continued. The title of the defendant to the fifty acres is therefore established unless the plaintiff has displaced it by proof of possession for ten years before the entry by the defendant in 1888. The affirmative of that issue was upon the plaintiff. He has the unanimous judgment of two courts against him, and he cannot appeal to the decision of the trial judge, which was reversed by the divisional court, as having found that issue in his favour. The decision at the trial rested upon the conveyance from the sheriff, the learned judge thinking that the defendant was too late in taking the position that the land vested in the plaintiff only as trustee, and as to the other issue merely remarking that "the plaintiff can also probably maintain his claim to the land by length of possession since the death of his mother." Under these circumstances it would require very clear demonstration of error or oversight in the judgment appealed from to justify this court in interfering with it. For my own part I should come to the same conclusion from a perusal of the evidence. It is by no means clear that there was any possession of these fifty acres, which were at the back part of the farm and the part most remote from the buildings, until a time within ten years of 1888, or any such ouster of the defendant as would have given occasion for an action on his part. The main reliance on the part of the plaintiff seems to be on evidence that the whole farm of 300 acres was let *en bloc* to tenants, but the evidence of this is very loose and has not the support of any written lease. Maguire who became tenant in 1876 makes it very clear that, with the exception of a small piece, less than an acre, which was fenced in with an adjoining lot and was therefore not in

Maguire's possession, there was not any continuous occupation of the fifty acres until three years or so before action when Keefe went in under Maguire.

It would be useless to attempt to analyse the evidence.

It is sufficient to say that in my opinion the conclusion of the courts below is amply supported and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant : *Leitch & Pringle.*

Solicitors for respondent : *McLennan, Liddell & Cline.*

1891
*Nov. 25.

1892
*May 2.

THE UTTERSON LUMBER COMPANY (Limited) (DEFENDANTS)..... } APPELLANTS;

AND

SIMPSON RENNIE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Description of property—Omission by mistake—Rectification—Subsequent purchase—Conditions—Notice.

M. & B. owners of certain village lots of land were in possession of an adjoining water lot in a lake, the title to which was in the crown and to which, according to the practice of the Crown Lands Department, they had a right of pre-emption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to R. of the village lots and certain other lands was intended to comprise the water lot and mill but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons.

M. & B. having become insolvent assigned all their property for the benefit of their creditors and the assignee sold at auction all their property including the mill. The sale was made subject to certain printed conditions one of which was that as all the information relating to the titles of the property was set out in the schedules, stock list and inventory the vendor would not warrant the correctness of the same and that no other claims existed "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale paying the amount out of the purchase money. The

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

conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages.

R., the mortgagee of the village lots, brought an action to have his mortgage rectified so as to include the water lot and mill property omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice.

Held, affirming the decision of the Court of Appeal, Gwynne and Patterson JJ. dissenting, that there being ample evidence to establish, and the trial judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R's equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal and they establish R's right to have his mortgage reformed.

Held, per Strong J.—1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently described, and the description "mill-property" in the mortgages in question would pass the land covered with water on which the mill was erected.

2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such chargees take rank according to priority in point of time, but R., not having an actual charge but merely an equitable claim for rectification such defence was not precluded.

3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without showing that the original mortgagees in whose shoes they stood were also purchasers for valuable consideration with notice.

4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment in favour of the plaintiff.

The facts are sufficiently stated in the above headnote and in the judgments hereinafter given.

Laidlaw Q.C. for the appellants agreed that the original mortgagors, Mahood & Brown, had no title to the water lot and that the mill and machinery were improperly dealt with as real estate in the courts

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below, citing *Moffatt* v. *Coulson* (1); *Tidey* v. *Craib* (2).

Blackstock Q. C., and Dickson for the respondent referred to *Adams* v. *Watson Manufacturing Co.* (3).

Sir W. J. RITCHIE C.J.—I think there was ample evidence to sustain the finding of the judge of first instance, confirmed by the unanimous decision of the Court of Appeal, viz., that the plaintiff's mortgage was intended to cover the mill and machinery and water lots and that they were omitted from the mortgage by mutual mistake, and defendants acquired the title after they had actual notice of plaintiff's claim, and subject to which defendants hold their title to the mill property in question; therefore this appeal must be dismissed.

STRONG J.—An accurate statement of the facts and the documentary evidence is indispensable to a right understanding of this case.

Messrs. Brown & Mahood were lumberers and mill-owners carrying on their business at the village of Port Sydney in the township of Stephenson in the Muskoka district. At this place they had a property consisting of village lots nos. 5, 6, 7 and 8, and they were also in possession of a water lot in Mary's Lake in front of the property mentioned. Upon this water lot they had erected a shingle mill. This mill was built upon a crib. Mahood in his evidence given at the trial describes it thus:—

> The main part of the building is built on a crib thirty feet by forty feet and then there is an extension of twenty-five feet.

This description, which is the only one I find in the evidence, implies that the mill was built upon and

(1) 19 U. C. Q. B. 341. (2) 4 O. R. 696.
(3) 15 O.R. 218; 16 Ont. App. R. 2.

fastened to a cribwork which itself was affixed to the realty, being built upon the bottom of the lake. The title to this water lot was in the crown and the only title of Brown & Mahood was that arising from the mere fact of possession, coupled with the right of pre-emption, which, according to the practice of the Crown Lands Department as proved by Mr. Kirkwood, an officer of that department, they as owners of the adjacent lots on the shores of the lake would be, and were in fact, recognized as having. The mill lot and the buildings upon it and the machinery affixed in the mill were, therefore, as far as Brown & Mahood had any title thereto, realty dependent on a mere equitable title.

Then on the 21st of November, 1887, Brown & Mahood executed an instrument in the ordinary form of a chattel mortgage which purported to be a mortgage upon the machinery in the mill, and, also, upon the mill itself described in the instrument as the "mill building" to Joseph H. Parkinson to secure $1,994.

On the 8th of December, 1887, the same parties executed a mortgage of the village lots and certain other lands to the plaintiff Simpson Rennie, the present respondent, to secure $2,500 which sum was actually lent and advanced by the respondent and appropriated to the payment of a prior mortgage made by Brown & Mahood to a Mr. Stephenson. It is proved beyond question, and as the learned judge who tried the action, Mr. Justice Falconbridge, has so found, it must on the present appeal be taken as an established fact, that the mortgage to the respondent was intended to comprise the water lot and mill erected thereon, and that this latter property was omitted therefrom by the mistake of the solicitor who prepared it. Subsequently to the mortgage to the respondent, and on the 2nd of January, 1888, Brown

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& Mahood, the mortgagors, executed an instrument in the ordinary form of a chattel mortgage, by which they purported to mortgage certain chattel property, and, also, the mill described as "the mill building" to one George Hughes to secure the payment of certain monies therein mentioned. Further, on the 17th of January, 1888, and on the 16th February, 1888, the same mortgagors executed instruments comprising the mill property in all respects similar to that formerly executed in favour of Hughes to one Alfred Hunt to secure monies therein respectively mentioned.

On the 25th of May, 1888, Brown and Mahood, having become insolvent, made an assignment for the benefit of their creditors to Robert Gray pursuant to the Ontario act respecting assignments and preferences by insolvent persons.

On the 6th November, 1888, Gray, the assignee, caused all the assigned property including the mill property in question to be sold by auction. At this sale Messrs. William A. Mitchell, John W Lang, William W. Park, James Todhunter and Thomas H. Steele, all creditors of the insolvents, became the purchasers of the insolvents' real estate and other property for the price of $16,050.

This sale was made subject to certain printed conditions of sale, the 10th of which is as follows:—

> The vendor has in the schedules hereto annexed, and in the stock list and inventory hereinbefore referred to, set forth all the information that he has been able to obtain relating to the titles to the various parcels, and the vendor shall not be understood to contract or warrant that the said information is correct or that no other claims are existing upon the said properties or any or either of them but the purchaser must take subject to all claims thereon whether herein mentioned or not and subject to all exemption in law.

These conditions of sale were duly signed by the purchasers.

Subsequently, and on the 5th February, 1889, the assignee Gray executed a conveyance to the purchasers of all the property comprised in the sale by auction, and the purchasers having afterwards, in accordance with the statute law of Ontario, formed themselves into a trading corporation or joint stock company under the title of the Utterson Lumber Company (Limited) which company is the present appellant, the original purchasers on the 12th March, 1889, conveyed all the property acquired under their purchase to the appellants.

Prior to the auction sale, and in the month of June, 1888, Gray had procured one Jenkins to advance the money required to pay off Parkinson, Hughes and Hunt, which Jenkins did, taking an assignment of the previously mentioned securities held by those mortgagees respectively.

Subsequently to the auction sale, but possibly before the conveyance to the purchasers, Gray acquired these securities by assignment from Jenkins who appears to have been paid off out of the purchase money paid by the purchasers at the sale of the 6th November, 1888. The purchase deed of the 5th February, 1889, executed by Gray for the purpose of conveying the estate purchased to the purchasers at the sale purports to be made in exercise of all powers contained in any of the prior mortgages. It is impossible, however, that if the mill property is to be regarded as realty any benefit could accrue to the purchasers from this form of conveyancing inasmuch as the powers of sale in the several mortgages to Parkinson, Hughes and Hunt, in which the mill property was included, were restricted in terms to the chattel property comprised in those instruments.

This being the state of facts and the history of the title the respondent brought this action against the

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appellants for the rectification of his mortgage by including therein the mill property which, as before stated, he clearly and satisfactorily establishes had been omitted therefrom by the error and mistake of the conveyancer who prepared the mortgage deed.

The appellants set up that they are purchasers for valuable consideration without notice.

So far as the appellants' own purchase at the sale of the 6th of November, 1888, is concerned it is out of the question to say that they are purchasers for value without notice, and this for two reasons. First, they had beyond all doubt or question, if the evidence given on behalf of the respondent is to be credited, full and precise notice of the respondent's equity before they paid their purchase money and took their conveyance, and the learned trial judge who tried the action without a jury having distinctly found in the respondent's favour on this point his finding must for all present purposes be deemed final. This finding of Mr. Justice Falconbridge is in these words:—

> The evidence that the plaintiff's mortgage was intended to cover the water lot including the mill is irrefragable. As to notice I think the plaintiff has proved his case. The testimony of Mr. Gray is confirmatory of plaintiff's position, and I regard the evidence of defendant Mitchell as pointing in the same direction. I find both facts in plaintiff's favour.

This is conclusive of the only contested facts in the case, and in the face of this finding the appellants are not entitled to be considered as purchasers without notice. There is, however, an additional reason for holding them disentitled to the benefit of such a defence. By the 10th condition of sale they expressly purchased subject to all outstanding equities and have thus incapacitated themselves from claiming to be purchasers without notice of any equity, whatever it may be, to which the property was subject in the assignee's hands. We have, however, to consider what

the position of the defendants is as assignees of the chattel mortgages transferred to Gray by Parkinson, Hughes and Hunt respectively.

They are now the holders and assignees for value of those mortgages which have not merged in the equity of redemption and which they are therefore still entitled to set up as existing securities.

The water lot, the mill erected upon it and the machinery affixed being, as I hold, all realty, but realty to which the mortgagors Brown and Mahood had only a precarious equitable title dependent entirely on their possession and pre-emption right, the legal estate being in the crown, was nevertheless susceptible of being made the subject of a mortgage security as real estate. That this property might in equity be effectually dealt with by an instrument which was in the usual form of and purported to be a mortgage of chattels, provided it appeared to be sufficiently ascertained by an appropriate denomination sufficient to describe it, cannot be doubted. Then the description given of it in the several chattel mortgages executed in favour of Parkinson, Hughes and Hunt as the "mill property" was ample for the purpose of passing not only the mill building, but also the land covered with water on which it was erected and was, so far as the limits of an ordinary water lot extended, appurtenant to it, and would probably be held a sufficient description for the purposes of a formal legal conveyance. This being so there were at the time the appellants got in their chattel mortgages, at least so far as we know from the evidence before us, four equitable charges or claims in respect of this mill property which in order of date stood as follows: Parkinson's mortgage first, then the respondent's equity to have his mortgage rectified so as to include the mill, and then the subsequent mortgages of Hughes and Hunt in order of their respective dates.

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Now in the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is in general inapplicable, the rule being that all such chargees take rank according to their priority in point of time. The respondent had not, however, an actual charge as the other mortgagees had, and although as between mere equitable chargees the defence of a purchase for value without notice does not apply, yet an equitable chargee for value not having the legal estate is, it has been held, entitled to set up the defence of want of notice as against one who has not an actual charge, but a mere equity such as the respondent's here, to have a conveyance or mortgage rectified. This is the law of courts of equity as laid down by Lord Westbury in the case of *Philips* v. *Philips* (1) where the whole doctrine of equity in connection with this peculiar defence of purchase for valuable consideration without notice is analysed and explained, and the different cases to which it applies analysed and classified, Lord Westbury there distinguishing between the case of an actual equitable estate or interest and "those in which there are circumstances that give rise to an equity as distinguished from an equitable estate as for example an equity to set aside a deed for fraud or to correct it for mistake," lays it down that in the latter class of cases it is not essential that a defendant should have the legal estate. And to the same effect is the decision of Lord St. Leonards in the case of *Bowen* v. *Evans* (2).

If there had been no assignment of these mortgages by Hughes and Hunt, and those persons had been brought before the court by the respondent claiming

(1) 4 De G. F. & J. 208; See an admirable commentary on the case of *Philips* v. *Philips* in Haynes Outlines of Equity, Supplt. Chapters 1, 2 & 3.

(2) 1 J. & LaT. 178.

priority over them, it would have been open to them to have pleaded this defence and it must have prevailed in default of proof of notice to them of the respondent's equity before they paid their money or took these mortgages. Then, although the appellants had notice before they took their conveyance from Gray and were therefore, as regards their own purchase, not entitled to insist on the defence of purchase for value without notice, yet they would still have been in a position as regards the mortgages of Hughes and Hunt to set up the defence that these assignors were such purchasers and to shelter themselves under the equitable defence which the latter would have been entitled to. There are, however, in my opinion, reasons why the appellants are not now entitled to insist on this defence to the clear *primâ facie* right to equitable relief which the respondent has established. First, whilst the appellants do plead that they were themselves, and that their immediate grantors who purchased at the auction sale also were, purchasers for value without notice, a defence which utterly fails on the evidence, they have not pleaded that the mortgagees Hughes and Hunt, in whose shoes they stand, were such purchasers; and they have not, therefore, put the respondent, as they should have done, to prove notice to those incumbrancers. It is impossible, therefore, that they can now be entitled to the benefit of the defence. Further in the face of the 10th condition of sale under which they purchased and by which they expressly undertook to be subject to all outstanding equities against the property, I should have thought it impossible that they could have maintained this defence in respect of securities which they also acquired from Gray under the same deed. I cannot agree with Mr. Justice Osler who was of opinion that the condition of sale referred to was superseded by the conveyance.

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As regards Parkinson's mortgage, in the view which I take, that charge is anterior in point of date to the respondent's mortgage and the appellants are clearly entitled to priority in respect of it over the respondent. There is, however, nothing in the formal judgment pronounced by Mr. Justice Falconbridge to prejudice this right of the appellants to priority in respect of the mortgage debt assigned to them by Parkinson. The judgment merely directs that the respondent's mortgage shall be reformed so as to cover the water lot, mill and machinery.

It is possible that it may be entirely immaterial whether the respondent has priority over the mortgages given to Hughes and Hunt or not. Should it turn out upon taking the accounts (which are not, however, directed by the judgment and in respect of the omission to direct which no complaint has been made by either party) that the proportion of the purchase money attributable to the property held in security by the plaintiff including the mill property is sufficient to pay his principal, interest and costs, as well as the amounts due on the mortgages of Hughes and Hunt, and also that due on Parkinson's mortgage, no question of priority will, of course, arise, but it is impossible to foresee, from the materials before the court on the present appeal, how this will be.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—The question in this case simply is whether the evidence discloses such a case as justifies the court, as against the defendants who derive title under certain mortgages, to decree the reformation of a mortgage by the insertion therein of certain property not inserted therein upon the suggestion and allega-

tion, that the property sought to be inserted in the mortgage was by the mere error and mutual mistake of the mortgagors and mortgagee omitted, and that the defendants purchased with full notice that it was so omitted by mistake.

Early in the year 1887 one Stephenson, then a practising attorney in the city of Toronto, appears to have made, or to have procured to be made, pecuniary advances to a firm carrying on the business of a general store and lumbering at Utterson in the county of Muskoka under the name of Brown and Mahood. Mr. Brown, the senior member of the firm, was a man advanced in years and Mahood, the other member of the firm, was his son-in-law. In security for the repayment of these advances a mortgage securing repayment of the sum of $2,500 was executed by, as I understand the evidence, Brown, in whom the fee was vested, upon lot 22 in the 7th concession of the township of Stephenson in favour of Stephenson the attorney, or his father, as mortgagee; the whole transaction was negotiated and arranged by Stephenson the attorney. In the summer of 1887, and after the execution of the above mortgage, Mahood contracted with one Alfred Hunt, the owner in fee of certain village lots known as village lots 5, 6, 7 and 8 in the village of Port Sydney as shown on Mary Anne Ladell's survey of part of that village registered in the registry office for the district of Muskoka on the 8th day of May, 1875, for the purchase of the said village lots. These village lots were conveyed by Hunt to Mahood by a deed of bargain and sale, bearing date the 20th and registered upon the 24th August, 1887. These village lots were separated from the waters of St. Mary's Lake, in the township of Stephenson, by a piece of land which, in the original survey of the township of Stephenson, was reserved as

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a road allowance reserve along the water's edge of the lake, and between the lake and lot no. 25, in the 6th concession of the said township of Stephenson, upon which lot the said village lots 5, 6, 7 and 8 in the village of Port Sydney were laid down. When Mahood contracted to buy the village lots he and his father-in-law, constituting the said firm of Brown and Mahood, contemplated erecting a steam shingle mill in the waters of the said lake opposite to the said village lots. At this time there was another person who either in point of fact was, or was believed by Mahood to be, trying to get possession of a water lot in front of the said village lots with the view of preventing Brown and Mahood from erecting the mill contemplated to be erected by them there; and in consequence Mahood came down to the Crown Land Office in Toronto to see, as he says, what could be done, and if they could buy, and he was told at the Crown Land Office that they could not buy unless they brought a plan prepared by a provincial surveyor showing the property applied for. This must have taken place as early as July, 1887, for in that month Mahood employed a provincial surveyor to survey and make a plan of a water lot in the lake on the north side of the said reservation for road allowance and opposite to the said village lots 5 and 6.

The surveyor so employed accordingly surveyed and made a plan of the water lot, which plan, however, Mahood says he did not get until some time after. Upon this subject he says:

> I don't remember when we bought the lots (the village lots). I think they were bought some time in June, if I am not mistaken, but it was about three weeks or a month afterwards before we got the surveyor out surveying, working to lay out the mill site for us. He said he would send us up a little plan of it when he had time to make it, we were not in a hurry for it we said; we would get it in the fall.

The plan was produced at the trial and it bore date July 13, 1887. Upon this Mahood said in his evidence

that it must have been prepared about the time it bears date, but that he did not get it then, and he added:—

I got it prepared with the intention of making application to the Crown Land Department for that water frontage. The application was never made until late in the same winter of 1887-8. I think it (the plan) lay in Mr. Brown's office for a long time after we had it prepared. It was prepared shortly after we bought the village lots—prepared to apply for the water frontage. We never made application. I was intending to make application. I went personally to the department and asked about how to proceed in the matter.

Having thus learned how to proceed to acquire title to the water lot upon which they proposed erecting the mill they proceeded with its erection upon a crib built out in the waters of the lake and they put in the machinery, so that they had the mill in operation in October, 1887. Upon the whole, then, it would seem, I think, very probable that the negotiations for the purchase, and perhaps the contract for the purchase, of the village lots was made, as Mahood in one place says he thinks the purchase was made, in June, 1887, and that about that time Mahood went to the Crown Land Office to ascertain how to acquire a water lot for their mill site. In another part of his evidence, not already quoted, he says:—

We were informed that one Sydney Smith was going to make application for the water lots to prevent us building the mill, and in order to prevent that I went to the Crown Land Department to get information.

Having been there informed that no sale could be made without a plan of the property made by a Provincial Surveyor, he employed a surveyor for the purpose, and being apparently satisfied with the information he obtained in the Crown Land Office that thus he could acquire a title he proceeded at once to erect the mill and had it in operation in October, not doubting but that on making his application at some

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future time to the Crown Land Department he could get a title to the lot on which the mill was so erected. In the month of November, 1887, Brown and Mahood effected a loan of $1,194.00 from one Parkinson; the security agreed upon for such loan was a chattel mortgage upon the said mill, and the machinery therein, and a quantity of logs and a stock of dry goods, groceries, &c., and a policy of insurance upon said chattels, and also a mortgage upon said village lots nos. 5, 6, 7 and 8, and other lands. To perfect this transaction a chattel mortgage was executed by the mortgagors Brown and Mahood respectively, and also a real estate mortgage, bearing date respectively the 28th day of November, and registered in the proper offices for the registration of such respective instruments on the 26th day of November, 1887, and a policy of insurance was, upon the 24th day of said month of November, effected by the mortgagors in the sum of $3,000 upon the said mill and the machinery therein, by which policy, which was delivered with the said mortgages to Parkinson as his security, it was provided that the loss if any should be paid to him. By the chattel mortgage the said mortgagors conveyed, bargained and assigned to the mortgagee all and singular the goods and chattels enumerated as follows, namely, one shingle machine bought from Polson iron works, all the shaftings, pulleys, belting and piping, and one incubator, a quantity of hose, one mill wheel, and jackladder and drag saw in the mill building in the village of Port Sidney, in the township of Stephenson, on the shore of Mary Lake, and also the said mill building belonging to the said mortgagors, and also all the pine timber cut and being cut into logs upon lot number 8, in the 2nd and 3rd concessions of the said township of Stephenson, also all the dry goods, groceries, wooden

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ware, ready-made clothing, boots and shoes, and generally all the stock in trade and fixtures owned by the mortgagors in and upon the premises at Utterson, in said township of Stephenson where the mortgagors carried on the business of merchants. And in the said chattel mortgage it was declared that it was executed upon the express condition that if the mortgagors should well and truly pay or cause to be paid to the said mortgagee the full sum of $1,194.00 as follows: $645.00 on the 22nd day of January, 1888, $345.00 on the 22nd day of February, 1888, $345.00 on the 22nd day of March, 1888, $337.50 on the 22nd day of April, 1888, and the sum of $322.00 on the 22nd day of May, 1888, then that the said chattel mortgage and every thing therein contained should cease and determine; but it was thereby provided that in case default should be made in the payment of the said above sums together with interest or of any part thereof then and in such case it should be lawful for the mortgagee, his executors, administrators or assigns, to enter upon any premises whatsoever where the said chattels or any part thereof should be and to sell the same or any of them, or any part thereof, either by public auction or private sale as to them or any of them should seem meet; and it was further provided that it should not be incumbent on the mortgagee, his executors, administrators or assigns, to sell the said goods and chattels, but that in case of default in payment of the said sum of money with interest it should be lawful for the mortgagee, his executors, administrators or assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of the mortgagors, their executors, administrators or assigns, or any of them or of any other person whom-

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soever. By the real estate mortgage, which was executed in pursuance of the act respecting short forms of mortgages, the mortgagors did grant and mortgage unto the said mortgagee, his heirs and assigns, the said village lots nos. 5, 6, 7 and 8 and also lots nos. 15 and 16 in the 6th concession and part of lot no. 15 in the 7th concession of the said township of Stephenson upon which last mentioned lot was situate the store of the said mortgagors where they carried on their business as merchants. This mortgage contained a power of sale of the lands thereby mortgaged upon default in payment of any part of the monies thereby secured. In this month of November, 1887, Stephenson the attorney, who had procured from Brown and Mahood the mortgage on lot 22 in the 7th concession of Stephenson in security for $2,500.00, was negotiating with Rennie for the sale to him of that mortgage, and within a week after the perfection of the securities upon the loan effected by Brown and Mahood with Parkinson, Stephenson took Rennie to Port Sidney to Brown and Mahood's place there. Brown was then living on his farm on the lot 22 and Mahood was at Utterson attending to their general store business. Hugh Brown, the son of Brown the senior partner in the firm of Brown and Mahood, was in charge at Port Sidney. He says that on that day Stephenson said to him that Mr. Rennie was not satisfied with the security on the farm alone, which was the property in the Stephenson mortgage, that he wanted the village lots and the mill put in, to which Hugh, as he says, replied that he did not think that he (Stephenson) would have any trouble about that. This was all that Hugh Brown professed to know upon this point. Rennie never spoke to him upon the subject. He knew nothing in point of fact, as far at least as appeared by his evidence, as to what authority,

if any, Stephenson ever got from Brown and Mahood, or either of them, as to adding the mill or the village lots to the farm lot in the Stephenson mortgage as a security to Rennie; in short, Hugh Brown's evidence as to what was the intention of Brown and Mahood, or either of them, or of Stephenson himself or Rennie upon the subject, was utterly valueless. He did not profess to have any knowledge whether Brown and Mahood, or either of them, had come to any definite agreement with Rennie or with Stephenson on his behalf upon the subject. Mahood was at the time attending to the store at Utterson where Stephenson and Rennie stopped on the evening of the day that they had been at Port Sidney, namely, the 30th of November or 1st December, '87. Now, Mahood's evidence is that on that occasion Stephenson came into the store at Utterson and taking him apart said to him that Rennie was not satisfied with the security of the Stephenson mortgage and asked him if they (that is if Brown and Mahood) would have any objection to putting in the mill property. Nothing with regard to the mortgage or money was mentioned in Mr. Rennie's presence. He was asked if Stephenson had spoken of the village lots, to which he replied, yes. He was then asked what he had said about them, to which he replied: "Well it was just mentioned—the mill property." Again, he said that "the mill went with the village lots;" and again, that as they had no deed for the mill property, that is, for the water lot on which the mill was situate, the description of the village lots was supposed to cover the mill; and he said that Mr. Stephenson asked him for a description of the mill property and that he replied that the only description they had was that of the village lots, which he wrote on a slip of paper and gave it to him. Mahood

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did not give Mr. Stephenson any information as to the mortgage transaction with Parkinson which, as we have seen, was completed only a few days previously, and the money, a loan of which was effected thereon, had been paid to Brown and Mahood, but it may be presumed that Mr. Stephenson, who was himself an attorney, and who by Mr. Rennie's evidence appears to have been acting for him, became aware of the negotiations which had been effected on the 20th November. Mr. Rennie says that he told Mr. Stephenson to find out that the mill and the village lots were clear, and that the money should be ready as soon as he should get the papers executed; and he says that on the 15th December he paid the money to Stephenson. He received it, not at all for Brown and Mahood, but for himself or his father. On the 8th day of December, 1887, Brown and Mahood executed a mortgage sent to them by Stephenson for their signatures. By that instrument the farm lot no. 22 in the 7th concession of the township of Stephenson and the village lots nos. 5, 6, 7 and 8, in the village of Port Sidney, by the precise description given to them in the deed from Hunt to Mahood, and in the mortgage from Brown and Mahood to Parkinson, were purported to be conveyed to Simpson Rennie as security for $2,500 therein alleged to have been advanced and lent by Rennie to Brown and Mahood. This instrument when executed by Brown and Mahood was returned by them to Stephenson, and the plaintiff Rennie says that he received it from Stephenson on the 18th December and then paid him the $2,500. In point of fact, as Mahood admits, (and he is the witness upon whom the plaintiff mainly relies in support of the contention raised by him in this suit,) Brown and Mahood never received any portion of this money nor was it ever intended that they should; the mortgage was the re-

sult of a transaction wholly between Stephenson and the plaintiff, and was executed by Brown and Mahood wholly by way of substitution for the Stephenson mortgage. On the 2nd day January, 1888, Brown and Mahood effected a loan of $693 from one George Hughes in security for which they gave Hughes a chattel mortgage upon the mill building and the machinery therein by the same description as that given in respect thereof in the chattel mortgage to Parkinson. The chattel mortgage to Hughes contained precisely the same powers as to sale and otherwise in case of default in payment of the said amount thereby secured as were contained in Parkinson's chattel mortgage, and was duly filed of registry in the proper office in that behalf on the 12th day of January, 1888.

On the 17th day of January, 1888, Brown and Mahood executed a further chattel mortgage upon a large quantity of chattels therein enumerated, including the stock in trade of dry goods, groceries, &c. in their store at Utterson, and "the shingle bolts, mill machinery and plant which are at and beside the mill owned by the mortgagors on the shore of Mary's Lake," &c., to one Alfred Hunt in security for $2,519.73, due by them to him. This mortgage also contained all the provisions as to powers of sale and otherwise that were contained in the Parkinson mortgage, and was duly filed of registry on the 18th January, 1888.

Upon the 16th of February, 1888, Brown and Mahood, in security for a further advance of $2,500.00 made to them by Alfred Hunt, executed in his favour a further chattel mortgage upon the same property as that described in the mortgage of the 17th January, and containing similar provisions as to sale and otherwise in case of default in payment of the moneys thereby secured. This mortgage was duly filed of registry in the proper office in that behalf on the 25th

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day of February, 1888, and on the same 16th February Brown and Mahood also executed in favour of the said Alfred Hunt a mortgage upon certain real estate therein mentioned in security for the same sum of $2,500. Now Mahood said in his evidence that at the time he gave to Stephenson a description of the village lots 5, 6, 7 and 8 the Parkinson loan had not been arranged for at all, and that he always thought the Rennie mortgage was prior to that of Parkinson until the summer of 1888. He also said that before executing the Rennie mortgage he read it and saw that the mill was not included in it. He was asked by the plaintiff's counsel in relation to this the following question :

What did you think and intend the discription to cover ?

To which he answered—

"We always held the description to cover the water frontage as well as the lots."

He was then asked—

What he meant when he said on his cross examination that when he executed the Rennie mortgage he knew it did not cover the mill ?

To which he answered—

"I mean to say that it did not expressly mention the mill."

Whereupon the plaintiff's counsel put a question to him in the following form :

You mean to say by that it did not mention the mill in so many words but you thought the mill was covered by the description of the lots ?

To which he answered—

Yes.

Now Mahood knew that he had purchased the village lots from Hunt. We have it from his own lips that at the time of his purchasing them he was informed that another person was trying to acquire the water frontage for the purpose of preventing him and his partner Brown erecting the mill they contemplated erecting there, and that in order to prevent that he went down to Toronto to the Crown Lands Depart-

ment for the purpose of endeavoring to secure the water frontage himself, and that he was there instructed how to proceed for that purpose, viz : to get a Provincial Land Surveyor to make a survey and plan and description of the water lot as required; that in adoption of these instructions he employed a surveyor to make and that such surveyor did make for him a plan of the lot for the express purpose of his making application to the Crown Lands Department for the water frontage as and for the site of the mill. The plan was prepared as we have seen in July, 1887. On the 21st of November following he executed to Parkinson a mortgage on the village lots by the description given to them in the deed from Hunt to him and on the same day he also gave Parkinson a chattel mortgage executed by Brown and himself upon the mill and machinery therein which they covenanted to insure in the interest of Parkinson, and on the 24th November they procured a policy as covenanted with a provision that in case of loss the amount should be paid to Parkinson. Now from all this it is quite plain that Mahood knew well that the description of the village lots in the deed from Hunt to him did not and could not cover any water lot in front and that the title to a water lot in front of the village lots which were separated from the lake by a road could only be obtained from the Crown Lands Department, for which purpose he had the plan made which shewed the metes and bounds of the water lot desired to be acquired by Mahood and upon which he and Brown erected their mill. Mahood thus well knew that the water lot upon which the mill was erected was wholly distinct from the village lots and was not covered by their description. When, then, he told Mr. Stephenson, if he did tell him, that the description of the village lots covered the mill, and that this was the only description he had or could give

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of the mill property; and when he said that he and Brown always held that the description of the village lots did cover the water lot in front upon which the mill was erected; and when he said that the Parkinson loan had not been arranged for at all when he gave Mr. Stephenson the description of the village lots, and that he always thought until the summer of 1888 that the Rennie mortgage was prior to that to Parkinson, and that when he executed the Rennie mortgage although he knew the mill was not mentioned in it still that he considered it to be covered by the description of the village lots; he was stating what is shown from his own lips in other parts of his evidence to be untrue. Indeed it is utterly impossible to believe that within the short space intervening between the 21st and 30th November he could have forgotten the transaction as to the Parkinson mortgage. The dealings also of Brown and Mahood with the mill property subsequently to the execution of the Rennie mortgage by giving chattel mortgages thereon in security for further loans show a deliberate intention to deal with that property as property in which they had only a chattel interest and which was wholly distinct from the village lots of which Mahood was seized in fee. If at the time of the execution of the Rennie mortgage Brown and Mahood entertained any intention to give to Rennie any security upon the mill property it could only have been to put Rennie in the same position in relation to the mill as he was by the mortgage which they executed placed in relation to the village lots, that is to say, as a second mortgagee only subsequent to Parkinson; and that intention, if entertained, would, it is reasonable to assume, have been given effect to by chattel mortgage as in the case of Parkinson. Now it is quite apparent that this would not have been at all in accord with Mr. Rennie's intention, for he says that

he told Mr. Stephenson, who appears to have been negotiating with him for the sale to him of the Stephenson mortgage which was on the farm on lot 22 on the 7th concession alone, that if the mill and the village lots were clear, and if a mortgage were drawn to him including them with the farm he would take it, otherwise not; and he told Mr. Stephenson to find out if the mill and the village lots were clear so that he could have what he was stipulating for on a clear mortgage upon the farm and on the mill and on the village lots. I can, therefore, arrive at no other conclusion than that the plaintiff has failed to establish the first step necessary to be established by him in support of the contention asserted in this case, namely, that by an agreement entered into between Brown and Mahood and Rennie the mill property and the right thereto, such as it was, of Brown and Mahood should have been inserted in the mortgage executed to Rennie and that this was, merely by their mutual mistake, omitted. It may be and perhaps is the fact that Rennie has been deceived and defrauded by Stephenson, who, it is said, subsequently left the country, and who appears to have been the only person who, in the character of or in the interest of the holder of the Stephenson mortgage, had any agreement with the plaintiff in respect of the transaction which Stephenson perfected by procuring Brown and Mahood to sign the mortgage which Stephenson prepared for them to sign, and which they did sign just as he had prepared it, in perfect ignorance, so far as appears, of its not expressing, if it did not express, the intention Stephenson had in preparing it in the form in which he did prepare it. But whatever equity the plaintiff may have against Stephenson it is obvious that against the defendants he can have none to the prejudice of the rights vested in Parkinson and his assigns by the instruments executed by Brown

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and Mahood if the defendants come within the designation of assigns of Parkinson, and as such entitled to the benefit of the powers which were vested in him. It is only necessary now to show how the defendants claim title.

On the 25th May, 1888, Brown and Mahood made an assignment of all their property, real and personal, to one Robert H. Gray for the benefit of all their creditors. At this time all the estate which Brown and Mahood had in the property in question, and in the village lots also, was an equity of redemption; all the legal estate of Brown and Mahood and the absolute power of sale thereof was vested in the mortgagees Parkinson, Hunt, and others. Nothing whatever, in the property now in question, passed to Gray by the assignment made to him by Brown and Mahood but such equity of redemption as was in them subject to the provisions in the mortgages to Parkinson and others. All the property of Brown and Mahood was mortgaged by instruments conveying to the mortgagees full power of sale in case of default in payment of any of the monies secured by the respective mortgages, and so Gray could not convey to any one any legal interest whatever in any part of the mortgaged property; the assignment to him for the benefit of creditors was therefore in effect almost illusory, and this fact he soon realised; for immediately upon the execution of the assignment to him bailiffs were put in possession of the mill and other chattel property mentioned in certain of the chattel mortgages under the powers in that behalf vested in the mortgagees for default in payment of moneys by these mortgages secured. In this state of things the assignee Gray, who was himself a creditor of Brown and Mahood, endeavoured to procure one Jenkins to purchase the mortgages held by the parties who had

taken possession with the view, apparently, of acting conjointly with him so as to effect a sale of the estate of the insolvents. Jenkins, before agreeing to complete such purchase, had an interview with Robert Brown and James Mahood, members of the firm of Brown and Mahood, and Hugh R. Brown, son of Robert Brown, who claimed to have had an interest in some part of the property mortgaged, and upon the 18th June, 1888, an agreement was entered into by and between the above parties, to which also the assignee Gray was a party, whereby it was agreed that Jenkins at the request of all of the said parties should buy the Hunt mortgages at the sum of $5,170.85; the Hughes mortgage at $696.48; and the Parkinson mortgages at $2,493.34; and pay all costs incurred in respect thereof and the costs of the assignment of the said mortgages and insurance policy to him, and in consideration thereof all the parties to the said agreement ratified and confirmed the said mortgages as valid and subsisting securities to Jenkins and he was thereby vested with full power to realize all the said assets as mortgagee in possession with power to sell the stock of logs in the log or manufactured and sell the product or in any way he might think expedient deducting all costs, outlay and expenses and a reasonable compensation for care, risk, time and trouble and interest at the same rate as Brown and Mahood had been paying and all expenses incurred by him, and it was declared that he should not be liable for any loss or depreciation of assets unless they arose by his wilful neglect or default. Under this agreement Jenkins purchased the mortgages mentioned therein.

Subsequently conditions of sale upon which the property should be offered for sale were prepared by a solicitor acting for Jenkins and approved by a solicitor acting for Gray the assignee. In these conditions under

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the head real estate the lands to be offered for sale were inserted including the village lots 5, 6, 7 and 8 in the village of Port Sidney. Also all the following:

TIMBER INTERESTS.

All the right, title and interest of Robert Brown, James Mahood, Janet Brown, Janet Mahood and Hugh Reside Brown, and of Robert Jenkins the assignee of certain mortgages given by the said parties or some of them to Alfred Hunt, Richard H. Parkinson and George Hughes in and to the timber now standing, lying and being on the following lots, viz., (naming them) timber licenses, &c., cut timber, &c., also the mill of Brown and Mahood at Port Sidney and the machinery thereon in running order subject to the claim of Polson & Company for about $500.00.

Then among the conditions of sale were inserted the following:—

1. All the said property shall be sold in one parcel.

5. The properties are sold subject to the five several mortgages set forth in the schedule annexed and marked "No. 5," and to the liens on machinery set forth in "Schedule No. 6," and any other liens thereon, particulars of the amounts due upon which are set forth as accurately as obtainable, and also to any government dues upon any timber cut or uncut.

9. The vendor agrees to obtain, contemporaneously with the making of the final payment, a conveyance, assignment or discharge, as may be preferred by the purchaser of Robert Jenkins' interest in the several parcels above mentioned.

16. The purchaser shall at the time of sale sign the agreement hereto annexed for the completion of the purchase, and in the event of his failure to do so the property may be put up at any time within two hours after the acceptance of the purchaser's bidding without any further advertisement of sale; and any deficiency in the price obtainable upon the second offering for sale together with any costs occasioned by such failure shall be made good by the bidder whose bid shall be first accepted and who shall make default as aforesaid.

Then followed the contract of purchase to be signed by the purchaser. Among the five mortgages mentioned in the schedule no. 5 was inserted Rennie's as follows:—

Simpson Rennie $2,500 and interest at 9 per cent. from 8th December, 1887, payable quarterly. Principal payable in five annual instalments of $500 each, first payable 8th December, 1888.

Land covered lots 5, 6, 7 and 8, Port Sidney, and lot 22 in 7th concession Stephenson.

The sale was advertised to take place on the 6th November, 1888, but prior thereto and on the 2nd day of November, 1888, a further indenture under seal was entered into by and between the said Robert Brown, Janet Brown, his wife, and Hugh R. Brown of the first part; James Mahood and Janet Mahood, his wife, of the second part; Robert Jenkins of the third part and Robert H. Gray, assignee of the assets of Brown and Mahood, of the fourth part, whereby the parties of the first and second parts:—

By way of confirmation and further assurance in consideration of the position of Gray as assignee of Brown and Mahood for benefit of creditors and of the purchase by Jenkins of the Hunt, Parkinson and Hughes mortgages and of future advances by him and of the management of affairs by Gray in the interest and for the protection of the estate and of the dealings and transactions on account of the parties interested in the assets grant, assign and release all their and each of their partnership and several assets, estate and effects to Gray his heirs and assigns subject to the said mortgages assigned to Jenkins his heirs and assigns which are hereby confirmed to him his heirs and assigns and to his future advances commission and expenses which are declared to have priority over the claims of unsecured creditors.

And it was thereby among other things further agreed that the sale of the said assets, estate and effects should be in one lot subject, by the consent of Jenkins, to the incumbrances on each parcel which had priority over him and that the price should be payable fifty per cent at the time of sale, balance in thirty days, to be applied first in payment of the claim of Jenkins as aforesaid and the balance if any to the unsecured creditors; that the sale should be proceeded with on the day advertised by the assignee; and that Jenkins should be at liberty to bid at the sale and buy the said assets, estate and effects as any other bidder and should if he bought take the absolute title as purchaser free from any objection that he is assignee of the said mortgages or is

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interested in the said assets, estate and effects and all legal objections were waived; and it was further agreed that all necessary parties should join in and sign all necessary deeds and papers to perfect a registered title of the said assets, estate and effects to a purchaser. In accordance with the provisions of this instrument the sale was proceeded with on the day advertised by the assignee, viz., the 6th of November, and at such sale one Mitchell on behalf of himself and others associated with him was the highest bidder and became purchaser subject to the conditions of sale and signed the contract of purchase at the foot thereof.

Under the circumstances above detailed and in view of the two special agreements of the 18th June and of the 2nd November signed by the respective parties thereto and of the conditions of sale it cannot, I think, be disputed that the sale in point of fact was, and was intended to be, a sale made by Jenkins as possessed of the legal estate and by Gray as assignee of the equity of redemption of all the parties interested in the property sold, and so made for the purpose of securing an undoubted title to the person becoming purchaser under the conditions of sale. In so far as the plaintiff in the present action is concerned the sale of lot 22 in the 7th concession of Stephenson, and of the village lots 5, 6, 7 and 8 in Port Sidney, was by the special consent of Jenkins made subject to Rennie's mortgage thereon; shortly after the execution of the agreement of the 18th June the assignee Gray instructed his solicitor, who is now the plaintiff's solicitor, to ascertain the particulars of the Rennie mortgage. This gentleman had, it seems, been partner of Mr. Stephenson who drew the mortgage, and who received from Rennie the moneys advanced upon the security thereof. He applied to Mr. Rennie and received from him the mortgage for the

purpose of supplying the particulars required, and on the 20th July, 1888, addressed the following letter to Mr. Gray:—

RE BROWN & MAHOOD.

DEAR SIR,—The Rennie mortgage bears date 8th day of December, 1887, is made by Robert Brown, James Mahood and their wives to bar dower only to Mr. Simpson Rennie, Scarborough, farmer, securing $2,500 with interest at 9 per cent per annum, payable in five equal annual instalments of $500 each on the 8th day of December in each year, with interest quarterly on the 8th days of March, June, September and December, the first of such payments of interest to be made on the 8th day of March, 1888. The property charged is lot 22 in the 7th concession of Stephenson containing one hundred acres more or less, and village lots nos. 5, 6, 7 and 8 as shown on Mary Ladelle's survey of part of the village of Port Sidney in the township of Stephenson, these said lots forming a part of lot 25 in the 6th concession of Stephenson. Nothing has been paid on account of this mortgage.

Very truly yours,

R. M. DICKSON.

Upon the faith of the accuracy of this information the conditions of sale were prepared wherein the mill is shown as offered for sale wholly distinct from all real property under the description of the mill of Brown & Mahood at Port Sidney, and the village lots separately as real estate. Upon the 6th December, the purchaser Mitchell appears to have paid the balance of his purchase money and thereby, under the terms of his contract and the conditions of sale and of the instruments of the 18th June and 21st November became entitled to the benefit of the interest acquired by Jenkins as assignee of the Parkinson mortgage on the mill as the first chattel mortgage executed thereon which title was in most express terms ratified and confirmed by the instruments of the 18th June and 2nd of November by all the parties called as witnesses on the part of the plaintiff in the present action for the purpose of avoiding the expressed purport tenor and effect of so many instruments ex-

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ecuted under their hands and of defeating the title of the persons who have purchased upon the faith of those instruments. Now the means adopted for giving effect to the condition upon which Mitchell became purchaser at the sale, that the benefit of the title and interest acquired by Jenkins as assignee of the mortgages assigned to him, which title and interest were expressly ratified and confirmed by the instruments of the 18th June and 2nd November, 1888, should be secured to Mitchell the purchaser at the sale, was that a deed of assignment by Jenkins to Gray of the mortgages which had been assigned to Jenkins was prepared for execution and executed by Jenkins and a deed was prepared for execution and executed by Gray, the party thereto of the first part to and in favor of Mitchell, and the persons jointly associated with him in the purchase made by him at the sale, the parties to the said deed of the second part, whereby after recital of the deed in trust for creditors, executed by Brown & Mahood to Gray, and the several mortgages which had been executed by Robert Brown and James Mahood to Parkinson and the others of which Jenkins had become the purchaser, and the assignment thereof to Jenkins and the several instruments of the 18th of June and the 2nd November, 1888, and that Gray had by and with the consent and concurrence of Robert Brown, Janet Brown, Hugh R. Brown, James Mahood, and Janet Mahood, and by and with the consent and concurrence of the said Jenkins, duly advertised all the real and personal estate mentioned in the instruments of the 18th June and 2nd November, for sale on the terms mentioned in the conditions of sale by public auction at Toronto, on the 6th November, 1888, and the assignment by Jenkins to Gray of the said several indentures of mortgage so as aforesaid

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assigned to him, he (Gray) for the consideration of the sum, which was the sum for which Mitchell purchased at the sale, and in pursuance of the powers contained in the several recited instruments, did grant and convey unto the said parties of the second part to the said deed all the real and personal estate therein mentioned and described, being the property as described in the conditions of sale under which Mitchell had become the purchaser at the sale, to have and to hold to the said parties of the second part to the said deed, their heirs, executors, administrators and assigns for ever. I cannot entertain a doubt that the effect of this deed was to vest in Mitchell and his associates, the parties thereto of the second part, the title and interest which by his purchase at the sale he became entitled to on payment of his purchase money the balance of which appears to have been paid in accordance with the conditions of sale, on the 6th December, 188 , and that the deed vested in Mitchell and his said associates the legal right and title to the mill which was vested in Jenkins by the assignment to him of the chattel mortgages thereon, which were ratified and confirmed by the instruments of the 18th June and 2nd of November in pursuance of the powers contained in which instruments the deed is expressed to be executed. Upon no principle of law, equity or morality, can the decree made in his cause be, in my opinion, supported in so far as it directs that the mortgage executed to Rennie:—

> Shall be reformed so as to cover in addition to the lands therein described (the water lot particularly described in the decree,) and that the said water lot together with the shingle mill, engine, boilers, machinery and fixtures situate therein be charged with the plaintiff's said mortgage in the same manner as if the same had been originally described in the said mortgage when it was executed and delivered.

As to this water lot Brown and Mahood never had any title thereto vested in them, and as to the mill and

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the machinery therein they had already when the mortgage to the plaintiff was executed been mortgaged for more than their value by instruments to the protection and benefit of which Mitchell by his contract of purchase became entitled as purchaser from Jenkins the assignee of those mortgages under the powers of sale contained therein. The principle which lies at the foundation of the case made and the relief prayed by way of reformation of the mortgage is that there was an agreement between the mortgagors and the mortgagee that the water lot in question should have been inserted in the mortgage, and that it was omitted merely by mutual error, inadvertence and mistake. I have already given my reason for arriving at the conclusion that the evidence fails to show that there ever was any such agreement, or that when Brown and Mahood executed the Rennie mortgage they intended that the water lot should have been inserted therein. That they entertained such intention is wholly inconsistent not only, as I have shown, with Mahood's own evidence in divers particulars, but with all the chattel mortgages and with the provisions of the instruments of the 18th June and 2nd of November, which ratified and confirmed those mortgages in the hands of Jenkins as the assignee thereof, and inconsistent, also, with the conditions of sale of which Brown and Mahood were well aware and under which Mitchell purchased. That Rennie when he received the mortgage entertained the belief that the water lot was or was intended to be inserted in the mortgage is wholly inconsistent with the letter of his solicitor of the 19th November, 1888, to Mitchell after the sale at the auction and with Rennie's own affidavit by way of proof of his mortgage debt made in April, 1889, in both of which he makes his claim solely upon the farm lot, no. 22 in the 7th concession of Stephenson, and the

village lots describing them as lots nos. 5, 6, 7 and 8, according to Ladelle's survey of part of the village of Port Sidney. If it were necessary I should also be obliged to arrive at a conclusion adverse to the plaintiff upon the question of notice, in view of the positive denial of every one of the parties sought to be affected with the notice charged of the truth of the statements in that respect of the witnesses testifying to such notice. Moreover the notice as spoken of by those witnesses seems to have been not that Rennie claimed that it was intended that the water lot should have been inserted in the mortgage in addition to the other lands and that this had been omitted by the mutual mistake and inadvertence of himself and of his mortgagors, but that, in point of fact, his mortgage did cover the water lot, a wholly different thing, and which as we see the mortgage clearly did not. However, for the reasons that under the conditions of sale upon which Mitchell became purchaser he and those claiming through him are entitled to the full protection and benefit of the Parkinson chattel mortgage and the other chattel mortgages on the mill and machinery therein assigned to and held by Jenkins, and for the reason that the evidence fails to establish any agreement or intention upon the part of Brown and Mahood that the water lot and mill should have been included in the mortgage to Rennie, I am of opinion that the passage to which I have referred must be eliminated from the decree whatever may have been Rennie's belief when he received the mortgage, and that the ordinary decree on foreclosure of the property mentioned in the mortgage must be substituted. The case is not, in my opinion, at all one for the peculiar relief prayed and by the decree granted.

PATTERSON J.—The respondent, who is plaintiff in the action, claims:

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(1). To have the said mortgage reformed so that it may become charged upon the said water lot, shingle mill, engine, boiler, machinery and fixtures: (2). Foreclosure of the said mortgage.

His right to a foreclosure is not disputed. The appeal relates altogether to the first claim. There is no case whatever made for charging the water lot. It never was the property of the mortgagors, nor did they ever pretend that it was. It was crown land. The mortgagors had taken some preliminary steps with a view to the purchase of the lot but they had not purchased it. Relying on their ability to purchase it they had constructed on it the shingle mill, not attaching it to the soil but resting it on cribs. In this way they occupied as much of the ground as the cribs stood upon, but without any title. The mill and machinery were chattels. The mortgagors so understood and treated them. They mortgaged them as chattels to Parkinson and to Hughes and to Hunt who filed their mortgages under the Chattel Mortgages Act, and at a later date seized the property by their bailiff. The Parkinson mortgage was made a few days before that which the plaintiff asks to have reformed, but, as Mahood one of the mortgagors says, after the agreement with the plaintiff. The mortgages were all made within three months, viz.: in November and December, 1887, and in January and February, 1888. Looking at the evidence of Mahood and of Hugh Brown and the plaintiff, who are the only people who speak of the negotiation on which the claim for reformation is based, we do not find a word of mortgaging the water lot. What they speak of is the mill. No doubt that term would colloquially include the land the mill stood on, and a conveyance of a building forming part of the freehold would have in law the effect of conveying the land; but here "the mill" means the chattel structure. That is unquestionably so in the mouth

of Mahood. He explains his idea in one place by saying: "The mill we had went with the village lots," apparently regarding the mill as in a sense appurtenant to the village lots, though of course it would not pass under a conveyance of those lots with the appurtenances. It is possible, and perhaps not unlikely, that the plaintiff when he stipulated for security on the mill had not his attention called to the fact that the mill was merely a chattel and did not form part of the freehold, but Mahood was under no misconception on that score, and what the plaintiff has to establish is not merely that he thought he was to get the water lot but that that was the mutual understanding.

This apprehension of the character of the mill and machinery, as being chattels and not realty, is very important in one aspect of the case. It is not discussed in the judgment of the court below though made prominent in the formal reasons of appeal, but Mr. Justice Maclennan, who delivered the judgment of the court, when he says that he thinks it "clearly proved that it was the intention and agreement of the parties that the security the plaintiff was to receive for his advance of $2,500 included the mill and machinery, and that the latter were omitted from the mortgage by mutual mistake," does not hint that that property was not regarded as chattel property. I take it that the reporter's note of the observation attributed to the learned judge who tried the action, viz., "the evidence that the plaintiff's mortgage was intended to cover the water lot, including the mill, &c., is irrefragable," must be incorrect, there being no evidence whatever that the water lot was intended to be conveyed, whatever may have been the case as to the mill, &c., but the contrary being obviously the fact. It may also be noticed that in the scheduled description of the properties sold by Gray, the assignee, the mill appears as a chattel and not as realty.

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Assuming, then, that there was a verbal agreement to give security on this chattel property, and therefore in equity a mortgage of it, the Ontario statute respecting Mortgages and Sales of Personal Property (1) has to be reckoned with. A mortgage, or conveyance of personal chattels intended to operate as a mortgage, which is not accompanied by an immediate delivery and an actual and continued charge of possession of the things mortgaged, is absolutely null and void as against subsequent purchasers or mortgagees in good faith for valuable consideration, unless registered as provided by the act with the prescribed affidavits.

The appellants are purchasers in good faith for valuable consideration. Notice of an unregistered chattel mortgage does not save it as against the statute. Some evidence was given for the purpose of showing notice in this case before the payment of all the purchase money. It was, as I think, beside the question under the Chattel Mortgage Act. The property passed without delivery by the sale made by the assignee. Blackburn on Sales c. 3. And by R. S. O. (2):—

> It shall in no case be necessary, in order to maintain the defence of purchaser for value without notice, to prove payment of the mortgage money or purchase money or any part thereof.

It appears to me impossible for the plaintiff to maintain his claim against these purchasers in the face of the Chattel Mortgage Act.

But dealing with the matter apart from that statute, and on the same principles as if the asserted agreement were for the conveyance of land, the difficulties in the way of the plaintiff seem equally insuperable.

There were four mortgages ahead of him, the Parkinson mortgage being earlier in time, and the mortgage to Hughes and the two mortgages to Hunt having been taken without notice of the asserted equity. The legal estate was in Parkinson.

(1) R. S. O. (1887) c. 125. (2) Ch. 100 s. 36.

The judgment proceeds, if I understand it correctly, on the ground that those four mortgages had been redeemed by Gray the assignee and that the appellants purchased simply from Gray who could convey only what the original mortgagors could have conveyed, namely, the mill charged with the plaintiff's debt, and that the actual conveyance not having been made till after the *lis pendens* was registered the plaintiff can assert against the purchasers his right to a reformation of his deed.

I do not so understand the transaction.

The conditions of sale expressly bound the vendor

> to obtain, contemporaneously to the making of the final payment, a conveyance, assignment or discharge, as may be preferred by the purchaser, of Robert Jenkins' interest in the several parcels above mentioned.

Robert Jenkins' interest was all the title under the Parkinson mortgage and the other mortgages. Those mortgages were never discharged, but were assigned to Gray and so kept alive, and Gray by his deed, which recited the mortgages, the assignment of them to Jenkins and the assignment of them by Jenkins to Gray, together with other matters, did "in pursuance and exercise of the powers contained in the said in part recited instruments and of all other powers enabling him in that behalf," convey the lands to the purchasers.

The purchasers take, as I understand it, all the estate and rights of Parkinson, Hughes and Hunt against whom it is not pretended that the present claim could be asserted.

In my opinion the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Bain, Laidlaw & Kappelle.*

Solicitors for respondent: *Dickson & Erwin.*

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*May 16.

THE AYR AMERICAN PLOUGH COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

WILLIAM B. WALLACE (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Promissory note—Liability on—Maker or indorser—Intention—Evidence.

W. having agreed to become security for a debt wrote his name across the back of a promissory note drawn in favour of the creditors and signed by the debtor. The note was not endorsed by the payees, and no notice of dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial of which a nonsuit was entered with leave reserved to plaintiffs to move for judgment in their favour, if there was any evidence to go to the jury as to W.'s liability.

Held, affirming the judgment of the court below, that there was no evidence to go to the jury that W. intended to be liable as a maker of the note, and plaintiffs were rightly nonsuited.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment of nonsuit at the trial.

The action in this case was against the respondent and one Clark as joint makers of four promissory notes. Clark allowed judgment to go against him by default, and the trial of the action against the respondent resulted in a nonsuit with leave reserved to plaintiffs to move to have it set aside and judgment entered for them, "if there was any evidence which should have been left to the jury of defendant's (respondent's) liability." This appeal is from the judgment of the Supreme Court of New Brunswick sustaining the nonsuit.

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

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THE AYR AMERICAN PLOUGH COMPANY v. WALLACE.

The following statement of facts is taken from the judgments of the court below:—

It appeared by the evidence on the part of the plaintiffs that they were manufacturers of agricultural implements in Ontario, and in May, 1887, sent Archibald B. Walker to this province as their agent, to effect sales. He called on the defendant Clark, who agreed to purchase a quantity of the goods. Walker, (whose evidence was taken under a judge's order previous to the trial) says that he sold the goods to the defendant Clark; that in conversation with the defendant Clark about the sale he told Clark that he required security for the payment, and that Clark said he would give satisfactory security, that he would give W. B. Wallace (the other defendant). Wallace was not present at the time, but on the following day Walker met both the defendants in Wallace's office when the matter of the sale of the goods was talked over, and the arrangement was that Wallace was to become security for the payment by Clark; that he (Walker) said to them that he was selling the goods cheap and that he wanted absolute security, and that Clark and Wallace agreed to give him their obligations. He also stated that he told Wallace that he would not sell the goods to Clark without security. That Wallace then commenced to draw a note payable to his own order when Walker interposed and said that the plaintiffs advised him always to take notes on their forms, which they had printed, and he produced some of the printed forms and gave them to Wallace who struck out some parts which he considered objectionable and filled in the date, amount, and time of payment, and Clark signed them, and Wallace indorsed them and delivered them to him (Walker).

The printed forms which Walker gave to Wallace to fill up were in the following form :

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" $ 188

" On or before the 1st of , 188 , I promise to " pay to THE AYR AMERICAN PLOUGH COMPANY " (Limited), or order, at the sum of " for value received, with interest at 7 per cent. per " annum until due, and 10 per cent after due, till " paid "

(Then followed a condition that the title to the goods sold should not pass from the company till the note was paid with interest, and that the company had power to take possession of the goods at any time they might deem themselves insecure.)

Before the notes were signed Wallace struck out with a pen that portion of them relating to the payment of interest, and to the power of the company to take possession of the goods if they considered themselves insecure.

At the trial the parties directly contradicted each other as to what took place when the notes were signed. The respondent swore that he only intended to become an indorser, and that he told the agent Walker that until the notes were indorsed by the company he, Wallace would not be liable. Walker, on the other hand, swore that nothing was said about indorsing, that he only asked for security and was accustomed to take joint notes in such cases and thought that he was getting such in this transaction.

In the court below the judges were equally divided, the Chief Justice and Mr. Justice Tuck, who had tried the case, being of opinion that the nonsuit should be set aside and judgment entered for the plaintiff, Palmer and King JJ., giving judgment in favour of affirming the nonsuit.

Earle Q.C. for the appellant. There was evidence to go to the jury that Wallace intended to become

liable as maker. See *Piers* v. *Hall* (1); *Bell* v. *Moffatt* (2); *Good* v. *Martin* (3); *Singer* v. *Elliott* (4).

In a New Brunswick case the court will follow the decision of the courts of that province.

Currey for the respondents.

Sir W. J. RITCHIE C.J.—I cannot see that there is any evidence whatever to be presented to the jury that Wallace intended to be a maker of these notes. He was to become surety as an indorser, and the notes would have been drawn in the usual form payable to his order but for the interposition of Mr. Walker himself, who would not have them drawn in that way but insisted on having them on the form used by the company. I do not say that the plaintiffs could not have maintained an action if they had given due notice of dishonour, but however that may be, as they have chosen to proceed without it, and as I cannot see that Wallace ever intended to be a maker, the plaintiffs' action fails and this appeal must be dismissed.

STRONG J.—I am of opinion upon authority of *Ex parte Yates* (5) and *Steele* v. *McKinlay* (6) that the respondent might have been made liable as an indorser of the notes if proper notice of dishonour had been given to him. As no such notice was, however, given he was discharged. The parol evidence was not, I think, admissible, though if taken into consideration it would have shewn that the respondent never intended to come under any other liability than that of an indorser. *Steele* v. *McKinlay* (6) is a strong authority against the admissibility of this parol evidence.

(1) 2 P. & B. 34.
(2) 4 P. & B. 121.
(3) 95 U.S.R. 90.
(4) 4 Times L.R. 524.
(5) 2 DeG. & J. 191.
(6) 5 App. Cas. 754.

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The want of a memorandum in writing sufficient to satisfy the Statute of Frauds would have been a defence available to the defendant if it had been sought to charge him as a guarantor. In the case of *Singer* v. *Elliott* (1) cited in the argument, the defendant was held liable as a guarantor upon a letter written and signed by him after he had indorsed the bill.

As the law now stands since the Dominion Bills of Exchange Act, 1890, it is clear that under section 56 the respondent would have been liable as indorser, but only as indorser. It has been frequently said as regards the English Act (Bills of Exchange Act, 1882), that it was not intended by it to enact new law but merely to declare and codify the law as it stood when the act was passed. Section 56 of the English act is identical in words with the same section of our act. This seems to me conclusive.

The appeal should be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—If the question had been whether there was evidence to go to a jury that the defendant signed as an indorser, if he had been sued as such, the answer must have been that there was abundant evidence. But the defendant was sued as maker, and I concur that there was no evidence to go to the jury in support of the issue upon the plea of *non fecit*, and that therefore this appeal must be dismissed and the nonsuit maintained.

PATTERSON J.—After hearing all that Mr. Earle has been able in his very full examination of the case to urge to the contrary, the evidence seems to me consistently to show that Wallace was to be indorser of the

(1) 4 Times L. R. 524.

notes, and I find no evidence that he was to be maker, or that he was understood by Walker, or represented himself, to be signing otherwise than as indorser. That is the view of two of the four learned judges who heard the case in the court below, and unless I misunderstand the opinions expressed by the learned Chief Justice and Mr. Justice Tuck, who took a different view, they would have agreed with the other members of the court if they had not been impressed by the idea that unless Wallace was liable on the notes as maker he was not liable at all. Under that idea they seem to have treated his defence as evidence of a dishonest contrivance from the imputation of which they shielded him by holding that, because there was proof of his intention to be surety for the purchaser of the goods, there was evidence of his being liable as joint maker of the notes. I am not able to concur in those views.

I see nothing to have prevented the plaintiffs as payees of the notes indorsing them, expressing the indorsement to be without recourse if they chose to do so though under the circumstances that would not have been essential, thus creating in Wallace the legal character of indorsee from them and indorser to them (1). I am not aware that the legal right of parties in the position of the plaintiffs to do this was ever questioned. It was not questioned in the case of *Bell* v. *Moffatt* (2) on which Mr. Earle relied so much. We find from the report of that case in 3 P. & B. that in one count the declaration charged that Fulton made his note payable to Bell or order, and that Bell indorsed the note to the defendant who indorsed it to the plaintiff. A plea that Bell the payee and Bell the plaintiff were the same person was met by a replication that Bell the plaintiff indorsed the note to the defend-

(1) See *Denton* v. *Peters*, L.R. 5 Q.B. 475. (2) 3 P. & B. 261.

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ant without recourse, and that replication was held good on demurrer as is stated by Wetmore J. at p. 267 of the report. The report relates to another replication, pleaded perhaps to meet the facts more fully, by which the plaintiff stated his title through an intermediate indorsement and not as indorsee direct from Bell. That replication was properly held bad as a departure from the declaration. Mr. Justice Wetmore referred to a number of cases, one of which, *Smith* v. *Marsack* (1) was a case of demurrer to a replication as a departure, which pleaded the same essential facts which would exist if the plaintiffs had in this case indorsed the notes without adding the words "without recourse," but relying on the fact that the defendant had indorsed for the purpose of being surety to them for the maker of the note. The replication in *Smith* v. *Marsack* (1) was held good. No question of circuity of action could arise here unless the defendant would have had recourse against the plaintiffs as prior parties to the note, but indorsing as he did as surety to the plaintiffs he had no such recourse against them. The report of *Bell* v. *Moffatt* in 4 P. & B. (2) and the case of *Piers* v. *Hall* (3), bear on the present discussion in the way in which they were used by Mr. Earle as showing that a man may write his name on the back of a note and yet be liable as maker of the note. That is a question of fact more than of law. The evidence in those cases proved the intention to be maker while here the whole evidence is that he was to be indorser.

Appeal dismissed with costs.

Solicitor for appellants: *A. C. Fairweather.*

Solicitors for respondent: *Currey & Vincent.*

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(1) 6 C.B. 486.

(2) 4 P. & B. 121.

(3) 2 P. & B. 34.

ALEXANDER McGUGAN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

LOUISA SMITH (PLAINTIFF).....RESPONDENT.

1892

*June 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Specific performance—Agreement for service—Remuneration.

S., a girl of fourteen, lived with her grandfather who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five when she married. The grandfather died shortly after leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for the daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses.

Held, reversing the decision of the Court of Appeal, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance. But

Held further, that S. was entitled to remuneration for her services and $1,000 was not too much to allow her.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the plaintiff at the trial.

The facts necessary to understand the decision in this case are sufficiently set out in the above head-note.

The case was tried by Mr. Justice Falconbridge who held that the agreement made with the plaintiff by her grandfather was sufficiently proved, and that she

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

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was entitled to have the same specifically performed. He made a decree accordingly, allowing the plaintiff $1,000 to place her in the same position under the will as the testator's daughters, which amount was to include her legacy. The Court of Appeal affirmed this decision and the defendants appealed to this court.

Glenn for the appellants.

J. A. Robinson for the respondent.

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be dismissed. The strong inclination of my mind is against the agreement in this case being one as to which the courts could decree specific performance, but I think the evidence shows quite clearly that the services performed by the plaintiff were not intended to be gratuitous Then it becomes a question as to what the plaintiff is entitled for such services under the *quantum meruit*, there being no wages fixed by the testator who had only agreed to provide for her remuneration by his will.

The plaintiff performed work which no woman should be called upon to perform, such as breaking in wild and ungovernable horses, cleaning out stables, doing all sorts of field work and other things usually done by a man. She appears to have been a very capable young woman, and I do not think that $1000 is too much to allow for her services from the time she was fourteen years of age until she was married, which would be about eleven years. To give her that amount would only be paying at the rate of $7.50 a month, and if I may be allowed to speak from my own knowledge of what services of the kind are worth I would say that the remuneration is very moderate as I have never been able to procure servants here at such a rate.

Under the circumstances shown in the case I think this appeal should be dismissed and the judgment of

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Strong J

the court of first instance varied by assessing the damages at $1000 in full for the plaintiff's services, including the amount left her by the will.

STRONG J.—I have no doubt that the agreement sought to be enforced in this case is one as to which specific performance would not be decreed. I very much doubt if it has any validity at all as an agreement, or if it is anything more than a representation or promise of future favours.

The grandfather of the respondent did not stand *in loco parentis* towards her. He considered her to be a capable worker and knowing that was anxious to secure her services. Then to look at the nature of the services that were performed, if they had been ordinary household services, such as are usually performed by a young girl, the case would have been different; but she performed very extraordinary services. We are told that she looked after 20 or 30 cattle; cleaned out stables, cut grass, drove horses; managed a reaping machine; broke in and managed wild, ungovernable horses. This, then, is not a case in which to apply any presumption arising from the relationship of the parties that the services were rendered gratuitously.

The respondent is, in my opinion, entitled to recover as on a *quantum meruit* without regard to the representation.

As regards the amount recoverable I should be prepared to give the respondent $1,000 in addition to her legacy, but I think that at all events she should have the $1,000 inclusive of the legacy, and she should be at liberty to apply if necessary for an administration order.

The appeal should be dismissed with costs.

TASCHEREAU J.—Concurred.

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Gwynne J.

GWYNNE J.—The question is not whether the plaintiff's grandfather has treated her as well in his will as he ought to have done but whether she can assert the claim which she does as one enforceable in law.

I can not consider myself bound by the finding of the trial judge in this cause as to the precise terms of the contract. I concur entirely with Mr. Justice Osler. Moreover, having all the evidence before us, I do not think the trial judge was justified in finding the contract to have been as stated by the plaintiff's mother. If it was as stated by the plaintiff herself I think the legacy left by the will was in full compliance with that agreement; moreover the Ontario statute that the contract sued upon should be confirmed was not complied with. The respondent by her counsel agreeing to accept $1,000 in full satisfaction of legacy and all claims the appeal is dismissed with costs and the judgment of the court below ordered to be altered accordingly. Costs of action to be out of the estate.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *James M. Glenn.*

Solicitor for respondent: *John A. Robinson.*

JOHN McGUGAN (PLAINTIFF).....APPELLANT; 1892

AND *June 20.

ALEXANDER McGUGAN AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitor—Bill of costs—Order for taxation—R. S. O. (1887) *ch.* 147 *s.* 42—*Appeal—Jurisdiction—Discretion—Proceeding originating in Superior Court—Final judgment.*

By R. S. O. (1887) ch. 147 s. 42 any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court, or of the County Court, for an order for taxation. An action was brought against school trustees and a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court the judgment refusing it was reversed. There was no appeal as of right to the Court of Appeal from the latter decision, but leave to appeal was granted and the Court of Appeal reversed the judgment of the Divisional Court and restored the original judgment refusing the application. From this last decision an appeal was sought to the Supreme Court of Canada.

Held, per Ritchie C.J., Strong and Gwynne JJ., that assuming the court had jurisdiction to entertain the appeal the subject matter being one of taxation of costs this court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters.

Per Ritchie C.J., Strong and Patterson JJ., that a ratepayer is not entitled to an order for taxation under said section.

Per Taschereau J.—The court has no jurisdiction to entertain the appeal as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the courts below; and the proceedings did not originate in a Superior Court.

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

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Per Patterson J.—The making or refusing to make the order applied for is a matter of discretion and the case is, therefore, not appealable.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2).

An action was brought in the County Court against the trustees of a school section of the township of Southwold to have the solicitor's bill in an action brought by said trustees against the school board, and delivered by the solicitor to the board, referred to a taxing officer for a report thereon, and for a decree ordering the amount disallowed from said bill to be repaid to the treasurer of the school section. The county court judge decided that he had no jurisdiction to try the action but that he had power to transfer it to the High Court, whereupon the defendants applied to the High Court for an order prohibiting such transfer or any further proceedings by the County Court in the action. The plaintiff made a cross-motion for a summary order to refer the bill of costs to taxation pursuant to sec. 42 of R.S.O. (1887) ch. 147. The motions were argued together before Mr. Justice Rose who dismissed plaintiff's motion for an order for taxation and reserved judgment on the other. The plaintiff appealed to the Divisional Court which reversed the decision of Rose J. and granted the order for taxation. On further appeal to the Court of Appeal the judgment of the Divisional Court was reversed and that of Rose J. restored. The plaintiff then sought to appeal to this court.

Riddell and *J. A. Robinson* for the appellants referred to the case of *Ex parte Bass* (3).

The court raised the question of jurisdiction and concluded that the appeal could not be entertained.

Glenn for the respondents was not called upon.

(1) 19 Ont. App. R. 56. (2) 21 O. R. 289.
(3) 2 Ph. 562; 17 L. J., ch. 219.

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Ritchie C. J.

Sir W. J. RITCHIE C.J.—I am not prepared to admit at present that we have jurisdiction to hear this appeal, because I think it was a pure matter of discretion in the judge to make the order or not, and moreover it was discretionary with the Court of Appeal to allow an appeal from the judge's decision or not, and the judgment sought to be appealed from was not a final judgment. But assuming that we have jurisdiction I think this is not a case in which we should interfere, more especially as it appears in the record that an action is now pending in the Superior Court to try the issue raised in this matter. More than that I very much doubt that a ratepayer is a person entitled to an order for taxation of costs. But admitting all this in favour of the appellant I think this court should not interfere in a matter of this kind. I think it would be a monstrous thing for us to interfere in matters relating to costs, for there can be no better tribunal for dealing with such matters than the courts of the provinces in which the proceedings are taken. If we hear an appeal in one case of the kind we must do so in every such case that comes before us.

For these reasons I am clearly of opinion that this appeal should be dismissed.

STRONG J.—Without actually deciding the case upon that ground I am strongly of opinion that we have no jurisdiction to hear this appeal. In the case referred to by my brother Taschereau of *The Canadian Pacific Railway Co.* v. *St. Thèrese* (1) it was determined, on appeal from the Court of Queen's Bench of the province of Quebec, that a matter in which the proceedings originated before a judge in chambers, pursuant to statute, was not within the provisions of the Supreme Court Act which require cases brought to this court on appeal to originate in a Superior Court. I agree in the *ratio decidendi* of that case and think it

(1) 16 Can. S. C. R. 606.

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is decisive here. True, the statute says that the application in the present case may be made to a judge of the High Court of Justice or of the County Court, and the judge of the County Court is a local judge of the High Court, but it is to be made to a judge in chambers, and I cannot see any difference in this respect between the case referred to and the present case. There was an alternative mode of commencing the proceedings, and if the application had been made to the Divisional Court the case might have been appealable, but the parties chose to adopt the other course. It makes no difference to say that a judge in chambers exercises the powers of the court. That was the argument in the *Canadian Pacific Railway Co.* v. *St. Thèrese* (1). We are bound by that decision, and I think it should be conclusive.

However, I do not rest my decision on that ground alone. I agree with what the Chief Justice has said. Nearly a year ago the case of *O'Donohoe* v. *Beatty* (2) came before this court, and during the argument my brother Patterson raised the question of jurisdiction to hear the appeal, and Mr. Justice Gwynne said, "I think that sitting as a Court of Appeal we should not interfere with the judgment of the Divisional Court on a question of this kind." Afterwards the judgment of the court in that case was delivered by my brother Gwynne, who said, "I have entertained, and still entertain, great doubt whether an appeal should be entertained, by this court in a matter of this description, which relates wholly to the practice and procedure of the High Court of Justice and of an officer of that court in construing the rules of the court, and in executing an order of reference made to him by the court." I think, therefore, that on the grounds indicated, even admitting that the party strictly has a *locus standi* so far as regards jurisdiction, we ought not

(1) 16 Can. S. C. R. 606. (2) 19 Can. S. C. R. 356.

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to exercise jurisdiction in such a case as this, not merely because the order was made in the exercise of discretion but for the reason mentioned by the Chief Justice, namely, that it was never intended that this court should interfere in such matters.

Lastly, in considering the case upon the merits, and having heard what was urged by counsel, I am of opinion that the case of *Re Barber* (1) is a decision that ought to govern this case. It is undistinguishable in its facts from the present appeal. I entirely disagree with the Divisional Court in their construction of the statute and of the words "shall be liable to pay." Shall be liable to pay whom? It must mean liable to pay somebody; but a ratepayer is not liable to pay a solicitor though he may be liable to contribute to a fund for the purpose; but he is not liable in the sense of the statute. The statute meant liable to pay directly which is not the liability of a ratepayer.

On these grounds I think the appeal should be dismissed.

TASCHEREAU J.—In my opinion the appeal should be quashed on three grounds, namely, that the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; that it was a matter entirely within the discretion of the court below; and that the proceedings did not originate in a superior court.

GWYNNE J.—Without determining whether or not we have jurisdiction to entertain this appeal upon the question raised as to whether or not the matter originated in a superior court I do not think we ought to interfere in a matter of this nature relating to orders for reference of a bill of costs to taxation, the more espe-

(1) 14 M. & W. 720.

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cially (as just observed by the Chief Justice) as an action appears to be preceding in which the identical matter in question is raised.

Patterson J.

PATTERSON J.—I agree with the other members of the court as to the result of this appeal. I think this order was one of those that are in the discretion of the court below and on that account not appealable to this court. I do not express any final opinion upon the question as to whether or not these proceedings originated in a superior court. It is very difficult to gather from the statute what the proceeding really is, but I do not think that a judge of a County Court, with the jurisdiction given him in matters of this kind, represents the High Court of Justice. Section 41 of the act R.S.O. (1887) ch. 147, provides that a judge of the High Court, or a county judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to quit Ontario, may authorise an action to be commenced, &c. Then there are other provisions which authorise an order to tax to be made by the High Court or a judge thereof, or a judge of a County Court. I think this treats a judge of the County Court as such simply, and not as exercising the powers of the High Court.

As to the merits I agree with the judgment of Mr. Justice Osler in the Court of Appeal. I do not think the ratepayer in a case such as this is a party chargeable within the meaning of the statute so as to be entitled to apply for an order for taxation. I entirely agree with the result dismissing the appeal.

Appeal dismissed with costs.

Solicitor for appellant: *John A. Robinson.*

Solicitor for respondent: *James M. Glenn.*

JOHN CAMERON AND OTHERS (DEFENDANTS) ..... } APPELLANTS; 1891 *Nov. 18.

AND 1892

THADDEUS HARPER AND OTHERS..... DEFENDANTS; *June 28.

AND

EZEKIEL HARPER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Executor—Action against—Legacy—Trust—Claim on assets—Charge on realty.

T. H. and his brother were partners in business and the latter having died T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having encumbered both his own share of the partnership property and that devised to him one of his creditors, and a mortgagee of the property, obtained judgment against him and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of T. H.

Held, affirming the judgment of the court below, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors.

Held also, that the legacy of E. H. was a charge upon the realty of the testator the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either of the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees who were shown to have had notice of the will.

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

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CAMERON v. HARPER.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment at the trial in favour of the respondent.

This was an action brought to have a judgment of the plaintiff against the defendant Thaddeus Harper, executor of the estate of one Jerome Harper, declared a charge upon the assets of said estate in priority to the mortgages and judgments of the other defendants. The circumstances which gave rise to the action were as follows:—

In 1871 and for many years previously Jerome and Thaddeus Harper, two brothers, had carried on in British Columbia, and also in the neighbouring States and Territories, the business of stock-raising, and had accumulated the ownership of much land, cattle and horses, and some plant and machinery. The land in British Columbia was all registered in the sole name of Jerome but the whole property, land and stock live and dead, was owned in equal shares by the two brothers in partnership; and they were reputed to be wealthy, worth $300,000 in British Columbia. The value of the personal estate at the time of Jerome's death exceeded $80,000.

In November, 1874, Jerome died. By his will he appointed the defendant, Thaddeus, sole executor, and after bequeathing several legacies, among them $10,000 to the plaintiff Ezekiel, another brother, he gave the residue of all his estate, real and personal, to the defendant, Thaddeus, for his own benefit. Thaddeus entered into possession of the whole property and has ever since dealt with it as being entirely his own. In or about the year 1875 he paid the plaintiff $5,000 on account of his legacy of $10,000, and has paid, or promised to pay, interest on the balance ever since. Ezekiel frequently asked Thaddeus for payment of the balance of the legacy but never took any steps to en-

force payment until December, 1888, when he commenced an action in which, Thaddeus admitting the amount, he obtained a judgment on the 24th January, 1889, for $6,865, legacy, interest and costs.

During the 14 or 15 years since the testator's death during which Thaddeus had, as has been said, dealt with the whole partnership property, his own original share as well as that which he derived from Jerome's will, he had very heavily encumbered the whole. He had between March, 1885, and March, 1888, created five mortgages aggregating $141,750 of principal moneys on which there was a large arrear of interest, and was indebted to other creditors as well. Among other speculations Thaddeus purchased a mine from one John Cameron for $50,000, for which sum he gave his own promissory notes. He became involved in financial difficulties and on the 10th day of December, 1888, Cameron recovered a judgment on his notes for the sum of $50,029.00. The mortgagees and other creditors of Thaddeus also sued and recovered judgments against him.

On the 19th day of December, 1888, Cameron obtained the appointment of the receivers J. C. Prevost and H. S. Mason. They took possession of the estate and subsequently it was sold for $225,000 to John Galpin who insisted, however, that the mortgages on the real estate should be paid off by him, and only paid over to the receivers the balance after payment of the mortgages.

When it was discovered that there would be a deficiency of assets to pay all the creditors of Thaddeus the present action was commenced, in which it was prayed that the Ezekiel's claim might be declared a charge on the fund in the hands of the receivers prior to the claim of the personal creditors of Thaddeus, and for an injunction to prevent the receivers from distributing the fund without payment of Ezekiel's claim.

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The action was tried before the Chief Justice who gave judgment for the defendants, dismissing the action with costs. The plaintiff thereupon appealed to the full court where the decision of the Chief Justice was reversed and judgment was given against the present appellants. From that order the present appeal is brought to this court.

Christopher Robinson Q.C. for the appellant cited *In re Jane Davis* (1); *Kitchen* v. *Ibbetson* (2); *Culhane* v. *Stuart* (3).

S. H. Blake Q.C. for the respondent referred to *Wedderburn* v. *Wedderburn* (4); *Pennell* v. *Deffell* (5); *Harford* v. *Lloyd* (6); *In re Hallett's Estate* (7).

The judgment of the court was delivered by:—

STRONG J.—This action was instituted by the respondent Ezekiel Harper to obtain payment of the residue remaining unpaid of a legacy of $10,000 bequeathed to him by the will of of his brother Jerome Harper. The defendants were Thaddeus Harper, the executor of the testator, and certain judgment creditors of the executor who have recovered judgment against him, *de bonis propriis*, in respect of personal demands and not for any debts or liabilities of the testator. These judgment creditors having obtained the appointment of receivers and these receivers having got into their hands moneys which the respondent alleges formed part of, or were derived from, the assets of the testator Jerome, the respondent seeks to have these assets applied in payment of his legacy, there being no debts or other legacies of the testator remaining unpaid. The judgment appealed against directs the payment

(1) [1891] 3 Ch. 119.
(2) L. R. 17 Eq. 46.
(3) 6 O. R. 97.
(4) 4 Mylne & C. 41.
(5) 4 DeG. M. & G. 372.
(6) 20 Beav. 310.
(7) 13 Ch. D. 696.

of the unpaid balance of the legacy out of these moneys, as claimed by the respondent.

Assuming that these moneys were, in fact, assets of the testator, or the proceeds of such assets, I can see no possible objection to the respondent's demand. The appellants are personal judgment creditors of the executor, and as such have no right whatever to the testator's assets so long as any of his pecuniary legatees remain unpaid. If all the legacies had been paid off then, inasmuch as the executor is also the residuary legatee, any assets remaining would no doubt be exigible by the creditors of the residuary legatee; but these creditors can have no possible right to have these assets applied in satisfaction of their debts to the prejudice of a legatee of the testator.

To admit the contrary of such a proposition would be to sanction the application of one man's property to the payment of another man's debts. Judgment creditors are only entitled to have applied to the satisfaction of their judgments such property as the debtor has a beneficial interest in, and they are not entitled to enforce their claims against property or assets which their debtor holds as an actual or constructive trustee for another.

The court below find that one-half of the sum of $45,497.50 in the receivers' hands belongs to the estate of Jerome Harper, the testator, and they direct that out of this moiety the amount of the judgment recovered by the plaintiff for the unpaid residue of the legacy, together with interest and costs, should be paid. Assuming that there are assets in the receivers' hands to the amount mentioned this judgment must surely be unimpeachable. That there are moneys in the receivers' hands which properly belong to the estate of Jerome is a fact which I consider concluded by the finding of

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the court below, the evidence of Thaddeus, the executor, being quite sufficient to warrant in this respect the judgment appealed against.

There is a further ground upon which the judgment might be sustained. The legacy bequeathed to the respondent was charged upon the testator's realty. There can be no doubt upon this head. The testator having first given several legacies, including that mentioned to his brother Ezekiel, gives and devises to his brother Thaddeus Harper, the executor, all "the balance and remainder of the property and of any estate" of which the testator might die the owner. The words "property" and "estate" are of course both sufficient to pass realty. Then it is established by *Greville* v. *Browne* (1), a decision of the highest authority, that where there is no specific devise of real estate, and a pecuniary legacy is given without any words making it an express charge upon the real estate, and the will contains a subsequent gift of the residue of the realty, there is by implication a charge of the legacy on the real estate.

This being so, and the evidence establishing that the testator's share of the realty has been sold by the receivers and the proceeds applied to the payment of the judgment creditors of the executor, including amongst others the present appellants, the respondent would, to the extent to which the appellants' judgments have been satisfied by a misapplication of real assets in the hands of the receivers to his prejudice, be entitled to stand in the appellants' place against moneys now remaining in the hands of the receivers applicable to the payment of the judgment creditors, even though not assets of the testator. This, however, would involve an account, which, under the judgment appealed against, proceeding as it does upon the

(1) 7 H. L. Cas. 689.

ground that the assets remaining in the receivers' hands are personal assets of the testator, is not required.

As regards the real assets, if it were necessary to resort to the principle of subrogation which I have just referred to, it would be no answer to such a proceeding to say that the judgment creditors were also mortgagees of the executor Thaddeus.

Granting that they were mortgagees of Thaddeus, the executor and residuary legatee and devisee, they must be held to have had notice of the will and the charge thereby created for, even assuming in their favour that the will was never properly registered, as to which I find some obscurity in the evidence, yet Mr. Maine, through whose agency the mortgages were obtained, expressly admits in his evidence that he saw and examined the will before taking the mortgages; so that he must be taken to have had express notice of the charge of the legacy on the real estate.

This action being brought to enforce the judgment recovered by the respondent in 1889 for the unpaid balance of the legacy the statute of limitations can, of course, be no defence to it.

I do not very well understand why the judgment creditors other than the appellants who were originally made parties to the action were dismissed. It would certainly seem that if their judgments were still in any part unsatisfied, they were interested in maintaining their right to be paid in preference to the respondent, out of moneys in the hands of the receivers, who were appointed at their instances as well as at the instance of the appellants. They have not, however, appealed, and in default of any appeal by them I am of opinion that we ought not to interfere with the judgment on this ground.

The appeal should be dismissed with costs.

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Gwynne J.

GWYNNE J.—I will not dissent, though I should have preferred to see the mortgagees before the court.

Appeal dismissed with costs.

Solicitor for appellants: *Charles Wilson.*

Solicitor for respondent: *Ernest J. Bodwell.*

PAUL COUTURE (DEFENDANT).....APPELLANT; 1892

AND

DIOS BOUCHARD (PLAINTIFF)..... ....RESPONDENT.

*Oct. 4.
*Nov. 3.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR LOWER CANADA (SITTING IN REVIEW).

Supreme and Exchequer Courts Amending Act, 1891—54-55 *Vic. ch.* 25 *s.* 3—*Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts.* 1178 *&* 1178*a C. C. P.*

In an action brought by respondent against the appellant for $2,006 which was argued and taken *en délibéré* by the Superior Court sitting in review on the 30th September, 1891, the day on which the Act 54 & 55 Vic. ch. 25 s. 3 giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favor of the respondents. On appeal to the Supreme Court of Canada:

Held, per Strong, Fournier and Taschereau JJ. that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise* v. *Desmarteau*, (19 Can. S. C. R. 562,) followed.

Per Gwynne and Patterson JJ.—That the case did not come within the words of s. 3 ch. 25, 54 & 55 Vic. inasmuch as the judgment, being for less than £500 sterling, was not a judgment from which the appellant had a right to appeal to the Privy Council in England. Arts. 1178, 1178*a* C. C. P.

APPEAL from a judgment of the Superior Court for Lower Canada sitting in review unanimously confirming the judgment of the Superior Court for the sum of $2,006 in favour of the respondent.

The appellant was sued for a sum of $2,006 and arrested under a writ of capias, in virtue of articles 796 *et seq.* of the Code of Civil Procedure.

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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The judgment of the Superior Court was delivered on the 31st August, 1891, and was inscribed in review on the 8th of September and argued and taken *en délibéré* on the 30th September, 1891. Judgment was pronounced some weeks later by the Superior Court sitting in review.

From this judgment the appellant appealed direct to the Supreme Court of Canada, under the Supreme and Exchequer Courts Amending Act, 1891, 54 & 55 Vic. ch. 25 s. 3 ss. 3. The section reads as follows:—

"3. Provided that such appeals shall lie only from the Court of Queen's Bench, or from the Superior Court in review in cases where, and so long as, no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec, are appealable to the Judicial Committee of the Privy Council."

Casgrain Q.C., Attorney General of Quebec, for respondent: The case was argued on the day on which the act was passed and upon the principle that *actus curiæ neminem gravabit* I contend the judgment must be held to have been delivered on the 30th September, 1891, and if so *Hurtubise* v. *Desmarteau* (1) decided by this court, applies.

Moreover the case is not appealable, the amount not being for £500 sterling, as regulated by art. 1178 C. C. P.

Pelletier for appellant: The jurisprudence in the Province of Quebec has always been to consider the date of the judgment and not the day of the argument for all purposes of appeal. See art. 483, C. C. P. As to the amount it is over $2,000, and comes within the very terms of the Supreme and Exchequer Courts Act, R. S. C., ch. 135, and the Parliament of Canada alone has jurisdiction to regulate the amount which is appealable to this court.

(1) 19 Can. S.C.R. 562.

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STRONG J. stated that he had read Mr. Justice Taschereau's judgment and that he concurred with him.

FOURNIER J.—Il s'élève en cette cause une importante question concernant la juridiction de cette cour, c'est de savoir, si l'on peut appuyer le jugement sur une loi qui n'a été sanctionnée que le même jour que cette loi a été adoptée.

Les faits sont ainsi qu'il suit: l'appelant était demandeur pour la somme de $2,006 devant la cour Supérieure à Chicoutimi, qui a rendu jugement pour la somme de $684.14, le 31 août 1891. Porté en appel devant la cour Supérieure siégeant en revision à Québec, le 8 septembre 1881, ce jugement a été confirmé le 30 septembre 1891. Ce même jour était sanctionné le statut 54 & 55 Vic. ch. 25, amendant la juridiction de cette cour de manière à permettre l'appel ici dans des causes décidées en revision qui n'y étaient pas appelables auparavant, savoir: celles dans lesquelles le jugement en première instance avait été confirmé.

En conséquence du jugement de confirmation cette cause ne pouvait être portée en appel à la cour du Banc de la Reine. Il ne restait que l'appel au Conseil Privé si le montant était suffisant. Mais la demande qui n'était d'abord que de $2,006, et le jugement qui d'après la jurisprudence du Conseil Privé doit servir de bâse pour régler le droit d'appel, n'étant que de $684.14, la cause n'y était pas appelable.

Privé du droit d'appel à la cour du Banc de la Reine et au Conseil Privé l'appelant a pensé que la 54 & 55 Vic. ch. 25 lui offrait un moyen de sortir de difficulté en lui ouvrant l'appel à cette cour.

En effet, une disposition de ce statut a introduit un important changement dans le droit d'appel. Il fallait auparavant que la demande fut au moins de $2,000.

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Un jugement de cette cour avait même décidé, comme au Conseil privé, que ce serait le montant adjugé et non celui demandé qui servirait de bâse au droit d'appel. Mais ce principe a été rejeté par le statut ci-haut cité, qui a déclaré (sec. 3 ss. 4,) que lorsque le droit d'appel dépend du montant en litige, ce montant sera estimé être celui demandé et non celui obtenu, s'ils sont différents.

La demande de l'appelant étant au-delà de $2,000, savoir : de la somme de $2,006, il a cru que la voie lui était ouverte pour l'appel à cette cour. Mais il se trouve encore un malheureux obstacle dans son chemin, il se trouve trop tôt pour bénéficier de la loi.

Il est de principe qu'une cause soumise à la considération de la cour pour jugement et qui est réservée pour considération ou prise en délibéré, doit, quelle que soit la date du jugement rendu plus tard, être jugée d'après la loi en force, lorsque la cour, après audition des parties, a été saisie de la cause. L'application de ce principe ruine les espérances de l'appelant. La cour a été saisie de la cause le 30 septembre et les parties ont droit à leur jugement d'après la loi, telle qu'alors en force ; mais c'est ce jour-là même que par la sec. 3 ss. 4 la cause a été rendue appelable en déclarant que l'appel serait désormais réglé par le montant demandé et non celui obtenu.

Une cause absolument semblable a déjà été décidée dans cette cour. C'est celle de *Hurtubise* v. *Desmarteau* (1). D'autres causes ont aussi été jugées d'après le même principe, comme on le voit par les autorités citées dans le rapport.

Il est d'autant plus regrettable que l'appel ne puisse avoir lieu qu'il s'agit d'une cause où la liberté du sujet est mise en question. L'appelant a été arrêté

(1) 19 Can. S.C.R. 562.

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sur *cap. ad resp.* et sera privé de sa liberté, tant qu'il ne pourra payer son jugement.

Ne serait-il pas plus raisonnable d'accorder l'appel dans un cas semblable que dans beaucoup d'autres où il ne s'agit que de sommes insignifiantes dues à titre de rentes annuelles, honoraires d'office, etc. Il faut espérer que cette anomalie va bientôt disparaître de nos codes.

TASCHEREAU J.—This case comes up on a motion to quash for want of jurisdiction. The motion must be allowed. The ruling in *Hurtubise* v. *Desmarteau* (1) applies here. It is true that the judgment appealed from here was in fact pronounced in the Court of Review after the coming into force of the act 54 & 55 Vic., ch. 25, which allows for the first time appeals from that court; but, as regards this appeal, the case having been put *en délibéré* on the 30th September, 1891, on the very day that the act was sanctioned, the judgment is to be treated as if it had been given on that day, on the principle *actus curiæ neminem gravabit.* Nothing that happens after the case is *en état* can alter in any way the rights or position of the parties. It cannot be that a judge can render a case appealable or not at his will by simply delaying or hastening the judgment thereon.

I refer to the following authorities: *Lawrence* v. *Hodgson* (2) in which Garrow B. says:

> Where a case stands over for judgment the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, if necessary, to meet the justice of the case.

Freeman v. *Tranah* (3) where Cresswell J. says:

> The maxim *actus curiæ neminem gravabit* is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law.

(1) 19 Can. S.C.R. 562. (2) 1 Y. & J. 372.
(3) 12 C. B. 415.

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Taschereau J.

And Maule J. says :

It is an established principle of law that the act of the court shall injure no one, such as the court's taking time to deliberate on its judgment.

And the writer's remarks on *Pinhorn* v. *Sonster* (1) in Maxwell on the Interpretation of Statutes (2) :

The judgment was, in strictness, due before the act, and the delay of the court ought not to affect it.

See also *Evans* v. *Rees* (3) ; *Green* v. *Cobden* (4) ; and *Miles* v. *Williams* (5).

I rest my judgment on that ground without expressing any opinion one way or the other on the ground relied upon by my brothers Gwynne and Patterson.

GWYNNE J.—I agree that this appeal should be quashed but upon the following grounds only, namely, that the judgment from which the appeal is taken was not one which this court has authority to entertain under the provisions of the Dominion statute, 54 & 55 Vic. ch. 125. inasmuch as it was not a judgment which the appellant had *de jure*, by the statute law of the Province of Quebec, a right of appeal to the Privy Council in England, the above statute of the Dominion authorizing in my opinion this court to entertain appeals from all judgments of the Court of Review thereafter delivered, affirming the judgment of the Superior Court in such cases only as were *de jure* appealable to the Privy Council.

I cannot concur in the opinion that upon a question of right to appeal a judgment delivered, it may be months after the day upon which the case is argued and judgment is reserved, shall be referred back to the day upon which the argument was closed so as to be deemed to have been delivered on that day. The logical

(1) 21 L. J. Ex. 336.
(2) 2 ed. p. 273.
(3) 12 A. & E. 167.
(4) 4 Scott 486.
(5) 9 Q. B. 47.

deduction from such holding, would be that the right to appeal might be barred by the time allowed for appealing from a judgment having elapsed before the judgment should be in point of fact delivered.

PATTERSON J.—This appeal being from a judgment of the Superior Court sitting in review cannot be heard by this court, unless the judgment is one which by the law of the Province of Quebec is appealable to the Judicial Committee of the Privy Council (1). The law of the Province of Quebec on the subject of appeal to the Privy Council is found in articles 1178 and 1178*a* of the Code of Procedure, and in cases like the present it confines the right of appeal to those wherein the matter in dispute exceeds the sum or value of £500 sterling. The sum or value in dispute in this action, which, according to the statute of 1891 we understand to be the amount demanded, or $2,000, is less than £500 sterling. This is a fatal objection to our jurisdiction and upon that ground I agree in quashing the appeal. The other objections, founded on the time when judgment was pronounced in its relation to the 30th of September, 1891, when the statute received the royal assent, have to be dealt with in one or two cases now standing for judgment. I therefore forbear to discuss them now, merely remarking that I do not assent to the proposition that a judgment, given after argument and after time taken for deliberation, relates back to the date of the argument as if given *nunc pro tunc*.

Appeal quashed with costs.

Solicitors for appellant: *Pelletier & Fontaine.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

(1) 54 & 55 Vic. ch. 25, sec. 3.

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*Feb. 29.
*Mar. 1.
*June 28.

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY (DEFENDANTS.)..... APPELLANTS;

AND

HARRY R. McLELLAN (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Ownership of property—Insurable interest—Transfer by insurer—Construction of agreement—Condition in policy—Insurance by other parties—Evidence.

An agreement by which M. undertook to cut and store ice provided :—That said ice houses and all implements were to be the property of P. who after completion of the contract was to convey same to M.; and that M. was to deliver said ice to vessels to be sent by P. who was to be obliged to accept only good merchantable ice so delivered and stored. The ice was cut and stored and M. affected insurance thereon and on the buildings and tools. In the application for insurance in answer to the question "Does the property to be insured belong exclusively to the applicant, or is it held in trust or on commission or as mortgagee?" the written reply was "Yes, to applicant." At the end of the application was a declaration "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value and risk of property to be insured so far as the same are known to the applicant, and are material to the risk."

The property was destroyed by fire and payment of the insurance was refused on the ground that the property belonged to P. and not to M. the insured. On the trial of an action on the policy the defendants also sought to prove that P. had effected insurance on the ice and that under a condition of the policy the amount of M's. damages, if he was entitled to recover, should be reduced by such insurance by P. This defence was not pleaded. The policies to P. were not produced at the trial and verbal evidence

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

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of the contents was received subject to objection. A verdict was given in favour of M. for the full amount of his policy.

Held, affirming the judgment of the court below, that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. under the agreement and not the ice which was at M's. risk and shipped.

Held, further, Gwynne J. dissenting, that the insurance to P. and the condition of the policy should have been pleaded but if it had been the evidence as to it was improperly received and must be disregarded.

Held, per Ritchie C.J., that the application of M. for insurance not being made part of the policy by insertion or reference the statements in it were not warranties, but mere collateral representations which would not avoid the policy unless the facts mis-stated were material to the risk. If materiality was a question of law the non-communication of the agreement with P. could not affect the risk; if a question of fact it was passed upon by the jury.

Per Strong J.—The application, being properly connected with it by verbal testimony, formed part of the policy and the statements in it were warranties, but as M. only pledged himself to the truth of his answers "so far as known to him and material to the risk" and such knowledge and materiality were for the jury to pass upon, the result was the same whether they were warranties or collateral representations.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment for the plaintiff at the trial.

The plaintiff, McLellan, a resident of St. John, N.B., entered into the following agreement with one Palmer of the same place :

"1st. Said McLellan agrees to cut, store and put in proper houses secured and properly protected from the weather, from 5,000 to 10,000 tons of pure fresh water ice, free from foreign matter in blocks of the following sizes, viz.: 22 in. x 32 in. and the thickness that the block ice will cut"

"2nd. That the said ice, houses, and all implements are to be the property of said Palmer, but after the completion of this contract he is to convey same to the said McLellan."

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"3rd. The said McLellan to build a good sluice or shute for delivering ice to vessels where they can load to 16 feet and proceed to sea and of such a character that he can deliver and load at least four hundred tons per day."

"4th. Said McLellan is to deliver the said ice free on board and stowed to vessels to be sent by said Palmer in July and or August and or September, 1890, and do all things necessary in the premises and usual by the shippers of ice."

"5th. Said Palmer is to pay said McLellan for all said ice as follows: The sum of one dollar and twenty-five cents per ton of 2,240 lbs. of good merchantable ice put on board and stowed in good merchantable condition, the quantity to be ascertained on the shipping documents of each vessel."

"6th. Said Palmer is to advance the said McLellan the sum of sixty cents per ton of ice as housed and secured and for the purpose of ascertaining quantity housed fifty cubic feet to be reckoned as a ton, such advances to be deducted from payments of the first cargoes shipped."

"Said Palmer shall be only liable to accept and pay for under this document the good merchantable ice delivered and stowed on board vessels sent by him or assigns."

The land on which the buildings in which plaintiff proposed to store the ice were situate was leased by the owner to Palmer, the lease containing a covenant of renewal in favour of plaintiff. The buildings were mortgaged by plaintiff to one Barnhill as security for money due.

McLellan, the plaintiff, cut and stored the ice, and before shipment he effected insurance with the defendant company for $15,000 on the ice, and smaller amounts on the buildings and tools. In the applica-

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tion for insurance was printed the following question: "Does the property to be insured belong exclusively to applicant, or is it held in trust or on commission, or as mortgagee?" To this question the answer written was "Yes, to applicant." At the foot of the application and just before plaintiff's signature, the following memo. was printed:—

"It is hereby declared that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk, of the property to be insured, so far as the same are known to the applicant and are material to the risk; and the said applicant hereby agrees and consents that the same shall be held to form the basis of the liabilities of the company."

One of the conditions of the policy was as follows:—

"13. If at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this corporation shall not be liable to pay or contribute more than its ratable proportion of such loss or damage."

The property insured was destroyed by fire, but payment of the insurance was refused by the defendants, who claimed that plaintiff had no insurable interest in the property, but that it belonged to Palmer. An action was brought on the policy on the trial of which defendants, in addition to the defence as to the whole claim, set up a partial defence under the 13th condition, and sought to prove that Palmer had also insured the ice and received the sum of $3,250 for such insurance. This 13th condition was not pleaded and the policies to Palmer were not produced at the trial. Defendants tendered secondary evidence of their contents which was received by the

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trial judge subject to objection that it was inadmissible.

The plaintiff obtained a verdict for the full amount of his policy which the court in banco affirmed. The defendants appealed.

Weldon Q.C. and *Jack* for the appellants. McLellan had no insurable interest in the property. *Calcutta & Burmah Steam Navigation Co.* v. *DeMattos* (1); *Castellain* v. *Preston* (2).

Plaintiff cannot recover profits on his business as part of his damages. *Wilson* v. *Jones* (3).

The application contained a warranty of the truth of the answers of plaintiff to the printed questions and some of the answers being untrue the policy was void. *Thomson* v. *Weems* (4); *Fowkes* v. *Manchester &c. Assurance Assoc.* (5); *Gore District Mutual Insurance Co.* v. *Samo* (6); *Marshall* v. *Times Insurance Co.* (7); *Cashman* v. *London & Liverpool Insurance Co.* (8).

The question of materiality should not have been left to the jury.

Barker Q.C. for the respondent. As to plaintiff having an insurable interest see *The North British & Mercantile Insurance Co.* v. *The Liverpool, London & Globe Insurance Co.* (9); and as to misrepresentation *National Bank* v. *Hartford Insurance Co.* (10); *Hopkins* v. *Provincial Insurance Co.* (11); *Stock* v. *Inglis* (12).

Sir W. J. RITCHIE C.J.—The whole property was substantially plaintiff's, in his possession and at his risk, and there was an insurable interest in

(1) 32 L.J. Q.B. 322; 33 L.J. Q.B. 214.
(2) 11 Q.B.D. 380.
(3) L. R. 2. Ex. 139.
(4) 9 App. Cas. 671.
(5) 3 B. & S. 917.
(6) 2 Can. S.C.R. 411.
(7) 4 All (N.B.) 618.
(8) 5 All (N.B.) 246.
(9) 5 Ch. D. 569.
(10) 95 U.S.R. 673.
(11) 18 U.C.C.P. 74.
(12) 12 Q.B.D. 564.

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plaintiff in the whole property. If destroyed by fire the loss would fall on him because he could never deliver the ice and so fulfil his contract and obtain payment, and if the building and tools were destroyed, which were only held by Palmer to secure the fulfilment of the contract, they could never be returned to him as contemplated by the agreement; and the same observation is applicable to Barnhill's bill of sale which was also only by way of security.

I think as the application was not referred to in the policy and therefore formed no part of it by insertion or reference the statements contained in it were not warranties but merely representations collateral to the policy, and therefore, unless material to the risk, would not avoid the policy; and inasmuch as the ice, buildings and tools were at the risk of the plaintiff I cannot, if the materiality was a question of law, see how the non-communication of the contract with Palmer, and the bill of sale to Barnhill, could possibly have been material to the risk. If the ice, houses and tools were all destroyed the loss, for reasons before stated, must necessarily fall on the plaintiff and therefore he was substantially and practically for the time being the owner of the ice, buildings and tools. If the materiality was a question of fact then the jury have passed on it in a manner I think entirely satisfactory. Thinking therefore, as I do, that the application contained a representation only and not a warranty; that if not literally it was substantially correct, and that if not substantially correct it was not material to the risk; and that the plaintiff had an insurable interest to the full value of the amount insured, I think he is entitled to recover the amount so insured, which is the whole marketable value of goods insured at the time of the loss, and they cannot cut that amount down by reason of transactions between plaintiff and Palmer

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and Scammel, to which the insurance company is in no way a party. They received the agreed premium for insuring this property; the market value of the property has been satisfactorily established; and this is the legitimate amount of the loss under the 9th condition of the policy, and this amount they must pay.

At the time this agreement was made there was no ice cut to which the second paragraph could refer if ice is to be read as separate from the houses, and I think the general scope of the clause indicates that it had reference to the houses and implements alone which for the time being are to be the property of Palmer and not to the ice itself, because "after the completion of this contract he is to convey the same, that is the ice houses and implements, to the said McLellan." How could this apply to the ice which, by the same agreement, McLellan is to deliver free on board and stowed to vessels to be sent by Palmer in all July, $\frac{\text{and}}{\text{or}}$ August, $\frac{\text{and}}{\text{or}}$ September, 1890, and do all things necessary in the premises and usual by shippers of ice.

It is said there should be a deduction by reason of there having been other insurance by other parties under the 13th condition which is as follows:

13. If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this corporation shall not be liable to pay or contribute more than its ratable proportion of such loss or damage.

But this was not pleaded, and had it been there was no legal evidence of any other insurance beyond that of the plaintiff. It was sought to prove the contents of the alleged policies by verbal evidence; this was objected to and the policies required to be produced. The evidence was objected to and received

subject to objection, the learned judge intimating that the evidence was not receivable, but it was pressed in subject to the objection and was clearly not admissible and must be rejected.

The appeal should be dismissed.

STRONG J.—The principal objection which has been raised to the respondent's right to recover in this action is that the answer recorded as his to the 14th question in the application on which the policy was issued was untrue, and constituted either a breach of warranty or at least material misrepresentation.

The jury have found that there was no misrepresentation or concealment of facts material to the risk, and the court on an application for a new trial have held that this finding was justified by the evidence. And the learned judge who presided at the trial, Mr. Justice Tuck, having ruled that as a matter of law and legal construction the answer to the question referred to did not constitute a warranty the court in banc have confirmed that ruling.

The first question to be considered is that as to the legal effect of this answer to the 14th question assumed to have been put to and answered by the appellant; whether it forms part of the contract of insurance, and is therefore to be regarded as a warranty, or whether it was a mere collateral representation, and as such of no effect save in so far as it mis-states some fact or facts material to the risk.

The 14th question is as follows:

> Does the property to be insured belong exclusively to the applicant, or is it held in trust or on commission or as mortgagee?

The answer recorded as the response of the respondent is "Yes, to applicant." At the foot of the application, after the last question and immediately

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preceding the signature of the respondent, this declaration appears:

> It is hereby declared that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured so far as the same are known to the applicant and are material to the risk; and the said applicant hereby agrees and consents that the same shall be held to form the basis of the liabilities of the said company.

The application is not dated, but the evidence shows that it was signed on the 18th or 19th of April, 1890.

The policy is dated the 25th of April, 1890, and is not under seal. The risk was from the 18th April, 1890, until the 18th of October in the same year. At the time of the application there was no other insurance on the property, the insurance effected on the ice by Mr. Charles A. Palmer not having been made until afterwards, namely, on the 23rd of April, 1890.

The policy does not in terms contain any reference to the application.

I am, however, of opinion that it is impossible to come to any other conclusion, having due regard to the express terms of the clause of the application before set forth, than that the statements embodied in the answers of the respondent, and which were "to form the basis of the liabilities of the company" were not mere representations or anything else than warranties, forming part of the contract between the parties. The case of *Thomson* v. *Weems* (1) was, it is true, a stronger case inasmuch as the proposal was there referred to in the body of the policy, but this difference is not conclusive against holding the statements in the answers contained in the proposal or application warranties for there is no reason why the statements in the application may not be connected with the policy by parol evidence, and if this is done, and these statements are read as the basis of the contract, they are as much part

(1) 9 App. Cas. 671.

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of the contract of insurance as if they had been written on the face of the policy. The case of *Wheelton v. Hardisty* (1) contains nothing adverse to this construction for it was not there stipulated by the insurers that the answers to the questions contained in the proposal should form the "basis" of the insurer's liability.

There would, however, be little difference between the effect of a warranty expressed in the terms used in the concluding clause of the application and a mere representation. In the latter case the questions of materiality and knowledge of the assured of the truth or falsehood of the facts stated would be the principal questions to be determined, and these would, of course, be questions for the jury. But under a warranty framed as this is the questions to be determined are identical, for the party proposing the insurance only states that his replies are just, full and true statements "so far as the same are known to the applicant and are material to the risk."

I do not at all agree in the meaning and construction attributed to this clause at the foot of the application which is relied on by the appellants, and which is set forth in their factum. This would make the applicant pledge himself to the truth and materiality of his statements absolutely, which is just what the words "so far as the same are known to the applicant and are material to the risk" protect him against. It would be impossible to attribute to these words the meaning contended for without perverting the language actually used.

It appears to me that the respondent only undertook to affirm the truth of his statements so far as they were known to him, and so far as they were material to the risk. The questions of materiality and of the

(1) 8 E. & B. 232.

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respondent's knowledge must therefore, even in the view which I think is the correct one, be for the jury. The result must consequently be that the questions for determination are practically the same whether we regard this last clause of the application as forming part of the contract and so constituting a warranty, or as being a mere collateral representation.

The principal objection to the truth and accuracy of the answer to the 14th question is that it states the property insured, which includes the ice, ice houses and tools, to belong exclusively to the respondent.

This was not strictly the answer which, according to the concurrent testimony of the respondent himself, and that of Mr. Brittain and Miss Wholley, the clerks of Mr. Russel Jack, the appellant's agent, was given to the question by the respondent, for according to all the witnesses what he, the respondent, said was that he was the owner of the ice but was under bonds to deliver it which, making due allowance for the difference between a technical and non-technical mode of expression, was strictly true. The respondent, in my opinion, was the absolute and exclusive owner of the ice, whilst he was by the contract into which he had entered under an obligation to deliver it or other ice to Messrs. Palmer and Scammels.

It is to be observed in the first place that the correctness of this statement does not depend on any question of fact, but on a question of law or rather of legal construction, a matter for judicial opinion. There is no question as to the fact that the respondent had duly executed and become bound by the agreements of the 18th March, 1890, and that his title to the leasehold property on which the ice house was erected depended on these agreements and the agreement for the lease entered into between Mr. Raynes and Mr. C. A. Palmer. Something might have turned upon this if

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the legal effect of those instruments had not been, as I think it was, such as entirely to warrant the construction the repondent put upon them.

This depends upon the question whether the property in the ice was by the terms of the agreement to vest in Mr. Palmer before its shipment. I entirely concur in the opinions of the learned judges who delivered judgment in the Supreme Court of New Brunswick, that the words "ice houses and all implements" in the second clause of the agreement of the 18th March, 1890, do not refer to the ice, but to the houses in which it was to be stored; this, in my judgment, necessarily results from the provision that after the completion of the contract Mr. Palmer was to convey "the same" to the respondent. What was to be so conveyed was the property which was to become vested in Mr. Palmer, and it could not have been meant that the ice was to be conveyed inasmuch as the completion of the contract would involve the shipment and delivery of that. The second paragraph of the 6th clause is, however, conclusive to shew that the property in the ice was not to pass. It reads as follows: "Said Palmer shall be only liable to accept and pay for under this agreement the good merchantable ice delivered and stowed on board vessels sent by him or his assigns." Nothing, in my opinion, could shew more plainly that the ice was not only to be at the risk of the respondent, but that he was to be the actual owner of it, and to retain the property in it until shipment.

Clearly Palmer could not be the owner of the ice which he had not accepted, and the time for his acceptance had not arrived when the insurance was effected, nor when the loss occurred. This is so plain that no further demonstration is required. As regards the tools, which were not consumed or damaged by the fire, and in respect of which no loss is alleged,

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there is no pretence for saying they vested in Mr. Palmer.

The legal property in the lease was no doubt in Palmer, but the clause in the agreement providing that he was to reconvey this property to the respondent after the completion of the contract, coupled with the stipulation in the agreement with Raynes that he was to renew in favour of McLellan, shows that Mr. Palmer held this property in the leasehold merely as a mortgagee and by way of security. Then there was nothing in this nor in the bill of sale to Barnhill inconsistent with the respondent's statement that he was the owner. A mortgagor is deemed the owner of property mortgaged both in a popular and in a technical sense, and the last alternative of the 14th question shows that the word "property" in the first part of the interrogation is used as contra-distinguished from the interest of a trustee, mortgagee or commission agent, and the question being read and construed in this sense the respondent was perfectly justified in saying that he was, according to the meaning thus attached to the word "property" by the appellants themselves, the exclusive owner of the icehouse as well as of the ice.

I have therefore no difficulty in holding that the absolute and exclusive ownership in all the property insured was in the respondent, and assuming the answers to the questions propounded to have been strictly warranties there has been no breach of the warranty contained in the answer to the 14th question.

The pleadings did not under the New Brunswick rules put the plaintiff to proof of the notice of loss required by the 6th condition and this objection requires no further notice.

The 9th condition does not apply; the respondent does not seek to recover for profit but for the amount of insurance on the substantial property actually in his possession at the date of the loss and of which he was the absolute and exclusive owner, and which on sufficient evidence the jury have found to have been of the value of $18,000 and upwards.

The objection founded on the 13th condition has given rise to some difficulty. That condition is in the following words:

> If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this corporation shall not be liable to pay or contribute more than its ratable proportion of such loss or damage.

It is said that Mr. C. A. Palmer, subsequently to the respondent's insurance with the appellants effected by the policy sued upon in this action, effected insurance upon the ice to the amount of $4,000 in two other offices, $2,000 being insured by each company, and that Mr. Palmer after the loss received from each company $1,625, being $3,250 in all.

The first observation to be made on this head is that it is a partial defence requiring to be pleaded and that it is not merely a matter of reduction of damages. Apart from this condition the respondent would, upon the finding of the jury that the ice, all of which was destroyed or so damaged by fire as to be of no value, was worth $18,000 and upwards, be entitled to recover upon this head the full amount insured, namely, $15,000. If his right to recover is to be partially reduced under this condition it should therefore have been pleaded. The only plea or notice of defence applicable is the 6th which alleges that Charles A. Palmer was jointly interested in the assured property with the plaintiff, that he (Palmer) effected other in-

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surance and after the loss recovered and received such further insurance for a total loss and to the extent of the full value of the property insured and of the property destroyed. This plea is not proved. Palmer was not jointly interested with the plaintiff, nor did he recover the full value of the property lost. No application to amend this plea or to add a proper plea founded on the 13th condition was made either at the trial or in banc or in argument at this bar.

Had the defence, however, been properly pleaded the evidence to sustain it is not sufficient. It is true that Mr. Palmer says that he did effect insurance on the 23rd of April on the ice, but the policies were not produced, the terms of them were not even stated, and the evidence, manifestly irregular, being persistently objected to was received subject to objection. Mr. Palmer says he was unable to state the terms of the policies and as these might, had they been produced, have shewn that they did not come within the condition, the evidence ought not to have been received and ought to have no weight.

But assuming that these preliminary objections had been got over there would still have remained a more substantial objection to this partial defence.

It does not appear from the agreement that Mr. Palmer had any lien or charge upon the ice which was the subject of his insurance, for his advance or otherwise. This specific ice need not have been delivered by the respondent. He was free to sell it and purchase or otherwise obtain other ice with which to fulfil his contract with Messrs. Palmer & Scammels. The contract contains no provision for any security on the ice for the advances, and the provision before noticed that the ice was not to be accepted by Palmer until it was shipped repels the presumption that it was

for any purpose, either by way of security or absolutely, to vest or that Mr. Palmer was to have any property equitable or legal before actual shipment. It follows that any insurance upon the ice effected by Mr. Palmer subsequently to the policy upon which this action is brought could not have covered the same property, since Mr. Palmer was a stranger having no legal or equitable interest in the ice to which his insurance as he states it was restricted. It would be impossible so to construe the 13th condition as to make it apply to any case in which an entire stranger, having no interest in the property which formed the subject of insurance, should subsequently to the date of the policy and without the privity of the assured assume to insure it by effecting what might be a mere wager policy. Such a proceeding could not under this condition operate to the prejudice of the owner of the property regularly insured by means of the policy to which this condition is attached, by reducing the amount of the risk or otherwise. And yet if we were to hold the 13th condition applicable to the present case it would also apply to such a case as that supposed.

For these reasons I have reached the same conclusions as have been arrived at by the Supreme Court of New Brunswick.

The appeal should be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—I think the plaintiff had an insurable interest as proprietor to the full value of the property insured whatever may have been the nature of Palmer's claim on the property by virtue of the contract entered into by plaintiff, and this I think is the extent of the representation made by the plaintiff that

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he was solely interested; that representation was never intended to be a warranty or assertion that no one else had any interest subject to which the policy was issued. The 13th condition of the policy shows this for it points to the contingency of any other person effecting an insurance upon the same property or any part thereof, and provides for what should take place in such an event. This was in fact done, and I must say I think that in justice the defendants are entitled to the benefit of a reduction provided for by that condition, whatever the amount may be. It was not disputed before us, on the contrary it was admitted, that in point of fact Palmer had effected an insurance upon the ice insured by the plaintiff or some part thereof, and that he had received thereon $3,250; I think, therefore, a reduction from the $15,000 insured upon the ice by the plaintiff should be made under the 13th condition.

PATTERSON J.—I concur in the opinions expressed by the Chief Justice and my brother Strong.

Appeal dismissed with costs.

Solicitor for appellant: *I. Allan Jack.*

Solicitors for respondent: *Barker & Belyea.*

THE CORPORATION OF THE TOWNSHIP OF SOMBRA AND PETER MURPHY (PLAINTIFFS).... } APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF CHATHAM (DEFENDANTS) ..... } RESPONDENTS.

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*Mar. 10, 11.

*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—Ontario Municipal Act—R.S.O. [1887] *c.* 184 *s.* 583—*Drainage Works—Non-completion—Mandamus—Maintenance and repair—Notice.*

The township of C., under the provisions of the Ontario Municipal Act (R.S.O. [1887] c. 184) relating thereto, undertook the construction of a drain along the town line between the townships of C. and S. but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township in which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains and a mandamus to compel the completion of the drain undertaken to be constructed by C. as well as damages for the injury to M.'s land and other land in S.

Held, affirming the decision of the Court of Appeal, that M. was entitled to damages, and, reversing such decision, Taschereau J. dissenting and Patterson J. hesitating, that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient.

Held, per Ritchie C.J., Strong and Gwynne JJ., that s. 583 of the Municipal Act providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain does

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

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not apply to this case in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act (R.S.O. [1887] c. 44.)

Held, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away.

Held, per Patterson J. that it might be better to leave the decision of the Court of Appeal undisturbed and let the township of S. give notice to repair under sec. 583 of the Municipal Act, and work out its remedy under that section.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Robertson at the trial in favor of the township of Sombra, and affirming it in favor of the plaintiff Murphy.

The facts of the case are sufficiently set out in the judgment of Mr. Justice Gwynne.

Meredith Q.C. for the appellants. As to the duty of public bodies in the construction of public works see *White* v. *Gosfield* (2); *Smith* v. *Township of Raleigh* (3).

Pegley Q.C. for the respondent referred to *Galbraith* v. *Howard* (4); *Northwood* v. *Township of Raleigh* (5); *Noble* v. *City of Toronto* (6); *Chrysler* v. *Township of Sarnia* (7): *Dillon* v. *Township of Raleigh* (8).

Sir W. J. RITCHIE C.J., and STRONG J., concurred in the judgment of Mr. Justice Gwynne.

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

(1) 18 Ont. App. R. 252.
(2) 2 O. R. 287; 10 Ont. App. R. 555.
(3) 3 O.R. 405.
(4) 14 O.R. 46.
(5) 3 O.R. 347.
(6) 46 U.C.Q.B. 519.
(7) 15 O.R. 182.
(8) 13 Ont. App. R. 53.

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GWYNNE J.—In the interval between the years 1874 and 1880 several drains were constructed in the township of Sombra, bringing down large quantities of water collecting in that township into and through the gore of Chatham which lies to the south of Sombra. The lands in the gore of Chatham lay lower than the lands in Sombra and a great part constituted a marsh. Some of the waters brought down by the drains in Sombra were conducted into, and left in, this marsh from which there was no outlet. In 1880 some persons in Chatham who had brought actions against the township of Sombra recovered judgment in those actions for injury to their lands from waters so brought down in some of the drains from Sombra. At this time the gore of Chatham appears to have been interested in having a drain made which should prevent all water coming down from Sombra from flowing at all through or into the gore of Chatham. The township of Sombra had also an interest in procuring a sufficient outlet for the waters which might be brought down by drains already constructed or thereafter to be constructed in Sombra. It seems to have been considered that there would have been a difficulty in getting the inhabitants of Sombra to petition for any drain which would be adequate for the purpose required, and that a petition could readily be obtained in Chatham, the inhabitants of which had a deep interest in preventing the Sombra waters flowing into the gore of Chatham; accordingly, either by agreement between the Reeves of the respective townships, or independently, one William Whitebread and others, inhabitants of the gore of Chatham, in or about the month of September, 1880, petitioned the council of the township of Chatham for a drain to be dug along the northerly side of the road between the gore of Chatham and the township of Sombra to extend from

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the north branch of the river Sydenham to the channel Ecarté. The council thereupon employed their engineer, a Mr. W. G. McGeorge, to make an examination of the locality and to report to the council thereon under the provisions of the drainage clauses of the Municipal Institutions Act. The petition for this drain would seem to have been presented upon previous consultation with the said township engineer, for he, in his report to the council in pursuance of the reference to him by the council, recommended a drain of certain dimensions in width and depth to be constructed along the precise line of that petitioned for, and in his report he assessed the lands and roads in Sombra to be benefited by the work and to a greater amount than he assessed the lands and roads in Chatham. Upon this report the council of the township of Chatham, on the 6th December, 1880, provisionally passed a by-law under ch. 174 of R. S. O. of 1877, whereby they provisionally adopted the report of their engineer and the assessments made by him upon the lands and roads which, in his opinion, would be benefited by the proposed work, and they appointed a day for the sitting of a Court of Revision for the hearing and trial of all appeals against the assessments made in the engineer's report. The municipality of Sombra, under the provisions of section 540 of said ch. 174, appealed against the assessment so made on the lands in Sombra as too great, and as made on some lands and roads that would not be benefited, and against the assessment in Chatham as omitting some lands therein that would be benefited by the proposed drain, but they did not, in their notice of appeal, allege as a ground of appeal a point much pressed upon the trial of this action, that a portion of the plan of the Whitebread drain which provided for the damming of one of the drains in Sombra, called the Pacific drain, where it

crossed the town line and the carrying the waters coming down by it from Sombra through the Whitebread drain along the town line to the channel Ecarté instead of conducting the waters to be brought down the latter drain into the Pacific drain and thence through that drain as constructed in the gore of Chatham to its mouth. Had they appealed upon that ground much of the evidence received and relied on in the present action, and irrelevant as so given, would have been relevant. See *Chatham* v. *Dover* (1). Their objections as to the amount of their assessments were entertained and adjudicated upon by the arbitrators, and there having been no appeal against their award under section 380 and 385 of said ch. 174 R. S. O. 1877 their award became conclusive and the by-law was thereupon finally passed on the 14th Oct., 1881, and the said Mr. McGeorge was thereby appointed commissioner to let the contract for constructing the said drain and works connected therewith by public sale to the lowest bidder (not exceeding the estimates made by the engineer in his report adopted by the by-law), and it was by the by-law enacted that it would be the duty of the said commissioner to cause the said drain and works connected therewith to be made and constructed in accordance with his plans and specifications, which were adopted by the by-law, not later than the 31st December, 1881, unless otherwise ordered by the council. This by-law was passed under the provisions of sections 547, 548, 549, and 550 of said ch. 174, R.S.O. 1877. This latter section 550 introduced the application of section 542 of the act which is identical with section 583 of R.S.O. 1887, and which enacted that:

After such deepening or drainage is fully made and completed it shall be the duty of each municipality in the proportion determined

(1) 12 Can. S. C. R. 349 and subsequent pages.

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by the engineer or arbitrators under the same formalities, as nearly 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.

It is to this and this case only, namely, of a work which it is the duty of two or more municipalities to preserve, maintain and keep in repair, and when any one of such municipalities neglects or refuses to make all necessary repairs within the limits of such defaulting municipality, after notice in writing, requiring such repairs to be made, that subsection 2 of said section 542 applies, which subsection, as amended by 47 Vic. ch. 32, s. 18, now subsection 2 of section 583 of R.S.O. 1887, enacts that:

> Any such municipality neglecting or refusing so to do (that is to make the necessary repairs within its own limits) upon reasonable notice being given by any party interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by 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 damages to any person who or whose property is injuriously affected by reason of such neglect or refusal.

This subsection, as I have already observed, is, as it appears to me, expressly limited to the case of one of two or more municipalities whose duty it is to execute all necessary repairs within its own limits neglecting or refusing to make some particular repairs after notice in writing given by any person interested in such repair being made and who becomes injuriously affected by neglect or refusal to make the necessary repairs after such notice. In such a case a mandamus may be obtained in addition to the municipality being liable to an action at the suit of any person who or whose property may be injured by the neglect or refusal of the

municipality to make the necessary repairs after such notice. In such an action the occurrence of damage from such neglect after such notice may be taken as conclusive evidence of negligence, but what in cases where no want of repair is apparent to any person interested and who may become injuriously affected and consequently no notice is given under the section, but the municipality with full knowledge, or means of knowledge, that a drain which they are bound to maintain has been suffered to fall into a state of disrepair omit negligently to make necessary repairs and negligently fail to discharge their duty of maintaining the work in an efficient state of repair and damages result to individuals by reason of such negligence? In my opinion the section in question has no reference to any such case; for such damage sustained by neglect to discharge a statutory duty any person injured has his remedy by action at common law which the section in question does not, as it appears to me, purport to restrict or affect in any manner. However the section has no reference whatever to the present case where the drain authorized to be constructed has never, in point of fact, been fully made and completed.

By the by-law the work designed was declared to be the digging of the drain upon the town line between Sombra and the gore of Chatham, but on the Sombra side of such line, and the raising of the residue of the town line so as to form a permanent embankment which should prevent all water descending from Sombra from flowing into the gore of Chatham, thus damming up all water courses, natural and artificial, flowing from Sombra across the town line between the River Sydenham and the Chenal Ecarté and the giving to the drain a uniform level bottom of the width of nine feet throughout and the width of eleven feet at the surface with side slopes of one to one. Although the

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by-law appointed Mr. McGeorge, the township's engineer, commissioner for letting the contract for the work and enacted that the work should be completed by the 31st December, 1881, unless otherwise ordered by the council, and although no order of council was ever made ordering otherwise, it appears that the engineer entered into no contract for constructing the work until in or about the month of September, 1882. It appears also that the contractor with whom this contract was entered into shortly afterwards wholly abandoned his contract and that Mr. McGeorge, the engineer of the township of Chatham, without any intervention of or authority from the council, from time to time afterwards let out the work in separate sections to divers persons who either could not, or if they could did not, complete the work, let to them respectively at one and the same time. In fact it appeared that without any order in council authorizing such a mode of letting the work and such deviation from the provisions of the by-law the work was still incomplete in the month of January, 1887. On the 15th day of that month Mr. McGeorge addressed to the township council a letter in the following words:—

> Gentlemen: I beg to report to your honourable council that the Whitebread drain is now completed, with the exception that some of the excavated earth taken out late in the season has not been properly spread on the road. This will be done as soon as the frost is out and the earth is sufficiently dry.

The present action was commenced in the month of November, 1887, and in the statement of claim filed therein the plaintiffs, the corporation of the township of Sombra and Peter Murphy, whose claims and rights of action respectively, if they have any, are quite independent the one of the other, unite in complaining that in point of fact the drain has never been com-

pleted according to the plan and specifications in the by-law, and in consequence thereof the drain does not answer the purpose for which it was constructed:—

But on the contrary thereof that the effect of it is to collect together and to cast upon the lands of the plaintiff Peter Murphy, and the roads of the plaintiffs, the corporation of the the township of Sombra, large quantities of water from the neighbouring lands, which would not but for the said drain have flowed upon the said land and roads, and the said plaintiffs and the said land and roads have been greatly damnified and injured by reason thereof in each year since the year 1882, and that the said drain was so unskilfully and negligently constructed that the above evils complained of have been greatly aggravated.

And they alleged, further, that the effect of the acts of the defendants with reference to the said drain and works is to prevent certain drains constructed in the township of Sombra from carrying off the waters brought down by them from lands and roads in Sombra and to pen back such waters upon and to flood the said roads and said lands of the plaintiff Murphy, and that the said defendants have refused to complete the said Whitebread drain; and they prayed among other things that the defendants may be ordered to complete the said drain in accordance with the provisions of the by-law, and that they may be ordered to pay to the plaintiffs and to each of them damages for the wrongful acts of the defendants complained of by the plaintiffs. Now it is obvious that as to the damage alleged to be done to the lands of the plaintiff Murphy and to the roads of the plaintiffs, the township of Sombra, the interests and rights of action of the respective plaintiffs are wholly distinct and independent. The lands of the plaintiff Murphy being flooded for a longer or a shorter period might render them unfit for cultivation more or less according to the duration of the flooding, while no injury of a like nature could be done to the corporation by the flooding of their roads. Their

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roads might thereby become impassable for a longer or shorter period, but that would constitute an injury in the nature of a nuisance to Her Majesty's subjects generally requiring to use the roads, but would give no cause of action to the corporation to recover pecuniary damages by way of compensation for such nuisance or otherwise. The only pecuniary compensation which the corporation in an action of this nature could, as it appears to me, claim would be for the cost of repairing and restoring any of their roads which might be washed away by floods occasioned by the wrongful or negligent conduct of the defendants.

The learned judge who tried the case, after taking a vast amount of evidence, has in effect found the defendants never did complete the drain to the width, depth and bottom level throughout as was provided by the plans and specifications adopted by the by-law, and he adjudged that the defendants should pay the plaintiff Murphy the sum of $150 for his damages in respect of the injuries complained of by him; and without entering into the evidence at large it is sufficient to say that there can, I think, be no doubt that the learned judge was right in his judgment that the defendants never did complete the drain in accordance with the plans and specifications adopted by the by-law, and that the damages sustained by the plaintiff Murphy were occasioned by such default of the defendants and by the negligent, unskilful and wrongful manner which their engineer adopted of letting the work in several sections to different persons, and in not securing the completion of the several sections at one time, and in not taking care that the bottom of the drain should be constructed at one level throughout as required by the by-law. The consequence of this mode of procedure, according to the engineer's own evidence, was that one section having been constructed before others caused,

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as he says, that section to become out of repair and to be choked with silt and earth before others were dug down to their proper level. The engineer's contention was that the drain after its completion became naturally out of repair, but the learned judge has found, and the evidence abundantly supports his finding, that in point of fact the drain never was completed in accordance with the provisions of the by-law. The question, therefore, is not one of non-repair after completion but of non-completion, and section 583 of the chapter 184 of the acts of 1887 has no application in the present case at all. The learned judge has not accorded to the plaintiffs, the corporation of the township of Sombra, any sum by way of compensation for damage done to any of their roads, and indeed no evidence of any damage enabling the corporation to any such sum appears to me to have been adduced; but the learned judge has in and by his decree ordered and adjudged that the defendants should, within one year from the 23rd day of October, 1888, complete the drain to the width and depth and in the manner provided for by the plans and specifications upon which the work was undertaken, such depth being that indicated by the red line in the plan prepared by John H. Jones put in by the plaintiffs at the trial of the action and numbered exhibit 7, and with proper and sufficient outlets at both ends thereof to carry off all the water which enters the same from time to time. The learned judge in his said decree did further declare that the amount provided by the by-law for the completion of the drain, and which came to the hands of the defendants, was sufficient to complete the drain in accordance with the said plans and specifications, and would have completed the same but for the want of skill, negligence and unnecessary delay of the defendants in proceeding with and carrying out the work, and he therefore adjudged

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and decreed that the cost of the works necessary for the completion of the said drain should be defrayed by the defendants, and that they should not be at liberty to levy or assess the same or any part thereof as a special rate against the lands and roads by the said by-law assessed for the cost of the construction of the said drain. From this judgment the defendants in the action appealed to the Court of Appeal for Ontario. That court ordered and adjudged that such appeal should be allowed as to the relief granted to the plaintiffs, the township of Sombra, and that the action so far as it was the action of the plaintiffs the township of Sombra should be dismissed, and that as regarded the plaintiff Murphy the appeal should be and the same was dismissed with costs to be paid by the defendants the township of Chatham to the said Murphy. The effect of this judgment appears to have been to have left the whole of the decree of Mr. Justice Robertson, as well as to the mandamus as to the damages awarded to Murphy, to stand while the action in so far as the plaintiffs, the township of Sombra, were concerned was dismissed. From this judgment the municipaliy of the township of Sombra have appealed and their appeal is against the judgment of the Court of Appeal for Ontario dismissing the action. They never appealed against the judgment of Mr. Justice Robertson on the ground of his not having awarded them any pecuniary damages. The case was argued before us upon the ground that the judgment of the Court of Appeal for Ontario was erroneous as depriving the township of Sombra of the right to the mandamus awarded by the judgment of Mr. Justice Robertson as if that portion of his judgment had been rendered in their favor alone, for on the present appeal the township of Sombra did not claim any damages. None having been awarded them by the original decree

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from which they had never appealed they could not well have claimed any on the present appeal. A difficulty now arises attributable to the fact that the original judgment was single and given in a case wherein the two parties, the plaintiffs in the action, asserted totally distinct and independent claims for damages and a joint claim for mandamus. If on this appeal we should reverse the judgment of the Court of Appeal for Ontario dismissing the action of the plaintiffs the township of Sombra, upon the ground that no question as to their right to pecuniary damages was before us, and that it would be useless to adjudicate upon their right to the mandamus claimed because our judgment could not affect the plaintiff Murphy in whose favor, equally as in favor of plaintiffs the township of Sombra, the mandamus would seem to have been awarded by a literal construction of the original judgment, we should confirm the confusion and difficulty in which the case would seem to be. The better way therefore of getting over the difficulty would seem to me to be to entertain the case as it was argued before us, namely, that that judgment affirmed the original decree in favour of Murphy as to the damages awarded to him, treating the original judgment in his favour as limited to the question of damages, and the award of mandamus in the original decree as a judgment rendered in favour of the township of Sombra. I see no better way at present of getting over the difficulty, and so regarding the case I am of opinion that although the plaintiffs, the township of Sombra, were awarded no pecuniary damages by the original decree against which they have not appealed, they have a substantial interest in maintaining their right to the mandamus awarded by the original decree which entitles them to our judgment upon that question. It has been established by the

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original judgment in the case and, in my opinion, upon abundant evidence that the drainage work for constructing which the by-law was passed never was, in point of fact, completed as required by the by-law. The municipality of the township of Sombra were, and it is unnecessary to say that the plaintiff Murphy also was, entitled to an adjudication to that effect, and the township of Sombra, therefore, on this appeal are entitled to have the original judgment restored in so far as it awarded a mandamus or mandatory injunction requiring the municipality of the township of Chatham to complete the drain as orignally designed and in the manner required by the by-law. To that relief they are, in my opinion, entitled, wholly irrespective of section 583 of the Municipal Institutions Act, under the provisions of the Ontario Judicature Act, ch. 44 R. S. O. 1887. The original decree, however, further adjudged that the plaintiffs were entitled to a declaration that the work of completing the drain should be executed at the proper cost and charges of the defendants and not at the cost and charges of those of the ratepayers who had already, by special assessment, contributed funds sufficient to have completed it. This portion of the decree is based upon a declaration contained in the decree that the amount for which those parties were assessed was sufficient to complete the work as directed by the by-law. This declaration or finding of the learned judge who tried the case does not appear to me to have been warranted by the issues or the evidence thereon in the action. On the contrary, the fact that the original contractor for the work who had entered into a contract to complete the work as originally designed within the original estimates as required by the by-law abandoned his contract, and that the engineer could get no other contractor to undertake the work

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on like terms, and that the engineer felt himself compelled to proceed with the construction of the work in the imperfect and unauthorized manner in which it was proceeded with, can, I think, be explained only upon the assumption that the original estimate of the cost of the work was insufficient. Now, the only authority that I can see in the act for charging monies necessary to complete a drainage work undertaken under a by-law, and left in an unfinished state, upon the parties originally assessed for the work is under section 573 chapter 184 R. S. O., 1887, namely, in the case of the original assessment proving insufficient for that purpose. I do not think that the defendants should be precluded by a judgment rendered in the present case, as they might be if that portion of the original decree should be left to stand, from showing their right if they can to act under said section 573.

The original decree must also be varied now as to the time within which the defendants were required to do the work, and the defendants should be left unfettered as to any right they may have under the acts relating to drainage works to raise the funds necessary to complete the work. In so far as the mandamus is concerned the decree should simply direct a mandatory injunction to issue requiring the defendants to complete the drain to the width and depth and in the manner provided for by the plan and specifications adopted by the by-law upon which the said work was undertaken, or to provide some substitution therefor under the provisions of the statute in that behalf, reserving leave to the plaintiffs to apply to the court for such other relief as in case of neglect or delay, or otherwise upon the part of the defendants as occasion may require; the decree should be varied by striking out the paragraphs numbered 3 and 5 and being

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so varied the appeal should be allowed with costs and the decree of Mr. Justice Robertson affirmed.

PATTERSON J.—The learned judge who tried this action awarded to the plaintiff Murphy $150 damages, and ordered, on the prayer of the two plaintiffs, the municipality and Murphy, that the defendant municipality should proceed to complete the Whitebread drain.

The Court of Appeal reversed the latter part of the judgment leaving the award of damages undisturbed. The plaintiffs join in appealing to this court and ask to have the order for the completion of the drain restored.

There is room for difference of opinion as to whether the Court of Appeal was so clearly wrong in disallowing the order as to make it proper for us to interfere with the judgment of that court in view of all the circumstances of the case, but it is manifest that if the order of the trial judge is to be restored it must undergo important variations.

My brother Gwynne has, in his careful examination of the case, given reasons for expunging from the order all reference to the manner in which and the persons from whom the money to pay for the work ordered to be done is to be raised, leaving the council quite untrammelled by any direction from the court upon that point. I agree with that conclusion.

Then, considering that the duty to be enforced is only that which arose under the proceedings taken in 1880 and 1881 which resulted in the making of the by-law, we must be careful not to enlarge that duty by the order which we sanction. That would seem to be done, however, by the order of the High Court which after directing the completion of the drain "to the width and depth and in the manner provided for

by the plan and specifications upon which the work was undertaken," adds "and with proper and sufficient outlets at both ends thereof to carry off all the water which enters the same from time to time."

If the plan and specifications or the by-law provide for this well and good.

They speak for themselves and the amplification is unnecessary.

We cannot say and are not called upon judicially to decide that it is possible, having regard to the levels of the lands and rivers, to make outlets sufficient to carry off, by way of those rivers, all the water the drain was originally designed to carry off. Much less can we say so with respect to all the waters that may from time to time enter the drain. This excessive mandate must be corrected.

There is a complaint against the township of Sombra, pleaded by way of counter claim, for sending into the Whitebread drain by means of new drains in that township more water than the drain was originally intended to receive. I do not think there was any finding at the trial respecting the facts on which the complaint was founded, but we have in evidence a formal protest by the council of Chatham by resolution passed in May, 1887, on the subject, and there is also a report made by Mr. McGeorge, the engineer, in November, 1887, to the council of Chatham, stating that excessive quantities of water were being sent down from the higher township by numerous drains.

The order as it was made at the trial requires a sufficient outlet for all these waters and is in that respect entirely unwarranted.

For my own part I should prefer to leave the judgment of the Court of Appeal undisturbed, and to allow the appellants to work out their object by a regular

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notice to repair and proceedings upon it under section 583, or by any other machinery available under the statute. It may be true, and I assume in deference to the opinions of my learned brothers that it is true, that the drain was never completed in full accordance with the original design. That the evidence is capable of being differently understood has been shown in the court below, particularly by Mr. Justice Maclennan. But the council of Chatham having adopted, in January, 1887, the report of Mr. McGeorge, who certified that the work was complete, could not allege the non-completion of the work in bar of the application of section 583. "Repair," under that section, includes deepening or widening in order to fit a drain to do the work it was originally intended to do.

It is now more than eleven years since the work was initiated. The action was not commenced until nearly six years after the date first fixed for the completion of the work. If the work had been promptly completed it would, in the natural course of things, have required repair by this time, and all the more so if the additional waters from Sombra helped to injure the embankment and to silt up the waterway. To put the drain now into the state it should have been in ten or eleven years ago will combine repairing with construction. The order now in question is not a mandamus such as, in cases under section 583, becomes, under proper conditions, claimable as of right.

It is one that is more in the discretion of the court to grant or refuse in view of all the circumstances, and I cannot say that, under all the circumstances, the decision of the court ought to have been different.

The order as originally made, freeing the appellants from liability to special assessment, was obviously better worth insisting upon than when shorn of that feature and with the question of the assessment left at

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large. I am not sure that the appellants will be better off with the order in the shape it is now to take than if left to work out their object under such provisions of the statute as may apply to the case, nor am I entirely free from doubt as to the proprietry of bringing an action like the present, or quite prepared to hold, what the judgment seems to involve, that a council can be compelled to carry out, without alterations, the plans and specifications on which a drainage work may be launched. My doubt as to the propriety of proceeding by action is partly suggested by subsection 16 of section 569, which declares that the provisions of that section shall be deemed to extend to the re-execution or completion of any works which have been executed or have been partly or insufficiently executed under any provision of any act of the Legislature of Ontario (as this case was) or of the Parliament of the Province of Canada.

But while I should prefer to do as the Court of Appeal decided to do, and leave the appellants to such remedies as the act affords them, I am not so clear about those remedies as to feel warranted in formally dissenting from the judgment of the court.

The proceedings referred to in subsection 16 of section 569 would apparently be proceedings at the instance of the Chatham people, not those of Sombra, and so would the action, if any, taken under section 573 to raise more money for the completion of the drain. The amendment of section 583 by 52 Vic. ch. 36 s. 35 does not aid the appellants or give them any better remedy under that section, while, curiously enough, the duty of Chatham to maintain and repair the drain, which depends on section 583, does not seem beyond dispute. The drain is not in either of the municipalities but on the road between them. The right to make a ditch in that position is given, and

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the liability to pay for it is provided for, by section 596. Then, by section 597, the chain of sections from 569 to 632 apply, as far as applicable, to it; but the duty of any municipality, under section 583, to maintain is confined to works within its own limits.

I agree without any hesitation in the variations of the original order proposed by his lordship the Chief Justice, and I also concur, though with hesitation, in allowing the appeal.

The cross appeal against the damages awarded to Murphy should, I think, be dismissed.

Appeal allowed with costs.

Solicitors for appellants: *Gurd & Kittermaster.*

Solicitor for respondent: *Charles E. Pegley.*

THE BRITISH AMERICA ASSURANCE COMPANY (DEFENDANTS).. } APPELLANTS;

AND

WILLIAM LAW & CO. AND OTHERS (PLAINTIFFS)..... ..... } RESPONDENTS.

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*May 9.

*Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Subject of insurance—Insurance on advances—Wording of policy—Insurable interest.

A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co. do cause to be insured, lost or not lost, the sum of $2,000, *on advances*, upon the body, etc., of the Lizzie Perry. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which was not insurable.

Held, affirming the judgment of the court below, that the instrument must, if possible, be construed as valid and effectual and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiffs.

The action in this case was upon a policy of marine insurance which contained the following as the subject matter of the insurance: "William Law & Co., on account of owners, in case of loss to be paid to William Law & Co., do make insurance and cause to be insured, lost or not lost, the sum of two thousand dollars on advances upon the body, tackle, apparel and other

*PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C. J. was present at the argument but died before judgment was delivered.)

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furniture of the good barque Lizzie Perry, etc. The only question involved in the appeal was as to the nature of the insurance effected owing to the use of the words "on advances," the insured being the owners of the vessel and the object of the insurance being to cover monies expended by them. The trial judge gave judgment for the plaintiffs and his decision was affirmed by the judges of the full court being equally divided on an appeal to that court. The judgments against the company proceeded on the ground that the insurance was really on the ship itself.

Henry Q.C., for the appellants, referred to Lowndes on Insurance (1).

Borden Q.C. for the respondents, cited *Williams* v. *Roger Williams Insurance Co.* (2); *Insurance Co.* v. *Baring* (3); *Hooper* v. *Robinson* (4).

STRONG J.—This is an action upon a policy of marine assurance bearing date the 28th October, 1887, for the sum of $2,000 effected by the respondents with the appellants. The respondents were owners of the barque Lizzie Perry. The two first clauses of the policy are in the following words:—

William Law & Co., on account of owners in case of loss to be paid to William Law & Co. do make insurance and cause to be insured, lost or not lost, the sum of two thousand dollars on advances upon the body, tackle, apparel, and other furniture of the good barque Lizzie Perry, whereof ———————— is master for the present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be called.

Beginning the adventure upon the said vessel, tackle and apparel, at and from Port Eads to Buenos Ayres against the risk of total loss of vessel only.

(1) 2 ed. p. 19.
(2) 107 Mass. 377.
(3) 20 Wall. 159.
(4) 98 U.S.R. 528.

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The remainder of the policy, which is a printed form with the blanks filled in, is applicable to an insurance on the ship and on the ship only.

The vessel was totally lost on the voyage from Port Eads to Buenos Ayres.

The appellants by the 8th, 10th and 11th paragraphs of their statement of defence set up that the policy was not on the ship but on advances made by the insured (who were the owners) to the ship, and that such advances were not insurable and the policy was therefore void. The action was tried before Mr. Justice Meagher without a jury, who gave judgment for the respondents. Upon appeal to the Supreme Court in banc the learned judges who heard the appeal were equally divided in opinion. Weatherbe and Townshend JJ. agreed with Mr. Justice Meagher that the respondents were entitled to recover, whilst the Chief Justice and Mr. Justice Ritchie were of a contrary opinion. The appeal was therefore dismissed.

The difficulty in the construction of the policy is caused by the two words "on advances" in the first clause of the policy before set out. This is the only reference to "advances" contained in the policy. Each of the learned judges before whom the cause came in the courts below delivered a written judgment in which their different views are very ably presented. The majority, whose opinion prevailed, base their judgments on the argument that the words "on advances" when read in conjunction with the context and the rest of the policy and in the light of the surrounding circumstances as disclosed in the evidence, were so repugnant to the other parts of the instrument that they either ought to be rejected, or to be construed as indicating something different from their ordinary primary meaning. I am of opinion that this was the correct conclusion. The well established rule

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of construction applicable to all deeds and written instruments, and especially to policies of marine insurance which are mercantile deeds not prepared by lawyers, is that they should be so interpreted, if possible, as to be valid and effectual and not in such a way as to be void. An insurance upon advances made by the owners to their own ship would, of course, be a nullity, and such a policy would necessarily be void if strictly construed. What ever may be the terms used in mercantile bookkeeping and generally by commercial men it is, in a legal point of view, not merely inaccurate but absurd to speak of the owner of a ship making advances to his own chattel. Therefore, to construe this policy as the appellants invite us to do as an attempt to insure that which never was nor could be insurable, and which could never by itself give rise to an insurable interest, namely, as an insurance of money expended in repairing and refitting the vessel, would be to declare that the policy which the appellants granted, and for which the respondents paid a premium, was an instrument upon its face void *ab initio*. Before we can do this we must be sure that no way is open by which such a result can be avoided. I think there is really no difficulty in doing this. Throughout the subsequent part of the policy the insurance is treated as one upon the ship herself and not upon any special or limited interest in her. In the second clause, before set forth, it is expressly said that the "adventure," that is the insurance contract embodied in the policy, is "upon the said vessel, tackle and apparel, at and from Port Eads to Buenos Ayres against the risk of total loss of vessel only," and all the usual provisions contained in a voyage policy upon the vessel are to be found in the instrument. It is true that these clauses are in a printed

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form and that the words "on advances" are in writing, but I do not consider that this circumstance, which, no doubt, has weight in some questions of construction, is sufficient here to warrant us in treating the policy as absolutely void as it would be if it is to be considered as an insurance of advances only. Then there are two ways of avoiding such a result. First, we may, to use the words in which Mr. Justice Weatherbe has expressed himself in his clear and forcible judgment, say: "There is no such thing as advances by owners on their own ship and in the light of the circumstances shewn by the evidence the words 'on advances' may, if necessary, be expunged from the policy." Or we may read those words in a secondary way as mere immaterial words of reference to the inducement which led the owners to effect the insurance, as indicating that all they meant by those words was that having advanced or expended money upon the ship in repairing or refitting her they were, therefore, led to make the insurance in order that the enhancement in value of the vessel caused by such expenditure might be covered by insurance. By reading the words "on advances" as if in a parenthesis, there can, it appears to me, be no difficulty in adopting this construction. Or (and this is the view which I am inclined to think the more correct one) we may treat the policy as its language requires us to do as an insurance on the ship, and then read the words "on advances" as intended to indicate a special interest which the assured supposed they had entitling them to insure the ship, and not as limiting the insurance to the advances; read in this way they would be immaterial and irrelevant since their interest as owners of course entitled them to insure. If, however, none of these constructions were admissible, there would be no alternative, if we are to give effect to the rule *res magis valeat quam pereat* at all,

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but to reject the words in question altogether as being repugnant to the other parts of the policy and at variance with the clear intent of the parties to insure the ship and the ship only, which is apparent therefrom.

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

Since writing this judgment I have been referred to the case of *Providence Washington Insurance Co.* v. *Bowring* (1) decided in February last by the United States Circuit Court of Appeal for the second Circuit, in which the decision of the Supreme Court of Nova Scotia in the present case was cited. Judge Wallace, in his judgment in the case referred to, points out the distinction between the two cases; and the learned judge's concluding observations entirely confirm the opinion I have stated in the present judgment.

TASCHEREAU J. concurred.

GWYNNE J.—If the word "advances" as used in the policy be construed in the limited technical sense insisted upon by the learned counsel for the appellants then the policy was, in point of law, null and void from the beginning. We must impute to the parties knowledge of the law affecting the matter with which they were dealing, and it must follow as a necessary consequence that we must impute to them the intention, to the respondents to pay, and to the appellants to receive a sum of money by way of premium or consideration for the latter's entering into a contract of insurance with the former which both parties knew to be null and void. To avoid such a conclusion we must seek for some other explanation for the word "advances" being inserted in the policy than that in-

(1) 50 Fed. Rep. 613.

sisted upon by the appellants, and the question simply appears to be whether that suggested by the learned counsel for the respondent can be accepted, namely, that the relation of both parties to the contract was to insure the vessel on account of the owners as is expressed in the policy, but to the amount only of $2,000 as part of a larger amount paid by the respondents, who were part owners, for advances made by them in payment of repairs on the vessel, such amount being by the policy made payable to the respondents in case of loss. *Ut res magis valeat quam pereat.* I think we may accept this explanation and hold the policy to be a valid policy upon the vessel and that the word "advances" was used unadvisedly, unguardedly, and not at all with the intention of its being taken in the sense now insisted upon by the appellants for the purpose of making their contract void. The appeal must therefore be dismissed with costs.

PATTERSON J.—The appellant company has not, in my opinion, shown any good reason for disturbing the judgment of the court below. The construction which we are asked to put upon the policy would not bring it into accord with any precedent cited to us, or with any recognized meaning of the word "advances," as far as I can gather from the treatises on the subject of Marine Insurance, while it would be contrary to what the evidence satifies me was the real intention and understanding of the persons concerned in making the contract. The oral evidence is that of William Law alone, which I must say is expressed in several of his statements in terms that may seem to favour the contention of the appellants if the surrounding circumstances, and the facts appearing from documents and formal admissions, are not kept in view.

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The writers on insurance point out that the old printed form of policy which is adhered to by underwriters was framed for insurance on goods and on the hull, tackle, &c., of the ship, and that when freight, profits or other interests are to be insured they resort to the expedient of writing in the body, at the foot, or on the margin of the policy a statement of the real nature of the subject matter intended to be insured, (as *e.g.* "on profits," "on freight," "on bottomry," "on 100 bales of cotton marked, &c.") leaving the printed clause entirely unaltered. I take this language from Arnould on Marine Insurance (1), where it is added :

> The written words thus inserted in the body, margin, or at the foot of the policy apply indefinitely to the whole instrument, and are considered as controlling the sense of the general printed clause applicable to ship and goods, and narrowing it in point of construction to the particular species of interest whether "ship," "goods," "freight," "profits," &c., the name of which is so inserted.

This being so, we are not assisted in ascertaining the force of the words "on advances," in this policy by the circumstance to which Mr. Borden called attention that the word "advances" does not again occur, the ship alone being mentioned in the other clauses of the instrument.

A remark made by the learned Chief Justice in the court below to the effect that the words "advance" and "advances" are of frequent occurrence in insurance contracts, and have well defined meanings in insurance law, must, in my judgment, be taken with a slight qualification. I do not find the word used by itself as it is in this contract, though such an expression as "advances on freight" or "advances on bottomry" may now and then be found in insurance contracts, though when bottomry is insured it is more

(1) 5 ed. vol. 1 p. 239.

usual to find that term without the word "advances." The word "advances" in such situations as these is not ambiguous. It is obviously used in its ordinary meaning of money lent, and I find no authority for saying that in insurance contracts or with regard to insurance law it has any peculiar significance, or that it has the character of a technical term. The four cases noted by the learned Chief Justice certainly afford no such authority. In one of them in *Palmer* v. *Pratt* (1) the subject of the insurance was two bills of exchange. Another case *Briggs* v. *Merchant Traders Assn.* (2) related to salvage and general average, and another *Simonds* v. *Hodgson* (3) to an insurance on bottomry. In the fourth *Manfield* v. *Maitland* (4) the insurance was declared to be on a bill of exchange drawn by the master on the charterers. In none of the cases did the word "advances" occur in the policy. It is used in the discussion of the bills of exchange in the first case and in the fourth, the two bills in the first case having been given by the captain for money lent to him—or "advances"—to buy goods with, and the bill in the fourth case representing advances on freight. The cases are examples of discussion of the description of the subject of the insurance as written in the policy, but as explained by the details of the transaction. They do not in any more direct way touch the present questions.

We have to construe this policy in accordance with the rules applicable to written instruments in general.

"Such" said Lord Ellenborough in *Robertson* v. *French* (5) as apply to all other instruments apply equally to this, viz., that it is to be construed according to its sense and meaning; that the terms of it are to be understood in their plain, ordinary and popular acceptation, unless by the known usage of trade they have acquired some pecu-

(1) 2 Bing. 185.
(2) 13 Q. B. 167.
(3) 6 Bing. 114.
(4) 4 B. & Ald. 582.
(5) 4 East 135.

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liar and appropriate meaning, or unless the context evidently shows that they must, in the particular instance, and to effectuate the manifest intention of the parties, be understood in some other special and peculiar sense.

BY THE BRITISH AMERICA ASSURANCE COMPANY.

William Law & Co., on account of owners, in case of loss to be paid to William Law & Co., do make insurance, and cause to be insured, lost or not lost, the sum of two thousand dollars, *on advances* upon the body, tackle, apparel and other furniture of the good barque Lizzie Perry.

Here we have the words "on advances" in writing, and we have the printed words of the form "upon the body," etc. The term "on advances," by itself, is an incomplete expression and very indefinite. If read with the following words:

On advances upon the body, tackle, apparel and other furniture of the good barque Lizzie Perry—

it makes an intelligible sentence and imports a loan on the security of the ship which ought to create in the lender an insurable interest. There are reasons, however, for not so reading the document, and some of those reasons are furnished by the context. From the context it appears that the insurance is on account of the owners of the vessel, and is effected by William Law & Co., to whom, in case of loss, the insurance money is to be paid. We learn from other evidence that the persons trading under the firm of William Law & Co. were among the owners of the vessel and were the managing owners. We learn further that several owners had insurances on their respective shares in the vessel, amounting together to something over $20,000, and that Law & Co. had, on behalf of all the owners, expended $6,000 or thereabouts in connection with the vessel, the firm obtaining the money from the bank and being liable for it to the bank, but raising it, as Mr. Law says, "on the credit of the vessel and the owners" whatever the exact meaning of that may

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be. Four thousand dollars and upwards, out of the $6,000, was expended in repairs upon the vessel. The insurance of $2,000 was in respect of these moneys which are what the policy designates as "advances." The premium for that insurance was $40 and was contributed, or refunded to Law & Co., by all the owners ratably according to their proportionate interests in the vessel, the owners who had not previously insured their individual shares being interested with the others in this joint insurance and paying their share of the premium. They would, of course, be interested in the insurance money in case of loss in the proportion of their respective shares in the vessel, and in the meantime those shares were enhanced in value by the expenditure in the same ratio.

The word "advances" requiring, as we have seen, some added word to give it a definite meaning what can it reasonably be supposed to have in this instance conveyed to the underwriters? The owners on whose account the insurance is effected cannot have been understood to say that they have lent money which is to be repaid to them in money, as advances on freight by a stranger or a loan on bottomry is to be repaid.

In the cases referred to, such as *Palmer* v. *Pratt* (1), or *Manfield* v. *Maitland* (2), or others of that class, where a loan of money for purposes connected with a vessel or her cargo or freight was held not to create an insurable interest, that result followed from the loan resting on the personal credit of the borrower.

Here we have no lender or borrower, as we might have had if the bank that advanced the money to pay the disbursements had assumed to effect the insurance. We have simply the owners insuring their own property. The occurrence of the word "advances" may be accounted for by the history of the transaction. It

(1) 2 Bing 185. (2) 4 B. & Ald. 582.

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is not a well chosen word and does not serve any purpose in connection with the contract, yet it is not entirely inapt as a concise allusion to the reason for effecting this joint insurance by or for the owners who had not joined in the insurances previously effected. There is no legal or technical force in the word, nor is there a suggestion that the underwriters were misled by it, to require us to treat it as describing the subject of the insurance. On the other hand it is impossible to assign to it, when read with the context, any meaning which the underwriters can be supposed to have attached to it, and which, if not descriptive of an interest in the vessel, would describe any other subject of insurance.

I agree with the learned judges in the courts below who held that the insurance is upon the ship, and am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Henry, Harris & Henry.*

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

THE CHANDLER ELECTRIC COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

H. H. FULLER & CO. (PLAINTIFFS)....RESPONDENTS.

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*May 9, 10.

Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Action for damages—Use of engine—Discharge of steam—Nuisance—Contributory negligence.

The pipe from a condenser attached to a steam engine used in the manufacture of electricity passed through the floor of the premises and discharged the steam into a dock below some twenty feet from an adjoining warehouse into which the steam entered and damaged the contents. Notice was given to the electric company but the injury continued and an action was brought by the owners of the warehouse for damages.

Held, affirming the decision of the court below, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured were entitled to damages therefor more especially as the injury continued after notice to the company.

APPPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The plaintiffs are owners of a warehouse for storing ironware in the city of Halifax and had occupied the same premises for some twenty years. Early in 1889 the defendant company set up an electric light station in the premises adjoining the warehouse and began operating an engine in connection with the same. Attached to the engine was a condenser, the pipe from which passed through from the floor of defendants' premises and discharged into the dock below at a distance

* PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
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of some twenty feet from the warehouse. In March, 1889, plaintiffs' warehouse was discovered to be full of steam and complaint was made to the officials of defendants' company who stated that they were unable to understand how it could have been caused by their engine but took no steps to prevent its continuance. In May, 1889, a writ was issued by the plaintiffs, and the statement of claim filed charged negligence in the construction and working of defendants' engine, and claimed damages and an injunction. At the trial the amount of damages was agreed upon subject to the right to maintain an action. Judgment was given for the plaintiffs for the said amount, and the injunction asked for was granted. On appeal to the Supreme Court of Nova Scotia the judges were equally divided and the judgment of the trial judge was affirmed. The defendants appealed to this court.

F. H. Bell for the appellant. The action as framed is for negligence and no negligence has been proved. See remarks of Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (1); Beven on Negligence (2).

The court below has treated it as a nuisance though the action is not so brought. That defendants were not guilty of a nuisance see *Robinson* v. *Kilvert* (3); *Fletcher* v. *Rylands* (4); Thomson on Negligence (5); *Middlesex Co.* v. *McCue* (6); *Harrison* v. *Southwark & Vauxhall Water Co.* (7).

Defendants are not liable as they were acting in exercise of a statutory right. *Dixon* v. *Metropolitan Board of Works* (8); *Truman* v. *London Brighton, &c., Railway Co.* (9).

(1) 11 Ex. 784.
(2) P. 111.
(3) 41 Ch. D. 88.
(4) L. R. 3 H.L. 330.
(5) Vol. 1 p. 100.
(6) 149 Mass. 103.
(7) [1891] 2 Ch. 409.
(8) 7 Q.B.D. 418.
(9) 11 App. Cas. 45.

Newcombe for the respondents relied on *Fletcher* v. *Rylands* (1), and on the question of nuisance cited *Reinhardt* v. *Mentasti* (2).

Bell in reply referred to *Dunn* v. *The Birmingham Canal Co.* (3).

STRONG and GWYNNE JJ. concurred in the judgment of Mr. Justice Patterson.

TASCHEREAU J.—This appeal must be dismissed. The respondents' goods were undoubtedly injured as found at the trial, by steam or vapour, from the condenser used by the appellant company in the building adjoining the respondents' warehouse. The trial judge also found that this injury could have been prevented, and that the respondents were not guilty of contributory negligence. The appellants have infringed the maxim *sic utere tuo ut alieno ne lædas*. They have injuriously affected the respondents' property and violated that rule of law which will not permit any one, even on his own land, to do an act, lawful in itself, which yet, being done in that place, necessarily does damage to another.

PATTERSON J.—The defendants are liable upon a very simple principle. They did something which caused injury to the plaintiffs. It may be true, and doubtless is true, that the act was done on their own land, but its influence did not end there. The hot water poured from their machinery, in their own premises, was liable to flow elsewhere or to be carried elsewhere in the form of vapour, and in the form of vapour it injured the property of the plaintiffs. The defendants must, therefore, pay the damages.

(8) L.R. 3 H.L. 330. (9) 42 Ch. D. 685.
(10) L.R. 7 Q.B. 244.

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The law was thus laid down two centuries ago in *Lambert* v. *Bessey* (1).

> In all civil cases the law doth not so much regard the intent of the actor as the loss or damage of the party suffering ;.....for though a man doth a lawful thing, yet if damage do thereby befall another he shall answer for it if he could have avoided it.

The report illustrates these propositions by a number of instances in which a defendant had been held answerable for the consequences of an act done *ipso invito* or *casualiter et per infortunium et contra voluntatem suam*.

There are many modern decisions on this branch of the law which it might be instructive to examine in detail, including, of course, the important case of *Fletcher* v. *Rylands* (2), but I shall content myself with quoting a passage from the judgment of Mr. Justice Denman in *Humphries* v. *Cousins* (3) where the result as applicable to facts of the same character as those before us is accurately stated :

> The *primâ facie* right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. Moreover, this right of every occupier of land is an incident of possession, and does not depend on acts or omissions of other people ; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it. That these are the rights of an occupier of land appears to me to be established by the cases of *Smith* v. *Kenrick* (4) ; *Baird* v. *Williamson* (5) ; *Fletcher* v. *Rylands* (6) and the older authorities there referred to ; and the recent decision of *Broder* v. *Saillard* (7).

The facts to which this law was applied in *Humphries* v. *Cousins* (3) afforded stronger ground for argument for the defence than do the present facts, because the defendant there did not know of the existence under

(1) Sir T. Raym 422.
(2) 3 H. & C. 774 ; L. R. 1 Ex. 265 ; L. R. 3 H. L. 330.
(3) 2 C. P. D. 239, 243.
(4) 7 C. B. 515.
(5) 15 C. B. N. S. 376.
(6) 3 H. & C. 774 ; L. R. 1 Ex. 265 ; L. R. 3 H L. 330.
(7) 2 Ch. D. 692.

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his house of the part of the drain the defective condition of which permitted the escape of the sewage that found its way into the cellar of the plaintiff's adjoining house under which the same drain ran, and the judgment assumed that the defendant had not brought the sewage on to his premises. That feature of the case is discussed with reference to other authorities including *Lambert* v. *Bessey* (2) which I have already cited.

I understand the opinion of the learned judges in the court below who held that the plaintiffs were not entitled to retain their judgment to have turned to some extent on the facts, as apprehended by them, that the defendants discharged the hot water from their condenser in the ordinary way of using their machinery in their own building, and without reason to anticipate its doing injury to their neighbour. With great respect for those learned judges I am of opinion that adopting the findings of fact by the trial judge, as we must do, those findings being moreover in clear accordance with the evidence, the discussion of that legal question is rather irrelevant. The finding is that notice that injury was being done in fact, not merely that the tendency of the discharge was to injure the plaintiffs, was given to the defendants, and the greater part of the injury was done after that.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Pearson, Forbes & Covert.*

Solicitors for respondents: *Drysdale, Newcombe & McInnes.*

(2) Sir T. Raym 422.

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*May 11.
*Oct. 10.

LEANDER J. CROWE (DEFENDANT).....APPELLANT;

AND

ANNIE ADAMS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTA.

Title to goods—Married woman—Execution against husband—Replevin—Justification by sheriff—Married Woman's Property Act, R. S. N. S. 5th ser. ch. 74.

In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act (R. S. N. S. 5th ser. ch. 74) the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that A.'s right to the goods seized was acquired from her husband after marriage which would not make it her separate property under the act.

Held, reversing the judgment of the court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment; *Hannon* v. *McLean* (3 Can. S.C. R. 706) followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband which was a complete answer to the action.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The plaintiff was a married woman residing in the county of Colchester and the defendant was high sheriff of the county. The action was one of replevin to recover possession of goods seized by defendant on

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

execution against the plaintiff's husband, it being claimed that the goods were the separate property of the plaintiff. Evidence was given at the trial that plaintiff had filed a license with her husband's consent to carry on a separate business of farming, and that the husband had never interfered in said business and did not live with her. Also, that after marriage the husband had conveyed land to trustees to hold in trust for his wife, and that she had taken an assignment of a bill of sale of stock which her husband had given to one McMillan.

The jury found that the goods seized were not the separate property of the plaintiff, and that she had not carried on a separate business in respect to said goods. The trial judge set aside these findings and ordered judgment to be entered for the plaintiff, holding that the sheriff in order to justify the seizure was obliged to prove a valid judgment, and the judgment on which the execution issued was defective in varying from the pleadings by giving a different name to the defendant in the action. The full court affirmed the judgment of the trial judge and the defendant appealed to this court.

Newcombe for the appellant.

Borden Q.C. for the respondent.

STRONG J.—The appellant is sheriff of the county of Colchester, and he appeals against a judgment of the Supreme Court of Nova Scotia in a statutory action of replevin brought against him by the respondent Annie Adams. The appellant, under a writ of execution against the goods of Donald Adams purporting to be issued upon a judgment recovered by John McDougall, seized the goods which have been replevied in the action. The appellant, amongst other defences which need not be mentioned, pleaded that the goods seized

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were not the goods of the plaintiff and also justified under the writ of execution before mentioned. The trial of the action took place before Mr. Justice Ritchie and a jury. The appellant did not put in evidence the judgment upon which the writ purported upon its face to have been issued, namely, a judgment against Donald Adams. It was proved sufficiently to warrant the finding of the jury to that effect that Donald Adams, the execution debtor named in the writ of execution, was the respondent's husband. It is quite clear on authority that the sheriff sued in trespass or trover for taking or converting goods seized by him under an execution, can justify under the writ without showing the judgment (1). It is true that under the old forms of pleading, when the sheriff was made a defendant together with the execution creditor and the defendants joined in pleading, it was essential to show the judgment inasmuch as according to the old rules of common law pleading it was requisite that a plea should be good in its entirety, and the execution creditor could only justify under a judgment as well as an execution, but it was never doubted, so far as I know, that the sheriff sued alone might justify under a writ of *fieri facias*, and for obvious reasons it would have been unreasonable that the law should have been otherwise.

The only question in the cause is, therefore, that which has been dealt with in the very well reasoned judgment of Mr. Justice Townshend, viz., whether the goods seized by the appellant and which have been replevied in the present action were or were not the property of the execution debtor, the respondent's husband. *Primâ facie* goods in the actual possession of the wife of an execution debtor are the goods of the latter. It lies on the wife to show if she can that they

(1) *Hannon* v. *McLean*, 3 Can. S. C.R. 706. See also Churchill on Sheriffs 2 ed. p. 441.

are her separate property, that is her separate property under the statute law or under the doctrines of courts of equity as to the separate property of married women. It was argued by the learned counsel for the respondent that these chattels were equitable separate property. There is no evidence whatever of this from the deeds and documents in evidence. Then the jury by their findings, on evidence amply sufficient to warrant them, have negatived the facts upon which alone this property could have been separate property under the statutory law of Nova Scotia; they found, first that the property levied on was not nor was any part of it acquired by the plaintiff in any other way than from her husband, and secondly that this property was not obtained by the earnings of the plaintiff since 19th April, 1884, in any employment, occupation or trade carried on by her separately from her husband. The respondent is then a woman married before the 19th of April, 1884, who does not bring herself, as regards a title to the separate ownership of this property, within any of the provisions of the Married Woman's Property Act (N.S.) and therefore, as Mr. Justice Townshend has, I think rightly, held, the goods seized must, under the findings of the jury which were warranted by the evidence, be considered to belong to her husband the execution debtor. The appeal must consequently be allowed with costs and judgment entered for the appellant with costs in the Supreme Court of Nova Scotia.

TASCHEREAU J.—This appeal must, in my opinion, be allowed. I adopt Mr. Justice Townshend's reasoning in the court below. Proof of a judgment by the sheriff was unnecessary in this case, the plaintiff not having shown a title in herself apart from her husband. It is not necessary for a defendant to prove his

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plea of justification if the plaintiff has not proved an act which requires justification.

GWYNNE J.—I am also of opinion that this appeal should be allowed.

PATTERSON J.—The plaintiff is a married woman who carries on the business of farming at Wittenburg in Colchester County in Nova Scotia, and lives on the farm. She was married before the year 1884. Her husband does not make his home at the farm, but is occasionally there. The goods in question were in the plaintiff's possession on the farm and were in use for the purposes of the farm when the defendant, who is the sheriff of Colchester county, seized them.

These facts, which have not been formally found by the jury, I take from the evidence of the plaintiff herself. Other facts on which her evidence bears we must, as I apprehend, take from the findings of the jury.

The jury specifically found that the plaintiff's husband did not interfere in the management of the property and affairs at Wittenburg.

We have thus the fact that the plaintiff had an employment, occupation or trade which she carried on separately from her husband, and that therefore the provisions of the Married Woman's Property Act of Nova Scotia relating to a married woman's separate business, which provisions begin with section 52 of chapter 94 of the Revised Statutes, 5th series, apply to her. They do not, however, apply to the property now in question, because the jury find that no part of it was obtained by the plaintiff since the 19th day of April, 1884, in any employment, occupation or trade carried on by her separately from her husband.

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The jury further find that no part of the property seized was acquired by the plaintiff in any other way than from her husband.

We have therefore to regard the goods as having been acquired by the plaintiff from her husband after marriage, and to discuss her right of action from that point of view.

The goods being seized in her possession, and a married woman having power when carrying on a separate business, and also in some other circumstances, to hold personal property apart from her husband, she made a *primâ facie* title to the goods by showing her possession of them. Were it not for the statute under which these rights are given the possession of the wife would have been ascribed to the husband and would have been evidence of title in him, but as under the effect of the statute the possession is *primâ facie* evidence of property in the plaintiff the defendant has to meet the charge of wrongfully seizing the goods. For this purpose he relies in the first place on the fact found by the jury that the plaintiff's right to the goods, whatever it was, was acquired from her husband after marriage. That fact has been held by the learned judge who dissented in the court below to be a complete answer to the plaintiff's action. I think he is correct in that opinion. If the plaintiff has any title to these goods as her separate property she must derive it under the third section of the statute which reads thus:—

Sec. 3.—Every married woman who shall have married before the nineteenth day of April, A.D. 1884, without any marriage contract or settlement, shall and may from and after the said date, notwithstanding her coverture, 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 the possession of her husband, whether such real estate or personal property shall have belonged to her before marriage or

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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.

Patterson J.

That section gives separate rights in property acquired after marriage but only when acquired otherwise than from the husband. Property acquired from the husband is not touched but is left as at common law.

The same legislation is applied in sections 4 and 5 to women marrying after the 19th of April, 1884, both sections excluding property received from the husband during coverture, with the exception only of wearing apparel and other articles necessary for the personal use of the wife.

The act does not contain any provision like the first section of the English Married Women's Property Act, 1882, (1) which in general terms confers upon a married woman the capacity to hold real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee, though the effect of sections 3, 4 and 5 may be fully as wide as regards any property except that which is acquired by the wife from her husband.

On this ground I think the plaintiff has no right of action even if the defendant were, as against her husband, a trespasser.

But if section 3 could properly be read, as it seems to have been by the other members of the court below, as giving to the married woman power to acquire property from her husband with the two limi tions upon her ownership, viz., that the property should not be free from his debts or obligations contracted after the specified date or from his control or disposition without her consent, I should be clearly of opinion that the sheriff established his plea

(1) 45 & 46 V. c. 75.

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of justification. He seized under a *fi fa* issued, as the writ recited, upon a judgment against Donald Adams. The plaintiff says her husband is "Daniel" Adams, and the jury find as a fact that Donald Adams and Daniel Adams are one and the same person. This is found on ample evidence including some documents. Daniel or Donald would seem to be a rather illiterate man. His signature, by his mark against the name Donald Adams, appears to three papers, viz., two promissory notes made jointly with John McDougall, who joined in them as surety and paid them, and a conveyance of land in which the plaintiff joins. All three were drawn and witnessed by Mr. Urquhart, a justice of the peace, who gave his evidence at the trial and who wrote the name "Donald Adams" to each paper, knowing the man very well and thinking Donald his right name. Mr. Fraser, to whom the joint notes were given for money lent, and who had known Adams from the time he was a little boy, says he went by the name of Daniel and Donald and understood one as well as the other. Robert Adams, his brother, gave evidence to the same effect, and said that at home he was mostly called Dan, and was, as Robert understood, named after their uncle Donald Tulloch. The plaintiff herself, while she says that her husband's name is Daniel, shows also that when the sheriff's officer came asking for Donald she knew who was meant and answered accordingly that he was not there, her explanation being that he was "at home that day," meaning evidently at the place where he lived which was not on the farm where she lived. When she was recalled, apparently to prove that when the sheriff came to serve the writ of summons in McDougall's action she told him that her husband's name was Daniel, she made it clear that she was under no mistake as to the person who was sued. She knew it as well as her husband did when

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he filed his appearance as "Daniel Adams sued as Donald Adams."

There is no pretense of disputing, as a matter of fact, the identity of the man who borrowed the money from Fraser which McDougall had to pay, the man who was sued by McDougall and who, after appearing in the action suffered judgment by default, and the plaintiff's husband from whom she acquired the property that was taken in execution.

The learned judge who tried the action, while he felt himself bound to hold that the proof of the plea of justification was technically insufficient, was sensible of the hardship of which, under the circumstances, the defendant was entitled to complain. It is, in my judgment, a hardship that would be a reproach to our jurisprudence, and I think it may be avoided without straining any principle of evidence, though, if astuteness were called for, it should be exercised in favour of what is manifestly the justice of the case and against the formal objections by which that is opposed.

I am not disposed to admit without proof that Daniel and Donald are different names, but assuming them to be different I do not find it formally established that the man's name is not Donald. The evidence for its being Donald seems as strong as that on which it has been taken to be Daniel.

Suppose, however, that "Donald" is a misnomer, what then? In old times in England, and I suppose also in Nova Scotia, a defendant sued by a wrong name might have pleaded the misnomer in abatement; at a later period (under 3 & 4 Wm. IV., c. 42) he might have had the declaration amended at the expense of the plaintiff, and his remedy under the more elastic system of the present day is not less ample. Adams did nothing but file an appearance which acknowledged that he was the person sued by the name

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of Donald, and judgment proceeded against him by that name. The duty of the sheriff to execute the process issued upon that judgment is clear. It would be sufficient to refer for authority for this proposition to the one case of *Reeves* v. *Slater* (1), but I shall first notice two other cases which illustrate the difference between the consequence of misnomer in mesne process and in final process.

Cole v. *Hindson* (2) was a case of mesne process. Aquila Cole was summoned to appear in Chancery by a writ erroneously addressed to Richard Cole, and he did not appear. Thereupon a distringas was issued against Richard under which the goods of Aquila were distrained. Aquila brought this action of trespass for the seizure of his goods and recovered. Lord Kenyon C.J. said :

> The defendants were not justified in seizing the goods of Aquila Cole under a distringas against Richard Cole, and the averment in the plea that Aquila and Richard are the same person will not assist them, as they have not also averred that the plaintiff was known as well by one name as the other.

In the present case the man was known as well by the name of Donald as Daniel, so that, even if the seizure had been under a distringas and not a fi fa, the writ would have protected the sheriff, as far as the law in *Cole* v. *Hindson* (2) is concerned.

We have an early case of final process in *Crawford* v. *Satchwell* (3). The defendant there had omitted to plead the misnomer, and it was held that he might be taken in execution under a ca. sa. by the wrong name.

In *Reeves* v. *Slater* (1) the sheriff had a *fi fa* against John Stone Lundie, under which he seized the goods of John Stowe Lundie who was the person sued by the wrong name of John Stone Lundie, but he gave up

(1) 7 B. & C. 486. (2) 6 T. R. 234.
(3) 2 Str. 1218.

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the goods without selling them and returned the writ *nulla bona*. The action was for a false return. Lord Tenterden C.J. said:—

> The party himself having suffered judgment to be entered up against him by the name of John Stone Lundie, it was not for the sheriff to render that nugatory by refusing to execute the *fi fa* and he must be liable for the consequences of having done so.

These cases, which are among the earliest of a mass of cases on the subject of misnomer, show that the sheriff did what under long established principles it was his duty to do, notwithstanding that the real name of the debtor may have been Daniel while the *fi fa* recited a judgment against Donald and commanded him to take the goods of Donald.

But if section 3 can properly be read, as it seems to have been read by the learned judge who tried the action and by the majority of the court *in banc*, as giving the wife some property in the goods the justification was, in my opinion, sufficiently proved as against her.

The production of the *fi fa* would be sufficient proof as against the judgment debtor who could have set aside the writ if it were not warranted by a judgment. Now, if the wife takes any property under section 3 in goods acquired from her husband it is not "free from his debts and obligations contracted after such date and from his control and disposition without her consent." I am inclined to think that, by reason of these limitations, any seizure which would be good against the husband is good also against the wife. It was established by *White* v. *Morris* (1), which is a case of recognized authority and one in which previous decisions are fully discussed, that when a sheriff takes goods from the possession of an assignee under a deed alleged to be fraudulent as against creditors, the title

(1) 11 C. B. 1015.

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being good against every one but a creditor, he must prove a judgment in order to show that he represents a creditor against whom the deed is void, and that that is not sufficiently shown by the writ of *fi fa*; but that reasoning does not strike me as applicable to a title which, if it exists at all, is of such a shadowy character as to leave the goods subject to every debt and obligation of the husband contracted after a named date and to his control and disposition.

But I see no reason to doubt that the judgment was proved. The recital in the *fi fa* issued by the court is some evidence of a judgment though not of all the particulars concerning it; but there was also, as I understand, evidence of all the proceedings. The specially endorsed writ which was filed when judgment was entered was produced. Under Order XX., rule 1, the special endorsement constituted the statement of claim. The appearance was proved and the entry of judgment for default of defence under Order XXVII., rule 2, and in the form and manner provided by the statute. I think the objections supposed to exist had reference chiefly to the matter of misnomer which I have already disposed of.

I think the judgment of the court ought to have been to dismiss the action.

I have not overlooked the cross appeal of the plaintiff in the court below.

The appeal there was by the present appellant, and there was a cross appeal with respect to the findings of fact and the direction to the jury at the trial.

The appeal below was dismissed and the order made at the trial was varied in a matter of costs. The cross appeal was not otherwise dealt with, nor was it necessary formally to notice it inasmuch as the principal appeal was dismissed. In the opinions expressed in pronouncing judgment Mr. Justice Townshend was

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against the respondent on the matter of the cross appeal, and the Chief Justice, with whom Mr. Justice Graham concurred, confined his observations in effect to the other branch of the case. The respondent now renews his objections to the charge and to the findings of fact.

In my opinion we cannot interfere as he invites us to do. I find evidence, which I need not discuss in detail, that justifies the findings, and I see no sufficient reason for ordering a new trial.

I think the appeal should be allowed with costs, and the action dismissed with costs.

Appeal allowed with costs and action dismissed.

Solicitor for appellant: *Hector McInnes.*

Solicitor for respondent: *W. A. Lyons.*

A. & W. SMITH & CO. (PLAINTIFFS)..APPELLANTS; 1892

AND *May 11 12.
*Oct. 10.

GEORGE W. McLEAN (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bill of sale—Affidavit of bona fides—Adherence to statutory form—Description of grantor—R. S. N. S. 5th ser., c. 92, ss. 4 and 11.

The act in force in Nova Scotia relating to bills of sale (R. S. N. S. 5th ser. c. 92) requires by section 4 that every such instrument shall be accompanied by an affidavit by the grantor, and section 11 provides that the affidavit shall be, as nearly as may be, in the form given in schedules to the act. The form prescribed begins as follows: I, A. B., of....., in the County of..... (occupation) make oath and say. An affidavit accompanying a bill of sale having omitted to state the occupation of the grantor:

Held, per Strong, Gwynne and Patterson JJ. that as the affidavit referred in terms to the instrument itself, in which the occupation of the deponent was stated, the statute was complied with.

Per Taschereau J. The onus was upon the persons attacking the bill of sale to prove, by direct evidence, that the grantor had an occupation which they had failed to do.

The judgment of the Supreme Court of Nova Scotia was reversed.

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

The plaintiffs are merchants of the city of Halifax who took a bill of sale from one Cunningham, of Sable Island, Lunenburg Co., as security for a debt. The statute governing bills of sale, R. S. N. S. 5th ser. ch. 92, provides that such an instrument must be accompanied by an affidavit "as nearly as may be" in the form given in a schedule. The affidavit in this case conformed to the statute in every respect save one,

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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namely, that the occupation of the deponent was not given, the form in the schedule being "I, A. B., of ....., in the County of..... (occupation) make oath and say," etc. W. C. Silver & Co., of Halifax, judgment creditors of Cunningham, seized under execution goods covered by the bill of sale and the same were replevied by the plaintiffs. On the trial of the action of replevin judgment was given for plaintiffs, the trial judge holding that if the mortgagor had an occupation it was sufficiently stated in the bill of sale itself to which reference was made in the affidavit. The full court reversed this decision holding that the statute had not been complied with and that the affidavit was bad on the authority of *Archibald* v. *Hubley* (1). The plaintiffs appealed.

Whitman for the appellants. The onus is on the parties attacking the bill of sale to show that the mortgagor had an occupation. *Sutton* v. *Bath* (2).

The evidence shows that he had no occupation, *Trousdale* v. *Sheppard* (3); *Ex parte Chapman* (4); *Smith* v. *Cheese* (5).

The object of requiring a description is to identify the party and he is sufficiently identified in this bill of sale. See *Ex parte Wolfe* (6).

This act has been construed to mean that the occupation is only to be stated when there is one; *Cunningham* v. *Morse* (7); and it has been amended subject to such construction thus showing the intention of the legislature to approve of it. *Windham* v. *Chetwynd* (8.)

Silver for the respondent cited the following cases on the contention that the statute must be strictly

(1) 18 Can. S.C.R. 116.
(2) 3 H. & N. 382.
(3) 14 Ir. C.L.R. 370.
(4) 45 L. T. 268.
(5) 1 C.P.D.62.
(6) 44 L. T. 321.
(7) 20 N. S. Rep. 110.
(8) 1 Burr. 419.

complied with. *Pickard* v. *Bretz* (1); *Castle* v. *Downton* (2); *Allen* v. *Thompson* (3); *In re Lowenthal* (4).

As to burden of proof the learned counsel argued that *Sutton* v. *Bath* (5) and similar cases cited only put the onus on the attacking party when he claimed that a wrong description had been given but not when none was given.

STRONG and GWYNNE JJ. concurred in the judgment of Mr. Justice Patterson.

TASCHEREAU J.—I am of opinion, first, that the onus to allege and prove that the grantor of the bill of sale had an occupation was upon the defendant, now respondent; and secondly, that of such a fact direct evidence was required and not mere inferences from documents in the record.

I would allow the appeal.

PATTERSON J.—We may assume for the purpose of this case that the word "occupation," which appears in parenthesis or between brackets in the blank left in the form of affidavit given by the schedule of the statute, is meant to show that the deponent's occupation is to be stated in the affidavit, perhaps with some idea of identifying him with the grantor of the instrument to which the affidavit relates; but the facts of this case make it unnecessary at present to consider what would be the effect on the validity of the instrument of the grantor having no occupation, or of the omission to state his occupation, the blank being left unfilled, or, as might easily happen, some other equally apt description of the deponent being substituted. It

(1) 5 H. & N. 9.
(2) 5 C. P. D. 56.
(3) 2 Jur. N. S. 451.
(4) 9 Ch. App. 324.
(5) 3 H. & N. 382.

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Patterson J.

is, I think, correctly remarked by Mr. Justice Graham in the court below that it appears from the deed executed by the grantor that he had an occupation and was a trader. That is a reasonable inference of fact from the deed which the plaintiff claims under, and which in this particular is legitimate evidence against the plaintiff. But whatever the deed shows respecting the grantor the affidavit also shows respecting the deponent who swears that he is the same person as the grantor. By this reference to the deed the occupation is shown and the statute satisfied.

On this short ground I think the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellants: *Alfred Whitman.*

Solicitor for respondent: *Alfred E. Silver.*

HANNAH VAUGHAN AND CLARENCE AUBREY VAUGHAN, EXECUTRIX AND EXECUTOR OF HENRY VAUGHAN, DECEASED (DEFENDANTS) } APPELLANTS;

AND

EDWARD C. RICHARDSON AND JAMES M. BARNARD, JUNIOR, (PLAINTIFFS) } RESPONDENTS.

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*May 12, 13.
Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Ships and shipping — Disbursements — Freight — Bill of exchange — Guarantee—Misrepresentation—Pleading.

On a ship under charter being loaded it was found that a sum of £173 was due the charterer for the difference between the actual freight and that specified in the charter party and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £753 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection to request that the matter should stand over until the ship arrived at St. John where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges and also payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft and to an action on his said guarantee he pleaded payment and that he was induced to sign the same by fraud. By order of a judge the pleas of payment were struck out.

On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before udgment was delivered.)

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evidence by showing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him. It was admitted that if there had been any misrepresentation by the solicitors it was innocent misrepresentation only.

Held, affirming the decision of the court below, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that if available without plea it was not proved; that nothing could be gained by ordering another trial as, V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him.

Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship.

APPEAL from a decision of the Supreme Court of New Brunswick (1) refusing to set aside a judgment for the plaintiff and order a non-suit or new trial.

The following statement of the facts of the case is taken from the judgment of Mr. Justice Fraser in the court below:—

This is an action brought to recover from the defendant £173 9s. 1d. sterling, the difference of freight coming to the plaintiffs under the charter party of the ship Eurydice, of the burden of 1,247 tons register, of which the defendant was a part owner.

The charter party was made on the 13th October, 1881, between S. Vaughan & Co., agents for the owners of the ship, of the first part, and the plaintiffs, who were merchants at Savannah, doing business by the name and style of Richardson & Barnard, of the second part. The voyage was to be from Savannah to Liverpool, Havre or Bremen direct, as might be ordered on signing bills of lading. The parties of the second part agreed to pay the party of the first part for the charter or freight of the vessel during the voyage, the sum of

(1) 28 N. B. Rep. 364.

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thirty-five shillings per net register ton. The captain was to sign bills of lading at any rate of freight as and when presented on gross receipts without prejudice to the charter party, any difference between charter party and bills of lading to be adjusted at Savannah before the vessel sailed; if in vessel's favour, to be paid in cash at the current rate of exchange, less insurance, if in charterer's favour to be secured by captain's bill, payable ten days after arrival at the port of discharge; sufficient cash for ship's disbursements to be advanced by the charterers (if desired by master) at current rate of exchange at port of loading, charging $2\frac{1}{2}$ per cent commission, and current rate of insurance, to be secured by captain's bill, payable ten days after arrival at port of discharge.

The vessel was loaded at Savannah, and was ordered to go to Bremen or Bremerhaven.

The amount of the disbursements account was £753 5s. 4d. sterling, and the difference of freight coming to plaintiffs as charterers was made up and agreed upon at Savanah at £173 9s. 1d. sterling, the difference of freight being in their favour.

Robert M. Vaughan, the son of the defendant, had been sent by him to Savannah to look after the vessel, and had, it appeared, a full power of attorney to act for the defendant.

Instead of the account for disbursements and the difference of freight being secured by the captain's bills payable ten days after arrival at the port of discharge, by arrangement between Robert M. Vaughan and the plaintiffs, the captain gave two bills, of date the 20th March, 1882, on S. Vaughan & Co., of Liverpool, for the £753 5s. 4d. sterling, and £173 9s. 1d. sterling, respectively, and each payable sixty days after sight.

S. Vaughan & Co. were, as already stated, the agents who acted for the owners in the making of the charter

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party. Simon Vaughan of this firm was, as appeared by the evidence, a part owner of the vessel, and was managing owner of her down to the 12th June, 1882. S. Vaughan & Co. acted as defendant's agents at Liverpool and as agents for the ship, and did all the business connected with her.

The bill of exchange for £173 9s. 1d. sterling is in the words and figures following:—

SAVANNAH, GA., 20th March, 1882.

Exchange for £173 9s. 1d.

Payable in London.

Sixty days after sight of this first of exchange (second and third of same tenor and date unpaid) pay to the order of Richardson and Barnard one hundred and seventy-three pounds nine shillings one penny sterling, value received, for necessary difference in freight of my vessel at this port, for which, besides the responsibility of the owners, my vessel and freight are hereby hypothecated.

(Signed) W. W. SPRAGUE,
Master of ship "Eurydice."

To MESSRS. S. VAUGHAN & Co.,
Liverpool, Eng.

Accepted 5th April, 1882, payable at Messrs. Barnett, Hoares & Co., London, on the 7th June, 1882.
(Sgd.) S. VAUGHAN & Co.

The bill of exchange being accepted was duly protested for non-payment and being dishonoured notice of dishonour was, *inter alia*, given to the defendant on the 17th June, 1882, by the plaintiffs through their attorneys in this suit, Messrs. Seely & McMillan. The notice of dishonour was addressed to the defendant, as follows: "To Henry Vaughan, part owner and managing owner of the ship Eurydice."

The defendant who, all through these transactions, owned 20-64 shares of the ship, became managing owner on the 12th June, 1882.

The firm of S. Vaughan & Co. failed after the acceptance and before the maturity of the two bills.

Finding that the bills were about to be dishonoured the plaintiff, Richardson, came on to St. John and retained the firm of Seely & McMillan, of that city, attor-

neys-at-law, to give notice of dishonour of the bills to the defendant, and to collect the amount of them from him.

The notices of dishonour were given as already stated for the £173 9s. 1d. bill, and also for the disbursement bill, £753 5s. 4d.

The defendant upon receiving notice of dishonour of the bills sent his son, Lorenzo H. Vaughan, to Seely & McMillan who said they had the bills of exchange which had been protested for non-payment and that they were for disbursements, and asked him what arrangements would be made about the matter, when he said his father would like the matter held over until he could communicate with the other owners, and on that understanding an agreement was drawn up, taken by him to his father, signed by him and returned to Seely & McMillan.

The agreement is as follows:—

ST. JOHN, N.B., June 19th, 1882.

To Messrs. Seely & McMillan,

Attorneys for Richardson & Barnard:

Dear Sirs,—I ask you to delay proceeding on the captain's draft, ship Eurydice, for £753 5s. 4d until the vessel's arrival here, and on such arrival here, or in case of her loss or of any delay happening to her, I guarantee immediate payment of the said draft, with cost of protest, re-exchange, interest, and charges of sending notices.

And I also guarantee payment of a draft for £173 9s. 1d. drawn by the master of the same vessel, with above charges.

HENRY VAUGHAN.

Witness: L. H. VAUGHAN.

In one of the counts in the declaration this agreement is set out and the defendant is sought to be made liable on the £173 9s. 1d. sterling bill by virtue of the agreement.

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Application was made to Mr. Justice King to set aside certain of the pleas and his order made thereon was the subject of an application to the Supreme Court to rescind such order. *Richardson* v. *Vaughan* (1).

The ship Eurydice arrived in Saint John about the 1st August, 1882, and on that day the defendant paid the £753 5s. 4d. bill, but declined to pay the bill for £173 9s. 1d, saying to Mr. McMillan that he was consulting Mr. C. A. Palmer about it, and afterwards Mr. Palmer said he would accept service of a writ for defendant when this suit was commenced.

The principal objections to the right of the plaintiffs to maintain action were that what took place at Savannah, *i. e.*, the taking of the captain's draft, payable at 60 days after sight, instead of ten days after the arrival of the vessel at the port of discharge, as per the terms of the charter party, relieved the owners of the vessel from liability, and left the whole liability against the captain upon the draft; that there was no consideration for the defendant's alleged promise to pay in his letter to Seely & McMillan; that there was no evidence to show that the plaintiffs agreed to give time; that Seely & McMillan had no authority to make the agreement, and no assent of plaintiffs to the agreement to give time; that the direction of plaintiffs to the master to remit the whole of the freight to S. Vaughan & Co., and the remittance of the freight accordingly, amounted to payment; that there was improper rejection of evidence in refusing to allow a witness to state what S. Vaughan & Co. said to him as to the receipt of the freight, and misrepresentation by McMillan to Lorenzo Vaughan before the agreement of the 19th June was signed, in stating that both of the bills (the £173 9s. 1d. bill, as well as the £753 5s. 4d bill) were for disbursements.

(1) 24 N. B. Rep. 75.

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The trial of the action resulted in a verdict for the plaintiffs and a motion to set the same aside and order a non-suit or new trial was refused. The defendant having died in the meantime the action was revived in favour of his executors who appealed to the Supreme Court of Canada.

Barker Q.C. and *Palmer* Q.C. for the appellants. The defendant was prejudiced on his trial by the striking out of the pleas of payment. *Wallingford* v. *Mutual Society* (1).

On the merits the verdict was not justified by the evidence which proved misrepresentation.

Hazen and *Currey* for the respondents referred to *Harris* v. *Venables* (2); *Alliance Bank* v. *Brown* (3); *Callisher* v. *Bischoffsheim* (4).

STRONG J.—The facts are fully set forth in the judgment of Mr. Justice Fraser who tried the cause, and to this I refer for a statement of them.

It does not seem to be at all material to consider what was the effect of the agreement entered into by Robert Vaughan, as the agent of his father, with the respondents at Savannah, in pursuance of which the two bills, the payment of which was guaranteed by Henry Vaughan, were drawn by the captain on the firm of S. Vaughan & Co., of Liverpool, the larger one for disbursements for the ship and the smaller one, the recovery of which is sought in this action, for the difference between the chartered freight payable to the owners of the Eurydice and the freight to be received for the cargo at Bremerhaven.

I incline to think that S. Vaughan & Co. must be taken to have accepted this bill, not as owners of the ship but as agents of the respondents and for their ac-

(1) 5 App. Cas. 693.
(2) L. R. 7 Ex. 235.
(3) 10 Jur. N. S. 1121.
(4) L. R. 5 Q. B. 449.

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commodation. I do not, however, enter into any further consideration of this question for I agree with Mr. Justice Fraser that, even assuming Mr. Henry Vaughan not to have been liable at all for the payment of the bill for £173 9s. 1d. drawn against the difference of freight, he would still, though an entire stranger to that transaction, have been liable on the guarantee. This bill had been placed in the hands of Messrs. Seely & McMillan at St. John, the attorneys for the respondents, with instructions to collect it. Mr. Henry Vaughan, in order to obtain time and in consideration of delay which was in fact granted, gave the guarantee contained in his letter to Messrs. Seely & McMillan of the 19th June, 1882. There was clearly consideration for this guarantee, and conceding that Henry Vaughan was a mere surety he would therefore be liable upon it unless the appellants can show some good defence to the respondents' action.

It is contended that such a defence is made out. It is said that Mr. McMillan made a representation, not, it is conceded, intended to be fraudulent but which was untrue in fact, which induced Henry Vaughan to give the guarantee. The first question upon this head is: Has this defence been properly pleaded? The only plea upon the record which can be referred to as setting up this defence is that of fraud. It is, however, clear, as was admitted by the learned counsel for the appellants on the argument of the appeal, that no fraud, that is moral fraud such as the plea must be construed to allege, was proved. What, if anything, was proved was innocent misrepresentation on the part of Mr. McMillan in representing to Lorenzo Vaughan, the son of Mr. Henry Vaughan, that the smaller bill was drawn not against the difference of freight but, like the larger one, on account of disbursements for the ship. It would be necessary then, in

the first place, in order to let in this defence, to permit the appellants to add a plea to the record. This, in my opinion, ought not now to be done after the great delay which has taken place and at this stage of the litigation, especially as such an amendment does not seem to have been applied for at the trial. No doubt any misrepresentation on the part of the creditor or his agent which may mislead a surety and induce him to enter into a contract of suretyship constitutes a good defence provided it is properly pleaded. But not only has this defence not been pleaded but it does not appear from the evidence at the trial that it would be sustained in point of fact even if it were pleaded. Mr. Henry Vaughan in his evidence states that he knew that this bill for £173 9s. 1d. was not drawn for ship's disbursements but was drawn on account of freight, and that he signed the guarantee knowing and believing this. It is suggested that Mr. Vaughan, who has since died, was at the time of the trial, from age and infirmity, incapacitated from giving a reliable account of the circumstances under which he was induced to sign the guarantee, but should we grant a new trial his evidence must be read to the jury who in the face of it could hardly find otherwise than for the plaintiffs. Moreover, there is another circumstance mentioned in the following passage from the judgment of Mr. Justice Fraser which confirms Henry Vaughan's evidence in this respect. The learned judge says:

> If anything further were wanting to show that the defendant had previous to the agreement full knowledge that the smaller bill was for difference of freight it would be this, that Robert M. Vaughan in his evidence states that he sent from Savannah to the defendant at St. John the plaintiffs' letter relating to the remittance of the difference of freight to S. Vaughan & Co., and this letter would explain to him why the whole freight was to be remitted to S. Vaughan & Co.

Referring to the deposition of Mr. Robert M. Vaughan I find this statement of Mr. Justice Fraser

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as to the purport of his evidence entirely borne out. Mr. Robert M. Vaughan appears to have assented somewhat reluctantly to the proposition that the provision of the charter party as to payment of freight should be so far derogated from that the whole freight should be remitted to S. Vaughan & Co. at Liverpool, and that the captain should draw on that firm against it in favour of the respondents as the respondents desired, but that he at last did so on the understanding that a letter explaining the transaction should be given to him; that such a letter addressed to the captain of the vessel was accordingly written and signed by the respondents, and that this letter, which appears to have been lost, was given to him. And upon being asked by one of the learned counsel for the appellants: What was done with that letter? the witness answers: "It was sent to Mr. Henry Vaughan, St. John."

Further, it is by no means clear from the evidence of Mr. Lorenzo Vaughan, who says that it was to him that Mr. McMillan made the representation that this bill was on account of the ship's expenses, that he communicated such representation to his father.

Mr. Lorenzo Vaughan's evidence on this point is as follows:—"In answer to a letter received from them" Messrs. Seely & McMillan), "I called; they said they had the bills of exchange which had been protested for non-payment, and that they were for disbursements, and they asked me what arrangements would be made about the matter, and I said my father would like the matter held over until he could communicate with the other owners. On that understanding the agreement was drawn up and my father signed it and it was returned to them."

It is somewhat ambiguous from the statement of the witness whether he means to say that the agreement was signed by his father on the understanding referred

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to, or whether he is only then referring to the agreement being drawn up. Conceding, however, that Mr. Lorenzo Vaughan meant to say that his father did sign the guarantee on the understanding that the smaller bill was for disbursements and not for difference of freight he is directly contradicted by Mr. Henry Vaughan himself, who says in answer to his own counsel that his son when he came back from seeing Seely & McMillan told him (the defendant) what Seely & McMillan had told him (the son); and being further asked "what was it?" the defendant answered, "the large bill was for disbursements and the other for difference of freight. They chartered the ship."

In the face of this evidence already on record, from which it appears that the defendant admitted that he knew that the bill was for freight, a statement which derives confirmation from the evidence of Robert Vaughan as to his disposition of the letter to Captain Sprague before referred to, it would not, in my opinion, be proper to send the case down to another trial in order that the issue on this defence of misrepresentation, which is not at present upon the record, might be tried. More especially is this so when we find the only evidence in support of it at the former trial, that of Mr. Lorenzo Vaughan, contradicted and neutralized by that of the original defendant himself. With this evidence before them no jury could be expected to do otherwise than to find a verdict for the respondents.

The appeal must be dismissed with costs.

TASCHEREAU J.—No appeal lies, in my opinion, from the order striking out the 2nd, 3rd, 6th and 12th pleas, and did an appeal lie I would not interfere with the ruling of the court below on such a question. On the merits I am of opinion that there is no ground for directing a non-suit, or for disturbing the verdict en-

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tered for the plaintiffs. I have nothing to add to Mr. Justice Tuck's and Mr. Justice Fraser's opinions in the court below.

Taschereau J.

GWYNNE and PATTERSON JJ. concurred in the judgment of Mr. Justice Strong.

Appeal dismissed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitors for respondents: *Straton & Hazen.*

DEMILL BUCK AND FRANK M. BUCK (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM G. KNOWLTON (DEFENDANT) ..... } RESPONDENT.

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*May 31.

*Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract—Application for insurance—Agreement to forward—Evidence—Escrow.

B. wishing to insure his vessel the C. U. Chandler went to a firm of insurance brokers who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at $2,500 and the rate of premium was fixed at 11 p.c. K. refused to forward the application unless the valuation was raised to $3,000 or 12 p.c. premium was paid. This was not acceded to by the brokers but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost and four days after K. received a telegram from the attorney of the company at the head office as follows: "Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and returned at once; he did not show it to the brokers nor to B. nor inform them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy:

Held, affirming the judgment of the court below, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at $3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence.

Held, further, that as the property in the policy prepared at the head office and sent to K. never passed out of the company and was at

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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the most no more than an escrow in the hands of K., the agent, trover would not lie against K. for its conversion.

APPEAL from a decision of the Supreme Court of New Brunswick ordering, on motion of the defendant pursuant to leave reserved, a new trial on terms, or in default of the terms being agreed to a non-suit.

The facts of the case will sufficiently appear from the above head-note and the following judgments.

Palmer Q.C. for appellants.

McLeod Q.C. for respondent.

STRONG J.—The question is simply one of fact: Did the plaintiffs ever authorize Whittaker Bros. to accept such a policy as that they now seek to get the benefit of in this action?

Upon the evidence it is plain that they never did. The only policy which the plaintiffs authorized Whittakers to procure for them upon the C. U. Chandler was one for $800 on a valuation of $2,500 at a premium of 11 p.c., whilst that which they now claim to be entitled to is one insuring $800 on a valuation of $3,000 at 11 p.c., and consequently at a premium which the plaintiffs never authorized. If the insurance company had sued for the premium it is manifest that they could not possibly have recovered.

The plaintiffs had never, before the policy was recalled by the company, assented to the terms of such a policy and they cannot, therefore, now sue for a conversion of it treating it as their policy. The instrument was, at the most, never anything more than an escrow in the hands of the company's own agents.

As regards negligence on the part of the defendant, which is charged in the first count of the declaration, there never was any privity between the plaintiffs and the defendant. The Whittakers never had authority

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to constitute Knowlton a sub-agent, and they dealt with him as the agent of the insurance company and in that character only. Knowlton, consequently, never owed any duty to the plaintiffs and the charge of negligence, therefore, wholly fails on the evidence.

In my opinion the rule absolute for a non-suit in default of the plaintiffs complying with the terms on which a new trial was granted to him was a proper disposition of the case. This appeal must, therefore, be dismissed with costs.

TASCHEREAU J.—Upon the question of amendment, as upon the whole of the controversy, I adopt Mr Justice Tuck's reasoning in the court below. The appellants have not proved the averments of their declaration. The rule for a non-suit or for a new trial upon terms must stand. I would dismiss the appeal.

GWYNNE J.—The plaintiffs have wholly failed to maintain the allegations in their statement of claim which are made the foundation of this action. The first count is framed upon the allegation that the plaintiffs, at the request of the defendant, retained and employed the defendant to cause to be made an insurance upon a ship of the plaintiffs called the C. U. Chandler for reward to be paid to the defendant in that behalf, and that the defendant accepted and entered upon such retainer and employment but neglected to effect the insurance and that the ship was lost, to the plaintiffs' damage, etc. Now, the evidence shows that no such contract as that alleged was ever entered into by the defendant, that, in point of fact, the plaintiffs never did retain or employ the defendant to effect any insurance upon the ship in question nor did the defendant ever undertake so to do. On the contrary what the evidence shows is that the plaintiffs retained and

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employed certain insurance brokers, practising as such under the name of Whittaker Brothers, to effect an insurance for $800.00 on the vessel valued at $2500.00, at the rate of 11 per cent premium, and that Messrs. Whittaker sent their clerk to the defendant, who was the agent at St. John, New Brunswick, of the Portland Marine Insurance Company, whose head office and place of business was at the City of Portland, in the State of Maine, for the purpose of procuring the defendant as such agent of the said insurance company to forward the said application to the said company, and that the defendant refused to forward such application or any application unless the plaintiffs should accept a policy wherein the vessel should be valued at $3,000.00 at such premium of 11 per cent or would pay 12 per cent on a valuation of $2500.00. The clerk of Messrs. Whittaker being unable to concur in such an arrangement was instructed by the defendant to communicate with his principals, and the defendant never did forward the application as proposed by the Messrs. Whittaker on the plaintiffs' behalf nor did he ever undertake so to do. But what he did do appears to have been that in the expectation that the Messrs. Whittaker would arrange with the plaintiffs that they should concur in the defendant's suggestion, which, however, they never did, he made application to the Portland Marine Insurance Company for a policy for $800 on the plaintiffs' vessel, valued at $3,000 at 11 p.c. premium. The letter enclosing this application would seem not to have been mailed at St. John until Sunday the 7th October, 1888. Upon the 11th of October the defendant received from his company a telegram from Portland as follows :—

Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy. Please decline risk and return policy.

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In fact upon the 8th October, and before ever the policy could have been prepared, the vessel had become a total loss occasioned by a fire which had arisen from lime with which she was loaded. Upon the following day, the 12th October, the defendant received by mail the policy wherein the vessel was valued at $3,000, and which in obedience to the telegram received the day before he returned to his company. It is plain that upon this state of facts the plaintiffs cannot recover upon the first count in their statement of claim because no such contract as therein alleged, nor any contract, was entered into between the plaintiffs and the defendant whereby the latter undertook for reward or otherwise to procure a policy of insurance upon their ship for the plaintiffs; neither can the plaintiffs recover upon the 2nd count, which is for conversion by the defendant of a policy upon their ship the property of the plaintiffs, for the policy which was received by the defendant on the 12th of October, and was returned by him to his company, never had been applied for by the plaintiffs—nor had they ever agreed to accept such a policy. It is obvious, therefore, that it never had become the property of the plaintiffs, but still continued to be the property of the company in the hands of the defendant as their agent, and subject to their order and control. The appeal, therefore, must be dismissed with costs.

PATTERSON J.—The gist of the first count of the declaration, which is somewhat long, is that the plaintiffs, who are the present appellants, at the request of the defendant, the respondent, retained the defendant to effect for them a policy of marine insurance upon their ship; that the defendant neglected to effect the insurance; and that the vessel was lost by perils that were to have been insured against.

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The defendant lives at St. John and is the provincial correspondent of an association of marine underwriters doing business at Portland in Maine.

The plaintiffs desiring to effect an insurance of $800 on a ship, the C. U. Chandler, went to an insurance broker at St. John named Whittaker, and in his office signed an application for insurance, filling up the blank for the whole value of the vessel with the sum of $2,500.

Mr. Whittaker prepared another application, signing it with his own name, for insurance on the vessel in the name and on account of the plaintiffs, giving the same valuation of $2,500. He sent that application by a clerk to the defendant, and the defendant declined to forward it to the Portland association unless the valuation was put at $3,000, or, as he says, unless in the alternative the rate was made 12 per cent in place of 11 per cent. There is a conflict of evidence between the defendant on the one side and Whittaker and his clerk on the other as to whether the defendant went with the clerk, or went at all, immediately after receiving the application to Whittaker's office, but it is shown by Whittaker as well as by his clerk that the clerk informed Whittaker that the defendant required the valuation changed.

This all happened on Friday, the 5th of October, 1888. The vessel was then loading or loaded with lime at St. John. One of the plaintiffs had charge of her as master, and he gave charge of her to another master on Saturday evening, the vessel being then at anchor in the harbour of St. John. She was injured by a gale on Sunday, and early on Monday the 8th of October she was on fire from the sea water having got at the lime.

If nothing further had occurred than what I have mentioned how did the defendant incur any liability to the plaintiffs?

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The plaintiffs' case under the first count is based on the proposition that a contract existed between the plaintiffs and the defendant, a promise by the defendant to effect the insurance, or at all events to forward the application, being supported by a consideration arising from the compliance by the plaintiffs with the standing request made by the defendant to all insurers to send their applications through his hands. I do not for the moment touch the dispute concerning the form of the count.

This proposition may, in point of law, be sound or may be open to dispute, and it may or may not appear, on close examination, to apply to transactions of the class of that before us. We need not at this moment pronounce upon those questions. If the defendant declined to forward the application in the shape in which it was given to him it is impossible to infer a contract to forward it, or to effect a policy in the terms of it, from his being engaged in that line of business. That he did so decline is proved by the evidence given on the part of the plaintiffs by Whittaker's clerk and by Whittaker also who speaks of what the clerk told him. The defendant is distinct on the same point. There is the curious discrepancy as to whether the defendant was or was not at Whittaker's office and in communication at the particular time with Whittaker. But even if Whittaker and his clerk are correct in saying he was there then, nothing that they say took place displaces the evidence of the fact that he insisted on the change of valuation. The only thing that can be said to look in that direction is Whittaker's statement that he asked the defendant if he had received the application all right and that the defendant said he had. That is indefinite enough, and there is not a word of the defendant receding from his position about the valuation, or being spoken to on the subject by

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Whittaker to whom the clerk had reported what had been said, or of the subject being mentioned, although according to the clerk it was to speak of it the defendant went to Whittaker's office. On the contrary the evidence is that it was not spoken of.

I do not understand it to be contended that, apart from such a contract as might be inferred from the delivery to and acceptance by the defendant of an application for insurance, the defendant owed any duty to the plaintiffs. They could not insist on his acting on an application which he chose to say he would not act on.

The defendants sent an application to the underwriters association but it was not the one he received from Whittaker. It was a fresh one prepared by himself, putting the value of the vessel at $3,000. In place of sending it by Friday evening's mail, which would be delivered in Portland on Saturday afternoon, he seems to have omitted mailing his letter till Sunday evening. A policy was sent to him, but before he delivered it to the plaintiffs or to Whittaker it was recalled by telegraph, and was returned by him to Portland. That was no doubt because of the loss of the vessel which had taken place before the application had reached the Portland office.

The second count, which was added at the trial, is in trover for that policy.

I see no ground for differing from the majority of the court below with regard to that policy. It did not become the property of the plaintiffs. The application for it was unauthorized by them. They were not bound to accept it, and might have refused to do so if it had been offered to them.

For these reasons, and without entering into some other questions that have been discussed, I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitors for respondent: *E. & R. McLeod.*

JOHN McDOUGALL AND ROBERT COWANS AND EMILY A. BICKFORD AND OTHERS, EXECUTORS OF EDWARD OSCAR BICKFORD (DECEASED) (DEFENDANTS). } APPELLANTS;

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*June 17.
*Oct. 10.

AND

HECTOR CAMERON AND ROBERT SWANTON APPELBE (PLAINTIFFS) ..... } RESPONDENTS.

EMILY A. BICKFORD AND OTHERS EXECUTORS OF EDWARD OSCAR BICKFORD (DECEASED) (DEFENDANTS)..... } APPELLANTS.

AND

HECTOR CAMERON AND ROBERT SWANTON APPELBE (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitors—Action on bill of costs—Set-off—Mutual debts—Special services—Retainer—Appeal—Jurisdiction.

In an action by a firm of attorneys for costs due from clients the defendants were not allowed to set off against the plaintiffs' claim a sum paid by one of them to one of the solicitors for special services to be rendered by him there being no mutuality and the payment not being for the general services covered by the retainer to the firm.

Held, per Taschereau J.—A decision of the Court of Appeal affirming the judgment of the Divisional Court which refused to allow such set-off is not a final judgment from which an appeal will lie to the Supreme Court of Canada.

Strong J. also expressed doubt as to the jurisdiction.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court

*PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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by which the ruling of the master allowing the defendants' set-off was overruled.

The plaintiffs, Cameron & Appelbe, brought an action against the defendants, McDougall, Cowans and Bickford, and another action against Bickford alone, for bills of costs due from the respective defendants for services rendered by the plaintiffs as solicitors, attorneys and counsel, and a reference was made to a taxing officer for taxation of said bills. On such taxation evidence was taken before the taxing officer, who, in his report, found as follows:—

"I further find that the plaintiffs are bound to give credit to the defendant, Edward Oscar Bickford, for the sum of $4,000 received by the plaintiff, Hector Cameron, from the defendant, John McDougall, as set forth in the evidence of the said plaintiff, Hector Cameron, taken before me."

By the evidence referred to it appeared that the $4,000 was paid to Cameron under the following circumstances. The firm of solicitors were acting for all the defendants in negotiations for the sale of the Grand Junction Railway to the Grand Trunk Railway Company and the defendants having quarrelled Bickford declared he would not sell. McDougall thereupon said to Cameron that if he could get the agreement signed by Bickford and by Hickson, manager of the Grand Trunk, he, McDougall, would pay Cameron $4,000. Cameron performed the service of getting the agreement signed and received the $4,000, but it never went into the funds or accounts of his firm.

The plaintiffs appealed from the report of the taxing officer to the Divisional Court where the appeal was allowed and the defendants appealed to the Court of Appeal, pending which appeal Bickford made a settlement with Cameron by which he abandoned his right to the said sum of $4,000. The other defendants con-

tinued the appeal on their own behalf, and the Court of Appeal affirmed the judgment of the Divisional Court. The defendants then appealed to this court.

Riddell and *Nesbitt* for the appellants referred, on the question of the right to appeal which was raised by the court, to *O'Donohoe* v. *Beatty* (1), and on the merits to *Cooper* v. *Ewart* (2); *Russel* v. *Buchanan* (3).

Ritchie Q.C. for the respondents.

STRONG J. I have great doubts as to the jurisdiction of the court to entertain this appeal, but assuming that there is jurisdiction it appears to me that the judgment of the majority of the Court of Appeal was perfectly right and must be sustained for the reasons given by them.

The set off of the $4,000 paid by McDougall to Mr. Cameron was originally claimed, not by McDougall but by Bickford. Bickford afterwards abandoned all claim to it but the taxing officer having allowed the credit insisted on McDougall supported it, and now appeals in order to have it allowed to him.

In the first place McDougall seeks to set off in this action, brought to recover a debt for solicitors' costs alleged to be due to Messrs. Cameron and Appelbe jointly, a separate debt which he claims to be due to him from Cameron alone.

Unless we are to apply different principles as regards the law of set-off in an action by solicitors against a client to recover costs, a proposition for which no authority has been or could be quoted, it is very plain that the ordinary rule that a debtor cannot, when sued by joint creditors, set off a debt due to him by one of them, in other words, the rule that mutuality is of the essence of set off, must be conclusive against the appellants' contention. Upon that ground alone the appeal must be dismissed.

(1) 19 Can. S. C. R. 356. (2) 2 Phil. 362.
(3) 9 Sim. 167.

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I am of opinion, however, that the additional reason assigned by Mr. Justice Osler in his judgment, namely, that this was not a payment to Cameron on account of professional services generally, but a specific payment for a specific service rendered by him to McDougall, not as a partner in the firm of McDougall, Bickford & Cowans, but to him personally, in procuring the signature of the agreement by Mr. Hickson and Mr. Bickford, is also conclusive. McDougall has made no case showing that he is entitled to recover back the payment and could not on the facts have made any such case. Whether Bickford had any equity which he might have asserted in an action against Cameron in respect of this payment is a matter which we need not inquire into as he abandoned all claim to such relief, and as, moreover, such an equity would not in any case be the proper subject of inquiry in this action as a set-off or otherwise.

Upon both grounds the decision of the Court of Appeal must be upheld and this appeal dismissed with costs.

TASCHEREAU J.—The objection taken by the respondent against this appeal should, in my opinion, prevail. This is not an appeal from a final judgment. I would quash, no costs.

GWYNNE and PATTERSON JJ. concurred in the judgment of Mr. Justice Strong for dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants McDougall & Cowans: *Riddell, Armstrong & Nesbitt.*

Solicitors for appellants executors of E. O. Bickford: *Blake, Lash & Cassels.*

Solicitors for respondents: *Cameron & Spencer.*

THE WESTERN ASSURANCE COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE ONTARIO COAL COMPANY OF TORONTO (DEFENDANTS)..... } RESPONDENTS.

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*June 20,21.

*Oct. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Marine insurance—General average—Insurance on hull—Cost of saving cargo—Average bond.

A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given to the underwriters on the hull. The cargo was not insured. The owners of the cargo offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the said loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the province in similar cases by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond to recover this amount:

Held, affirming the decision of the Court of Appeal, that the owners of the cargo were only liable, under the bond, to pay such amount as would be legally due according to the principles of the law relating to general average; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average; that the money expended, beyond what was the actual cost of the salvage of the cargo saved, was in no sense expended for the benefit of the cargo owners; and the defendants having paid into court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's

PRESENT.—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

(1) 19 Ont. App. R. 41.

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Bench Division (1) which also affirmed the decision of Boyd C. (2) in favour of the defendants.

The claim in question arose under the following circumstances:—

The plaintiffs were insurers of the schooner Gleniffer, which was stranded in the Humber Bay, a few miles from Toronto, on 27th November, 1889, whilst attempting to make the port of Toronto, bound from the port of Oswego, and laden with a cargo of coal belonging to the defendants, which was uninsured, and she was abandoned by her master and crew.

On the morning of the 28th November the owner of the vessel—one Matthews—called upon Mr. Kenny, the managing director of the appellant company, and notified him of the loss, and either on that or the following day he gave written notice of abandonment to the underwriters.

Mr. Kenny without delay secured the services of Captain Donnelly an experienced and successful wrecker, who visited the vessel at the earliest opportunity and who, after consideration, advised that the best course to take was to make an attempt to save both vessel and cargo.

The plaintiffs also secured by telegram, and with the utmost possible despatch, a wrecking expedition from Port Colborne, which was on the spot as soon as the exigencies of the weather would permit.

Owing to stress of weather the wrecking expedition was not able to commence work until 2nd December, on which day the defendants gave notice to the plaintiffs to the effect that unless the latter would commence and continue delivering the coal in question on or before the 4th December, the defendants would proceed to unload the same, and would look to the

(1) 20 O. R. 295. (2) 19 O. R. 462.

underwriters for any damage suffered by reason of delay.

On the following day, and before any of the coal was delivered, the plaintiffs and defendants executed an average bond which, after setting out the loss of the vessel, contained the following covenant:—

Now we, the subscribers, being owners, shippers or consignees, or the agents or attorneys of owners, shippers or consignees, of said vessel or cargo, or underwriters on said vessel, cargo or freight, do hereby, for ourselves, our executors and administrators, and our principals, severally and respectively, but not jointly, nor one for the other, covenant and agree to and with each other, and also separately to and with the owners and underwriters of the said schooner Gleniffer, that the loss and damage aforesaid, and such other incidental expenses thereon as shall be made to appear to be due from us, the subscribers to these presents, or our principals, either as owners, shippers or consignees of said vessel or cargo, or as underwriters upon said vessel, cargo or freight, shall be paid by us respectively, according to our parts or shares in the said vessel, her earnings as freight, and her said cargo, or our interest therein, or responsibility therefor, and that such losses and expenses be stated and apportioned in accordance with the established usage and laws of this province in similar cases, by Captain Robert Thomas, Adjuster of Marine Losses.

This bond was signed by their manager for the appellant company and the respondent company as owners of the cargo.

After the execution of the said bond coal to the extent of $578\frac{900}{2000}$ tons were removed from the vessel and delivered to the respondents, and attempts were made to save the vessel but without success, and she was accordingly abandoned. Only a small portion of the material was saved.

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After the expenditure had been incurred the matter was placed in the hands of Captain Robert Thomas for adjustment, and the total expenditure as found by him was $2,551.98, which was apportioned as follows :—

To the appellants, as the owners of the material saved.	$ 237 53
To respondents, as the owners of the cargo, the sum of.....	2,314 45
	$2,551 98

The claim of the plaintiffs is for the amount apportioned against the defendant company, viz., the said sum of $2,314.45 and interest thereon, the whole expenditure, as is admitted, having been paid by the plaintiffs.

The defendants, without admitting liability, paid into court $557.98, which they alleged to be the amount for which they could have procured the delivery of the coal saved from the vessel to their docks in Toronto. The plaintiffs declined to accept it.

The action was tried before the Chancellor of Ontario, by whom it was dismissed and the money in court was directed to be paid to the plaintiffs. This decision was affirmed by the Divisional Court and the Court of Appeal.

Osler Q. C. and *Chrysler* Q.C. for the appellants. This loss was the subject of general average. *Kemp* v. *Halliday* (1); *Svensden* v. *Wallace* (2); *Job* v. *Langton* (3); *Moran* v. *Jones* (4); *Grover* v. *Bullock* (5).

The vessel and cargo were in a common danger and the expenditure was made for the preservation of both. The case is therefore within the rule laid down by Brett M. R. in *Svensden* v. *Wallace* (2); see also

(1) 6 B. &. S. 723.
(2) 13 Q.B.D. 69.
(3) 6 E. & B. 779.
(4) 7 E. & B. 523.
(5) 5 U.C.Q.B. 297.

Walthew v. *Mavrojani* (1); *Nelson* v. *Belmont* (2). Lowndes on General Average (3), under the head of "Complex Salvage Operations," where the cases are collected.

Delamare Q.C. for the respondents cited *Kemp* v. *Halliday* (4); *Gerow* v. *British American Assurance Co.* (5); *Dancey* v. *Burns* (6); *Anderson* v. *Ocean SS. Co.* (7).

STRONG J.—The average bond sued upon must, I think, be construed, as all the three courts below have construed it, as an obligation to pay such sums as should be legally due according to the principles of the law relating to general average. The question, therefore, is whether beyond the amount paid into court anything is shown to have been due by the respondents in respect of general average.

It seems very clear, as has been successively held by the learned Chancellor who tried the cause, and by the unanimous judgments of the Queen's Bench Division and the Court of Appeal, that nothing was properly due from the respondents.

In the first place the coal which formed the schooner's cargo and the vessel herself were never in that common peril which is the very foundation of the right to claim for general average. The money expended, beyond what was the actual cost of the salvage of the coal saved and which is covered by the money paid into court, was in no sense expended for the benefit of the cargo owners. The respondents offered to discharge their coal themselves at their own expense, but the underwriters refused this and insisted upon keeping

(1) L. R. 5. Ex. 116.
(2) 21 N. Y. 36.
(3) 4 ed. p. 157.
(4) 6 B. & S. 723.
(5) 16 Can. S.C.R. 524.
(6) 31 U.C.C.P. 313.
(7) 10 App. Cas. 107.

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the coal on board. This they clearly had no right to do.

The case of *Kemp* v. *Halliday* (1) is a conclusive authority in favour of the respondents. In that case Mr. Justice Blackburn says :

> I do not mean to say that in every case where a ship with a cargo is submerged and the two are in fact raised together by one operation the expenditure must necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so ; and if the cargo could be easily and cheaply taken out of the ship and saved by itself it would not be proper to charge it to any portion of the joint operation which in that case would not be incurred for the preservation of the cargo.

It is abundantly proved in the present case that the coal could have been more cheaply saved by itself, as the respondents proposed it should be, than by the expensive and risky operations necessary to save the schooner, operations which, moreover, proved fruitless as regards the vessel. The case of *Kemp* v. *Halliday* was on appeal affirmed by the Exchequer Chamber (2).

In *Job* v. *Langton* (3) the Court of Queen's Bench had previously pronounced a similar decision ; and in *Walthew* v. *Mavrojani* (4), the Court of Exchequer Chamber approved of the decision of *Job* v. *Langton* (3).

Mr. Carver in his work on Carriage by Sea (5) thus states the law as settled by the decided cases :

> If for example a ship is sunk with her cargo and the whole is raised together at an expense which, if made good by general average contributions, would throw a burden on the cargo greater than the cost of saving it separately, the whole expense ought not to be so treated.

And again (6) the same learned writer says :

> The burden thrown on the cargo must not be greater than the expense of saving it by itself.

The amount paid into court is ample to cover the cost which would have been actually incurred in sav-

(1) 6 B. & S. 723.
(2) L.R. 1 Q.B. 520.
(3) 6 E. & B. 779.
(4) L. R. 5 Ex. 116.
(5) 2 ed. p. 396.
(6) At page 397.

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ing the cargo by itself, and if the above authorities are law, which there is no reason to doubt, that is the utmost amount for which the respondents could be made liable, which is conclusive of the case in their favour.

The appeal must be dismissed with costs.

TASCHEREAU J.—I would dismiss this appeal. Chief Justice Hagarty's judgment in the Court of Appeal seems to me unanswerable.

GWYNNE J.—The true construction of the agreement, in my opinion, is that the respondents would pay to the appellants whatever amount, when settled by Capt. Thomas in accordance with the law of the province, should be found to be due by them for general average on their cargo. If nothing was so due, and clearly under the circumstances nothing was, nothing was recoverable under the bond The appeal must therefore be dismissed.

PATTERSON J.—Concurred.

Appeal dismissed with costs.

Solicitors for appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondents: *Urquhart & Urquhart.*

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*June 21, 22.

*Oct. 10.

MARY HARRIS (DEFENDANT).....APPELLANT;

AND

FRANCIS ROBINSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Specific performance—Time for completion—Extension—Rescission—Conduct of party seeking relief—Laches.

The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the person seeking relief.

H. and R. agreed to exchange land and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days if possible. R. at the time had no title to the property he was to transfer but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void.

Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him, and that the lands were subject to an annuity; R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange.

Held, reversing the judgment of the Court of Appeal, Taschereau J. dissenting, that the action could not be maintained; that R. not having

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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title when the agreement was made H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that even if there had been no rescission the conduct of R. in relation to the completion of the contract was such as to disentitle him to relief by way of specific performance.

Held, also, affirming in this respect the judgment of the courts below, that time was originally of the essence of the contract, but there was a waiver by H. of a compliance with the provision as to time by entering into negotiations as to the title after its expiration.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming, by an equal division of the judges, the judgment of the Divisional Court (2) by which the judgment for defendants at the trial was reversed.

The material facts are set out in the above head-note and in the judgment of the court.

Reeve Q.C. for appellant referred to Dart on Vendors and Purchasers (3) and Fry on Specific Performance (4).

Hodgins and *Coatsworth* for the respondent. As to waiver see *Salisbury* v. *Hatcher* (5) and *Hoggart* v. *Scott* (6).

Plaintiff was entitled to reasonable notice of rescission. *Green* v. *Sevin* (7); *Murrell* v. *Goodyear* (8).

As to right of plaintiff to specific performance see *Hall* v. *Warren* (9).

The judgment of the majority of the court was delivered by

STRONG J.—On the 1st of August, 1888, the appellant and respondent entered into an agreement for the exchange of certain landed property and houses in the

(1) 19 Ont. App. R. 134.
(2) 21 O. R. 43.
(3) 6 ed. p. 482.
(4) 2 ed. ss. 1070 & 1072.
(5) 2 Y. & C. 54.
(6) 1 Russ. & Mylne 293.
(7) 13 Ch. D. 589.
(8) 1 DeG. F. & J. 432.
(9) 9 Ves. 605.

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city of Toronto. By this agreement the appellant was to convey to the respondent seven lots situate in Dupont and Kendal avenues, subject to a mortgage for $4,375, and the respondent was to convey to the appellant two houses on George street, and in addition to give the appellant a mortgage for $1,000 on the avenue lots and to pay to the appellant $175 in cash. This agreement was in writing in the form of an offer or proposal signed by the appellant, to which was subjoined an acceptance signed by the respondent.

At the date of the contract the title to the property in George street which was to be conveyed by the respondent was as follows:—The legal estate in fee was vested in Mr. W. G. Schreiber who, by a contract dated the 1st of November, 1884, had agreed to sell the same to one Frank Simpson for the sum of $3,400, payable in certain instalments which need not be particularly specified. Part of the purchase money, amounting to $799, was to be paid by instalments before conveyance, and the residue was to be secured by a mortgage also payable by instalments. At the date of the agreement between the appellant and respondent $499 of these instalments had become due, and it does not appear whether at that time they had been paid by Simpson or not.

On the 26th of June, 1888, Simpson signed the following offer in the form of a letter of that date addressed to the respondent Francis Robinson:—

> I hereby offer to sell you the lands and premises lots 95 and 97 east side George street, Toronto, for the sum of $5,000 payable in cash on completion of the title, and give you the refusal thereof for 30 days from this date.

There is no evidence in the case showing that this offer was accepted by the respondent within the thirty days limited for its acceptance. Caston in his evidence says it was accepted in writing, and when asked "have

you got that acceptance?" answers "it was forwarded," meaning, of course, forwarded to Simpson. The written acceptance was not, however, produced, and there is nothing to show, what was essential to make out a contract, that it was accepted within the time limited. In connection with this part of the case there is an important piece of evidence in the deposition of Mr. Henderson, who acted as the appellant's solicitor in carrying out the agreement. It is contained in the following extract :—

Q. Didn't Caston tell you he had an agreement with Simpson? A. No ; I didn't understand that he had an agreement with Simpson.

Q. He had a contract of some kind? A. He claimed it was a contract.

Q. And that Simpson was entitled to a deed from Schreiber? A. So he stated.

Q. It is not an unusual thing that there should not be a deed registered? A. There are transactions of that kind.

Q. You would not have regarded that at all as serious? A. If he produced the agreement; he gave me to understand he could not produce.

Simpson's father (Francis Simpson) being called as a witness for the respondent in reply does not prove an acceptance within the 30 days. What he says about it is contained in the following extract from his deposition :—

Q. You instructed counsel that no agreement had been signed with Caston? A. Yes, until I understood differently. I understood the contract to be only to allow 30 days to sell it; I understood it voided the agreement if the sale did not take place within 30 days, and then of course it fell through; that is the way I understood it. Afterwards I went to Caston and I saw the original agreement, and, of course, as it was my signature for my son I must agree to it.

Q. That was just before the judgment was pronounced? A. It was at Caston's, some time before that.

Q. You came to my office with Miller? A. That was some time afterwards?

Q. You made an affidavit in this case at the request of Harris? A. Yes ; but I want it understood that I made it before I understood that

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that contract was binding; we had no solicitor up to the time the writ was issued against us.

His Lordship—You thought if he could sell it within 30 days it was binding? A. Yes.

His Lordship—If he could not sell it, it fell through? A. Yes.

Q. You did not discover that was binding till shortly before the judgment was delivered against your son? A. No; then I was informed by my solicitor.

Q. Up to that time your son was refusing to carry out the contract? A. We refused to carry it out or had not done so; that was the way we refused.

Up to the time of the trial of this action on the 16th September, 1889, nothing had been paid by Robinson to Simpson on account of the purchase money payable under his contract.

Simpson, the father, speaks positively as to this. His evidence is as follows:—

His Lordship—They had not given you $5,000? A. No.

His Lordship—Have they offered it since? A. No; I am pretty sure they have not; it has not been paid yet.

Q. You would not know if it had been paid? A. Yes; they promised to do so.

His Lordship—It still stands in the same position? A. Yes.

Mr. Henderson, a solicitor, having been employed to examine the title on behalf of the appellant, raised two objections: First, that the contract which formed Simpson's title had not been registered; and secondly, that there appeared on the registry to be an annuity or rent charge which formed an incumbrance upon the lands having been granted by one Perry in favour of Sir William Campbell when Perry purchased from Campbell as part security for payment of the purchase money on that sale. These objections having been taken at the outset nothing whatever seems to have been done by the respondent towards removing them up to the 19th of November, on which day, as will be hereafter shown, notice of rescission was given on behalf of the appellant. In the interval nothing, so far as appears, was done by the respondent towards

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the removal of the difficulties. There were interviews and correspondence, but Caston does not show that he was at all active in endeavouring to surmount the objections to the title. As to the annuity he said "he had been trying to see those parties but could not find out who the man was." There is no evidence that he offered compensation for the annuity. He did, however, offer to give indemnity by a mortgage upon lands at Ingersoll which were subject to an overdue mortgage containing a power of sale. The evidence of Mr. Henderson appears to have been satisfactory to the learned Chief Justice of the Queen's Bench who tried the action. It is as follows:—

Q. Was there any other objection? A. There was an objection as to an annuity.

Q. What position did Caston take respecting the annuity objection? A. He said he would inquire into it, and endeavour to clear it up; he said it was the first he heard of it.

Q. Did you report the objections to Harris? A. Yes; Caston called at the office two or three times on the subject.

Q. Did he remove these objections? A. Never to my knowledge.

Q. What became of the matter, so far as you are concerned? A. He came in, and I met him upon the street once or twice, and he always told me he was endeavouring to get things into shape. He was in my office once or twice; he and Harris came in one morning and I said there was no use fooling away more time. He claimed there would be no difficulty in getting his title; he seemed to think that was a matter of very small moment at the time. I told him there was no use considering the matter till he had that settled. He said his client's title rested upon agreements. I asked him if he could produce copies of them; he could not even do that. I told him it was no use fooling about the matter; that I did not want to hear any more about it; that I was simply asked to report upon the title, and it seemed to me like a farce.

The evidence may therefore be summed up by saying that it is proved that two objections having been taken, the first as to the annuity and the second that neither the contract between Schreiber and Simpson nor that between Simpson and Robinson was regis-

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tered or produced, the respondent took no steps to remove the first objection and declared his inability to produce even an agreement which formed his own immediate title. In this state of things L. G. Harris, the appellant's son who acted for her in the matter, on the 19th November, 1888, wrote to Mr. Caston, as solicitor for the respondent, the following letter :—

TORONTO, November 19, 1888.

MR. CASTON.

Dear Sir,—Unless something definite is done *re* our "exchange" (of the day) we will have to call it null and void after to-morrow a.m. They have all been here to-day and say they are disgusted, so please, Mr. Caston, come over in the morning first thing and see what we can do.

Yours truly,
L. G. HARRIS.

Nothing further material to be mentioned occurred until the 1st December, 1888, when the respondent commenced an action against Simpson for specific performance of his alleged agreement with the latter.

Subsequently to this some letters appear to have been written by Mr. Caston to L. G. Harris, to one only of which the latter replied, in a letter written on the 29th January, 1889, in which he reiterated his abandonment of the purchase.

This action was commenced on the 22nd January, 1889, and came on to be tried before the Chief Justice of the Queen's Bench at the Toronto Assizes on the 16th September, 1889, when his Lordship gave judgment dismissing the action. This judgment was subsequently set aside by the Queen's Bench Division, composed of Falconbridge J. and Street J., and judgment for specific performance was ordered to be entered for the respondent. From this judgment the appellant appealed to the Court of Appeal, where his appeal was dismissed with costs. From this latter judgment the present appeal has been brought.

No decree was obtained in the action brought by the respondent against Simpson until the 12th December, 1889, when a decree by consent was made. This decree, which was not drawn up until the 25th February, 1890, referred it to the master to inquire as to whether a good title could be made. The master's report was made on the 16th June, 1890, reporting the title good. It does not appear what, if anything, was done in the master's office to remove the objections.

Thus, to begin with, we have a contract entered into on the 1st August, 1888, to be completed within ten days from its date, and nothing to show that a good title could be made earlier than 10th June, 1890, more than a year and ten months after the time originally fixed for completion.

The jurisdiction which courts of equity formerly exercised by way of specific performance, a jurisdiction which is now in Ontario, since the Judicature Act, administered, but upon the same principles and subject to the same limitations, by all courts, is peculiar. It is not sufficient to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a court of law, namely, that a contract existed, but, as is well shown by the quotations made in the judgment of the learned Chief Justice of the Court of Appeals from the judgment of the House of Lords in *Lamare* v. *Dixon* (1) and from Lord Justice Fry's Treatise (2), the exercise of the jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shown to the conduct of the party seeking the relief.

(1) L.R.6 H. L. 423.

(2) Fry on Specific Performance, 2nd ed. sec. 25.

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There can be no doubt, upon the evidence before us, that both parties entered into this contract for speculative purposes, and that the property which is the subject of it was recognized by both as having a speculative value. This was the conclusion of the learned Chief Justice of the Queen's Bench, and I entirely agree with him in that opinion. It follows that originally time was of the essence of the contract, and if there had been no waiver on the part of the appellant by entering into negotiations as to the title he would have been bound to have completed it within ten days, for I do not regard the words "if possible" in the agreement as negativing this inference. The appellant did not, however, insist on a literal compliance with this term of the contract, but by negotiating as to the title after the expiration of the time limited recognized the existence of the contract. So far I agree with Mr. Justice Street's judgment.

I am of opinion, however, that two propositions, both equally fatal to the respondent, may upon the facts in evidence and upon the law applicable to those facts be safely laid down. I say, then, that in the first place the letter of the 19th November, 1888, having regard to the circumstances disclosed in the evidence, was sufficient to put an end to the bargain. Secondly, the conduct of the respondent in relation to the completion of the contract has been such that without reference to any actual rescission he has been guilty of such laches as disentitles him to specific performance. First, as regards rescission: The evidence entirely fails to establish that the respondent had any title whatever, equitable or legal, to the property he was to give in exchange at the time he entered into this contract. It is to be observed that the letter from Frank Simpson to the respondent of the 26th of June, 1888, which is relied on by the respondent as containing his contract

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with Simpson, is a mere offer to sell, not a concluded contract but an option, which did not become a contract unless the respondent, according to the express terms of the letter, should accept it within thirty days from the date of the letter, the 26th of June, 1888. During that period of thirty days, and until his proposal was accepted, Simpson could at any time have revoked his offer. Further, I need scarcely say that in a unilateral offer of this kind time is strictly material, and acceptance after the thirty days without more, that is, without some extension of the time in writing signed by Simpson, would not be sufficient to constitute a binding contract. Now there is no evidence whatever that there ever was an acceptance within the thirty days. All that Caston says in the extract from his deposition before given is that it was accepted in a writing which was forwarded to Simpson; but the written acceptance itself is not produced, as it ought to have been and might have been if it existed since it must have been in the possession of Simpson, nor does Caston say that it was sent within the thirty days. Simpson does not say that there was an acceptance within thirty days; it is true he does not say there was not, but he understood there was to be a sale within thirty days and that otherwise it fell through, which gives much colour to the inference that there was not, in fact, an acceptance within the specified time. Again, Mr. Henderson says that when, finding this agreement was not registered, he pressed Caston to produce it the latter admitted he could not even do that. So that up to the present time there has been no legal evidence in this action that there was, anterior to the 26th July, 1888, when the thirty days option expired, any acceptance by the respondent, either written or oral, of Simpson's offer, and consequently it does not appear that any binding contract

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whatever existed between Simpson and the respondent on the 1st August, 1888, the date of the contract between the respondent and the appellant.

The appellant by her pleading directly puts in issue the defence that the plaintiff had not at the date of the contract any title to the George street property.

The second paragraph of the statement in defence is as follows :—

> The defendant further says that the plaintiff had not at the time of the making of the alleged contract, or the rescission thereof as aforesaid, any title to the said lands on George Street or any such title thereto as the defendant was bound to accept, and the plaintiff was unable to perform the said alleged contract on his part.

By the first paragraph of the defence the appellant pleaded the rescission of the contract. As a general rule, under the practice of courts of equity, questions of title were not disposed of at the hearing of a suit for specific performance but were made the subject of a reference to the master, but when the defence of the want of any title is raised, as it is in the present case, not with a view of compelling the plaintiff to show a good title but as a substantive defence to the action, there is no reason why it should not be disposed of at the trial. Upon these pleadings the burden of proving that he had at least some title to the property was upon the respondent, and it is manifest that he has failed in doing so ; on the contrary, the evidence raises at least a strong presumption to the contrary.

Another reason for saying that the plaintiff had no title at the time of the contract is this : he professed to deal with the property itself and not with a mere contract to purchase it, and yet he had nothing, according to his own statement of his case, but an executory contract in respect of which $5,000 had to be paid before his vendor, Simpson, could be called on to convey. This money had not been paid at the date of the trial, and it

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does not appear satisfactorily that the respondent was in a position to pay it. Therefore, even assuming, what as I have said before is not proved, that the offer had been duly accepted before the contract with the appellant it still could not be said that the respondent had even an equitable title to the property. A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked, and is pointed out by Lord Cottenham in *Tasker* v. *Small* (1); and by Lord O'Hagan in *Shaw* v. *Foster* (2). See also *Wall* v. *Bright* (3). Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot be properly called the equitable owner of it.

My conclusion is, therefore, that upon both the distinct grounds indicated the respondent had no title to the land which he could properly sell at the date of his contract. Had there been a sum of money in excess of, or equivalent to, the amount which the respondent was to pay as purchase money to Simpson, payable in cash under the contract between the appellant and the respondent, this might not have been an objection since the appellant would in that case have had it in her power to apply a proportion or the whole of the price she was herself to pay to paying off Simpson, but the only cash payment from the appellant which the contract of the 1st of August, 1888, calls for is the sum of $175.

Therefore, for this additional reason, the respondent had no title at the date of the contract.

(1) 3 Mylne & C. 63. (2) L.R. 5 H.L. 349.
(3) 1 Jac. & W. 503.

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Further, assuming that there had been no acceptance by Robinson at the time of the contract with the appellant, then that agreement could only have been an attempt to transfer a mere option which, according to Lord Justice Fry, is not the subject of assignment. That learned judge lays down the law thus:

> It must be added that even where a concluded contract would be assignable the benefit of an offer cannot, it seems, be transferred by the person to whom it was made to a third person.

Then to apply the law to this fact of want of title in the respondent to any marketable interest in the land at the date of the agreement, taken in connection with the letter of the 19th November, 1888, rescinding the contract. It is said that this notice did not allow a reasonable time to the respondent. The authorities, however, are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agreement, as distinguished from cases in which he has some, though an imperfect, title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which it is considered proper to require from him when the title is merely imperfect. The case of *Forrer* v. *Nash* (1), the circumstances of which are stated in the judgment of the learned Chief Justice of the Court of Appeal, is a strong authority for this proposition. *Lee* v. *Soames* (2) is to the same effect. That was an action by a purchaser claiming a declaration that the contract had been verbally rescinded; the defendant, the vendor, counterclaimed for specific performance.

Kekewich J. in his judgment says:

> As to Mr. Barber's point, that time not having been made of the essence of the contract the plaintiff was not entitled to fix an arbitrary date in the absence of unreasonable delay on the part of the vendor,

(1) 35 Beav. 167.

(2) 59 L. T. N. S. 366.

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the doctrine is laid down in Sugden's Vendor & Purch. (1) and cited by Fry J. in *Green* v. *Sevin* (2) and also in Fry on Specific Performance (3). But both these statements of the law assume that there is a contract. In the present case there never was a contract between the real vendor and the purchaser. *Forrer* v. *Nash* (4) and *Brewer* v. *Broadwood* (5) support this view. It was not a contract which the vendor could have carried out. I think the plaintiff was, on the 8th November, 1887, entitled to say "this bargain is at an end. There is no contract."

This last observation of the learned judge exactly describes what, by a fair intendment, the appellant is to be taken as meaning by the letter of the 19th November, 1888. I am, therefore, of opinion that that letter was sufficient to terminate the bargain between the parties to this appeal.

It is further to be remarked that, as appears from the judgment of Mr. Justice Kekewich in the case just quoted from, it is only in cases where there has been no unreasonable delay in making out a title that a vendor is entitled to reasonable notice of rescission. It is impossible to say that the respondent here has shown that he is free from the imputation of unreasonable delay, for down to the time of bringing his action he had wholly failed in taking any active steps to remove the defect in the title, or even to produce the contract (if he had any) which constituted his own title.

Then there is another and wholly independent ground upon which, in my opinion, the action was properly dismissed by the original judgment, that of laches, which is distinctly pleaded by the fourth paragraph of the defence.

Granting that time was not originally of the essence, or that if so it had been waived by the appellant, yet considering the nature of the property and the object for which, as must have been well known

(1) 13 ed. 227.
(2) 13 Ch. D. 589.
(3) 2 ed. p. 471.
(4) 35 Beav. 167.
(5) 22 Ch. D. 105.

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to the respondent, the appellant was seeking to acquire it, namely, for a speculative purpose, that is, in order to sell again at a profit, and that, therefore, it was of the utmost consequence to him that he should be promptly put in a position to take advantage of a rise in the real estate market, the delay from the date of the contract on the 1st of August, 1888, up to the date of the action on the 22nd January, 1889, nearly six months, was most unreasonable. The rule which governs the courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must show that he has been always ready and eager to carry out the contract on his part. Can it possibly be said that the respondent has brought himself within such conditions in the present case? Most certainly it cannot. We see, indeed, that he did not obtain a decree in his suit against Simpson until the 12th December, 1889, and that he allowed more than two months to elapse before he had even caused this judgment to be drawn up, and further, that no report on the title was obtained until the 10th June, 1890. There was, therefore, not only gross laches and delay anterior to bringing the present action, but afterwards in prosecuting his action against Simpson. To grant specific performance in such a case would, it seems to me, be to set at defiance the wholesome rule before adverted to, which requires promptitude and diligence on the part of one who seeks at the hands of the court this extraordinary relief.

For these reasons, which are in the main identical with those assigned for their judgments by both the learned chief justices in the courts below, I am of opinion that we cannot do otherwise than allow this appeal, thus restoring the original judgment, with

costs to the appellant in this court and both the courts below.

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TASCHEREAU J.—I dissent, and would dismiss this appeal. I adopt the reasoning of Street J. in the Divisional Court, and Maclennan J. in the Court of Appeal. It is a great satisfaction for me, seeing that I am alone of that opinion in this court, that the conclusion I have reached does not affect the result of the judgment.

Appeal allowed with costs.

Solicitors for appellant: *Reeve & Woodworth.*

Solicitors for respondent: *McMurrich, Coatsworth, Hodgins & Geddes.*

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*Oct. 19

HENRY V. EDMONDS (PLAINTIFF).....APPELLANT:

AND

W. W. TIERNAN AND EDWARD WALTERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mechanic's lien—Materials supplied to contractor—Payment by promissory note—Suspension of lien—Waiver.

E. supplied a contractor with materials for building a house for W. and took the contractor's note for $1,100 at thirty days for his account. The note was discounted but dishonoured at maturity and E. took it up and registered a mechanic's lien against the property of W. While the note was running W. paid the contractor $500 and afterwards, but when was uncertain, $600 more. In an action by E. to enforce his lien:

Held, affirming the judgment of the court below, that as the lien was suspended during the currency of the note it was absolutely gone there being nothing in the Lien Act to show that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor.

APPEAL from a decision of the Supreme Court of British Columbia (1) in favour of the defendants.

The defendant, Tiernan, is a contractor who was building a house for his co-defendant Walters, and was supplied with lumber therefor by the plaintiff. Tiernan gave plaintiff his note for $1,100, at thirty days, which was dishonoured at maturity and taken up by plaintiff. During the currency of the note Walters paid Tiernan $500 and he paid him $600 more, but when was not proved. The plaintiff registered a mechanic's lien against the property of Walters and

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 2 B. C. Rep. 82.

brought his action under the statute which was tried before the Divisional Court and resulted in judgment for the defendants the court holding that the lien was extinguished by the plaintiff taking the note from Tiernan. The plaintiff appealed.

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Cassidy for the appellant.

Chrysler Q.C. for the respondent.

The judgment of the court was delivered by :

STRONG J.—We are all of opinion that this appeal should be dismissed. In the first place the lien was waived by taking the promissory note from the contractor and by its negotiation, inasmuch as, under ordinary circumstances, that would have been at least a suspension of the debt, and therefore the lien, for the time being, was as if it had never existed. The statute does not give the lien but only a potential right of creating it, and during the thirty days the note was running it having been discounted it was impossible that the lien could have been created and the potentiality of creating it was, therefore, gone. It is quite clear that when a statute gives a privilege in favour of a creditor the creditor must bring himself strictly within its terms, and there is nothing in the statute in question here which provides that if a lien has once been abandoned it is to be considered as being abandoned merely for a time. If we should hold that it was to be so considered we should be adding a clause to the act.

It follows, that if the evidence was that only $500 of the $1,100 was paid by the respondent to the contractor during the currency of the note, and whilst it was outstanding in the hands of a *bonâ fide* indorsee for value, the lien would be absolutely gone. I am satisfied, however, that the whole amount was paid

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during that time. Had the note not been negotiated by the appellant different considerations might have prevailed.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Corbould, McColl, Wilson & Campbell.*

Solicitors for respondents: *McPhillips & Williams.*

JOSEPH ARTHUR TREMBLAY (PETITIONER)..... } APPELLANT;

AND

MICHEL ESDRAS BERNIER, *et al.*, (RESPONDENTS)..... } RESPONDENTS.

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*Oct. 6.

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

Notarial Code—R. S. Q. Art. 3871—*Board of Notaries—Disciplinary powers—Prohibition.*

When a charge derogatory to the honour of his profession is made against a notary under the provisions of the Notarial Code, R. S. Q. Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of a court of criminal jurisdiction.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court (2), which had maintained a writ of prohibition restraining the respondents in their proceedings on a complaint made before them against the appellant.

The facts which gave rise to the petition in prohibition are briefly as follows:—

The 7th August, 1890, L. P. Sirois, syndic of the Board of Notaries of the Province of Quebec, and one of the respondents, made before the board a complaint against the appellant. By that complaint the appellant was charged with having on the 19th October, 1887, caused to be delivered to the Registrar of deeds, of Charlevoix and Saguenay, to be registered, a false and untrue copy, certified by him as notary of a

* PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) Q. R. 1 Q. B. 176. (2) 17 Q. L. R. 185.

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deed of *main levée* and discharge which never existed and which appeared to have been executed before him on the 17th of the same month, in the city of Montreal, by Madame Josephine Eleonore d'Estimauville, widow of the late Leon Charles Clement, of the mortgage created in her favour, dated the 23rd October, 1882, upon an immovable being no. 277 of the official *cadastre* of Les Eboulements; and also with having on the 3rd March, 1887, caused to be delivered for registration to the same registrar of deeds, a document purporting to be a true copy certified by him as notary of a false and forged deed of discharge, appearing to have been executed before him notarially on the 17th January, 1887, at Les Eboulements, by Joseph W. Tremblay, of a mortgage for one hundred dollars in his favour granted by François Tremblay, son of Paschal, by deed of the 14th December, 1884.

The complaint also alleged that the first of these two deeds of discharge of mortgage had been declared false by a judge of the Superior Court for the district of Saguenay and the judgment affirmed in appeal, and that the appellant was thereby guilty of acts derogatory to the honour of the profession.

The appellant was summoned to appear before the committee on discipline of the Board of Notaries to answer to these charges. He appeared by his attorney and then filed a declaration in writing by which he took exception to the jurisdiction of the committee on discipline appointed by the Board of Notaries, and objected to their power to deal with complaints of this nature. He also by special preliminary objections alleged that the complaint against him could not be maintained.

The preliminary objections having been overruled the appellant pleaded specially that inasmuch as the charge against him amounted to a felony the committee on

discipline had no power to try him or pronounce in the matter so long as it had not been "legally proved and followed by a final sentence of a competent court."

The complaint was thereupon proceeded with and a number of witnesses were examined, when the proceedings were suddenly arrested by the issue and service upon the respondents of a writ of prohibition at the instance of the appellant, who by petition, under art. 1031 C. C. P., had applied for a writ to prohibit the committee on discipline and the respondents nominatively from proceeding further with the accusation before them. The grounds urged in the petition were:—

1st. That the respondents were proceeding to take evidence of forgeries without producing the documents impugned; and

2nd. That the charge against the petitioner being one of felony could not be inquired into by the committee on discipline so long as it had not been legally proved and followed by a final sentence of a competent court.

In answer to the merits of the petition for prohibition the respondents *inter alia* pleaded:

1st. That it was their right and duty to take cognizance of the complaint made against the appellant and that their proceedings were legal;

2nd. That in acting as they have done the Board of Notaries have never pretended to exercise a jurisdiction, nor judicial powers.

Belcourt, for the appellant, cited and relied on art. 3871, section 8, R. S. Q.; Abbott's Digest of the Law of Corporations (1); High's Extraordinary Legal Remedies (2); Brice on *ultra vires* (3); Lloyd on Prohibition (4).

(1) Vo. Expulsion No. 4.
(2) P. 557 No. 772.
(3) Ed. 1877 p. 370.
(4) P. 53.

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Mr. *Frémont* and Mr. *Languedoc*, for respondents, contended that respondents were proceeding within the scope of their powers under Title X. of the Revised Statutes of Quebec, and which is known as the "Notarial Code" and that they had the right to investigate the charges made against the appellant.

STRONG J.—We are all agreed that this appeal should be dismissed. My own opinion is based upon this: The act charged, which the writ of prohibition in this case would restrain the Committee of Discipline of the Board of Notaries of the Province of Quebec from investigating, was one derogatory to the honour of the profession of a notary, and comes within the first part of art. 3871, R. S. Q. I do not read subsection 8 of this art. 3871, viz.: "The commission of a crime or felony "legally proved and followed by a final sentence of a "competent court," as intended to restrict in any way the jurisdiction of the committee under the first part of the article. On the contrary, I think it was intended to provide for cases where a crime or felony is committed by a notary outside of his duties, as, for instance, if such an officer should be convicted of arson or burglary, an offence having nothing whatever to do with his professional quality, and the intention of the statute is that when such crime or felony has been legally proved the convicted person should not be allowed to remain a notary, and that it was not intended by this sub-section 8 that if a notary should be guilty of conduct derogatory to the honour of his profession, which professional misconduct would also be a crime or felony, that the committee should then be incapacitated from taking cognizance of the case and of suspending him until he was legally convicted on an indictment. For these reasons, which are the same as those upon which the Court of Queen's Bench proceed-

ed, as stated in the opinion of Mr. Justice Hall, the appeal must be dismissed with costs.

Fournier and Taschereau JJ. concurred.

GWYNNE J.—I think it was quite competent for the court of committee of discipline to entertain a charge of the committal of acts which, if committed, would subject the person doing them to indictment for felony; such charge would be cognizable by the committee of discipline sitting in the present case, although the party accused had not been tried.

PATTERSON J.—I concur in dismissing the appeal. I have nothing of any importance to add to what my brother Strong has said. I would, however, like to make an observation as to the contention that under the 8th sub-section of art. 3871 R.S.Q. there is no jurisdiction to investigate any charge of felony except when a conviction has been obtained. It seems to me beside the question altogether. The one question is whether the charge is one which in the judgment of the board is derogatory to the honour of the profession. What was done may or may not have amounted to forgery. A man has been held guilty of forgery although the deed declared forged was in fact made and executed as it purported to be, and was what the parties to it intended it to be, but was ante-dated with intent to defraud. The case of the *Queen* v. *Ritson* (1) is a case of this kind. But I do not think this a criterion of the jurisdiction of the board. The particulars mentioned in the 8th subsection of this article 3871 are declared absolutely to be derogatory in addition to those which may be so held by the board in their discretion, and

(1) L. R. 1 C.C.R. 200.

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Patterson J.

there are certainly many cases in which this discretion can be exercised.

Besides there are some things under article 3871 which may be felony, and which do not come under subsection 8. For example, embezzlement is in several cases felony under the criminal statutes, and subsection 6 which says nothing of conviction would cover some of these cases of felonious embezzlement.

The board do not convict of felony. Their decision would have no effect in a prosecution for felony under the same facts on which they act, and could not be pleaded to an indictment founded on those facts.

Appeal dismissed with costs.

Solicitor for appellant: *L. F. Pinault.*

Solicitor for respondents: *J. Fremont.*

MICHAEL O'SHAUGNESSY, *et al.* (PLAINTIFFS)..... } APPELLANTS;

AND

GEORGE BALL (DEFENDANT).....RESPONDENT.

1892
*June 1.
*Oct. 10.

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

36 *Vic. ch.* 81 *P.Q.—Booms—Proprietary rights—Replevin—Revendication—Estoppel by conduct.*

O'S. claiming to be the legal depositary and T. McG. claiming to be usufructuary of certain booms, chains and anchors in the Nicolet River under 36 Vic. ch. 81 P.Q., and which G.B., being in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same and for $5,000 damages.

Held, affirming the judgment of the court below, that O'S. and T. McC. were not entitled to the possession as alleged and that they were precluded by their conduct and aquiescence from disturbing G. B.'s possession. See *Ball* v. *McCaffrey* (20 Can. S.C.R. 319).

APPEAL from a judgment of the Court of Queen's Bench Lower Canada (appeal side) affirming the judgment of the Superior Court sitting in Three Rivers which dismissed the plaintiffs' action.

This was an action brought by the appellants for the recovery (*revendication*) of certain booms, chains, &c., which the respondent had been using on the Nicolet River and had stored in a shed (1).

The appellants claimed title to the booms and chains replevined, Michael O'Shaugnessy as the legal de-

*PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie was present at the argument but died before judgment was delivered.)

(1) See also the report of the case of *Ball* v. *McCaffrey* reported in 20 Can. S.C.R. 319, in which the facts are substantially the same and are fully set out.

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positary, and Francis McCaffrey as usufructuary under certain agreements entered into with and transfers made by Antoine Mayrand and Charles McCaffrey, to whom certain rights and privileges were granted by 36 Vic. ch. 81 P.Q., "An act to authorize the erection of piers and booms in the River Nicolet."

The respondent pleaded that by virtue of certain deeds and agreements entered into between Antoine Mayrand and himself and his *auteurs* which are also referred to in the report of the case of *Ball* v. *McCaffrey* (1), he had become the absolute owner of the booms and chains, &c. seized, had been in possession of the same for several years and had always stretched and maintained them, and stored them in a shed during the winter with the consent and acquiescence of the appellants, and moreover that the appellants had no such right or title to the property in question as alleged by them in their declaration.

Geoffrion Q.C. and *Honan* with him for appellants contended that under the deeds alleged they were joint proprietors as alleged of the booms and anchors seized, and could as such revendicate them as they must be held to be movables: art. 866 C.C.P.; arts. 384, 385, 478, 479 C. C. The respondent could not have a better position than his *auteur* Ross, who never deprived appellant McCaffrey of the possession to enable him to collect dues.

The case of *Ball* v. *McCaffrey* (1) virtually holds that the appellants are bound to maintain the booms, and that McCaffrey has the right to collect from all others except Ball, the respondent, if so they must have the possession of the booms.

Laflamme Q.C. and *Martel* Q.C. for respondent contended upon the deeds that they did not give to the ap-

(1) 20 Can. S. C. R. 319.

pellants any such rights of usufructuary or depositary as alleged in their declaration of the booms in question. They were new booms made by the respondent and his *auteurs*, and the chains were also new and not those in use in Mayrand's time. The appellants moreover were estopped by their conduct from disturbing the respondent's possession of the same for a period of more than three years.

The following statutes and authorities were cited by respondent's counsel: C. C. arts. 443, 457, 463, 468, 479, 2268; 42 & 43 Vic. ch. 18 s. 1 (P.Q.); R. S. Q. art. 5623; Boileux (1); Dalloz, Rep. de Jurisprudence (2).

The judgment of the court was delivered by:—

TASCHEREAU J.—This case arises out of the same facts that were under consideration in *McCaffrey* v. *Ball* (3). The same Francis McCaffrey is also here the appellant with the assistance of O'Shaugnessy. In the previous case he claimed from Ball the boomage on the logs passed by him through the booms in question. Now he claims by *saisie-revendication*, the very booms themselves, with the necessary materials, chains, &c., that form part thereof. His action has been unanimously dismissed by the two courts below, and that no other conclusion could be reached is unquestionable. He has no claim whatever to the possession of these booms. They belong to the defendant, which he cannot deny and he admits that they have always been in the defendant's or his *auteurs*' possession. He, McCaffrey, has a right to the boomage from all other parties than Ball, but that does not make him an usufructuary and as such entitled to the possession of these booms. Neither is O'Shaugnessy a depositary by the deed of June 15th, 1877, by Mayrand to him. Both McCaffrey

(1) 2nd vol. on art. 617 C. N. (2) Vo. Usufruit nos. 94, 95.
(3) 20 Can. S.C.R. 319.

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Taschereau J.

and O'Shaugnessy are precluded by their conduct and acquiescence from disturbing Ball in the exercise of his rights on these booms as they claim to be entitled to do in this case. I need on this point but refer to the remarks I made in the previous case.

Appeal dismissed with costs.

Solicitor for appellants: *M. Honan.*

Solicitor for respondent: *P. N. Martel.*

TÉLESPHORE PARADIS (DEFENDANT)..APPELLANT; 1892

AND *May 31.
June 1.

THE HON. J. G. BOSSÉ (PLAINTIFF).....RESPONDENT. *Oct. 10.

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

Proceedings before Exchequer and Supreme Courts of Canada—Solicitor and client—Costs—Quantum meruit—Parol evidence—Art. 3597 R. S. Q.

In proceedings before the Exchequer and Supreme Courts there being no tariff as between attorney and client an attorney has the right in an action for his costs to establish the *quantum meruit* of his services by oral evidence.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court in favour of the respondent for the sum of $2,152.

The action was instituted by the respondent against the appellant to recover the sum of $2,999.52 being the balance of the sum of $4,195.42 for the value of fees, costs and disbursements in a case before the Federal Arbitrators, before the Exchequer Court on an appeal and cross appeal from the award, and also before the Supreme Court on an appeal and cross appeal from the judgment of the Exchequer Court, and in which the appellant claimed from the crown the sum of $96,441.67 due him for land expropriated for the purposes of the Intercolonial Railway of Canada.

To this action appellant pleaded by a general denial (*défense au fonds en fait*), and by a peremptory exception, in which he admitted the fact that respondent acted as

*PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument, but died before judgment was delivered.)

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his attorney and solicitor but alleged that the cross appeal to the Supreme Court was taken against his will; that respondent's services in no way benefited him; and that he was more than paid for his said services by the amounts he had received from appellant.

At the trial the respondent produced as witnesses to prove the value (*quantum meruit*) of his services, one judge who had acted while at the bar on behalf of the crown in expropriation cases and two prominent lawyers of the Quebec bar, and the Superior Court gave judgment for $2,152 in favour of the respondent. This judgment was confirmed by the Court of Queen's Bench on appeal.

Belcourt and *Mackay* for appellant, contended that under the law of the province of Quebec unless there is an agreement in writing the attorney cannot recover against his client more than what the tariff of fees will allow him, and in the present action the respondent had no right to base his action on the tariffs of the Supreme and Exchequer Courts, and charge also a commission on the amount of judgment without an agreement in writing. The learned counsel referred to *Brown* v. *Dorion* (1); *Larue* v. *Loranger* (2); *Amyot* v. *Gugy* (3).

Casgrain Q.C., Attorney-General for the province of Quebec, for respondent, contended that under rule 57 of the Supreme Court Rules the tariff is only applicable as between party and party and that the respondent, having a right of action for a *quantum meruit*, had the right to claim and prove by oral evidence the full and real value of his services rendered; (see *Doutre* v. *The Queen* (4); art. 3597, R. S. Q.); and this court would not, upon the question of *quantum*, review the decision arrived at by the courts below.

(1) 2 Leg. News 214.
(2) 3 Leg. News 284.
(3) 2 Q. L. R. 201.
(4) 9 App. Cas. 745.

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The judgment of the court was delivered by:

TASCHEREAU J.—There is nothing in this appeal. I would have been of opinion to dismiss it immediately after hearing the appellant. The respondent's right of action cannot be denied in the face of the decision of the Privy Council in *Doutre* v. *The Queen* (1). Then, it being in evidence that there is no tariff in the Exchequer Court or in the Supreme Court as between attorney and client, the respondent had the right to establish the *quantum meruit* of his services by oral evidence. Such is the well settled jurisprudence of the province. As to the amount allowed to the respondent it is amply supported by the evidence. The appeal is dismissed with costs

Appeal dismissed with costs.

Solicitors for appellant: *Mackay & Lemay.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

(1) 9 App. Cas. 745.

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*May 3.
*June 3.
*Oct. 10.

THE EMERALD PHOSPHATE CO.....APPELLANT;

AND

THE ANGLO-CONTINENTAL (LATE OHLENDORFF'S) GUANO WORKS... } RESPONDENT.

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

Mining lands—Bornage—Injunction—Appeal—Jurisdiction—R. S. C. ch. 135 s. 29 (b).

In a case of a dispute between adjoining proprietors of mining lands where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a *bornage*, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada:

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound the case was not appealable. R. S. C. ch. 135 s. 29 (*b*).

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) setting aside the judgment of the Superior Court granting an injunction to the appellant company.

The appellant company, proprietor of lot 19 in the 12th range of the township of Buckingham, by its petition for a writ of injunction, alleged that it had been in possession of the lot in question since November, 1875, and that the eastern bounds of the lot were marked by posts placed about the 3rd November, 1875, by one G. C. Rainboth and that the respondent company had trespassed on lot 19 underground, and was actually

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument, but died before judgment was delivered.)

(1) M. L. R. 7 Q. B. 196

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mining and carrying away large quantities of phosphate from the west side of the G. C. Rainboth line. The respondent company proprietor of lot 18 by its pleas denied that the G. C. Rainboth line was the true easterly limit of lot 19, and alleged that no steps had ever been taken to legally establish the true boundary between lots 18 and 19; that the petition or demand did not allege exposure to irreparable damage, or show that injunction was the proper remedy and that the petition was premature.

Upon issue joined and evidence taken, the judgment of the Superior Court maintained the writ of injunction until a proper boundary should be fixed. The Court of Queen's Bench for Lower Canada (appeal side) on appeal held that the proper remedy being an action *en bornage* an injunction did not lie to prevent the alleged encroachment.

Laflamme Q.C. and *Cross* for respondent on the motion to quash: The ownership of lots 18 and 19 being admitted in this case the issue between the parties resolves itself into a mere question of trespass, alleged by the appellant and denied by the respondent, and we, therefore, submit that this court should declare itself without jurisdiction and dismiss the appeal as the case does not come within R. S. C. ch. 135 s. 29.

McCarthy Q.C., and *Foran*, for appellant, on motion to quash. We are in possession of the land for over a year, and under art. 946, C. C. P., are entitled to bring the present action for being disturbed, and therefore we come under section 29 (*b*) of the Supreme and Exchequer Courts Act, the title to the land of which we are in possession being in dispute. The court has heard possessory actions wherein no amount of damages were claimed. See *Hall* v. *Canada Land Co.* (1) and *Pinsonnault* v. *Hébert* (2.)

(1) 8 Can. S. C. R. 631. (2) 13 Can. S. C. R. 450.

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The court reserved judgment on the question of jurisdiction and the counsel were heard on the merits, but the appeal was disposed of on the question of jurisdiction. The judgment of the court was delivered by:

TASCHEREAU J.—We have no jurisdiction to entertain this appeal, and the respondent's motion to quash it must be allowed.

The appellants are proprietors and in possession of lot 19, on the 12th range of Buckingham Township. The respondents are in possession of the adjoining lot no. 18. There is no controversy as to the parties' respective titles. The cause of the litigation between them is the want of boundaries between their lots. The appellants alleging that the respondents encroach upon lot 19, took out an injunction to restrain them from doing so. Now, under the laws of the province, the rights to the title to this lot, or to the possession thereof, could not be determined on such a proceeding taken *ab initio*. No judgment either *au possessoire* or *au pétitoire* could be given thereon as well held by the Court of Appeal. Consequently, no title to this land is in issue, and no appeal lies.

Appeal quashed with costs.

Solicitor for appellant: *T. P. Foran.*

Solicitors for respondents: *Laflamme, Joseph & Cross.*

ALEXANDER BAPTIST (DEFENDANT)...APPELLANT; 1892

AND *June 6. *Oct. 10.

MARGARET BAPTIST (PLAINTIFF *en réprise d'instance*)..... } RESPONDENT.

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

Appeal—Final judgment—Action en réprise d'instance—Art. 439 *C.C.P.—R.S.C. ch.* 135, *secs.* 2, 24 *and* 28.

The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was

Held, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. R.S.C. ch. 135 secs. 2 and 28. *Shaw* v. *St. Louis* (8 Can. S.C.R. 385.) followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

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*PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument, but died before judgment was delivered.)

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This was a motion by the respondent to quash the appeal for want of jurisdiction. The facts of the case and proceedings are fully stated in the head note and in the judgment of His Lordship Mr. Justice Taschereau, hereinafter given.

Lafleur for respondent. This is not a final judgment but an interlocutory order in the original suit. As stated in our code of procedure it is an incidental proceeding. C. C. P. ch. VII. art. 434. *Darling* v. *Templeton* (1). There is no evidence in the proceedings for the continuance of the original suit that any particular amount is in controversy, and therefore the case is not appealable, R.S.C. ch. 135, sec. 29. *The Rural Municipality of Morris* v. *The London & Canadian Loan Agency Co.* (2).

G. Stuart Q.C. for appellant. As to the amount involved the suit originally brought is for a balance of over $4,000 alleged to be due by the appellant, and that is the amount which by her petition the respondent seeks to recover.

As to the finalty of the judgment it cannot be said that it is not *res judicata* and final as between these parties, and if so it is a final judgment by the highest court in the province, upon a judicial proceeding and therefore appealable under sections 2 and 28 of the Supreme and Exchequer Courts Act. See *Chevalier* v. *Cuvillier* (3); *Shaw* v. *St. Louis* (4); *Dawson* v. *Dumont* (5); Dalloz Répertoire (6).

The judgment of the court was delivered by:

TASCHEREAU J.—This case comes up on a motion by the respondent to quash the appeal for want of jurisdiction, on the ground that the judgment appealed

(1) 19 L.C. Jur. 85.
(2) 19 Can. S.C.R. 434.
(3) 4 Can. S.C.R. 605.
(4) 8 Can. S.C.R. 385.
(5) 20 Can. S.C.R. 709.
(6) Vo. jugement No. 12.

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Taschereau J.

from is not a final but merely an interlocutory judgment. It is necessary for a proper understanding of the question raised by the respondent to go more minutely than usual upon such a motion into the details of the case. I will do so, however, as concisely as possible.

On the 17th November, 1869, Isabella Cockburn, widow of George Baptist, and mother of the litigating parties in this case, made her will in favour of Margaret Baptist, the present respondent and others.

On the 17th January, 1885, the said Isabella Cockburn made another will, but this time in favour of Alexander Baptist, the present appellant. On that same date, the 17th January, 1885, she passed a deed of transfer and assignment or gift also in favour of the present appellant.

On the 23rd March, 1889, the said Isabella Cockburn was interdicted for cause of insanity and one Houliston was appointed her curator.

Houliston, then in his said quality, instituted an action against Alexander Baptist, the present appellant, asking, in her name, that the deed of transfer or gift passed by her, Isabella Cockburn, in favour of the present appellant, on the 17th January, 1885, be set aside, as having been passed by the said Isabella Cockburn when *non compos mentis*, and obtained by the appellant by undue influence and fraudulent manœuvres. To this action the defendant, present appellant, pleaded a general denegation and an exception amounting to nothing more, by which he says that his mother Isabella Cockburn, though since interdicted, was *compos mentis* on the 17th January, 1885, when she consented to give him the said deed, and that all the plaintiff's allegations of undue influence and fraudulent manœuvres are unfounded. Soon after issue had been so joined the said Isabella Cockburn died, September

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28th, 1889. Thereupon, Houliston's powers as her curator and plaintiff in her name in the said action against the present appellant having come to an end, Margaret Baptist, the present respondent, asked the court to be allowed to continue the suit, alleging in her petition, as the basis of her right to do so, the said Isabella Cockburn's will of 1869 in her favour (jointly with others) and that the said will had never been revoked. To this petition the present appellant pleaded that the respondent had no right to continue the suit as he, the appellant, was the late Isabella Cockburn's legatee by her will of 1885, revoking that of 1869. The respondent replied that this will of 1885 passed on the same day as the transfer impugned by the principal action, was null and void for the same reasons and upon the same grounds invoked in the said action, that is to say, that it had been passed when the testatrix was not *compos mentis* and obtained by the appellant by undue influence and fraudulent manœuvres; she therefore prayed that the said will be declared void *à toutes fins que de droit*, and that the appellant's contention of her demand for permission to continue the suit be declared unfounded and rejected. The parties went to trial upon those issues, which clearly raised a *question préjudicielle* (1) and on the 16th January, 1891, the Superior Court of Three Rivers gave a judgment maintaining the will of 1885 in favour of the present appellant, holding that the respondent's allegations of fraud and illegality against it had not been proved, declaring that the respondent was consequently not entitled to continue the original action as the will of 1869 upon which she based her claim had been revoked by that of 1885, and dismissing her petition for continuance of the principal action. Upon appeal to the Court of Queen's Bench, however, the judgment of the

(1) See Mer in vo. question préjudicelle.

Superior Court was reversed, and the will of 1885 set aside on the grounds of insanity of the testatrix, and of undue influence and fraudulent manœuvres by the present appellant. It is this judgment that the respondent contends to be not appealable to this court. I, at first, was inclined to think that she was right but, after further consideration, I have come to the conclusion that we have jurisdiction to entertain the appeal.

By section 2 of the Supreme Court Act, it is enacted that the expression "final judgment" therein, from which an appeal would lie to this court means

any judgment, rule, order or decision, whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

Now, though we have held that no interlocutory judgments can be reviewed by this court under that clause, and though in form, perhaps, this is, in one sense, an interlocutory judgment, yet, it is clear that, though upon a side issue, the controversy between the parties has been, as far as can be in the provincial courts, determined and concluded. See *Shaw* v. *St. Louis* (1) and authorities therein cited.

The judgment setting aside the will of 1885 would not bind this court on an appeal from a judgment on the action setting aside the deed of assignment of the same date, but it would remain in force as *res judicata* between the parties upon the validity of the said will. The parties have, in fact, given themselves the luxury of two contestations where one would have been sufficient. They have made of the controversy between them on the petition for continuance of the suit a second case quite independent of the other. Upon that case the judgment which has been obtained is final and consequently we have jurisdiction. It is a noticeable fact, though not by itself a conclusive one, that the appeal to the Court

(1) 8 Can. S. R. 385.

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of Queen's Bench was taken *de plano* by the present respondent, without objection. Of course she was appealing from a judgment which had dismissed her petition, and that judgment was appealable as a final one, but why the judgment she has obtained in the Court of Queen's Bench maintaining her petition and dismissing the contestation thereof is not also a final one, and as such appealable by her adversary to this court, I fail to see.

Motion refused with costs.

Solicitor for appellant: *A. Oliver.*

Solicitor for respondent: *E. Lafleur.*

THE GREAT EASTERN RAILWAY (OPPOSANTS)..... } APPELLANTS;

AND

WILLIAM B. LAMBE, *esqual.* (PLAINTIFF)..... } RESPONDENT.

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*Oct. 10.

*Nov. 2.

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

Opposition afin de charge—Pledge—Art. 419 *C. C.—Agreement—Effect of —Arts.* 1977, 2015 *and* 2094 *C. C.*

The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal and Sorel Railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *afin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company wasentered into between the Montreal and Sorel Railway and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *afin de charge.*

On appeal to the Supreme Court the respondents moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and it was

Held, 1st. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal and Sorel Railway Company.

* PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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2nd. That as the agreement granting the lien or pledge affected immovable property and had not been registered, it was void against the anterior creditors of the Montreal and Sorel Railway Company. Arts. 1977, 2015 and 2094 C. C.

3rd. That art. 419 C. C. does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition afin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972 C. C.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court which dismissed the appellants' opposition *afin de charge* to the writ of *venditioni exponas* issued against the company.

On the 9th October, 1889, the respondent, acting for the crown, as Collector of Revenue for the District of Montreal, obtained a judgment against the Montreal and Sorel Railway Company in the Superior Court for the District of Montreal, for the sum of $675.00 with interest and costs. This sum represented the arrears of taxes due to the Government of the Province of Quebec, for the working of the Montreal and Sorel Railway, under the special act passed by the legislature of this Province, imposing a tax on railways.

On the 10th January, 1890, at the instance of respondent, a writ of execution *fieri facias de bonis et terris* issued against the Montreal and Sorel Railway Company, and the respondent caused to be seized by the sheriff of the district of Montreal all the railway of said company consisting of a line of railway of about fifty feet in width and forty-five miles in length.

The Montreal and Sorel Railway (defendant in the Superior Court) met this execution by an opposition *afin d'annuler;* and after contestation, this opposition was dismissed with costs by a judgment rendered on the 20th September, 1890.

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On the 10th September, 1890, a writ of *venditioni exponas* issued at the instance of respondent, and the sheriff caused to be published the necessary notices for the sale of the said line of railway.

On the 23rd December, 1890, the appellant filed an opposition *afin de charge* in answer to the writ of *venditioni exponas*, praying by its conclusions that the immovables of the defendant be sold subject to the payment by the highest bidder of the sum of $35,000; and praying further that, by the judgment to be rendered, the said appellant be given the right to retain and keep possession of said immovables until said sum should be paid in full.

The appellant alleged in said opposition :—

"That on the 1st June, 1889, a written lease was passed between the Montreal and Sorel Railway Company and said appellant, by which the latter undertook to work the line of railway, so seized by the respondent, and to make the repairs necessary to put the line in working order, the railway standing pledged to the appellant until the repayment of the advances that were to be made for such repairs."

"That the appellant entered upon the possession of this railway about the 1st June, 1889, that since that time the said appellant has worked the railway and made repairs and improvements amounting in value to the sum of at least $35,000, and said appellant by his conclusions claims the right to keep possession of the railway as long as such advances shall not have been repaid, and further, that the railway be sold subject to this charge."

The Montreal and Sorel Railway Company (defendant) did not appear in answer to this opposition; but the respondent, as creditor, contested this opposition on the following ground amongst others :—

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"That furthermore, supposing this pretended right of pledge did exist, the appellant should have exercised it against the writ of *fieri facias*, because it was in existence at that time; and it should not have been exercised against the writ of *venditioni exponas*."

"That the contract upon which the opposition is based, having been made before the writ of *fieri facias* issued, all the pretended rights given to appellant ought to have been invoked against that writ, because appellant could only invoke against the writ *venditioni exponas* those rights of which he became possessed after the issuing of the writ of *fieri facias*."

"That the pretended lease or contract upon which the opposition is founded is illegal, having been made to defraud the creditors of the defendant, which company was completely insolvent and in bankruptcy at the time this contract was made, and even before that time, to the knowledge of the appellant, and therefore the defendant could not alienate nor pledge its property; and, besides, that such contract had not been registered and could not give any right of pledge as against the rights of third parties, particularly those of respondent whose claim existed at the time the contract was made."

"That, moreover, the defendant had not the right to lease its line of railway, nor to pledge its property, nor to alienate the same, without the assent of its directors duly ratified by the shareholders in conformity with."

The agreement relied on by the appellant was as follows:—

MEMORANDUM OF AGREEMENT.

"Made this 1st day of June, 1889, between the Montreal and Sorel Railway Company acting by Charles N. Armstrong, president, duly authorized; and the Great Eastern Railway Company, acting by James

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Cooper, its president, duly authorized, for the purpose of this agreement, respecting the operation of the line of the said Montreal and Sorel Railway."

"Whereas the Montreal and Sorel Railway is burthened with debts which it at present is unable to discharge and has neither money nor credit wherewith to place its road in running order or condition, nor rolling stock or equipment for the said purpose."

"And whereas the Great Eastern Railway Company is interested in the road of said Montreal and Sorel Railway, and anticipates using the same as a link in its own line, and it is to the advantage of the public and the municipalities through which the said road runs, that the same should be operated and available to the community."

"Therefore the Great Eastern Railway Company undertake to make the necessary repairs and put the said line of the Montreal and Sorel Company between St. Lambert and Sorel in proper running order; and as soon as the sanction of the government is obtained to open the road and provide sufficient equipment to maintain a useful train service between said points, and supply agents and the necessary assistance."

"The total receipts of such operation shall be received and be the property of the said Great Eastern Railway Company, and be applied after the payment of current expenses to recoup the outlay of the operating company in connection with the preparation of the road for traffic and train service."

"In the event of any balance remaining at the end of any quarterly term, after the payment of every expense and disbursement made and incurred by the said Great Eastern Company and the discharge of its obligations in connection therewith, such balance, less an amount equal to ten per cent of the gross earnings, shall be payable to or on account of the Montreal and Sore

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Railway Company, in such manner as its board of directors may advise, the said amount of ten per cent to be retained and applied by the directors of said Great Eastern Company to indemnify them for the said undertaking."

"In the event of any subsidies and bonuses being granted towards the opening and maintenance of the said line, the same shall, if made payable to the Montreal and Sorel Company, be transferred and paid over to the Great Easterm Company, the proceeds to be accounted for and disposed of as ordinary earnings mentioned above."

"The Great Eastern Company shall not be liable or responsible for any debt or obligation of whatever nature or kind of said Montreal and Sorel Company, and shall have a lien and pledge upon said Montreal and Sorel Company's property, chattels and effects or credits for the disbursements and expense made and suffered on account of the repairs, improvements and operation above mentioned and contemplated."

"This agreement may at any time be terminated on the demand of either company by giving one month's notice in writing; but if such demand be made by the Montreal and Sorel Company it shall only be effective upon tender therewith of whatever balance may be found to be due at that date to the Great Eastern Company for the reasons mentioned above."

Before the case was argued on the merits a motion was made to quash the appeal for want of jurisdiction.

Choquette for respondent. The original judgment being for the sum of $675.00, that is to say, a sum less than $2,000, the right of appeal to this court does not exist. Possibly the appellant will pretend that the right contended for is of a greater value than $2,000; to that pretension I would answer that in the matter of an opposition the jurisdiction of the court

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is always determined by the original judgment. In the present case the respondent sued the defendant for a sum less than $2,000 (about $1,000) and judgment was given for $675. The opposition is an incident in the case and it appears contrary to law to allow an appeal upon an incident in a case when the court would not have jurisdiction to decide the case itself. The jurisprudence on that point appears to have been clearly established by this honourable court in the following cases: *Champoux* v. *Lapierre* (1); *Bourget* v. *Blanchard* (2); *Gendron* v. *McDougall* (3).

Lonergan, contra. The appellant claims over $35,000, and therefore the amount in controversy is over $2,000. It is also a question of revenue and comes within sub-sec. (b.) of sec. 29, ch. 135 R.S.C. We allege in our opposition that the sheriff has in his hands several writs and under art. 642 C.P.C. the seizure could be abandoned by the sheriff unless the amount due in the several writs were paid in and these amounts aggregate over $1,500.

STRONG J.—We will hear the case on the merits.

Lonergan for the appellant.

1. The company were entitled under the said lease to retain the railway property until its disbursements thereunder were paid; and even wholly disregarding said lease, as an occupant in good faith it had a right to remain in possession until reimbursed the *impenses utiles* and cost of improvements under the provisions of article 419 of the Civil Code.

2. Defendants' obligation as a railway corporation compelled them to keep their line open and run it, otherwise their charter might become forfeited. Thus

(1) Cassels's Dig. p. 244. (2) Cassels's Dig. p. 241.
(3) Cassels's Dig. p. 248.

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in whatever financial condition defendants were at the time, in leasing their property with the condition of keeping it in running order, they acted in the interest of their creditors in preserving their privileges and protecting the property from decay, *le gage commun des créanciers.* And if the company defendant were insolvent (although the ordinary tests are not applicable to a railway company and one heavily subsidized) yet it could enter into a contract necessary for the preservation of its estate and without onerous conditions. Here the only obligation in resuming possession was repayment of the actual outlay of the lessees in improving and maintaining the property—an expense alike advantageous to the lessor and its creditors.

3. When a sale of the immovable was imminent under the writ of *venditioni exponas* the defendants failing in their obligation to maintain the company appellant in the enjoyment of the property pledged for their advances and ameliorations, the lessees were compelled to file an opposition *à fin de charge* to protect their disbursements made upon the faith and pledge of the property they had so improved.

4. While I contend that the Montreal and Sorel Railway Company was capable of legally entering into the lease in question, and that this opposition must be sustained in consequence thereof,—still I further rely, independently of said lease, upon the provisions of the articles of the Civil Code relating to improvements made by occupants in good faith, and the right thereby provided to retain the immovable until the *impenses utiles* are paid.

5. The last point relied on in support of the judgment is one of procedure, viz., that under art. 664 C. P. C. the present sale cannot be stopped by opposition. In answer to this we say that the greater portion of this outlay was made between the issuing of the writs

of *fieri facias* and *venditioni exponas*, and the amount of the expenditure or its usefulness is not seriously questioned. This opposition is identical with that upon which a similar opposition was maintained in appeal in *Stephens et al.* v. *Bank of Hochelaga* (1).

Choquette for respondent.

At the time the contract was made, on the 1st June, 1889, was the defendant competent to give a right of pledge upon its immovables, or to pledge them, or even to alienate them?

The negative of this proposition cannot be controverted. The defendant was wholly bankrupt and in a state of insolvency at the date of the contract; this was within the knowledge of the appellant, the fact appearing on the contract itself. The plaintiff respondent, as well as the other creditors of the defendant, had an acquired right to the property of the defendant. The principle that a debtor's property is the common pledge of his creditors is elementary, and it is useless to discuss it.

Moreover, the appellant cannot exercise any right by virtue of this contract, because it had not been registered. It is only necessary to refer to the law and to read the articles 1633, 2128 of the Civil Code on this subject to gain the conviction at once that no right could be conferred upon the appellant by the contract prejudicial to the rights of third parties.

I also contend that the Montreal and Sorel Railway Company could not lease their line of railway to the appellant or any other company without having obtained the sanction of its shareholders. This company was incorporated by the act 44 & 45 Vic. ch. 35, P. Q.; and by section 18 of its charter it was expressly enacted that the company can make any arrangement with any other company to lease its line, &c.,

(1) M. L. R. 2 Q. B. p. 491.

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&c., provided that such arrangements and agreements, respectively, have been first sanctioned by the majority of votes at a special general meeting of shareholders called for the purpose of taking them respectively into consideration after due notice given as laid down in the Railway Act of 1880 of the Consolidated Statutes of the Province of Quebec.

Then again, could the appellant invoke against the writ *venditioni exponas* the reasons alleged in the opposition ?

The cause which gave rise to the appellant's opposition *afin de charge* was not subsequent to the writ *fieri facias*, but long anterior to it. This alone is a sufficient reason to dismiss the appellant's opposition, and it was so adjudged by the Superior Court and the Court of Appeals.

The judgment of the court was delivered by :

TASCHEREAU J.—Lambe, the respondent, having obtained a judgment for the crown in his quality of revenue collector, against the Montreal and Sorel Railway Company, seized in execution thereof the railway of the company. Divers oppositions having been filed to the said seizure the said respondent, after adjudication on said oppositions, took out a writ of *venditioni exponas*. Thereupon the Great Eastern Railway Company, the present appellants, filed an opposition *à fin de charge* to the said writ, alleging that by an agreement in writing, dated the 1st June, 1889, passed with the said Montreal and Sorel Railway Company, which instrument is called a lease in their answers to respondent's pleas, they undertook to put the railway in question and keep it in running order; that for their disbursements and expenses for that purpose it was expressly stipulated that they, the appellants, would have a lien and pledge upon the said railway; that

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under that agreement they, the said appellants, took possession of the said road, and have since kept it in running order; that the amount for their disbursements thereon over the receipts is $35,000, and they pray that the said railway be sold *à charge* by the purchaser of paying to them, the said appellants, the said sum, with right of detention by them till payment.

The respondent contested this opposition on the grounds, amongst others:

That the pretended lease or contract, upon which the opposition is founded is illegal, having been made to defraud the creditors of the defendant, which company was completely insolvent and in bankruptcy at the time this contract was made, and even before that time, to the knowledge of the appellant; and therefore the defendant could not alienate nor pledge its property; and, besides, that such contract had not been registered and could not give any right of pledge as against the rights of third parties, particularly those of respondent whose claim existed at the time the contract was made.

That, moreover, the defendant had not the right to lease its line of railway, nor to pledge its property, nor to alienate the same, without the assent of its directors duly ratified by the shareholders in conformity with its rules and regulations, and the law; and that such assent and ratification were never obtained.

Special conclusions to these pleas were taken that the said agreement between the two companies be set aside as illegal and fraudulent

Issue having been joined and evidence adduced on this contention, the Superior Court gave judgment dismissing the appellants' opposition. This judgment was subsequently confirmed unanimously by the Court of Appeal. We are asked by the appellants to reverse those judgments.

We cannot do it, in my opinion. Their opposition could not possibly have been maintained. And this on various grounds, all equally fatal to their contentions.

First, that the agreement of June 1st, 1889, consented to by the Montreal and Sorel Railway Company

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when insolvent, to the appellants who knew of that insolvency, as appears by agreement itself, is deemed, in law, to have been made with intent to defraud and void as to its anterior creditors, of which the respondent was one. Arts. 1035, 1036 C. C. This is the first ground of the judgment appealed from, and one which, to my mind, remains unimpeached by the appellants.

The second ground of the judgment appealed from is, that the appellants have no lien on this railway, that is to say, I assume it to be meant, that they have no right of retention thereof for the payment of their claim, but that any right they may have against the Montreal and Sorel Railway Company should be adjudicated upon on an opposition *à fin de conserver* on the proceeds of the sheriff's sale. This ground I take to be as fatal to the appellants as the first one. A pledgee as a general rule, has not the right to oppose the sale of his pledge under a writ of execution by another creditor of the pledgeor. A thing pledged continues to be the common pledge of the pledgeor's creditors, subject to the special pledgee's right of preference. His right of retention of the pledge till he is paid is a right *quoad* his debtor only, and one which cannot be opposed to his co-creditors. Art. 2001 C.C.; Troplong, Priv. & Hyth. under art. 2092 (1); Troplong on Nantissement (2); Pont des Petits Contrats (3); Pothier, Nantissement (4); Laurent (5); *Fortier* v. *Hébert* (6).

The Court of Appeals' judgment, in that sense, in *Young* v. *Lambert*, delivered by Mr. Justice Badgely, is reported at full length in 6 Moore, P. C., N. S. 406. The Privy Council, it is true, reversed that judgment,

(1) P. 57, note 3 (ed. Belge.)
(2) Nos. 458, 574, 594, *et seq.*
(3) 2 vol. No. 1184.
(4) No. 26.
(5) 28 vol, no. 502; 29 vol. nos. 283, 291 and *seq.*
(6) 15 Rev. Lég. 476.

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but they passed over the question whether the pledgees, in that case, had rightly proceeded, probably because the point, as they remarked, had been taken before them for the first time. Then the cases had been heard *ex parte*, and the decision, and on that account, has less weight according to what their Lordships of the Privy Council themselves said of their decisions, under such circumstances, in *Tooth* v. *Power* (1). As to the pledge of immovables, the pledgee may perhaps, under certain circumstances, have a right of retention as against the other chirographary creditors of the pledgeor, though that is, in France, a mooted point (2). With us, I would be inclined to think that no distinction can be made, on this point, between the pledge of movables and the pledge of immovables. However, that may be questionable. It is sufficient for us, for the determination of the present controversy, to hold that, when a contract of pledge of immovables is unregistered, as this one is, it has no effect whatever against anterior creditors generally. Arts. 2015, 2094 C. C.

Under our system, as a general rule, no rights whatever on immovables exist against third parties without registration. All causes of preference, or privilege on immovables, and the right of retention by a pledgee is clearly a privilege in this sense, must be made public by registration to be effectual against third parties; art. 1977 C. C. There are a few exceptions to this rule, art. 2089 C. C., but they do not include the right of retention by a pledgee. Then, a deed as the one now in question, if registered, would perhaps, at most, only entitle the pledgee to ask, before

(1) [1891] App. Cas. 284.

(2) 3 Delvin p. 444; Martou, Priv. & Hyp., 1 vol., No. 259; Aubry & Rau., 4 vol., & 438, note 9; Pont, Priv. & Hyp., 1 vol., no. 21; Pont, Des Petit Contrats, no. 1292 *et seq.*; Laurent, 28 vol., nos. 561, 581.

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being compelled to surrender the immovable pledged. security that its sale will bring a sufficient price to ensure the payment of his claim, art. 2073 C. C., if he alleged that the value of the thing pledged does not exceed the amount of his claim, or that his security may be endangered by the sheriff's sale. The appellants here have failed to do this in their opposition. However, we have not to determine what may be the appellant's rights after the sale, or what they might have been if the deed of pledge had been registered. All that we determine is that they have no right of retention in the present case against their anterior creditor, the respondent.

Art. 419 C. C. invoked by the appellants does not apply. Upon the principle that guided the Superior Court in *Prowse* v. *Simpson* (1) and the Court of Appeal in *Matte* v. *Laroche* (2), that article does not give to a pledgee a right of retention against the pledgee's execution creditors for the payment of his disbursements on the property pledged (3).

The case of *Monnet* v. *Brunet* (4), cited by the appellants was not an action by a creditor and consequently does not support his contention. Here also, it must be remarked it is not the disbursements incidental to their possession that the appellants claim but the very debt for which the pledge has been given to them by the Montreal and Sorel Railway Company, and I have said why, in my opinion, they cannot succeed on their opposition.

Another serious objection to the appellants opposition, were it possible otherwise to maintain it, arises from their not having proved that the deed of June, 1890 had been ratified by the shareholders of the com-

(1) 13 Rev. Lég. 302.
(2) 4 Q. L. R. 65.
(3) See also Cabrye du Droit de rétention no. 108.
(4) 17 Rev. Lég. 681.

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pany as required by sec. 18 of their charter, 44 & 45 Vic. c. 35. The respondent specially denied such ratification and upon the appellants, it seems to me, was, on that issue, the *onus probandi*.

The deed, it may be remarked, was not an authentic one.

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

Appeal dismissed with costs.

Solicitor for appellants : *M. S. Lonergan.*

Solicitor for respondent : *C. Beausoleil.*

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*June 7.

*Dec. 13.

IN RE COUNTY COURTS OF BRITISH COLUMBIA.

SPECIAL CASE REFERRED BY GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Administration of justice—Criminal procedure—Speedy trials Act—Constitution of provincial courts—Appointment of judges—B.N.A. Act s. 92 ss. 14.

The power given to the provincial governments by the B.N.A. Act, s. 92, ss. 14 to legislate regarding the constitution, maintenance and organization of provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

The acts of the legislature of British Columbia, C. S. B. C., c. 25, s. 14, authorizing any county court judge to act as such in certain cases in a district other than that for which he is appointed, and 53 V. c. 8, s. 9, which provides that until a county court judge of Kootenay is appointed the judge of the county court of Yale shall act as and perform the duties of the county court judge of Kootenay, are *intra vires* of the said legislature under the above section of the B.N.A. Act.

The Speedy Trials Act, 51 V. c. 47 (D.) is not a statute conferring jurisdiction but is an exercise of the power of parliament to regulate criminal procedure.

By this act jurisdiction is given to "any judge of a county court" to try certain criminal offences.

Held, that the expression "any judge of a county court," in such act, means any judge having, by force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a county court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the provincial legislature so to do.

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* PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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Held, Per Taschereau J.—It is doubtful if Parliament had power to pass those sections of the act 54 & 55 V. c. 25 which empower the Governor-General in Council to refer certain matters to this court for an opinion.

SPECIAL CASE referred to the Supreme Court of Canada by the Governor-General in Council, pursuant to section 4, of chapter 25 of 54 & 55 Vic.

The special case referred was as follows :—

"Important questions affecting the jurisdiction of the judges of the several county courts in British Columbia and the power of the legislature of the province to pass laws regarding the territorial jurisdiction of county court judges as well as the constitutionality of certain legislation of the Parliament of Canada, having been raised on the hearing of a writ of error before the Supreme Court of British Columbia, in the case of Piel Ke-ark-an against Her Majesty the Queen (1) (cor. Sir Matthew Baillie Begbie, Chief Justice, and Justices Crease, McCreight, Walkem and Drake) the opinion of the Supreme Court of Canada is desired upon the following case: "

"1. By section 5 of the provincial statute, cap. 25, Consolidated Acts of B. C., the 'County Courts Act,' the following provision is made: "—

"A county court shall be and is hereby established within and for the Cache Creek, Kamloops, Nicola Lake, Okanagan and Rock Creek polling divisions of the electoral district of Yale, to be called the 'county court of Yale,' having jurisdiction throughout the said polling divisions of the electoral district of Yale."

"2. The polling divisions referred to in the said section were the divisions of the district of Yale for the purposes of provincial elections to the legislative assembly for the province of British Columbia."

(1) 2 B. C. Rep. 53.

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"3. Section 7 of the same act provides that a county court shall be and is hereby established within and for the electoral district of Kootenay, to be called the 'county court of Kootenay,' having jurisdiction throughout the electoral district of Kootenay."

"The electoral district of Kootenay referred to in the last quoted section was the electoral district for the purposes of elections for the provincial legislature."

"4. Section 12 of the same statute (cap. 25) enacts that 'each such court shall be holden before a judge, to be called and known by the name and style of the judge of the county court of Yale, or the judge of the county court of Kootenay,' as the case may be; each such judge shall, from time to time, be nominated and appointed by the Governor-General of Canada.

"5. By section 14 of the last mentioned act, as amended by 54 Vic. cap. 7, section 1, the 'County Court Amendment Act, 1891,' it is enacted that 'any county court judge appointed under this act may act as county court judge in any other district upon the death, illness or unavoidable absence of, or at the request of, the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a county court judge in the said district: provided, however, that the said judge so acting out of his district shall immediately thereafter report in writing to the provincial secretary the fact of his so doing and the cause thereof."

"6. By commission, under the great seal, dated the 19th of September, 1889, William Ward Spinks, Esquire, was appointed judge of the county court of Yale, and such commission is as follows:"—

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(L.S.) "W. J. RITCHIE,
"Deputy-Governor.

CANADA.

"VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, etc., etc., etc."

"*To William Ward Spinks, of the Town of Kamloops, in the Province of British Columbia, in our Dominion of Canada, Esquire, Barrister-at-Law, Greeting:*"

"Jno. S. D. Thompson, Attorney-General, Canada. } Know you that reposing trust and confidence in your loyalty integrity and ability,

We have constituted and appointed and We do hereby constitute and appoint you the said William Ward Spinks, to be a judge of the county court of Yale, in the province of British Columbia."

"To have, hold, exercise and enjoy the said office of judge of the county court of Yale, unto the said William Ward Spinks, with all and every the powers, rights, authority, privileges, profits, emoluments, and advantages unto the said office of right and by law appertaining, during good behaviour, and during your residence within the territory to which the jurisdiction of the said court extends, that is to say: the polling divisions of Cache Creek, Kamloops, Nicola Lake, Okanagan and Rock Creek, in the electoral district of Yale.

"In testimony whereof, we have caused these our letters to be made patent and the Great Seal of Canada to be hereunto affixed: Witness, the Honourable Sir William Johnston Ritchie, Knight, Deputy of our Right Trusty and Well Beloved the Right Honourable Sir Frederick Arthur Stanley, Baron Stanley of Preston, in the County of Lancaster, in the Peerage of the United Kingdom; Knight Grand Cross of Our Most Honourable Order of the Bath, Governor-General of Canada; at our Government House, in the City of

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Ottawa, this nineteenth day of September, in the year of our Lord one thousand eight hundred and eighty nine and in the fifty-third year of Our Reign."

"By Command,

"J. A. CHAPLEAU,

"Secretary of State.

"7. By the 'Speedy Trials Act' (C.S. Can. cap. 175) as amended by 51 Vic. cap. 46, the expression 'judge' in the province of British Columbia, was defined to mean the chief justice or a puisne judge of the supreme court, or a judge of a county court; but by 51 Vic. cap. 47, this definition of a judge is repealed, and in lieu thereof it is provided that in the province of British Columbia the expression "judge" means and includes the chief justice or a puisne judge of the supreme court, or any judge of a county court."

"The Governor-General of Canada has not made any appointment of a judge for the county of Kootenay."

"8. By the provincial statute, 53 Vic. cap. 8, section 9, the "County Courts Amendment Act, 1890," it is enacted as follows:"

"Until a county court judge of Kootenay is appointed the judge of the county court of Yale shall act as and perform the duties of the county court judge of Kootenay, and shall, while so acting, whether sitting in the county court district of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the county court of Kootenay, all the powers and authorities that the judge of the county court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters, and proceedings: and for the purpose of this act, but not further, or otherwise, the several districts as defined by sections 5 and 7 of the county courts Act, over which the

county court of Yale and the county court of Kootenay, respectively, have jurisdiction, shall be united."

"9. By the federal statute, 54 & 55 Vic. cap. 28, the following provisions are made:"

"(1.) The jurisdiction of every county court judge shall extend and shall be deemed to have always extended to any additional territory annexed by the provincial legislature to the county or district for which he was or is appointed, to the same extent as if he were originally appointed for a county or district including such additional territory: Provided that nothing in this section contained shall, in any way, affect any litigation now pending, in the course of which any question has been raised as to the jurisdiction of a judge beyond the limits of a county or district for which he was originally appointed".

"(2.) It shall be competent for any county court judge to hold any of the courts in any county or district in the province in which he is appointed, or to perform any other duty of a county court judge in any such county or district, upon being required to do so by an order of the Governor in Council, made at the request of the lieutenant-governor of such province; and without any such order the judge of any county court may perform any judicial duties in any county or district in the province, on being requested so to do by the county court judge to whom the duty for any reason belongs; and the judge so requested or required as aforesaid shall, while acting in pursuance of such requisition or request, be deemed to be a judge of the county court of the county or district in which he is so required or requested to act, and shall have all the powers of such judge."

"(3.) Any retired county court judge of a province may hold any court or perform any other duty of a

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county court judge in any county or district of the province, on being authorized so to do by an order of the Governor in Council made at the request of the lieutenant-governor of such province; and such retired judge, while acting in pursuance of such order, shall be deemed to be a judge of the county or district in which he acts in pursuance of the order, and shall have all the powers of such judge."

"The questions for the opinion of the court are:"

"(1.) Was section 14 of the said County Courts Act (C.S. of B.C., cap. 25, so amended as aforesaid) *ultra vires* of the provincial legislature, either in whole or in part."

"(2.) Was section 9 of the said 'County Courts Amendment Act, 1890,' (53 Vic. cap. 8) *ultra vires*, either in whole or in part?"

"If it shall be considered that the above sections, or either of them, apart from Dominion legislation, were *ultra vires*, either in whole or in part, does the federal statute, 54 & 55 Vic. cap. 28, validate them, and to what extent?"

"(3.) Is the jurisdiction of a county court judge in British Columbia, when acting under the 'Speedy Trials Act," confined to the county to which his commission extends? Or"

"(a.) May he exercise jurisdiction under the 'Speedy Trials Act' in other parts of the province, and what is the proper interpretation to be put on the term 'any judge of a county court' occurring in section (2) *a* and (5) 'Speedy Trials Act?'"

"Respectfully submitted.

(Sgd.) "JNO. S. THOMPSON,

"For Minister of Justice."

Æmilius Irving Q.C. for the Attorney-General of British Columbia.

Sedgewick Q.C. for the Attorney-General of Canada.

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STRONG J.—In answer to questions 1 and 2 I am of opinion that both section 14 of the County Courts Act (Con. Stats. of British Columbia, ch. 25) as amended by 54 Vic. ch. 7, section 1 (the County Court Amendment Act, 1891) and section 9 of the County Courts Amendment Act, 1890 (53 Vict. ch. 8) were within the powers of the legislature of British Columbia, and I am of opinion that they are so *intra vires* independently of any Federal legislation.

My reasons for this opinion are that such legislation was a valid exercise of the power conferred upon the provinces by subsection 14 of section 92 of the British North America Act, whereby provincial legislatures were empowered to make laws regarding the administration of justice in the provinces including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including civil procedure in those courts. The powers of the federal government respecting provincial courts are limited to the appointment and payment of the judges of those courts and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by subsec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

Then if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.

If this were not so it would be necessary, whenever the territorial jurisdiction of a county court was

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altered or enlarged, that recourse should be had to federal legislation, under the general reserved powers of parliament, to sanction the change, or that the judges should be re-appointed by a new commission. I think it clear that parliament in such a matter could not legislate without infringing the exclusive powers of the provincial legislature, and the notion that a new commission would be requisite in every case of an enlargement of the territorial jurisdiction of any of the courts in question is too preposterous to be entertained. It must follow, therefore, that the whole power of legislating as regards the jurisdiction of provincial courts is restricted to the provincial legislatures.

I therefore answer the two first questions in the negative.

The expression "any judge of a county court" in the "Speedy Trials Act," must, in my opinion, be taken to refer to any judge having, by force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." This statute would not, I conceive, authorize a county court judge having no authority from the provincial legislature so to do in holding a "speedy trial" without the limits of his territorial jurisdiction. This last conclusion necessarily results from the preceding observations. I may add that I do not regard the Dominion statute known as "The Speedy Trials Act" as a statute conferring jurisdiction, but rather as an exercise of the power of parliament to regulate criminal procedure. This answers question three.

TASCHEREAU J.—I do not take part in this consultation. I have some doubts on the constitutionality of some of the enactments contained in the 54 & 55 Vic. ch. 25, and on the power of parliament to make this court

an advisory board to the executive power or its officers, or, as it seems to me to have done in some instances by that statute, a court of original jurisdiction.

GWYNNE J.—Concurred in the judgment of Mr. Justice Strong.

PATTERSON J.—I also agree with Mr. Justice Strong and scarcely understand how any doubt could have arisen among the judges in British Columbia.

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*Oct. 4, 5.

*Dec. 13.

THE CORPORATION OF AUBERT-GALLION ..... } APPELLANT;

AND

DAVID ROY ..... RESPONDENT.

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

44 & 45 *Vic. ch.* 90 (*P.Q.*)—*Toll-bridge—Franchise of—Free bridge—Interference by—Injunction.*

By 44 & 45 Vic. (P.Q.) ch. 90 sec. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River in the parish of St. George, it is enacted that "so soon as the bridge shall be open to the use of the public as aforesaid during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles or cattle for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river for the conveyance of persons, vehicles or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present act, for the persons, cattle or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall, at any time, for lucre or gain, convey across the river any person or persons, cattle or vehicles within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal or vehicle which shall have thus passed the said river; provided always that nothing contained in the present act shall be of a nature to prevent any persons, cattle, vehicles or loads from crossing such river within the said limits by a ford or in a canoe or other vessel without charge."

After the bridge had been used for several years the appellant municipality passed a by-law to erect a free bridge across the

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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Chaudière River in close proximity to the toll-bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge.

Held, affirming the judgment of the court below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll-bridge, and the injunction should be granted.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court.

The material facts are as follows: In 1881 the respondent, by a statute passed by the legislature of Quebec, 44 & 45 Vic. ch. 90, obtained the statutory privilege to erect a toll-bridge, on the Chaudière River, in the parish of St. George, in the district of Beauce. In addition to the clause of the statute given in the head note section one was also referred to.

By that section it is provided that "after the expiration of eight years from the passing of the act, it shall and may be lawful for the municipality of St. George to assume the possession of the said bridge and dependencies and to acquire the ownership thereof, upon paying to the said David Roy the value which the same shall, at the time of such assumption, bear and be worth, with an addition of twenty per centum, and after such assumption it shall become a free bridge and shall be maintained by the municipality as such free bridge."

The respondent maintained in good order his bridge collecting tolls thereon for ten years, it being the only one erected on the Chaudière River, within a distance of six miles. In 1891 the appellant municipality, in order to avail itself of a subsidy of $17,500, granted by the government of the province of Quebec to aid in the erection of an iron bridge on the river Chaudière, determined to erect within the limits of the municipality an iron bridge free and open to the public,

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and passed a by-law on the 19th June, 1891, authorizing the erection of a free iron bridge opposite the parish church of St. George, within a short distance of respondent's toll-bridge, without paying to him the indemnity mentioned in the first section of 44 & 45 Vic. ch. 90.

After the passing of this by-law, on the 14th July, 1891, the respondent applied for and obtained a writ of injunction calling upon the corporation, appellant, to suspend all action and operations under the by-law of the 19th June, and to stop all work of construction on the bridge, because, amongst other reasons, the by-law was illegal, null and void, and also because the act of the legislature, 44 & 45 Vic. ch. 90, had given him the exclusive and perpetual privilege of building and maintaining a toll bridge within the limits of three miles above and three miles below his own.

The superior court of the district of Beauce held that the by-law of the 19th June was valid, and that Roy did not have as against the municipality of Aubert-Gallion, the exclusive privilege to build and maintain an open bridge, and rejected the writ of injunction with costs.

The court of Queen's Bench also held the by-law of the 19th of June to be legal and *intra vires*, but held that the by-law could not be carried out so long as the statutory privileges in question remained in force, and maintained the injunction.

Linière Taschereau Q.C. and *Lemieux* for the appellant.

The statute 44 & 45 Vic. ch. 90 cannot be relied on as a prohibition to the municipality to erect a free bridge.

A municipal corporation has unrestricted and clearly defined rights to build free bridges on rivers, watercourses, etc.; and this power or right cannot be taken

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away from it by a charter granted to an individual, unless it be by a formal enactment to that effect.

The act recited forbids only private persons, for the space of thirty years, from entering into competition with Roy by the erection and building of a toll-bridge for lucre or gain, within three miles on either side of this bridge but this prohibition does not extend to the corporation.

The act forbids the erection by individuals for lucre or gain, but does not apply to the bridge intended by the corporation of Aubert-Gallion which is to be for free and gratuitous use.

Roy answers this objection by a reason *ab inconveniente*: "A free bridge" he says "is even more ruinous to me than another bridge for lucre or gain." That may be; but Roy has placed himself in that position, for the act of the legislature, which forbids individuals to erect bridges for lucre or gain, was passed at his request, on his own petition, addressed to the legislature, and which should have contained the terms under which the statute was to be passed. He defined his own position, as appears by the preamble of the act, and he cannot to-day be allowed to improve it.

Moreover, is it to be believed that if Roy had asked of the legislature an enactment forbidding the building of a free bridge by the corporation, such a monopoly would have been granted him? No, for it would have been manifestly unjust to make the interest of the whole public subservient to that of a simple individual.

To grant such a monopoly legislative authorization was required in formal and express terms, and such was never given directly or indirectly to municipal corporations in the province of Quebec. See Harrison's Municipal Manual (1).

(1) Pp. 313, 517, 520.

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The authorities are unanimous in declaring that the terms of grants conferred on individuals must always be applied and interpreted strictly. See Endlich on the Interpretation of Statutes (1); Maxwell on Statutes (2); Sedgewick on the Interpretation of Statutory Law (3); and also arts. 520, 542, 485, 460, 84 M.C. (P.Q.)

Fitzpatrick Q.C. for the respondent:

The question which arises on this appeal is: Whether a corporation which, in the public interest, grants a perpetual and exclusive franchise to any one to build a bridge, a franchise which has been confirmed by the legislature with the condition that the said corporation may, after eight years, convert the same into a free bridge on indemnifying the proprietor, has a right to set at nought its promises and engagements, without any right, on the other hand, to those who are ruined by its conduct to complain of the same?

I contend that the statute 44 & 45 Vic. ch. 90, grants to the respondent a perpetual and exclusive privilege, and that the appellant cannot without breach of the most elementary good faith, violate a public contract, repudiate a solemn engagement, and not only ruin the respondent but tax him over the bargain, in order to aid in the construction of a free bridge alongside of his own.

The clause by which the appellant cannot convert this toll-bridge into a free bridge, without paying the value thereof, has not been written to protect the public, for, to the latter, a free bridge is worth a hundred-fold more than a toll-bridge. It was evidently framed in the interest of the respondent so that he might not be ruined at the caprice of four councillors.

(1) P. 494 sec. 354. (2) P. 264, 268.
(3) Pp. 291, 296.

The following cases and authorities were cited and relied on: *Galarneau* v. *Guilbault* (1); *Corriveau* v. *Corporation St. Valier* (2); *Charles River Bridge Co.* v. *Warren Bridge Co.* (3); and Kent's Commentaries (4).

The learned counsel also argued the question of the validity of the by-law, but the grounds relied on for and against the validity are sufficiently reviewed in the judgment of Mr. Justice Fournier.

STRONG J. concurred with TASCHEREAU J.

FOURNIER J:—Par un règlement du conseil de la municipalité d'Aubert-Gallion, en date du deux novembre mil huit cent quatre-vingt, il fut ordonné et statué:

ART. 1er.—Que M. David Roy est par le présent règlement autorisé à construire un pont sur la rivière Chaudière, vis-à-vis l'église paroissiale de St. Georges.

ART 2.—Qu'après que le pont aura été ouvert au public, et tant qu'il restera en bon état, nulle personne et nulle compagnie ne construira ni ne fera construire aucun pont ou ponts, ou n'emploiera comme traversée aucun bateau ou vaisseau d'aucune espèce pour traverser aucune personne, bestiaux ou voitures quelconques, soit en louant ou autrement, les susdits bateaux ou vaisseaux sur la dite rivière Chaudière, à une distance de trois milles en haut et en bas du dit pont qui sera construit par le dit David Roy, et si aucune personne construit un pont ou des ponts d'aucune espèce ou établit une traverse d'aucune espèce ou fait traverser sur la dite rivière Chaudière dans les dites limites, elle paiera au dit David Roy pour chaque personne ou animal ou voiture qu'elle traversera pour lucre trois fois la valeur des taux imposés par le présent règlement pour toutes les personnes et animaux qui passeront sur tels ponts ou par telles traverses ainsi construits ou établis, en contravention des dispositions de ce règlement, et toute contravention à la prohibition de traverser pour rémunération d'un côté de la rivière à l'autre entraînera une amende n'excédant pas dix piastres. Cette amende recouvrable de la même manière que celle imposée par le code municipal de la province de Québec.

(1) 16 Can. S.C.R. 579.
(2) 15 Q. L. R. 87.
(3) 11 Peters 420.
(4) 13 Ed. 3 vol. par. 439a.

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Avec le privilège de construire un pont, l'intimé obtint aussi le droit de prélever des péages qui furent fixés par le règlement.

Après le règlement, et pendant qu'il était en force, la législature de la province de Québec, passa à la session de 1881, un statut qui fut sanctionné le 30 de juin, accordant au dit intimé le droit exclusif de construire à ses dépens, au même endroit, sur la rivière Chaudière, dans la paroisse de St-Georges, un pont de péage avec dépendances, réservant cependant à l'expiration de huit années après la passation du dit acte, à la dite municipalité, le droit de prendre possession du dit pont et de ses dépendances et d'en acquérir la propriété, en en payant la valeur au temps de la prise de possession et en payant 20 p.c. en outre de la valeur, lequel pont deviendrait alors un pont libre et serait maintenu par la municipalité.

Il est évident que par le règlement ci-haut cité, la municipalité appelante s'est interdit le droit de construire un pont libre, dans la limite indiquée, pendant toute la durée du privilège accordé à l'intimé. Ce privilège ayant été confirmé par l'acte 44-45 Vic. c. 90, il n'est plus loisible à la municipalité de rien entreprendre qui soit en contradiction avec son règlement ni avec le statut de la législature accordant à l'intimé les mêmes droits et privilèges, car tous deux sont de la nature d'un contrat entre la législature et la municipalité d'une part, et l'intimé, de l'autre, et sont également obligatoires pour les deux parties.

En vertu des pouvoirs qui lui étaient conférés par le règlement et le statut ci-haut cités, l'intimé a construit à l'endroit indiqué dans la dite municipalité, un pont offrant au public toutes les conditions de sûreté et de commodité voulues. Ce pont a existé depuis au delà de dix ans, et est encore en existence, et en état de servir avantageusement pour l'utilité du public.

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Cependant la dite municipalité, en violation du règlement et du statut ci-haut cités, a passé en date du 19 juin 1891, un règlement ordonnant la construction d'un pont en fer qui devait être un pont municipal.

Ce règlement contient entre autres les dispositions suivantes: 1° Que ce pont serait construit en fer sous la direction du gouvernement de Québec, conformément à l'art. 859*a* du Code Municipal; 2° Que le gouvernement se chargerait de tous les frais de la superstructure du dit pont, et la municipalité construirait les culées et les piliers en pierre suivant les plans et spécifications annexés au règlement.

3° Les clauses 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 et 15 fixent la date du commencement des ouvrages et de leur achèvement, le mode d'accorder le contrat, ainsi que le mode de paiement, les garanties d'exécution du contrat, les cotisations sur les contribuables pour frais de construction, en outre une déclaration limitant la responsabilité de la municipalité à $11,500, avec l'intérêt de trois ans, se montant en tout à $13,340, le nom du surintendant, le mode d'entretien et de réparation du dit pont et finalement que ce pont serait libre et gratuitement ouvert au public.

Après l'adoption de ce règlement, l'intimé a demandé à la cour Supérieure un bref d'injonction pour faire ordonner à l'appelante de suspendre tous procédés en vertu du règlement du 19 juin, et d'arrêter tous les onvrages de la construction du dit pont, pour entre autres, les raisons suivantes: Que le dit règlement était nul, et que l'acte de la législature 44-45 Vic. c. 90, lui avait accordé un privilège exclusif de construire et entretenir un pont de péage dans les trois milles au-dessus et au-dessous du lieu indiqué.

Le jugement de la cour Supérieure, district de Beauce, a reconnu la validité du règlement du 19 juin, et a dénié à l'intimé son privilège exclusif de construire un pont

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à l'encontre de la municipalité. Ce jugement ayant été porté en appel à la cour du Banc de la Reine a été infirmé.

Dans leur constestation les parties ont soulevé un grand nombre de questions dont il est inutile de s'occuper pour la décision du litige en cette cause.

La question se réduit à savoir si, après le règlement adopté par la dite municipalité appelante, accordant à l'intimé le privilège exclusif de construire un pont, privilège reconnu plus tard, par l'acte de la législature 44-45 Vict. ch. 90, accordant de nouveau au dit intimé, le même privilège, la municipalité peut-elle maintenant entraver l'exercice du privilège de l'intimé, en construisant ou permettant de construire, au même endroit, dans la dite municipalité un pont libre qui aurait l'effet de détruire complètement la valeur du pont de péage de l'intimé? Ne s'est-elle pas au contraire, par son dit règlement interdit tout droit de construire un pont en opposition au privilège qu'elle a accordé?

La décision de cette question est réglée par les termes du règlement et par les sections 1 et 3 du statut 44-45 Vict. ch. 90.

En déclarant, par son règlement qu'après que le pont aura été ouvert au public, et tant qu'il restera en bon état, nulle personne et nulle compagnie ne construira ni ne fera construire aucun pont ou ponts, etc., l'appelante a fait une prohibition générale et absolue dans laquelle elle est nécessairement comprise elle-même, puisqu'elle est la partie contractante et l'autorité qui crée et accorde le privilège en question en faveur de l'intimé. Il n'y a aucune réserve quelconque en sa faveur, et cette déclaration doit être interprétée comme s'appliquant à elle-même.

La même prohibition est contenue dans l'acte 44-45 Vict. ch. 90 et doit avoir le même effet. Elle est même

encore plus étendue, puisqu'elle ne fait qu'une exception en faveur de celui qui passerait à gué ou en canot et sans charge, cette restriction prouve bien que la prohibition est générale. 1892 THE CORPORATION OF AUBERT-GALLION v. ROY. Fournier J.

J'ai dit que le règlement doit être considéré comme ayant l'effet d'un contrat entre la municipalité d'une part et l'intimé Roy, de l'autre. Celui-ci, en construisant un pont a accepté le privilège qui lui avait été accordé à ce sujet. Le fait d'avoir demandé et obtenu de la législature la confirmation de ce privilège, ne peut pas être considéré comme une renonciation à ses droits. Tout au contraire, ce procédé ne peut être considéré que comme une mesure de prudence pour se mettre à l'abri des contestations trop fréquentes des règlements municipaux. Il sauvegardait ainsi ses droits en les mettant sous la protection d'un acte de la législature qui lui en assurait la jouissance. Ce privilège doit, d'après le statut, durer pendant trente ans, et d'après le règlement, tant que le pont restera en bon état.

Dans un de ses plaidoyers, l'appelante a prétendu que le pont en question était en ruine et dangereux pour le public. Ce motif n'a pas été invoqué comme raison d'ordonner la construction d'un nouveau pont, parce qu'il eût alors été facile à l'intimé de prouver que le pont existant était suffisant et en état de servir au public et que le public s'en servait alors. Ce fait a été établi par la preuve en cette cause, ainsi que le comporte le jugement de la cour du Banc de la Reine, déclarant qu'il n'appert pas que le dit pont n'est pas en bon état.

Dans la cause de *Galarneau* v. *Guilbault* (1), la cour a eu l'occasion d'examiner la question de l'étendue d'un semblable privilège accordé pour la construction d'un pont. Une des conditions du privilège était que

(1) 16 Can. S. C. R. 579.

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si le pont par accident ou autrement était détruit, ou devenait dangereux ou impassable, les demandeurs seraient tenus de le rebâtir dans les 15 mois, sous peine de forfaiture de tous les avantages accordés par le dit acte, et que pendant tout le temps que le dit pont serait dangereux ou impassable, les dits demandeurs seraient obligés de maintenir une traverse sur la dite rivière, pour laquelle ils pourraient percevoir des péages Ce pont ayant été entraîné par les glaces, les demandeurs se mirent en frais d'en construire un autre et entretinrent une traverse, les défendeurs prétendant que les prohibitions du statut n'avaient pas d'autre effet que de protéger le pont, pendant qu'il était en existence, et ne pouvaient nullement s'étendre à la protection de la traverse. La cour décida que le privilège exclusif accordé par le statut s'étendait à la traverse, et, tant qu'elle était maintenue par les demandeurs, les défendeurs n'avaient aucun droit de bâtir un pont temporaire, etc.

L'étendue de ce privilège a été portée encore plus loin dans la cause de *Girard* v. *Bélanger* (1), où il avait été décidé, en cour Supérieure, à St-Hyacinthe, le 2 décembre 1872, par Sicotte, J., que la construction d'un pont sur lequel on n'exigerait pas de péages n'était pas une atteinte aux privilèges des demandeurs.

Sur appel à la cour du Banc de la Reine, (2) ce jugement fut infirmé et il fut, au contraire, maintenu que c'était une atteinte aux privilèges des demandeurs, appelants, leur donnant le droit d'en demander la démolition pour faire respecter leur privilège. Ce dernier jugement fut rendu unanimement en 1874 par la cour du Banc de la Reine. On en trouve la substance dans l'ouvrage de feu l'honorable juge Ramsay, où l'on voit qu'il fut décidé que la construction d'un

(1) 17 L. C. Jur. 263.

(2) Ramsay's App. Cas. 712.

semblable pont n'était qu'un moyen d'éviter le privilège accordé au propriétaire du pont de péage.

Ce privilège a encore été maintenu dans une cause de *Globensky et ux.* v. *Lukin et al*, (1) dans laquelle il fut décidé :

Que le propriétaire d'un moulin qui a pratiqué ou fait pratiquer au moyen de bacs ou chalans des voies de passage et traverses dans les limites du privilège d'un pont de péage, pour y traverser les gens à son moulin gratuitement, mais dans la vue de se procurer des gains par la mouture de leurs grains, est passible de dommages et intérêts envers le propriétaire de ce pont à raison de la perte de ses profits, qui lui sont ainsi enlevés indirectement.

Par tous ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens,

TASCHEREAU J.—The respondent in this case attacks, by a petition for injunction, a by-law passed by the municipality, appellant, in June, 1891, for the erection of a free bridge across the Chaudière River, and prays that the appellant be restrained from proceeding with the said erection on the ground that it would be an unlawful interference of the privilege granted to him by the legislature in 1881, by the act 44 & 45 Vic. ch. 90, under which he was authorized to build and has built a toll-bridge across the said river, within the said municipality. Section 3 of the said act reads as follows (2).

The bridge projected by the municipality, appellant, would be within one league from the respondent's, but they contend that a free bridge would not be an unlawful interference with his franchise. The judgment of the Court of Queen's Bench, reversing the judgment of the Superior Court, was adverse to their contention and ordered them not to proceed with the erection of the said bridge. I am of opinion that this judgment was right though on grounds different from those upon

(1) 6 L. C. Jur. 149.

(2) See p. 456.

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which the said judgment of the Court of Queen's Bench was based.

The appellants would read section 3 above cited of the respondent's charter, as if it said: "during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, for lucre or gain, within the distance of one league from the said bridge" and hence argue that a bridge for lucre or gain only is prohibited by the statute, and not a free bridge. But the words "for lucre or gain" are not so to be found therein after the words "any bridge or bridges or works," but only after the words "or use or cause to be used any means of passage for the conveyance of any persons, vehicles or cattle." I do not see that these words "for lucre or gain" are at all connected with the words "bridge or bridges or works." I read the sentence as if the words "for lucre or gain" were inserted immediately after "or use or cause to be used." And I am fully justified in doing so, it seems to me, by the fact that it is after the same words, "use or cause to be used," that the words "lucre or gain" are to be found a few lines after, in the same clause, when decreeing the penalty for infringement of the charter. And that penalty is "on any person who shall build or cause to be built a toll-bridge or toll-bridges within the said limits," consisting in three times the amount of the tolls imposed by the act for the persons, cattle or vehicles, which shall thus pass over such bridge or bridges, whether such persons, cattle or vehicle have passed free or not, such a toll-bridge, it is clear, not being absolutely prohibited, *sed quære?* as per Sir Montague Smith in *Jones* v. *Stanstead, Shefford & Chambly Ry. Co.* (1); *Leprohon* v. *Globensky* (2); *Globensky* v. *Lukin* (3),—with a penalty

(1) L. R. 4 P. C. 116. (2) 3 L. C. Jur. 310.
(3) 6 L. C. Jur. 145.

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of ten dollars for each person, animal, or vehicle conveyed across the said river for lucre or gain, within the said limits, by any other means of passage—here again, using the words "for lucre or gain," only in connection with the means of passage other than by a bridge.

Then the words "bridge for lucre or gain" are not those generally used in statutes *in pari materiâ*, to mean a toll-bridge. Whenever a bridge for lucre or gain is meant, it is called a toll-bridge, not a bridge for lucre or gain, and this very statute, nay this very clause itself, when decreeing penalties, is an instance of it. And if the legislature had here intended to forbid only the erection of a toll-bridge or of toll-bridges it would have said, "no person shall erect or cause to be erected any toll-bridge or toll-bridges." But it did not say so. The prohibition extends to any bridge.

Neither can this section be read again as limiting the prohibition to a bridge for lucre or gain, as contended for by the appellants; "no person shall erect or cause to be erected any bridge or bridges, or works for the conveyance of any persons, vehicles or cattle for lucre or gain across the said river." A bridge is built for the passage but not for the conveyance of any one, and the words "for the conveyance of any persons, vehicles or cattle for lucre or gain" are clearly governed by and relate only to the preceding words "any means of passage." This section must be read, and, in fact, reads as follows, in the French as in the English version: "During thirty years, no person shall erect or cause to be erected any bridge or bridges or works across the said river within the distance of one league." * * * It thus expressly enacts that no bridge of any kind shall, within a league, be erected in opposition to the respondent's privilege, a prohibition which as against a free bridge was obviously, by the legis-

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lature itself, considered as absolute, and which accordingly was left to be enforced, when necessary, as has been done by the respondent here, and by the grantee of a similar franchise, in an analogous case, in Montreal, *Leprohon* v. *Globensky* (1), by a restraining order, the penalties imposed applying exclusively to the infringement of the franchise by a toll-bridge or by the other prohibited means of passage.

This is made still clearer by the proviso of the section which specially exempts a free passage by a ford, or in a canoe, or other vessel from the prohibition to cross the river within the said limits. Does not that infer that a free bridge is to be prohibited? If not, why a proviso to allow free passage by a ford or canoe or other vessel without mention of a free bridge? If the legislature had intended to permit a free bridge, it would not so have exclusively provided for a free passage by a ford or canoe or other vessel. *Inclusio unius est exclusio alterius.* Comp. Garnier, Reg. des Eaux (2).

The appellant would have us read this proviso as if it extended to a free bridge. But there is no rule or construction of statutes that I know of to authorize it. Quite the contrary, when the statute says that, notwithstanding the privilege granted, a free passage by a ford or in a canoe or other vessel, shall be permitted, it clearly, it seems to me, though impliedly only, decrees, or assumes rather, that a free bridge or a free passage by a bridge shall not be permitted. And is it not evident that if the legislature had, by the act, allowed the erection of a free bridge at any time, by this corporation or by any one else, in opposition to the respondent's privilege, the public would then have had no bridge at all?

(1) 3 L. C. Jur. 310. (2) Vol. 1, no. 368.

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Suppose (says Putnam J.) (1) for example, a free bridge should be placed by the side of the toll-bridge, it would seem a mere mockery to tell the proprietors of the toll-bridge that they might still have all the toll that they could collect over their bridge. This free bridge would as effectually destroy their franchise as if an armed force were stationed to prevent any one passing over it. Who does not see that their charter would be subverted by this construction?

Charters creating a monopoly or granting a franchise, it is true, are, as argued by the appellants, *strictissimi juris*. But they, like all other statutes, must receive, if possible, a construction which will promote the object of the law giver, not one which would defeat his intentions. And

in every case, (says Story J.) the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favour of the king. And, if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. Whenever the grant is upon valuable consideration this rule of construction ceases, and the rule is expounded, exactly as it would be in the case of a private grant, in favour of the grantee (2).

Such a grant is always made in the interest of the public, to ensure an easy access from one side of a river to the other which it has previously been impossible to get, and which without it, it must be assumed, cannot be obtained. And this very grant itself was, on its face and in express terms, so made to the respondent for the benefit of the public:

"Whereas (says its preamble) the construction of a toll-bridge over the river Chaudière, in the parish of St. George, in the county of Beauce, would greatly tend to promote the welfare and to facilitate the intercourse of the inhabitants of the said parish and of the neighbouring parishes, and whereas David Roy has, by petition, prayed to be authorized to construct such a toll-bridge."

(1) *Charles River Bridge* v. *Warren Bridge* 7 Pick. 493.

(2) *Charles River Bridge* v. *Warren Bridge* 11 Peters 589, 597.

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Could anything be clearer? Is it not solely upon these considerations of public utility, and in return for his assuming an enterprise needed by the public, that the legislature granted this franchise to the respondent?

These franchises (says Chancellor Kent) (1) are presumed to be founded on a valuable consideration and to involve public duties, and to be made for the public accommodation, and to be affected with a *jus publicum*, and they are necessarily exclusive in their nature.

See also *Perrine* v. *Chesapeake* (2).

The obligation between the Government and the grantee of such a franchise is mutual. He is obliged to provide and maintain facilities for accommodating the public, at all times, with an easy crossing. The law, on the other hand, in consideration of this duty, provides him a recompense by means of an inclusive toll, to be exacted from persons who use the bridge, and, of course, it will protect him against any new establishment calculated to draw away his custom to his prejudice.

Or, in the words of the same learned Chancellor:

The grant must be so construed as to give it due effect, by excluding all contiguous and injurious competition. *Ogden* v. *Gibbons* (3).

For it has been said long ago

where the use is granted, everything is granted by which the grantee may have and enjoy the use (4).

And if two constructions may be made, one to make the grant good, the other to make it void, then for the honour of the king and the benefit of the subject, such construction shall be made that the grant shall be good." Bacon's Abridg. Prerog, F. 2.

And, (says Mr. Justice Story) (5): Wherever a grant is made for a valuable consideration, which involves public duties and charges, the grant shall be so construed as to make the indemnity co-extensive with the burden.

McLean J., in the same case, said:

Much discussion has been had at the bar, as to the rule of construing a charter or grant. In ordinary cases, a grant is construed favour-

(1) 3 Comm., p. 458.
(2) 9 How. 180.
(3) 4 Johns. Ch. Rep. 160.
(4) 1 Saunders Rep. 321.
(5) *Charles River Bridge* v. *Warren Bridge* 11 Peters 630.

ably to the grantee, and against the grantor. But it is contended that in government grants nothing is taken by implication. The broad rule thus laid down cannot be supported by authority. Whatever is essential to the enjoyment of the thing granted must be taken by implication, and this rule holds good whether the grant emanates from the royal prerogative of the King in England, or under an act of legislature in this country. *Charles River Bridge* v. *Warren Bridge* (11 Peters 557.)

In *Newburg Turnpike Co.* v. *Miller* (1), it was held, in that sense, that where one has a franchise of a bridge with the exclusive right of taking toll, though no limit above or below are defined by the charter, the erection of a free bridge, by another person, so near as to create a competition injurious to such franchise, is an infringement of the grant and will be prohibited by injunction.

No rival road, bridge, ferry or other establishment of a similar kind (said the court), can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant and goes to defeat it. The consideration by which individuals are invited to expend money upon great, expensive, and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means.

I need not remark that the respondent's case here is still more favourable, as his charter clearly defines the limits of his privilege.

In *Reg.* v. *Cambrian Railway Co.* (2), Blackburn J. said :

The prosecutor's right is to a ferry, or franchise, by which he had the exclusive right of carrying passengers across the river. It is well established that if that right is interfered with, without the authority of an act of parliament, an action would lie for that disturbance.

That case was, it is true, overruled by *Hopkins* v. *The Great Northern* (3), but only on the ground that a railway bridge, authorized by act of parliament, is not

(1) 5 Johns. Ch. Rep. 100. (2) L.R. 6 Q.B. 422.
(3) 2 Q. B. D. 224.

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an infringement of the franchise of a ferry. A question of the same nature as to a toll-bridge arose in the province of Quebec in the case of *Jones* v. *Stanstead* (1), which was ultimately determined by the Privy Council (2), but upon grounds which have no application to the present case.

In the United States, it was also held in *Re Lake* v. *Virginia* (3), upon the principle that any ambiguity in the terms of the grant of a franchise must operate against the grantee and in favour of the public, that a railway bridge is not an infringement of a previous grant of the exclusive right of a toll-bridge. But neither does that case help the appellants here. It is in fact their construction of the respondent's charter which would, if adopted, then have clearly, in 1881, not been in favour of the public, since the public would not then have had the bridge which the act itself says was needed to promote the welfare of the inhabitants.

In the well known case of *Charles River Bridge Co.* v. *Warren Bridge Co.* (4) to which I have already referred, the grantees of the franchise of a toll-bridge were, it is true, defeated in their attempt to restrain the erection of another bridge near theirs; but they had no limits defined by their charter above and below their bridge for the exclusive exercise of their franchise, and moreover, the bridge of the defendants had been authorized by a special act of the legislature; and the great controversy before the courts was as to the power of the legislature to pass such an act, it being contended by the plaintiffs that the act was *ultra vires* under the constitution of the United States, as impairing the obligation of a contract. But the case is no authority in favour of the appellants here. On the contrary, it

(1) 17 L.C.R. 81.
(2) L.R. 4 P.C. 98.
(3) 7 Nev. 294.
(4) 11 Peters 420.

is evident by a reference to the opinion of Taney C.J., who gave the judgment of the court, that the plaintiffs would have been successful if their charter had defined certain limits for their privilege, and, I assume from the report, even without any such limits being defined in their charter, if the defendant's bridge had not been authorized by statute. See also *Tuckahoe Canal Co.* v. *Tuckahoe Railroad Co.* (1). Such, according to Garnier, Reg. des. Eaux (2), would be the decision, in France, under similar circumstances. See also Daniel, Cours d'Eaux (3).

And it cannot be doubted, in fact it must be assumed, that if the legislature, here, had been asked, or were asked at any time during the thirty years of the respondent's privilege, to grant a charter, or a permission for another bridge, whether a free bridge or a toll-bridge, within three miles from the respondent's, such a petition would not have been, or would not be granted, if the respondent performed all his obligations, or if granted at all, would have been so, or be so, only upon providing for due compensation to the respondent. It would have been an expropriation of the franchise. It cannot be presumed that the legislature would, by a clear abuse of power, have destroyed its own grant and committed a fraud on its grantee.

As said in Dalloz Répertoire (4).

Par le fait même de la concession, l'état contracte envers les adjudicataires de constructions de ponts l'obligation de les maintenir dans la jouissance du droit de péage, et de n'apporter dans la situation des choses aucun changement qui serait de nature à porter prejudice aux interêts des concessionnaires.

A case noted in Ramsay's Digest of *Girard* v. *Belanger* (5) decided by the Court of Appeal in Montreal, in 1874, is on all fours with the present one. There the

(1) 11 Leigh 42 ; 36 Am. Dec. 374.
(2) Vol. 1, no. 567.
(3) Vol. 1, no. 227.
(4) Vo. Voirie par Eau no. 635.
(5) P. 712.

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court, reversing the judgment reported at 17 L. C. Jur. 263, distinctly held that a free bridge was an infringement of a charter for a toll-bridge similar to the respondent's here, and, in one respect, not so favourable to the exclusiveness of the franchise. For there, the proviso exempted from the operation of the act the free crossing by a ford or in a canoe or otherwise (1) whilst here, these words "or otherwise" have been replaced by the words "or other vessel," removing one of the grounds that had given rise to the controversy in that case of *Girard* v. *Belanger*. And this decision of the highest court in the province which, as I have said, was rendered in 1874, furnishes an additional argument against the appellants' contention here, the respondent's charter having been granted in 1881, after that decision. For it is a well settled rule of construction (unaffected by legislation in the province of Quebec as it is for Dominion statutes, by 53 Vic. ch. 7 (D.) that, where a statute has received a judicial interpretation, and the legislature has afterwards re-enacted one *in pari materia*, it must be considered to have adopted the construction which the courts had given to it. See Per Strong J., *Nicholls* v. *Cumming* (2). See also cases cited in Endlich on Interpretation of Statutes (3). This rule, it seems to me, applies here with the more force, as by the replacing I have noticed above, of the words "or otherwise," by the words "any other vessel," the legislature must be assumed, in view of the anterior decision of the Court of Appeal, to have intended the decree more clearly, and so as to remove any room for doubt, that a free bridge would be an infringement of the grant to the respondent.

In the case of *Galarneau* v. *Guilbault* (4), in this court, Mr. Justice Fournier, delivering the judgment

(1) 26 Vic., ch. 32, sec. 10 (1863.)
(2) 1 Can. S.C.R. 425.
(3) P. 513.
(4) 16 Can. S.C.R. 579.

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of the court, was clearly of opinion that a free bridge, under similar circumstances, is an infringement of the franchise of a toll bridge. It was not necessary, however, for the determination of that case to decide the point.

A case of *Motz* v. *Rouleau*, noted in *Globensky* v. *Lukin, et al.* (1), decided in the Court of Appeal, Quebec, in 1848, is the other way. *On cite ces arrêts comme on signale des écueils*, says Boncenne. It was there held that a free bridge was not an infringement of a charter for a toll-bridge granted in 1818, by the 58 Geo. III. ch. 25, Lower Canada, to one Verrault, of Ste. Marie, Beauce. That decision, however, was overruled by the legislature itself in 1853, by a declaratory act, the 16th Vic. ch. 260, wherein it is declared to remove all doubt, that the intention of the legislature, in the aforesaid act of 1818, was to prohibit the building of any bridge or bridges whatsoever in opposition to Verrault's toll-bridge. To show how similar on this point the charter there in question was to the one now under consideration, I quote it at length.

Sec. 6. No person or persons shall erect or cause to be erected any bridge or bridges or works, or use any ferry for the carriage of any persons, cattle or carriages whatsoever, for hire (pour gages) across the said river Etchemins, within half a league * * * and if any person or persons shall erect a toll-bridge or toll-bridges over the said river Etchemins within the said limits, he or they shall pay to the said Verrault treble the tolls hereby imposed for the persons, cattle and carriages which shall pass over such bridge or bridges; and if any person or persons shall at any time, for hire or gain (pour gages ou gain) pass or convey any person or persons, cattle or carriages across the said river, within the said limits, such offender or offenders shall, for each person, animal or carriage so carried across, forfeit and pay a sum not exceeding forty shillings. Provided that nothing in this act contained shall be construed to prevent the public from passing any of the fords in the said river or in canoes without gain or hire (sans lucre ou gages).

(1) 6 L. C. Jur. 149.

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The court had construed that clause as the appellants here would construe section 3 of the respondent's charter, that is to say, as prohibiting only a toll-bridge within the grantee's limits and not a free bridge. That construction the legislature declared to have been erroneous, and contrary to its intentions. Could it not be argued here, if it was at all necessary for respondent's case, that, by this declaration of the legislature of what is the construction to be given to that section of Verrault's charter, the court must give a similar section re-enacted in a subsequent charter *in pari materia*, even to another party, that same construction that the legislature has declared must be the true construction of the previous one? In other words, what the legislature meant in 1881, by section 3 of the respondent's charter, must be what it meant by the same section enacted in 1818.

It is exactly, it seems to me, as if the legislature, in 1881, had contracted with the respondent that he would have, as to this bridge, the same rights that were conceded to Verrault, in 1818, as to his bridge.

An additional argument against the appellant's contention is derived from the very first section of the respondent's charter, whereby the legislature provided for the case, and the only case, where they might, after eight years, have a free bridge in this locality. It reads as follows:—

> After the expiration of eight years from the passing of the act, it shall and may be lawful for the municipality of St. George to assume the possession of the said bridge and dependencies and to acquire the ownership thereof, upon paying to the said David Roy the value which the same shall, at the time of such assumption, bear and be worth, with an addition of twenty per centum, and after such assumption, it shall become a free bridge and shall be maintained by the municipality as such free bridge.

The appellants would contend, for they are driven to go so far, (and the superior court had supported

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their contention) that they had the right to build a free bridge in the locality at any time immediately after the erection of the respondent's toll-bridge, or even simultaneously with it. That cannot be, in my opinion. Such a contention, if it were to prevail, I have already remarked, would clearly render vain and illusory, and nullify the grant made to the respondent. Comp. *Anderson* v. *Jellet* (1). And apart from the reasons I have hereinbefore attempted to explain, this first section further demonstrates, in my opinion, the unsoundness of the appellant's proposition. It is only after eight years from the passing of the act that this municipality can, there, have a free bridge, and then, not one in opposition or adverse to the respondent's grant, but only upon expropriating his bridge and paying him, not merely the actual value thereof, as in ordinary expropriations, but an addition of 20 per cent over and above such value, the legislature thereby clearly, it seems to me, showing that, in its intention, such an expropriation, at the end of eight years, would deprive the respondent of a privilege for the balance of the thirty years against any bridge whatever, the 20 per cent above the value being for that privilege and franchise. Such a clause would not be found in the statute if, as they contend, this municipality, appellant, had, and has had, the right, at any time, to erect a free bridge within one league from the respondent's toll-bridge. It would have been futile, and ironical almost, to grant to the municipality appellant the right of expropriating the respondent's bridge, without any privilege in their favour thereafter on their paying him 20 per cent more than its value, if they always had an independent right to build one themselves.

(1) 9 Can. S. C. R. 1.

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And, it must not be lost sight of, the erection of a free bridge by the appellants would not relieve the respondent from the duties and obligations cast upon him by the statute. He would be deprived of all the benefit of the franchise, whilst he continued liable during the unexpired term of thirty years to all the burdens imposed upon him. He would have to keep his bridge in repair under a penalty of ten dollars a day, and give to the public without distinction the right to pass over it. For though the bridge is his property, yet he could not in law, refuse to any one the right of passage over it, upon payment of the statutory tolls.

Upon the consideration of the right to an exclusive toll for 30 years, he disbursed a large amount to build it, and to repay to Cahill and Gilbert, as obliged to by his charter, their cost of a temporary bridge they had erected in this same locality. This consideration the appellants would take away from him and leave nothing but the charges and obligations. They have not the right to do so, in my opinion. The rights of a grantee are not to be extended by implication they say. Spoliation is not to be authorized by implication, I would say.

In France, as in England and the Unites States, as might well be expected, it is held that the right to a franchise of this nature called *droit de bac* and *de pontonage* must necessarily be exclusive and entitle the grantee *ex necessitate rei* to restrain all interference with his right. Daniel des Cours d'Eaux (1); Bacquet, des Droits de justice (2); Henrys, Ferrière dic. de Droit vo. Péage (3); Dupont, Actions possess (4); Dalloz, rép. vo. Voirie par Eau (5); Domat, Dr. publ. tit. (6); 3 Despeisses (7).

(1) Vol. I, 234 à 238.
(2) Ch. 30 no. 19 & seq.
(3) Vol. I ch. 1 quest. 77 page 233, des péages.
(4) Nos. 461 à 469.
(5) Nos. 400, 584.
(6) 8 Sec. 1 par. 7.
(7) P. 233, du droit de péage; see also Merlin Rep. v. péage.

We see in Lebret's decisions (1) that the King Louis XIII. having run great danger in crossing the Seine at Neuilly in a scow decided that a bridge should there be built, and that this bridge be built by private parties, upon the king granting them an exclusive right to tolls during a certain time. By an arrêt of March 4th, 1705 (5 Journ. des audiences 507), it appears that the king himself, Louis XIV., successor to the grantor, paid an annual sum for the passage of the officers of his household.

And in Anc. Dénizart (2), the following case is reported:

The Seignior of Coulonge, owner of the franchise of a ferry across the River Saône, took proceedings against one Bourdance, to prohibit him and his servants from crossing the river in his own scow opposite his residence, twelve hundred feet from the ferry. In the Court of first instance, the Seignior obtained a judgment in his favour. This judgment, however, was reversed in appeal on the 9th January, 1758, but only upon a declaration by Bourdance that he admitted the plaintiff's right to the franchise, and upon his binding himself not to allow any one else but members of his family and his servant to cross at all in his scow. This is a clear case where, long ago, a free passage to the public was held to be an infringement of the franchise of a ferry.

In modern times, this doctrine, in a case under analogous circumstances, of *Turquand* v. *Goagon* (3), has received the sanction of the Court of Cassation.

In another case reported in Sirey (4), the grantee of a toll-bridge was held to be entitled to recover damages from the state for a breach of the state's contract, by having allowed the construction of a railway bridge

(1) *Liv.* 5, *décision* 12.
(2) Vo. *Bac.*
(3) S.V. 52, 1, 15.
(4) S. V. 54, 2, 158.

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within the limit of the toll-bridge privilege. See also Sirey 59, 2, 461.

In 1875 also, Sirey (1), *Re Société des Ponts de St. Michel*, the state was declared to be responsible in damages for the erection of a free way of crossing within 40 metres of a toll-bridge. A prior case in Sirey (2), and another one in Sirey (3), seem to have been determined in a contrary sense. However, they merely declare the right generally of the state to build a new bridge, without compensation, near a toll-bridge, and have no application here. They are, moreover, overruled by the more recent cases, and, at most, demonstrate, if demonstration was needed, that Sirey, like Dalloz, may well be termed:

Un arsenal du droit français où toutes les erreurs peuvent trouver des arrêts et tous les paradoxes des autorités (4).

A case of *Guerin* v. *l'Etat* (5), before the Conseil d'Etat in 1869, is absolutely in point. The plaintiff had obtained from the state, in 1851, the grant of the franchise of a toll-bridge of which he was in possession. The state subsequently built a free bridge on the same river, three thousand metres from the plaintiff's toll-bridge. Thereupon, an action of damages against the state was instituted. The action was dismissed, but only upon the ground that the distance between the new bridge and the toll-bridge was such that the plaintiff could not be admitted to contend that his privilege extended so far, and without questioning at all his right to an exclusive privilege, even against a free bridge, within a certain distance below and above his own bridge, though such was not expressly reserved to him in his charter.

Le requérant (said the Minister of the Interior for the state) se borne à soutenir que l'interdiction qui ne se trouve pas écrite dans son con-

(1) S.V. 77, 2, 30.
(2) S. V. 41, 2, 110.
(3) S. V. 46, 2, 350.
(4) Appleton, de la possession, no. 220.
(5) S.V. 70, 2, 135.

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trat, y est sous entendue, c'est-à-dire qu'en lui concédant le droit de se rembourser au moyen d'un péage d'une partie du capital engagé pour la construction du pont de Magné, le gouvernement n'a pas pu se réserver la faculté de lui enlever les bénéfices qu'il croyait pouvoir retirer de ce péage. Cette observation est exacte, sans doute ; le concessionnaire d'un pont à péage doit avoir le monopole du passage dans une certaine étendue de la rivière ; mais évidemment aussi cette étendue a des limites. Le perimètre de protection reservé aux entrepreneurs ne peut pas être illimité.

And on this last ground alone, as I have said, the grantee's claim was dismissed.

GWYNNE J.—I cannot entertain a doubt that the true construction of the act which has conferred upon the plaintiff his franchise is that so long as the franchise continues in force it is not competent for the appellants to erect or maintain a free bridge within the limits over which the franchise operates without expropriation of the plaintiff's franchise rights by compensating him as the act provides after expiration of eight years. I entirely concur in the judgment of my brother Taschereau, and that the appeal be dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Taschereau & Pacaud.*

Solicitor for respondent: *F. X. Drouin.*

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Oct. 21.
*Dec. 13.

F. A. FAIRCHILD AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

FERGUSON & NOLAN (PLAINTIFFS)..RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Promissory note—form of—"We Promise to Pay" and signed by manager of co.—Descriptive words—Liability of members of co.

The manager of an incorporated co'y, in payments for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay" and signed "R., manager O. L. Co." In an action against the individual members of the co'y the defence was that R. alone was liable on the note and that the words "manager," etc., were merely descriptive of his business.

Held, affirming the decision of the court below, that as the evidence established that both R. and the payees of the note intended to make the co'y liable; and as R. had authority, as manager, to make a note on which the co'y would be liable; and as the form of the note was sufficient to effect that purpose; the defence could not prevail and the holders of the note were entitled to recover.

APPEAL from a decision of the Supreme Court of the North-west Territories affirming the judgment for the defendants at the trial.

The plaintiffs, Ferguson & Nolan, are merchants, doing business at Calgary, N. W. T. The defendants are residents of Winnipeg and carry on a lumber and mill business at Otter Tail, B.C, under the name of The Otter Tail Lumber Co. This company was not incorporated but defendants had entered into articles of partnership among themselves.

The manager of the company was one of the partners, W. D. Rorison.

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 1 N. W. T. Rep. Part 3 p. 41.

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The action was brought on an account for goods sold to the company and also upon a note in the following form :—

Sixty days after date we promise to pay Dolan & Barr, or order, four hundred and seven 29-100 dollars, at the Imperial Bank here, value received.

W. D. RORISON,
Manager Otter Tail L. Co.

This note was endorsed by the payees, Dolan & Barr, to the plaintiffs. Rorison was not made a defendant to the action.

The defence to the action as to the note was that it was the note of Rorison only and that the words "Manager Otter Tail L. Co." were merely words of description; that to hold the company liable the note should show on its face that it was signed on behalf of the company; and that evidence of intention must be gathered from the contract itself and not otherwise.

The majority of the court below held the defendants liable on the note but not on the claim for goods sold. The defendants appealed.

Ewart Q.C. for the appellants. The words "Manager Otter Tail L. Co." are descriptive merely. *Thomas* v. *Bishop* (1); *Lennard* v. *Robinson* (2); *Leadbitter* v. *Farrow* (3); *Lindus* v. *Melrose* (4).

As to the significance of the word "we," in the note, see *Alexander* v. *Sizer* (5); *Dutton* v. *Marsh* (6); *Hagarty* v. *Squier* (7).

The rule as to notes made by an agent is laid down by different text writers in the same way, namely, that the note must state on its face that it is made for another. Byles on Bills (8); Chitty on Bills (9); Chal-

(1) 2 Str. 955.
(2) 5 E. & B. 125.
(3) 5 M. & S. 345.
(4) 2 H. & N. 293.
(5) L. R. 4 Ex. 102.
(6) L. R. 6 Q. B. 361.
(7) 42 U. C. Q. B. 165.
(8) 15 ed., pp. 40, 42 and 43.
(9) 11 ed., p. 33.

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mers on Bills and Notes (1); Daniel on Negotiable Instruments (2).

Ferguson Q.C. for the respondents cited *Trueman* v. *Loder* (3); *Young* v. *Schuler* (4); *Calder* v. *Dobell* (5); *City Bank* v. *Cheney* (6)

STRONG and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Patterson.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

GWYNNE J.—The defendants and one W. D. Rorison, carried on business in partnership together as saw-mill owners and manufacturers of logs into lumber, at a place called Otter Tail, in the North-west Territories, under the name of the Otter Tail Lumber Company. Of this firm Rorison was the managing partner, residing at Otter Tail where the mills of the partnership were and their business was carried on. The defendants resided at Winnipeg, in Manitoba, where one of them acted as secretary of the partnership firm. Upon the 21st September, 1889, a clerk of Rorison, in Rorison's name, addressed and sent to the secretary at Winnipeg, a letter in which it was communicated to the defendants that the lumber company had become and were then indebted to a firm, named Dolan & Barr, for logs delivered to the company, in the sum of $1,066.90 and that Rorison had given to persons trading under the name and firm of Carlin, Lake & Co., a promissory note for $300 to settle bills of Dolan & Barr to that amount. About the 9th October, 1889, Dolan & Barr were indebted to the plaintiffs for cer-

(1) 4 ed., p. 65.
(2) 4 ed., secs. 300-1.
(3) 11 A. & E. 589.
(4) 11 Q. B. D. 651.
(5) L. R. 6 C. P. 486.
(6) 15 U. C. Q. B. 400.

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tain goods purchased from the plaintiffs. This fact was communicated to Rorison and he suggested to the plaintiffs as a mode by which they could secure payment of the goods, that if they would get Dolan & Barr's note the lumber company would endorse it as they were indebted to Dolan & Barr, and that the plaintiffs could get the note, so endorsed, discounted by the bank. The defendants, however, instead of getting Dolan & Barr's note, drew a note in blank payable to Dolan & Barr for the purpose of its being signed by the lumber company, and got Dolan & Barr to endorse it and then sent it to Rorison for the company's signature. Rorison having signed the note returned it to the plaintiffs. The note as signed is as follows:

CALGARY, 9th October, 1889.

$407.29.

Sixty days after date we promise to pay to Dolan & Barr, or order, four hundred and seven $\frac{29}{100}$ dollars at the Imperial Bank here, value received.

W. D. RORISON.
Manager Otter Tail Lumber Co.

And the sole question is: Are the defendants who, it is not disputed, are members of the Otter Tail Lumber Company liable upon this note, or, on the contrary, is Rorison the only person liable, and is all after his name to be read only as descriptive of his person? This raises a question of the intent of the parties to the note, which is a matter of evidence, and in the view which I take many of the cases cited have little bearing upon the subject.

There can be no doubt that *primâ facie* it was quite competent for Rorison, as managing partner of the lumber company, to bind the company by a promissory note, given by him in the name of the company for goods delivered to the company in the course of the business of which he was the managing partner, nor can there be any doubt that

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evidence of all the circumstances surrounding the making of an instrument as to the intent with which, and the consideration for which, it was executed is admissible for the purpose of showing who was or were the party or parties bound by it if there be anything on the face of the instrument which creates any ambiguity in the matter. *Lindus* v. *Melrose* (1), and *Young* v. *Schuler* (2), are sufficient authorities on this point.

Now the evidence is express and unequivocal that the intent of all the parties to the note, and of the plaintiffs who were to receive it when made for full value given to their payees, was that the lumber company who had received the consideration for which the note was given were to be the parties to be bound by it. Then the words "we promise" &c. upon the face of the note indicate that more persons than one were contemplated to be makers of the note.

It was argued by the learned counsel for the appellants that the use of these words "we promise," &c., made no difference for that if, as he contended, a note so framed had been signed by one person only as maker, as he contended the note in question was, that person would be alone bound, and so if the note had been framed "I promise," &c., and had been signed by several that all would be bound, and he argued that the note should be read as if it were written and signed as follows:

We the manager of the Otter Tail Lumber Company promise, &c.,
W. D. RORISON.

in which case, he asked, could there be a doubt that Rorison alone would be liable? But without inquiring what should be the construction of a note so framed it is a sufficient answer to such an argument to say that it would be more consistent with the un-

(1) 2 H. & N. 293. (2) 11 Q. B. D. 651.

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doubted intent of the parties to the note, and with the consideration for which it was given, and with the use of the words "we promise," etc., and more natural and more reasonable to read the note as if written and signed as follows:—

We, The Otter Tail Lumber Company, promise, &c., &c.
W. D. RORISON,
Manager.

in which case there could be no doubt that the lumber company would be the persons represented on the note as the makers, and this is the way in which, in my opinion, the note can and should be read, and so construing it the appeal should be dismissed with costs. It is unnecessary to refer to the contention of the defendants that by a clause in the articles of partnership Rorison was restricted from signing notes in the name of the company, or to put a construction upon that clause, for it is not suggested that Dolan & Barr or the plaintiffs had any notice whatever of their being any such clause in the articles of partnership.

PATTERSON J.—This is an action brought by the respondents as endorsees of a promissory note, charging the appellants as makers of the note. There was also a claim for goods sold and delivered upon which the respondents recovered. The appeal relates only to the promissory note.

The appellants all reside at Winnipeg. In April, 1889, they formed a partnership between themselves and one W. D. Rorison for carrying on a lumber business at Otter Tail, in the North-west Territories, where the appellants had timber limits and machinery. A written agreement was entered into by which, amongst other things, it was provided that Rorison was to devote his whole time to the business at Otter Tail, and by which it was also stipulated

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that he should not incur any liability, debt or obligation in the name of the co-partnership or that should bind the members thereof either jointly or severally. The business was to be conducted in the name of the Otter Tail Lumber Company.

Rorison accordingly conducted the business at Otter Tail, and occasional debts were incurred.

Money became due to persons named Dolan & Barr for saw-logs. Their account as kept by the lumber company, which is in evidence, runs from the 15th of June to the 30th of September, 1889, with items on both sides of the account, those on the credit side being, all except one, for logs. There is in evidence a letter written by the defendant Bathgate, who acted as secretary of the company at Winnipeg, to Rorison at Otter Tail, in which the writer says:

> We have a telegram this morning from Dolan & Barr *re* money due them. As you will learn by my last the Company here have no knowledge of the exact amount due them until they get your statement and see the contract.

That letter is dated the 7th of October, 1889. Two days later Rorison made the promissory note in question which is in these words:

> $407\frac{29}{100}$. CALGARY, 9th October, 1889.
>
> Sixty days after date we promise to pay to Dolan & Barr or order Four Hundred and Seven $\frac{29}{100}$, Dollars at the Imperial Bank here. Value received.
>
> W. D. RORISON,
> *Manager Otter Tail L. Co.*

Dolan & Barr at once endorsed the note to the plaintiffs. Indeed, as we learn from the evidence of the plaintiff Ferguson, the note was made for the purpose of its being used in that way. The plaintiffs wanted money from Dolan & Barr who had to get it from the lumber company. We have seen that they were telegraphing for it and, as Ferguson says, it was slow in coming. Rorison suggested to Ferguson that

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he should get a note from Dolan & Barr and the company would endorse it. That suggestion was acted on but the note was made to Dolan & Barr and indorsed by them, which put the transaction in a more appropriate shape.

The question is whether the defendants are properly held liable on the note.

There is no suggestion that Dolan & Barr or the plaintiffs knew of any restrictions on Rorison's authority, as between himself and his partners, to do any act in the conduct of the business which a partner may ordinarily do.

I say this without intending to imply that by giving the note Rorison violated his agreement not to incur any liability, debt or obligation in the name of the co-partnership. There is no reason to suppose that he was in any way to blame for the incurring of the debt to Dolan & Barr. He merely gave a note at sixty days for an overdue debt, and I form no opinion on the question between him and his partners.

At the trial the appellants were held liable on the note and the Supreme Court of the North-west Territories affirmed that decision, one of the learned judges dissenting and holding that Rorison alone was liable.

The appellants urge that, by reason of the form in which the note is made, Rorison is individually liable upon it, and that neither the plural pronoun "we" nor his designation "Manager Otter Tail L. Co." would avail to save him. They support their contention by decisions of weight which convinced the dissenting judge in the court below, while the majority of the court, relying on other cases as precedents, and on the principle which they deduced from all the cases, held a different opinion.

I do not propose to devote much discussion to questions which might arise if Rorison alone were sued as

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maker of the note. We have to do with the liability of his partners and only indirectly with his individual liability. If it were conceded, for the purpose of the argument, that Rorison could properly be held individually liable as sole maker of the note, which I am not prepared to admit except for the purpose of the argument, it would not follow that his partners are not also liable.

There can be no doubt that, as a matter of fact, Rorison made the note, and was understood by the plaintiffs as well as by Dolan & Barr to make it, on behalf of his company.

Under the well settled doctrines that apply to contracts in general the principal may be liable upon a contract made by the agent in his own name and on which the agent is himself also liable.

The rule applies not only to the case of principals whose name or whose existence is undisclosed at the time of the making of the contract, though it was once supposed to be confined to cases of that class, but it equally applies when the principal is known. That was decided in *Calder* v. *Dobell* (1), by the Court of Common Pleas, whose judgment was affirmed in the Exchequer Chamber in 1871.

It had been decided thirty years earlier that, contrary to an idea that had previously prevailed, the rule applied to written contracts and not to oral contracts only, so that a dormant partner whose name did not appear in the firm was held liable on a written contract made in the names of and signed by the ostensible partners. *Beckham* v. *Drake* (2), in which that question was settled by the Court of Exchequer, is a singular case in one respect, viz., that the court differed, as to the liability of the dormant partner, from a decision of the Court of Common Pleas pronounced

(1) L.R. 6 C.P. 486. (2) 9 M. & W. 79.

three years earlier upon the same contract and between the same parties, in *Beckham* v. *Knight and Drake* (1).

The rule was, however, supposed not to apply to negotiable instruments. Parke B. said in *Beckham* v. *Drake* (2):

> The case of bills of exchange is an exception which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable in an action upon it.

And Lord Abinger C.B. used language which, though in terms directed to bills of exchange only, would seem to apply to promissory notes which are made negotiable by the statute of Anne. Referring to the Common Pleas decision as being placed on grounds contrary to the doctrines he had been just enunciating, he said (3):

> The only cases cited by the judges who follow the Lord Chief Justice are cases of bills of exchange which are quite different in principle from those which ought to govern this case, and in which, by the law merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it and with no other party whatever.

The reason thus given for the exception of bills of exchange from the general rule does not seem to be accepted in more modern cases.

In *Alexander* v. *Sizer* (4) Kelly C.B. points out the distinction between bills of exchange and promissory notes in the particular in discussion. Speaking of bills he says:

> The acceptor, though he may purport to accept in some manner limiting his personal liability, becomes liable if he does accept. He cannot vary or limit his liability on the contract; and by his acceptance of the bill, which is addressed to him, it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him. If express words of

(1) 4 Bing. N.C. 243.
(2) 9 M. & W. 79, 96.
(3) P. 92.
(4) L.R. 4 Ex. 102.

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exclusion were to be used the result might be different, but then the acceptance would, in fact, be no acceptance at all. Bills of exchange are all drawn on the intended acceptor in a personal character, and if he accept them he must be held to have done so in that character, and will be held liable no matter what words of mere description may be added to his name.

In reference to promissory notes a well known commentator says (1):

> These instruments are, by the statutes 3 & 4 Anne c. 9, and 7 Anne c. 25, made capable (if payable to order or bearer) of assignment, and placed in all respects upon the same footing with inland bills of exchange, so that every point of law which applies to the one may be taken generally as applicable to the other, with only this difference, that as a note is originally made between but two parties, viz., the maker and payee, and there is no third party or drawee, as in the case of a bill, so all those legal incidents of a bill which regard the position of the drawer and the nature and effect of an acceptance are, of course, foreign to a note.

In Pollock on Contracts (2) the author, discussing the technical rule as to a deed executed by an agent in his own name, which ordinarily binds the agent only, remarks that

> A similar rule has been supposed to exist as to negotiable instruments; but modern decisions seem to show that when an agent is in a position to accept a bill so as to bind his principal, the principal is liable though the agent signs, not in the principal's name, but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand.

In *Lindus* v. *Bradwell* (3) a bill had been drawn on William Bradwell, and it was accepted by his wife in her own name, "Mary Bradwell." The husband was held liable on the bill on proof of the authority of his wife to act as his agent.

In *Edmunds* v. *Bushell and Jones* (4) the question was the liability of Jones on a bill drawn on "Bushell & Co." and accepted by Bushell in the name of "Bushell & Co." Cockburn C.J. said:

(1) 2 Stephen's Com. 171.
(2) P. 99.
(3) 5 C.B. 583.
(4) L.R. 1 Q.B. 97.

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The defendant (meaning Jones) carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employing Bushell as manager. Bushell was, therefore, the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot, by a secret reservation, divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary and incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held liable on the bill.

In *Penkivil* v. *Connell* (1), decided in 1850, there was a promissory note in these words:

THE ROYAL BANK, LONDON.

£200. 19th FEBRUARY, 1845.

We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay G. H. Wray or bearer, on the 19th of February, 1850, at the Union Bank of London, the sum of £200 for value received, on account of the Company.

T. W. SUTHERLAND,
JOHN CONNELL,
M. BOYD,
A. DUFF.
} Directors.

Connell was sued alone upon the note, and he moved to stay proceedings until the plaintiff should have made proof of his debt before the master appointed to wind up the affairs of the Royal Bank of Australia which was an unincorporated company. His motion was refused on the ground, as I understand the decision, that the note was not the note of the company. Pollock C.B. said:

The defendant is sued individually in respect of a joint and several promissory note of which he is the maker. * * * It would be a fraud upon some one if such a note were allowed to be proved against the funds of the company. The note, as sued upon, has no connection whatever with the company.

(1) 5 Ex. 381.

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Maclae v. *Sutherland* (1) in 1854. was an action on precisely similar notes against six shareholders of the company, one of whom was a director who had signed the notes, another was a director when, by his authority, the notes were issued, but the other four were only shareholders. The defendants were held liable. Lord Campbell C.J. said :

> The decision of the Court of Exchequer in *Penkivil* v. *Connell* (2) we entirely concur in. Each director who signs the notes is liable to be sued separately upon them ; but this does not in any degree affect the joint liability of the shareholders.

The cases which chiefly influenced the dissenting judge in the court below were the English case of *Dutton* v. *Marsh* (3) and the Ontario case of *Hagarty* v. *Squier* (4). The latter was a very plain case. Squier as inspector of a fire insurance company had adjusted the amount of a loss with Hagarty, and he drew upon his company at thirty days, in favour of Hagarty, for the amount agreed upon, stating in the draft that it was the amount of the claim under the policy. He signed the draft "A. Squier, Inspector." On the face of that transaction the company could have been party to the bill only as acceptors. Squier personally was the drawer.

Dutton v. *Marsh* (3) was a case on a promissory note very like the notes in the Royal Bank of Australia cases of *Pinkivil* v. *Connell* (2) and *Maclae* v. *Sutherland* (1), except that the makers of the note were directors of an incorporated company. The note was as follows :—

> ISLE OF MAN, 7th January, 1864.
>
> We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of £1,600 sterling, with interest at the rate of 6 per cent per annum until paid, for value received.

(1) 3 E. & B. 1.
(2) 5 Ex. 381.
(3) L. R. 6 Q B. 361.
(4) 42 U.C.Q.B. 165.

It was signed by the four defendants, the word chairman being written after the name of Richard J. Marsh, and at the left hand side of the paper it had the seal of the company with the words "witnessed by Leslie Lochart."

The decision was that the defendants were personally liable on the note, just as in the Royal Bank of Australia cases the directors who signed the notes were personally liable, and it might perhaps be an authority for holding Rorison personally liable in this case, though I am not prepared to say that in that respect the cases are on all fours; but as to the actual question, viz., whether the partners of Rorison are not liable, as were the shareholders in the Royal Bank of Australia, nothing is decided by *Dutton* v. *Marsh* (1).

The case of *Alexander* v. *Sizer* (2), on which the judgment of the majority in the court below was to a great extent founded, is much more to the purpose as a precedent, the decision being that the person who signed the note was not liable upon it.

The note was in this form:

£1,500.

On demand I promise to pay Messrs. Alexander & Co., or order, the sum of £1,500 with legal interest thereon until paid value received the 16th of August, 1865.

For Mistley, Thorpe and Walton Railway Company.

JOHN SIZER,
Secretary.

Witness,—Charles Taylor.

Lindus v. *Melrose* (3), is also a strong authority for the view acted on by the court below. If that case is well decided the present one I should say is so *a fortiori*. The note there was:

Three months after date we jointly promise to pay Mr. Frederick Shaw, or order $600 for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited.

(1) 3 E. & B. 1. (2) L.R. 4 Ex. 102.
(3) 2 H. & N. 293.

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It was signed James Melrose, G. N. Wood, John Harris, directors, and had at the left hand side and under the body of the note the words:

Payable at the London Joint Stock Bank Company, Princes St. Mansion House. EDWIN GUESS, Secretary.

Then there were the words "we jointly promise," with three signatures of gentlemen with the one word "directors" added. Yet those gentlemen were held not to have bound themselves personally, the other things contained in the paper being taken to show that they acted only for their company.

We may note that in *Lindus* v. *Melrose* (1) the word "directors" was not treated as merely descriptive, nor was the word "secretary" in *Alexander* v. *Sizer* (2), the court holding that the use of those words showed that the parties signed as directors and as secretary.

Here we couple the words "we promise," which are not appropriate to a promise by one man, with the designation "manager of Otter Tail L. Co.," and we go no further than the authorities warrant when we read the promise, according to what it was in fact intended to be, as the promise of the company, and the signatures as being written as manager.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Davis, Costigan & Bangs.*

Solicitors for respondents: *Lougheed, McCarthy & McCaul.*

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(1) 2 H. & N. 293.

(2) L. R. 4 Ex. 102.

JAMES McGREGOR (PLAINTIFF). .....APPELLANT; 1892

AND *Oct. 7.
*Dec. 13.

THE CANADA INVESTMENT & AGENCY COMPANY (LIMITED) (DEFENDANTS) ..... } RESPONDENTS.

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

Will—Construction of—Usufruct—Sheriff's sale—Effect of—Art. 711, *C. C. P.*

The will of the late J. McG. contained the following provisions :—

Fifthly, I give, devise and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife the usufruct, use and enjoyment during all her natural lifetime, of the rest and residue of my property movable or immovable * * * in which I may have any right, interest or share at the time of my death, without any exception or reserve.

To have and to hold, use and enjoy the said usufruct, use and enjoyment of the said property unto my said wife the said Helen Mahers as and for her own property from and after my decease and during all her natural lifetime.

Sixthly, I give, devise and bequeath in full property unto my son James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind movable, real or personal of which the usufruct, use and enjoyment during her natural lifetime is hereinbefore left to my said wife the said Helen Mahers but subject to the said usufruct, use and enjoyment of his mother the said Helen Mahers during all her natural lifetime as aforesaid and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever; should, however, my said son, the said James McGregor, die before his said mother, my said wife, the said Helen Mahers, then and in that case I give, devise and bequeath the said property so hereby bequeathed to him, to the said Helen Mahers, in full property to be disposed of by last will and testament or otherwise as she may think fit and without any account to be rendered of

*PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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the same or of any part thereof to any person or persons whomsoever.

To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property for ever, and in the event of his pre-deceasing his said mother, unto the said Helen Mahers, her heirs and assigns as and for her and their own property for ever.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side) that the will of J. McG. did not create a substitution but a simple bequest of usufruct to his wife and of ownership to his son.

Held, also, that a sheriff's sale (*décret*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711, C. C. P. *Patton* v. *Morin*, (16 L. C. R. 267.)

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing a judgment of the Superior Court (2), which declared the appellant proprietor of the undivided half of a portion of lot No. 560, on the official plan of the parish of Montreal, and condemning the respondents to abandon to the appellant the undivided half of the said property, and to render an account of the fruit and revenues since the 7th October, 1886, and in default to pay the sum of $2,000.

The main questions upon this appeal were as to the interpretation of the will of the late James McGregor father of the appellant, the validity of an order for the sale of the property granted on the advice of a family council on the 19th September, 1886, upon the petition of the appellant's mother as tutrix to her minor children, and also the effect of a sheriff's sale of the same property to respondent's *auteurs*.

The material clauses of the will appear in the head note, and the facts and pleadings are fully reviewed

(1) Q.R. 1 Q.B. 197. (2) M.L.R. 6 S.C. 196.

in the judgments of the court hereinafter given. (See also reports of the case in the courts below (M.L.R. 6, S.C. 196 ; Q.R. 1 Q.B. 197.)

Honan and *Lafleur* for the appellant :

When analysed it will be found that the will contains in reality three distinct provisions: (1) a bequest of the usufruct to the testator's wife ; (2) a bequest of the ownership to the son, at first in general terms but subsequently, subject to the limitation and condition that he shall survive his mother; (3) a vulgar substitution in favour of the mother if she should survive the son

It is important to observe that the bequest of the ownership of the property to the son, though at first expressed in general terms, is afterwards restricted to the case of his surviving his mother. The will at first says: "I give, devise and bequeath in full property unto my son James McGregor, issue of my marriage with said Helen Mahers, the whole of the property of whatever nature or kind movable or immovable, real or personal of which the usufruct, use and enjoyment during her natural lifetime is hereinbefore left to my said wife;" and this clause might, if alone, appear to vest the ownership of the property in the son immediately upon the testator's death ; but a little further down the generality of the bequest is restricted by the following words: "To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns should he survive his said mother as and for his and their own property fore er." The general rule of interpretation to be followed in this case is that when a will or charter contains a bequest or conveyance in general terms and subsequently in more limited terms, there being no repugnancy between the general and the more limited words of grant or bequest, the specific limitation will

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prevail over the general expression. This rule of construction is expressed in the old maxim: "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia* (1)."

Accordingly, the highest title which James McGregor, jr., could claim under his father's will, was the ownership of the property should he survive his mother, or, in other words, the bequest by James McGregor, sr., to his son, was made under a suspensive condition, and until his mother's death the son had merely the hope or expectation of becoming proprietor. Consequently, under this restriction James McGregor, jr., did not acquire upon his father's death any rights which he could transmit to his heirs. He was not yet at that date the owner of the property, and as the ownership of the property could not remain in suspense pending his mother's usufruct, it follows that during the pendency of the condition the ownership must have vested in the mother.

We have therefore, the following condition of things: first a bequest of usufruct to the mother; secondly a conditional bequest of the ownership to the son if he should survive his mother, the ownership only vesting in him upon such contingency; and thirdly, a bequest of the ownership to the mother if she should survive the son.

Now the combined result of these provisions is exactly what would, by law, take place if the testator had simply used the words, "I bequeath the property to my wife and on her death to my son James." For a fiduciary substitution, such as the one contained in the last mentioned words, would, in fact, give the usufruct to the wife during her life, and would vest the property in the son from the time of her death, and

(1) 8 Coke 154.

(fiduciary substitutions include vulgar substitutions without any expressions to that effect being necessary art. 926 C. C.) would vest the ownership in the mother, —the institute if she should survive her son (the substitute.) By article 928 C. C. a substitution may exist although the term usufruct may have been employed to express the right of the institute, and the whole tenor of the act and the intention which it sufficiently expressed are considered rather than the ordinary acceptation of particular words in order to determine whether there is a substitution or not. The appellant submits that as the various operative words of bequest contained in the above mentioned clauses of this will have in combination no other result than would be produced by the creation of an ordinary fiduciary substitution, the court must, in interpreting the will, come to the conclusion that the testator intended to create a substitution and did create one by these somewhat clumsy and inartistic expressions. To isolate any of these expressions and derive from them separately an intention of creating a usufruct rather than a substitution, would, it seems to us, be simply violating the spirit of the whole bequest. See *Joseph* v. *Castonguay* (1); Thévenot-Dessaules, Substitution (2); *Roy* v. *Gauvin* (3); *McDonnell* v. *Ross* (4); *Plamondon* v. *de Chantal* (5); *Coutu* v. *Dorion* (6); *Phillips* v. *Bain* (7).

But even if the will in question were held not to contain a substitution, the sheriff's sale would still be null and void as having been made *super non domino et non possedente*. This was well established by the testimony of Thomas Craig, and if our view of the facts is concurred in, the sheriff's sale has not discharged the property from the appellant's right of ownership. Art.

(1) 8 L. C. Jur. 62.
(2) No. 526, 529, 552, 556, 557.
(3) 14 Rev. Lég. 270.
(4) M.L.R. 2 Q.B. 249.
(5) 17 Rev. Lég. 515.
(6) M.L.R. 2 S.C. 132.
(7) M.L.R. 2 S.C. 300.

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708 C.C. The sale was therefore *super non domino*, and the appellant, even if no substitution existed, could attack the sheriff's sale on this ground and afterward's attack the previous chain of title on the ground of fraud and illegality.

We also submit that according to the well established jurisprudence the lawful owner could assert his right of ownership in a direct action *en nullité de décret*, even if he had not filed an opposition to the sale. The advertisements of the seizure and sale on Craig, who was neither the owner nor in possession, could not convey any information or warning to the appellant that his rights were in danger. He had at that time sued the ostensible owner and possessor, Devlin, to recover his property, and this action was still pending. See *Dufresne* v. *Dixon* (1).

The learned counsel also contended that the sale made by the wife as tutrix to her son, under judicial authorization of the property in question to one Devlin, was null as not having been made in accordance with all the formalities required by law and that judicial authorization was fraudulently obtained, and referred to and cited art. 1278 C.C.P.; arts. 652, 656, 269 C. C.; *McTavish* v. *Pyke* (2); *Rattray* v. *Larue* (3) and Demolombe (4).

R. Laflamme, Q.C., and *H. Abbott*, Q.C. for respondents.

The main question is whether the will created a substitution. We adopt the reasoning of Mr. Justice Bossé in the court below, and we contend that the will of the late James McGregor divested of technical phraseology bequeaths in effect:—firstly, a usufruct of the property to the wife; secondly, the ownership to the son; and thirdly a substitution from the son in favour

(1) 16 Can. S.C.R. pp. 604-5.
(2) 3 L.C.R. 101.
(3) 15 Can. S. C. R. 107.
(4) 7 Vol. no. 755.

of the mother, in case she should survive him or perhaps a conditional legacy of the property to the wife in case she should survive him. The third case was never in fact realized as the wife died before the son; so that whether there was a substitution in favour of the wife, or a conditional legacy, is immaterial, and the two first effects are the only ones to be considered, namely, that there was a legacy of usufruct to the wife, with a legacy of the property to the son. Merlin Vo Condition (1). Rolland de Villargues, Substitutions prohibées (2). Now, if we assume that the will contained a usufruct in favour of the wife, with ownership to the son, the effect of the sheriff's deed of sale which took place after the appellant came of age, when he could have demanded the nullity of the seizure and of the anterior titles, under an execution against and upon the person who was in the legal possession of the property, constituted a valid title to the respondent. Art. 711 C.C.

The learned counsel also contended that the different formalities required by law for the successive sales which had been made of the immovables in question since the testator's death, were complied with, and referred to *Davis* v. *Kerr* (3).

Lafleur in reply relied on the findings of fact of the trial judge.

STRONG J.—concurred with Fournier J.

FOURNIER J.—Le présent appel est interjeté d'un jugement de la Cour du Banc de la Reine, province de Québec, infirmant un jugement de la Cour Supérieure, rendu à Montréal par l'honorable juge Pagnuelo, en date du 30 mai 1890, déclarant l'appelant propriétaire

(1) See 2, par. 5 art. No. 1. (2) P. 373.
(3) 17 Can. S.C.R. 235.

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de la moitié indivise d'une partie du lot n° 260 du plan officiel de la paroisse de Montréal et condamnant l'intimée à faire abandon à l'appelant de la moitié indivise de la dite propriété, à compter du 7 octobre 1886, ou à défaut de ce faire, à lui payer la somme de $2,000.

Le juge a de plus ordonné une expertise pour faire l'évaluation des améliorations faites sur la dite propriété par la défenderesse et Helen Mahers ordonnant aussi de faire rapport si la dite propriété peut être divisée, etc., etc.

Dans sa déclaration l'appelant réclame cette propriété en vertu du testament de son père, en date du 28 janvier 1863.

L'intimée a plaidé par défense au fonds en fait, et allègue qu'une partie de la propriété réclamée formant le n° 15 du plan de Perreault et maintenant formant partie du lot 560, n'a jamais appartenu à James McGregor, père. Par son deuxième plaidoyer l'intimée allègue que l'appelant est devenu majeur d'âge le 16 juin 1882, et en état de protéger tous ses droits et réclamations sur la dite propriété qui a été vendue par le shérif le 18 novembre 1884, sur Thomas Craig alors en possession ouverte et publique de la dite propriété; que l'intimée l'a de bonne foi achetée à cette vente, qui avait eu l'effet d'éteindre et de purger tous les droits que l'appelant pouvait avoir sur la dite propriété.

Dans son troisième plaidoyer l'intimée donne la longue énumération de ses titres et de ceux de ses auteurs. Elle allègue que sur les lots 16 et 17 du plan Perrault, acquis par James McGregor, il n'y avait presque aucune amélioration; et que l'inventaire de sa communauté avec la mère de l'appelant a fait voir que le passif excédait l'actif; qu'en conséquence Helen Mahers, sa mère, se fit autoriser en justice à vendre

les dits lots et les vendit après l'accomplissement de toutes les formalités voulues. Tous les titres subséquents sont énumérés en détail. Ensuite, il est allégué que Mde McGregor après avoir acquis les lots 16 et 17 construisit avec de l'argent emprunté une série de magasins et de maisons sur tout le lot 560 comprenant les lots originairement connus sous les nos 15, 16 et 17, et d'autres constructions, au montant de $20,000 et que la valeur des lots 16 et 17 en fut considérablement augmentée. Après ces diverses constructions, Mde McGregor vendit les dites propriétés à O. J. Devlin pour $20,000 dont $5,800 payable à elle-même et la balance payable aux divers prêteurs qui avaient avancé les fonds pour la construction des dites bâtisses. Ensuite le prêt par l'intimée à Thomas J. Craig de la somme de $15,000 avec hypothèque sur la dite propriété y est allégué ainsi que la vente de la dite propriété par le shérif à l'intimée.

L'intimée allègue en outre la prescription de dix ans et la possession par elle-même et ses auteurs pendant le temps nécessaire et dans les conditions pour acquérir la prescription ; elle plaide aussi qu'elle ne peut être dépossédée à moins d'avoir été payée de ses améliorations.

L'appelant a répondu spécialement, réitérant l'allégation que feu James McGregor était devenu propriétaire du lot 560 avant sa mort et que l'appelant en était devenu propriétaire de la moitié indivise comme appelé à la substitution créée par le testament de son père.

C'est la première fois qu'il est fait mention que le testament de son père contient une substitution, qu'il invoque par exception et non par action. Il allègue que le testament a été dûment enregistré, qu'il contenait une substitution dont sa mère était grevée en sa faveur comme appelé, que cette substitution n'a été ouverte que le 7 octobre 1886 par le décès de sa

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mère ; et que la vente par le shérif n'avait pas eu l'effet de purger la dite substitution.

Dans le mois de mars 1882 l'appelant institua une action contre O. J. Devlin, sa mère, James Thomas Craig, et les représentants de feu William Quinn, auteurs de Thomas Craig, alléguant qu'il ignorait alors la vente de Devlin à Craig, et demandant par cette action que tous les actes et procédés allégués par l'intimée dans son plaidoyer fussent annulés. Cette action était pendante au temps de la saisie et de la vente faite par le shérif dont l'appelant prétend avoir été ignorant.

L'appelant a aussi allégué que l'inventaire était faux et frauduleux. Il attaque aussi l'évaluation des propriétés faite par l'expert nommé par le juge, préalablement à l'autorisation de la vente. Il a aussi mis en cause par son plaidoyer tous les auteurs de l'intimée ainsi que les héritiers et représentants de Mde McGregor.

L'intimée a longuement répliqué à cette réponse speciale de l'appelant en niant spécialement toutes ses allégations. Par une des allégations de sa réplique, l'intimée allègue que l'appelant est un des héritiers d'Helen Mahers, sa mère, qu'il n'a jamais renoncé à sa succession et que si elle a fait aucun acte illégal au sujet des propriétés en question, l'appelant, comme son héritier en est responsable et ne peut aucunement les attaquer. Comme réponse à cette partie de la réplique de l'intimée, l'appelant a produit, le 20 mai 1889, une renonciation à la succession de sa mère, trois mois après l'institution de la présente action et près de trois ans après la mort de sa mère.

L'appelant a aussi allégué la nullité de la vente comme ayant été faite *super non domino* et *non possedente*. La réponse à ce dernier moyen est que lors de la vente par le shérif, il a été prouvé que Devlin avait

fait opposition à la vente sur le principe que Craig n'était pas en possession comme propriétaire lors de la saisie et l'opposition a été renvoyée. Il ne peut plus être question maintenant de cette prétention.

Par cette longue plaidoirie les parties ont soulevé les questions suivantes: 1° Savoir, si par le testament de James McGregor, il a été fait une substitution en faveur de James McGregor, son fils. 2° Si l'ordre rendu par le juge ordonnant la vente de la propriété en question, accordé le 19 septembre 1886, après avis d'un conseil de famille, est légal. 3° L'effet de la vente par le shérif de cette même propriété par rapport à la validité du titre de l'intimé et de ses auteurs.

Le testament de James McGregor contient-il une substitution en faveur de son fils?

Par l'article 5 de son testament feu James McGregor, lègue à Helen Mahers, son épouse, l'usufruit et jouissance, sa vie durant, du résidu de ses biens meubles et immeubles, à quelque somme qu'il puisse se monter, et sans aucune réserve. Par l'article 6 du dit testament, il donne à son fils James McGregor, issu de son mariage avec la dite Helen Mahers, tous ces biens de quelque nature qu'ils soient, tant meubles qu'immeubles dont l'usufruit est donné à la dite épouse, mais sujet au dit usufruit et jouissance de sa mère, Helen Mahers, sa vie durant, et sans que celle-ci soit obligée de rendre compte des dits biens ou de partie d'iceux à qui que ce soit. Dans le cas cependant où le dit James McGregor décéderait avant la dite Helen Mahers, alors et dans ce cas, il donne et lègue les dites propriétés à la dite Helen Mahers en pleine propriété, pour en disposer comme bon lui semblera et sans être tenue d'en rendre aucun compte à qui que ce soit.

Par le jugement de la Cour Supérieure il a été décidé que ce testament contenait une substitution dans laquelle la mère était l'instituée et son fils, l'appelant,

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substitué, et que la vente du shérif faite le 18 novembre 1884 ayant eu lieu avant le décès de la mère, la substitution n'était pas ouverte, et qu'en conséquence les droits de l'appelant comme substitué n'avaient pas été purgés par le décret.

La Cour du Banc de la Reine a infirmé ce jugement et décidé au contraire qu'il n'y avait pas de substitution, mais un simple legs d'usufruit en faveur d'Helen Mahers, et un autre legs de la nue propriété en faveur de l'appelant. C'est évidemment conforme aux termes mêmes du testament qui ne contient aucune expression faisant voir que l'intention du testateur était de faire une substitution. Au contraire on y trouve un legs d'usufruit pur et simple pour la vie durant d'Helen Mahers, avec, au lieu de la charge de rendre les propriétés, la dispense de rendre, aucun compte de tout ou partie des dites propriétés à qui que ce soit. Cette disposition est tout à fait contraire à l'essence de la substitution et à la définition qu'en donne le Code civil, art. 925: "La substitution fidéicommissaire est celle où celui qui reçoit est chargé de rendre la chose soit à son décès, soit à un autre terme," selon Thévenot-d'Essaules (1).

La substitution fidéicommissaire doit être définie une disposition de l'homme par laquelle en gratifiant quelqu'un expressément ou tacitement on le charge de rendre la chose à lui donnée ou une autre chose à un tiers qu'on gratifie en second ordre.

La substitution fidéicommissaire est la disposition que je fais au profit de quelqu'un par le canal d'une personne interposée que j'ai chargée de lui remettre. Pothier, Substitution (2).

Comme on le voit par l'art. du Code et par les autorités citées, la charge de rendre est le principal caractère de la substitution. Ici la charge de rendre des biens légués en usufruit n'est nullement imposée à l'usufruitière qui, au contraire, est dispensée même

(1) Traité des Substitutions fidéicommissaires, p. 5.

(2) § 1, art. 1er.

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de conserver les biens sujets à l'usufruit. On a vu qu'elle est aussi dispensée de rendre aucun compte à qui que ce soit, du tout ou de partie, ce qui équivaut à un legs de la propriété.

Il y a ensuite un legs de la nue propriété à son fils, James McGregor, de toutes les propriétés quelconques dont l'usufruit a été donné à sa mère, sa vie durant ; suivi d'un autre legs conditionnel, par lequel il lègue à Helen Mahers, dans le cas où son fils mourrait avant elle, tous les biens qu'il lui avait légués en pleine propriété. Ce legs ne peut non plus être considéré comme une substitution en faveur de la mère, parce que la charge de rendre n'est pas imposée au fils. Dans cette même disposition de la propriété en faveur du fils, le testateur réaffirme la déclaration que c'est un legs d'usufruit qu'il a fait à sa femme. Il le change en un legs conditionnel dans le cas où ce fils prédécéderait. Toutefois il ne peut s'élever aucune question au sujet de ce dernier legs puisque la mère est morte avant son fils.

Il est clair que la prétention qu'il y a eu substitution n'est pas fondée, en conséquence la vente par le shérif de cette propriété, à l'époque où l'appelant était majeur, et sans aucune opposition de sa part a eu l'effet de purger la propriété de tous droits réels et de donner un titre complet et absolu à l'intimée. S'il avait existé une substitution non ouverte comme on l'a prétendu, lors de la vente par le shérif, d'après l'art. 710 C. P. C. cette substitution n'aurait pas été purgée, mais cet article n'a aucune application dans le cas actuel, puisqu'il n'y avait pas de substitution.

Je ne considère pas qu'il soit utile d'entrer dans la discussion des nombreuses questions soulevées au sujet de la vente par autorité du juge à la requête de Mde McGregor, non plus que de celles soulevées au sujet de l'inventaire car toutes ces procédures attaquées ont été régulièrement faites. Mais indépendamment de

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cela, la vente qui a été régulièrement faite depuis par le shérif, de la propriété a mis fin à toutes ces questions. Cette vente n'a pas été faite comme l'a prétendue l'appelant *super non domino et non possedente*. Au contraire, Craig, sur qui elle a été faite en était alors en possession publique et paisible comme propriétaire en vertu de titres authentiques, enregistrés et réguliers, après même une contestation par opposition faite par Devlin aux droits de propriété de Craig.

D'après la loi et les décisions dans la province de Québec la vente judiciaire accompagnée des formalités légales donne un titre complet et absolu à l'adjudicataire de la propriété vendue et purge tous les droits dont la propriété peut être grevée, à l'exception de l'hypothèque résultant de la commutation des rentes seigneuriales, de l'emphytéose, des substitutions non ouvertes et du douaire coutumier non ouvert. Par l'art. 711 C. P. C. le décret purge tous autres droits.

Comme il a été déjà dit plus haut, le testament de McGregor ne contenant pas de substitution, la vente judiciaire a eu son plein et entier effet et a purgé les droits du propriétaire faute d'avoir fait opposition à la vente en temps opportun. On ne trouvera pas de décisions de nos cours contraires à ce principe mais on en trouve qui le soutiennent hautement.

Dans une cause de *Patton* v. *Morin* (1), où la demande de la nullité d'un décret était demandée comme fait *super non domino* il a été jugé : 1° que le décret purge un immeuble de tous les droits de propriété, excepté dans le cas où le propriétaire est lors du décret en possession de l'immeuble saisi *super non domino* ; 2° que si au moment de la saisie de l'immeuble le vrai propriétaire n'en est pas en possession, il doit, pour conserver son droit de propriété s'opposer à la vente par les moyens ordinaires. Un des considérants de ce jugement est comme

(1) 16 L.C. Rep. 267.

suit: "Considérant que la vente judiciaire accompagnée des formalités légales, doit être respectée et ne peut être révoquée en droit sans porter atteinte à l'efficacité d'un titre accordé par les mains de la justice, la cour maintient la défense du défendeur et renvoie l'action du demandeur.

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Un autre considérant affirme le principe que le demandeur aurait dû se porter opposant à la saisie et vente du dit immeuble, mais qu'au contraire il a laissé vendre et adjuger le dit immeuble en justice sans formuler sa plainte et s'opposer à la dite saisie et vente.

Je suis d'opinion que l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—This is an appeal by plaintiff from a judgment of the Court of Queen's Bench reversing a judgment of the Superior Court which had been given in his favour. The judgment of the Superior Court is reported in M. L. R. 6 S. C. 196 and that of the Queen's Bench in Q. R. 1 Q. B. 197.

The action of the present appellant was brought to obtain the partition and licitation of an immovable property in the parish of Montreal and to claim from the defendant company the fruits and revenues collected since the opening of the plaintiff's right.

The declaration alleged that the late James McGregor, the appellant's father, was in community of property with his wife Helen Mahers, and that during the marriage the consorts had acquired the immovable in question which, consequently, fell into the community; that by his will of the 28th January, 1863, the late Mr. McGregor bequeathed to his wife the usufruct of one-half of this immovable property with substitution in favour of his son, the plaintiff; that Helen Mahers died on the 7th October, 1886; that on the last mentioned date the substitution opened in favour of the plaintiff who, in

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consequence, became the owner of the one-half of said immovable property; that the defendant company, who were lawfully possessed of the one undivided half of the said immovable as representing Helen Mahers, were illegally in possession of the undivided half belonging to the plaintiff. The conclusions of the action prayed that the plaintiff be declared the owner of the undivided half of the said property; that the defendant company be ordered to account for the fruits and revenues thereof from the 7th October, 1886, and that a partition or licitation be ordered in the ordinary course.

The defendant company met this action by pleading ing that they were the proprietors of the undivided one-half claimed by the plaintiff and alleged the following chain of title:—

"1. A deed of sale of 7th April, 1885, from the sheriff of Montreal to the company, the property having been sold in a case wherein one McDougall was plaintiff against Thomas Craig his debtor, to whom he had advanced, on the 17th September, 1875, a sum of $15,000, secured by hypothec on the property in question."

"2. A deed of sale of 30th August, 1875, from O. J. Devlin to Thomas Craig."

"3. A deed of sale of 11th May, 1875, from Helen Mahers to O. J. Devlin."

"4 A deed of sale of 25th October, 1876, from William Quinn to Helen Mahers of no. 16, being part of the lot in question, and a deed of sale of 14th January, 1870, from James Thomas to Helen Mahers of no. 17, the other part of said lot."

"5. A sale by authority of justice, dated 15th October, 1866, from Helen Mahers, acting on her own behalf and also in her capacity of tutrix, to James Thomas of lot no. 17, and a sale by authority of justice, dated

15th October, 1866, from Helen Mahers, acting as aforesaid, to William Quinn of lot no 16."

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The defendant company alleged that at the time of the sheriff's sale the plaintiff had attained his majority and was in a position to protect his rights, if any he had; that the sheriff's sale against Thomas Craig had been made against a proprietor in open and public possession; that the defendant company had purchased in good faith at a sale made with all the requisite formalities, and that the effect of the sheriff's sale was to purge the property of any rights which the plaintiff might have had therein.

The plaintiff filed special answers to these pleas attacking the validity both of the sheriff's sale and of the sale by authority of justice to Quinn and Thomas. He alleged in regard to the sheriff's sale that it could not purge the rights of the plaintiff inasmuch as the substitution did not open in his favour until 1886, two years after the said sale. He also alleged that even if the will were held not to contain a substitution, the sheriff's sale would be null and void as having been made *super non domino et non possidente*, inasmuch as the sale from Devlin to Craig was simulated and Devlin was the owner and in possession of the lots in question at the time of the sheriff's sale. He also impugned the sale by the tutrix under the order of the court as tainted with fraud.

The judgment appealed from holds that the will of the late James McGregor did not create a substitution, but simply a legacy of the usufruct to the wife and of the ownership to the son. I unhesitatingly adopt that view of the will. I am also of opinion that, as held by the court below, the plaintiff, being of age at the time of the sheriff's sale to the defendant, though I do not see what difference that makes) was bound then to oppose the sale and assert his right, if he had any;

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that his default to do so precludes him from now attacking the validity of the defendant's title, as this sale has been accompanied with all the formalities required by law, and as Craig upon whom it has been made was then in possession as proprietor of the said lot in virtue of duly registered authentic deeds. The case of *Dufresne* v. *Dixon* (1) cited by the appellant was totally different from the present one, as a reference to the report will clearly show.

There the sheriff had sold Mrs. Dixon's property, to which she had a title and of which she was in possession, and so having both title and possession the sheriff's sale thereof against another person was annulled. Here the actual possession was in Devlin, but by the registry office the title was in Craig. Now, under those circumstances, Devlin's possession was Craig's possession. Upon Craig alone could that property be sold, as it was so sold. If at the period of the seizure of an immovable the proprietor is not in possession thereof he must, for the preservation of his rights of property, oppose the sale by the usual means. Such is the law as laid down in the case of *Patton* v. *Morin* (2) to which we must give application in the present case. Assuming that he had rights to this property the appellant has lost them by the sheriff's sale. *Vigilantibus non dormientibus subvenit lex.* In Rodière, Proc. Civ. (3) and Beriat du St. Prix (4), *inter alias*, the difference between the old and the new law in France on this subject is pointed out.

I would dismiss the appeal with costs.

GWYNNE J.—I concur that the will under which the plaintiff claims did not not create a substitution in his favour, as contended by the learned counsel for

(1) 16 Can. S C. R. 596.
(2) 16 L. C. R. 267.
(3) 2 vol. p. 292.
(4) 2 vol. p. 658.

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the plaintiff, but devised the usufruct to his wife and the ownership to the appellant with substitution over to the wife in case the son should die during his life, and I concur in the opinion of my brother Taschereau that, for the reasons which he has stated in his judgment which I have had the opportunity of reading, the title of the respondents which is derived from the sheriff's sale cannot be impeached and that the appeal must, therefore, be dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *M. Honan.*

Solicitors for respondent: *Abbotts, Campbell & Meredith.*

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*Oct. 21.
*Dec. 13.

THE MANITOBA FREE PRESS COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH MARTIN (PLAINTIFF).....RESPONDENT.

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

Libel—Personal attack on Attorney-General—Pleading—Rejection of evidence—Fair comment—General verdict—New trial.

In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the attorney-general of the province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's council objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants and in answer to the trial judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted.

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

PRESENT:—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

(1) 8 Man. L. R. 50.

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The action against the defendant company was for an alleged libel in a newspaper owned and published by them against the plaintiff, then attorney-general of the province as well as railway commissioner, charging him with malfeasance of office in connection with the construction of the Northern and Manitoba Railway. The defendants pleaded not guilty and that the alleged libellous publication was a fair comment on a matter of public interest. On the trial certain questions were submitted to the jury who returned a verdict of not guilty, and on being asked by the trial judge as to their finding on the question as to whether or not the publication bore the meaning ascribed to it by the plaintiff, the foreman replied:

"We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury while giving the verdict desire to state that it would have been better if more temperate language had been used."

On appeal to the full court the verdict was set aside and a new trial ordered, the majority of the court being of opinion that the answer of the foreman meant that the jury had not considered the case as submitted. The defendants appealed.

Haegel Q.C. for the appellant. The whole matter was tried out and nothing can be gained by a new trial. See *Merivale* v. *Carson* (1). The publication was not libellous. *Campbell* v. *Spottiswood* (2; *Odger* v. *Mortimer* (3).

Ewart Q.C. for the respondent. An appellate court will not interfere with an order for a new trial on the ground that the verdict was against the weight of evidence. *Toulmin* v. *Hedley* (4).

(1) 20 Q.B.D. 275.
(2) 3 B. & S. 769.
(3) 28 L.T.N.S. 472.
(4) 2 C. & K. 157.

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Even under the recent statute, granting a new trial will be regarded as a matter of discretion in the court appealed from. See *Barrington* v. *The Scottish Union* (1); *Accident Ins. Co.* v. *McLachlan* (2); *Moore* v. *The Connecticut Mutual Ins. Co.* (3).

Though having jurisdiction since the statute of 1891 the court will refuse to interfere in such a case. *Scott* v. *The Bank of New Brunswick* (4).

STRONG, FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Patterson.

GWYNNE J.—This appeal, for which as we read the case as presented upon the appeal books there does not seem to be any substantial foundation, must be dismissed with costs, and the new trial had as directed by the order of the court below.

PATTERSON J.—This is an action for libel. The respondent is plaintiff in the action and complains of the publication, in a newspaper published by the appellants, of the words:

Another disgraceful piece of business, which has never been explained, was the celebrated $500 per mile charge, which, had it not been for the watchfulness of the "Free Press," would have put $90,000 in the promoters' pockets, and everybody knows that the Attorney General (meaning the plaintiff) was the principal promoter.

Innuendo,

that the plaintiff, as a member of the executive council of the province of Manitoba, took part in the negotiation of a contract between Her Majesty the Queen and certain persons who afterwards became incorporated as the Northern Pacific and Manitoba Railway Company, and that at the instance and connivance of the plaintiff provision was made in the contract arising from such negotiations whereby a large sum of money should be raised by the said company, a portion of which was to be dishonestly and corruptly received by the plaintiff for his own use and benefit to the great detriment of this province.

(1) 18 Can. S.C.R. 615.
(2) 18 Can. S.C.R. 627.
(3) 6 Can. S.C.R. 634.
(4) 21 Can. S.C.R. 30.

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There is no doubt that these words are capable of a meaning defamatory to the plaintiff who is charged as being the principal promoter of some scheme or project which would have put $90,000 into the pockets of the promoters but for the watchfulness of the newspaper.

The pleas are first, not guilty; secondly,

That before and at the time of the alleged publication of the alleged libel great public interest was felt in the province of Manitoba in reference to the negotiation and making of the contract in the declaration referred to, and the subject was much discussed in the said province, both in the public newspapers and otherwise, and the words complained of were and are part of an editorial article referring to said matter, and the defendants being the proprietors of a public newspaper published the words complained of, together with the whole of said editorial article, which is the publication complained of; and the words complained of were fair comment on the said matters of great public interest in the said province, and were published by the defendants *bonâ fide* for the benefit of the public and without any malice toward the plaintiff.

There is a large mass of evidence which does not, except to a very small extent, bear on the matter now before us. It appears that in 1888 negotiations were going on between the government of Manitoba, generally represented by the plaintiff who was attorney-general of the province and railway commissioner, and certain contractors, respecting the construction of a railway. There is abundant evidence that great public interest was taken in that negotiation.

On the third of August, 1888, the "Free Press" published a memorandum of agreement made, under date 26th of July, 1888, between the plaintiff as railway commissioner and three persons designated contractors. By that instrument the contracting parties mutually agreed to endeavour to procure from the Manitoba legislature a charter incorporating a company to be called The Northern Pacific and Manitoba Railway Company, and within ten days after the incorporation of the company to execute a contract for the construc-

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tion of the railway, a draft of which was annexed to the memorandum of agreement and was also published in the "Free Press" along with the memorandum.

The draft contract provided for the delivery by the commissioners to the company of guaranteed bonds and unguaranteed bonds, to amounts computed, with reference to the work done, according to a defined scale. In connection with this we learn what it is that the libel alludes to as "the celebrated $500 a mile charge." It appears from the following extract from clause 11, of the draft contract:

> The effect of this is intended to be that where the construction and equipment of the said line costs less than $16,000 per mile, the commissioner will retain in his hands, in unguaranteed bonds, the difference between the cost as aforesaid and $16,000 per mile, and when the line costs more than $16,000 per mile the commissioner will deliver to the company the overplus of the cost above $16,000 in accumulated unguaranted bonds in the hands of the commissioner. In calculating the amount of work done for the purpose of delivering to the company the amount of unguaranteed bonds the commissioner agrees to add the sum of $500 per mile to the actual cost of construction and equipment.

That draft contract was executed, but after the incorporation of the company (1), a fresh contract was prepared and was executed by the plaintiff as railway commissioner, and by the Northern Pacific and Manitoba Railway Company. It bore date the 29th December, 1888, but had before that date been approved and ratified by the legislature of Manitoba by an act that was assented to on the 4th of September, 1888 (2), the contract forming schedule A to that act. As thus approved and executed the contract contained a $500 per mile clause in these terms:

> It is further agreed that in calculating the amount expended on the said lines from Winnipeg to Portage la Prairie, and from Morris to Brandon, the sum of five hundred dollars per mile shall be allowed

(1) 52 V. c. 2 (M.); 52 V. cc. 7 & 17 (M.); 52 Vic c. 58 (D.)

(2) 52 V.c. 2 (M).

for cost of organizing, preparing and printing bonds and coupons and legal expenses in connection with such organization and preparation of bonds, etc.

But by another provincial act passed on the fifth of March, 1889 (1), the money arrangements of the contract were put on a different basis; six clauses of the contract, including that in which the $500 per mile was provided for, were abrogated, and others were substituted for them. All this provincial legislation was confirmed by an act of the Parliament of Canada passed on the 16th of April, 1889 (2).

The article containing the words charged to be libellous seems to have originally appeared in a paper called the Morden "Monitor," and it was copied, with words of approval, in the "Free Press" of the 18th of September, 1890 It referred, in a tone of hostile criticism, to several matters connected with the railway arrangements of the provincial government. The passage touching the $500 per mile clause is as follows:

> Another disgraceful piece of business, which has never yet been explained, was the celebrated $500 per mile charge, which, had it not been for the watchfulness of the "Free Press," would have put $90,000 into the promoter's pockets, and everybody knows that the attorney-general was the principal promoter. By the prompt exposure of this transaction on the part of men who had just been returned to power for their devout pledges to secure honest government for the people, the "Free Press" compelled the government to hastily drop this palpable attempt at jobbery as though it were a hot cinder, and a second bargain was entered into, but with as much despotic secrecy as ever.

As far as this passage is properly comment or criticism it is, no doubt, capable of justification as being not so unfair as to amount to an actionable libel. The imputation of dishonesty in framing the contract so as to put unearned money into the pockets of "the promoters," whatever that term is here intended to mean, may have been undeserved, but, judging merely from

(1) 52 V. c. 17 (M). (2) 52 V. c. 58 (D).

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the documents, the inference was one for which there was room. The plaintiff does not complain on that score, nor could "the promoters" whoever they are supposed to be. The complaint is that the plaintiff personally is charged with framing the contract so as dishonestly to put money into his own pocket. That is the meaning of the statement that he is the principal promoter, and the personal charge is an allegation of fact and not a comment on admitted facts.

The new fact so asserted may itself happen to be the subject of comment, as was the case in *Davis* v. *Shepstone* (1), where a newspaper charged certain acts against the British Resident Commissioner in Zululand and commented severely upon the acts assumed to have been done. It has been so here, for whatever is said of "the promoters" is said of the plaintiff. But, as remarked by Lord Herschell in delivering the judgment of the Judicial Committee in the Zululand case:

> The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or to criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

This general doctrine was evidently well understood and was present to the mind of the learned judge who tried this action, and I find no trace in the report of the trial of any suggestion that the alleged fact of the plaintiff's complicity in the asserted fraud could be regarded as a known or admitted fact.

On the part of the defence evidence was offered in proof of the alleged fact, and what took place in connection with that evidence gave rise to some of the questions which we have to discuss.

A general idea of the positions taken may be gained from reading a page or so from the printed report of the

(1) 11 App. Cas. 187.

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trial. There are one or two places where the meaning is slightly confused, probably from inaccuracy in taking or transcribing the shorthand notes, or perhaps from some typographical error.

Mr. Howell is counsel for the plaintiff, *Mr. Haegel* for the defendants. A witness named Hagarty is under examination on the part of the defence, and is asked concerning a conversation with the plaintiff:

Q. Relate what that conversation was as regards the $500 a mile clause?

Mr. Howell—What issue is this going to meet?

Mr. Haegel—I submit it is the most material evidence.

His Lordship—For what purpose?

Mr. Haegel—For the purpose of showing there was some foundation in fact, all the defendant has to show, for the purpose of proving the plea of *bonâ fide* comment, not that they are true, it is not necessary that he should establish that, but it is necessary that he should establish that he commented on this matter in the public interest, and that there was some foundation in fact for the statements which he made. Cites Odger at page 38. I submit if I show that the plaintiff himself has made explanations of this $500 a mile provision, which admit that it is not a proper and honestly made provision or which failed to explain and satisfy a reasonable man, but kept it tainted, that it is evidence under that plea of fair and *bonâ fide* comment. *Wills* v. *Carman* (1). I propose to prove by this witness that certain admissions were made touching the $500 a mile clause.

Mr. Howell—It seems to me it would have been more manly to have come here and said you are a thief, and you have said you are a thief. I will accept the truth of it, that is the going into it if we are allowed to deny it in rebuttal, but it would have been more manly if you had pleaded it.

His Lordship—It appears to me that there are really two questions that arise under this language that is charged to the defendant. The first is whether the language that is used is language that can be construed fair comment upon the contract of this kind made under the circumstances. The second is the direct statement that is made in it that the plaintiff was what was called one of the promoters into whose pockets it appears to be charged that some of these moneys went; that charge of fact whether he was such or not, it appears to me the defendant cannot raise without placing it on the record distinctly. They

(1) 17 O. R. 223.

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are not entitled to raise it, but they are entitled to go into anything that shows the nature and effect of this contract for the purpose of showing whether the language used with regard to it, which, to a certain extent, is open to the jury to connect with the plaintiff is correct and, therefore, it appears to me to that extent it may be used, but that the defendant cannot give any evidence whatever for the purpose of showing that the plaintiff was one of the promoters, because they have not placed on the record that he was, and if they are not willing to assert in court that he was, they are not entitled to have the evidence taken. I think the question in the present form I have to admit subject to that statement, that evidence bearing merely upon the question whether the plaintiff was one of the promoters or rather parties into whose pockets it was charged this money should go, the defendant is not entitled to give any evidence.

Mr. Howell—There is another reason for its exclusion. How can his conversation with the plaintiff give Mr. Luxton any right to libel the plaintiff?

His Lordship—Do you propose to show communication to the defendant?

Mr. Haegel—Yes, my Lord.

Mr. Wilson—Prior to the writing of the article?

Mr. Haegel—I don't know that I can show that. It is just as good evidence if the plaintiff never learned it. I can show it if it is pressed for.

His Lordship—I think I will still allow it, notwithstanding, I may say, that I am not quite satisfied in my own mind whether it ought to be allowed, but it must be to show whether the language used was justified with regard to this contract.

Then when another witness for the defence, one A. F. Martin, was asked about a discussion that took place at a caucus of the liberal party, to which the plaintiff belonged, respecting the contract, this is reported to have occurred:

Q. Did you hear any discussion about the $500 a mile?

A. Yes; there were strong objections against it at the time. The strongest objections were made by Mr. Isaac Campbell and Mr. Fisher and Col. McMillan and Mr. Thompson, of Carberry. The strongest objections to it were by Mr. Campbell and Mr. Fisher.

Mr. Howell—Of course we expect to be able to rebut this evidence.

Mr. Haegel—My learned friend has no reason to assume that we are making a bargain.

His Lordship—I can't undertake anything of the kind, Mr. Howell.

Mr. Howell—It is either objectionable or I have the right to rebut it if it can be received in evidence; or I will make a bargain with my learned friend to let it go in, we having the power to meet it.

Mr. Haegel—I must object to that.

His Lordship—On what grounds do you want this evidence, Mr. Haegel?

Mr. Haegel—On the same ground I put before—that these statements were made in the presence of the plaintiff, and I propose to prove what the plaintiff said and did on that occasion in answer to the statements: what justification he made to the charges.

Mr. Howell—I agree it is evidence on the view the people there took of it, and if your Lordship can only see your way clear to receive it I shall be only too glad.

His Lordship—I will allow it to be given on the same principle as that with regard to the other.

A good deal of evidence was given on the part of the defence in direct support of the personal charge of corrupt dealing by the plaintiff. This evidence consisted chiefly, and it may be said altogether, of conversations with the plaintiff sworn to by Mr. Luxton, the managing director of the defendant company, and by other witnesses, and amounting, if believed to have taken place as stated, to express admissions by the plaintiff that the design of the $500 per mile provision was to provide money for use, either personally or as members of a political party, by himself and others.

It was evidence that would have been properly receivable upon a plea justifying the statement complained of as being true, and it was not properly receivable without such a plea.

If the libel had in direct terms stated, as it did less directly, that the plaintiff had been guilty of a palpable attempt at jobbery by framing the contract so as to put money into his own pocket, the only effective plea to a declaration charging the publication of a libel in those terms would have been a plea that the asserted fact was true. A plea that the contract was a matter of public interest and that the libel was a fair comment

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or criticism of it would manifestly have fallen short of meeting the gravamen of the complaint.

To state facts which are libellous is not comment or criticism on anything.

Per Field J. in *R. v. Flowers* (1).

Such a plea ought to be met by a demurrer as in the Irish case of *Lefroy* v. *Burnside* (2). In giving the judgment of the Court of Exchequer in that case, allowing the demurrer, Palles C.B. said:

> That a fair and *bonâ fide* comment on a matter of public interest is an excuse for what would be otherwise a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true.

The conclusion from this statement of doctrine, and from the allowance of the demurrer to the plea, is that the truth of the allegation of fact should be pleaded.

The rule is stated in Odger on Libel and Slander (3), that:

> If the comment introduces an independent fact, or substantially aggravates the main imputation, it must be expressly justified. Thus the libellous heading of a newspaper article must be justified as well as the facts stated in the article.

The authorities cited for this are *Lewis* v. *Clement* (4), where the report of proceedings in a court of justice would probably have been held to give no right of actions, but for the heading "shameful conduct of an attorney," and a somewhat similar case of *Bishop* v. *Latimer* (5), where the heading was "How Lawyer Bishop treats his clients."

In another part of the same treatise the case of *Mountney* v. *Watton* (6), is cited, in which case the

(1) 44 J. P. 377.
(2) 4 L.R. Ir. 556.
(3) 2nd ed. p. 539.
(4) 3 B. & Ald. 702.
(5) 4 L.T. 775.
(6) 2 B. & Ad. 673.

libel was contained in a newspaper paragraph headed "horse stealer." The innuendo was that it was intended to charge the plaintiff with felony. The plea which justified all the statements except the heading in which the imputation of felony was implied was held bad on demurrer.

Were such a justification formally pleaded the plaintiff would of course be entitled to give evidence in answer to that given by the defendant, who would, in his turn, be entitled to call witnesses in rebuttal.

The assumption on the part of these defendants was that, as put by their counsel according to the report from which I have read an extract, in order to maintain that the publication was a fair comment on the matter of public interest it was not necessary to establish the truth of their allegation of fact, but only to show that there was some foundation in fact for it.

I do not profess to see the distinction between a statement being true and its having a foundation in fact, but I do not find any authority for the contention that imputations of personal misconduct can be excused by anything short of proof that they are well founded in fact. The passage in Mr. Odger's work to which counsel is said to have referred in support of his proposition is, I imagine, the following (1):

> It will be no defence that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably and without any foundation in fact.

The authority cited being *Campbell* v. *Spottiswoode* (2). What was discussed in *Campbell* v. *Spottiswoode* (2) was the imputation of motives, not statements of fact. Cockburn C.J. said:

> I think the fair position in which the law may be settled is this: That when the public conduct of a public man is open to animadver-

(1) 2nd ed. p. 38.

(2) 3 F. & F. 421; 3 B. & S. 769.

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sion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is, therefore, justified in assailing his character as dishonest.

There is nothing in that decision to favour the assumption on which the evidence was offered. The conduct of a public man which may be commented on, and from which inferences unfavourable to his character may be fairly deduced, must be something known or admitted or proved, not conduct which the writer chooses to ascribe to him.

The case of *Lefroy* v. *Burnside* (1) was also relied on, or rather an Ontario case of *Wills* v. *Carman* (2) in which, in refusing the plaintiff's motion for a new trial, the case of *Lefroy* v. *Burnside* (1) was referred to by the court. In *Wills* v. *Carman* (2) the pleas were not guilty and "fair comment," and there was no express justification of defamatory statements which I suppose were statements of fact, though the report does not make that clear. The Chief Justice said:

> The defendant did not justify, nor did he seek to justify, the alleged defamatory matter published as being true, but he alleged that it was a fair comment upon matters of public and general interest, and he was entitled to show that the matters on which he commented were true and without so doing it is clear that he could not have established his plea of fair comment.

I entirely agree with this last statement; but I do not hold that without a plea of the truth of defamatory allegations of fact a defendant can insist on giving evidence of their truth, nor do I consider that a contrary opinion is necessarily involved in the refusal of a new trial where the evidence may have been given and the question pronounced upon by the jury though not formally raised upon the record.

(1) 4 L. R. Ir. 556. (2) 17 O. R. 223.

I may read a few words more from Palles C. B. in Lefroy's case. They immediately follow those already quoted:

> Setting apart all questions of forms

he says—meaning, as I understand, without strict regard to the precise issues joined upon the record—

> the questions which would be raised at a trial by such a defence must necessarily be—first the existence of a certain state of facts; secondly, whether the publication sought to be excused is a fair and *bonâ fide* comment upon such existing facts. If the facts as a comment upon which the publication is sought to be excused do not exist the foundation of the plea fails.

I may quote also from the Chief Baron's reference to the facts alleged in the plea before him which, *mutatis mutandis*, is not inapposite to the plea before us.

> The imputation to be justified is that the plaintiff dishonestly or corruptly supplied to a newspaper information acquired by him as manager of the Queen's Printing Office. Leaving out the qualifications of "dishonesty" or "corruptly," as clearly comment, the allegation of fact to be excused is that he did supply it. There is an allegation of the defendant's belief that the information could only have been procured from the Queen's Printing Office, but there is not even an allegation of fact (as distinguished from belief) that the information could only have been so procured.

The evidence given on the part of the defendants being given for the purpose of proving, and being fitted to prove, the defamatory statements on which the action was founded was, in my opinion, improperly admitted; but having been insisted on by the defendants and admitted at their instance, just as it would have been if they had regularly pleaded their justification, it was not open to them to object to its being met by counter evidence on the part of the plaintiff, not only to contradict the witnesses who swore to admissions, but to disprove the charges. The question was not whether certain admissions had been made, but

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whether the plaintiff was guilty of what was charged against him, and the alleged admissions were merely evidence on that issue.

Owing to some misapprehension of the rights of the plaintiff in this respect his evidence was rejected. A witness named McNaught who had acted in the negotiations for the contractors or the company was called by the plaintiff, and in reply to the defendants' evidence, and after he had, under the ruling of the judge, been allowed to speak in contradiction of the defendants' evidence touching the conversations with the plaintiff, he was asked some questions on the substantial question of fact. I read from the notes. Mr. Culver here appears with Mr. Haegel as counsel for the defendants.

Q. What was the object of putting that $500 a mile in the contract?

Mr. Culver—That clearly was matter in chief, and is not rebuttal.

Mr. Haegel—And the object is not an answer; the only question is, what did the object seem from the surrounding circumstances? The object might have been pure, but it might have seemed bad from the surrounding circumstances, and it is pertinent to the issue.

Mr. Howell—They suggested or endeavoured to show all sorts of schemes and frauds, and I ask him what was the object of putting that in. Was it a base object or otherwise?

His Lordship—I don't think you can go into that question at all now.

Q. Was that clause as to $500 a mile put in for the benefit of any other person than the Northern Pacific Railway Company?

Mr. Haegel objected to this.

His Lordship—I can't allow it.

Q. Was there any fraudulent design of any kind in putting in that clause?

Objected to.

His Lordship—I can't allow it.

Q. Was there any intention that Mr. Martin or any member of the local government should take any benefit of any kind whatever out of that $500 a mile?

Objected to and ruled out.

The same course was pursued with Mr. Kendrick another witness and with the plaintiff himself.

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The evidence ought, under the circumstances, to have been received.

The case presents this dilemma:

The defendants' evidence ought not to have been admitted, or the plaintiff's counter evidence ought to have been admitted.

On this ground alone I should decline to interfere with the order for a new trial, but there are other grounds equally fatal to the appeal.

After a very full and careful charge to the jury the learned judge asked them to answer three questions:

1st. Are these words defamatory in themselves within the definition I have given you?

2nd. Do they bear the construction that the plaintiff in this case in the innuendo annexed to the declaration says they bear?

3rd. In either sense are they fair comment upon this question upon which they are said to be comment?

Counsel for the plaintiff made some objections to the charge, one of which is thus noted:

Further, in any event, Your Lordship should have told the jury that there should be a verdict for the plaintiff unless they found that there was a foundation in fact for the charge, and secondly, that there was a *bonâ fide* belief in the truth of the charge.

Then the report proceeds:

The jury having come into court the foreman (F. W. Stobart) announced that they found for the defendant.

Mr. Howell asked if the questions were answered.

His Lordship to the jury—Have you anything to say as to any of the questions? Do you find whether the publication has the meaning ascribed by the plaintiff? Mr. Stobart (foreman). We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury while giving the verdict desire to state that it would have been better if more temperate language had been used.

It is impossible to hold that the court improperly exercised its discretion in sending the case to another jury.

No doubt a jury may lawfully decline, in a libel case, to give any verdict except a general verdict. If

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that right had been insisted on here, and a general verdict for the defendants given without explanation, the plaintiff might have been driven to rely on his objections to the judge's charge and to the reception or rejection of evidence, or upon the verdict being against the weight of evidence. With the explanation given it is evident that the most material inquiry received no attention from the jury. The meaning ascribed to the publication by the plaintiff, in other words the innuendo that a corrupt act was charged against the plaintiff personally, the jury say they did not consider at all. They found that the article complained of was a fair comment on a matter of public interest, and so they may well have found if they separated from it the allegation that touched the plaintiff personally, and which, as expressed by Lord Field in *R.* v. *Flowers* (1), was not comment or criticism on anything, or at least might properly have been held so if the jury had considered that point.

The ground of misdirection or non-direction, indicated by the objection to the charge which I have noted, is involved with the question of the improper reception or rejection of evidence and need not now be further considered.

On the whole the case is clearly one in which the order for a new trial cannot be said to be improper.

I ought not to omit to refer to the very important case of *The Capital and Counties Bank* v. *Henty* (2) in the House of Lords, and to the discussion by Lords Selborne, Penzance, Blackburn and Bramwell of the respective duties of the court and the jury in actions of libel, and particularly to what is said by those learned lords, as well as in the cases referred to by them, as to the duty of the jury to say whether the publication has the meaning ascribed to it in the

(1) 44 J. P. 377. (2) 7 App. Cas. 741.

innuendo, the duty which the jury in this case declared they did not perform. I refer to the case without attempting an analysis of the judgments delivered. To do that would be to write an essay of some length.

I shall merely quote from the remarks of Lord Selborne the words:

> The Court of Appeal has thought that there was no evidence to go to the jury, and I must be satisfied that their judgment was wrong before I can say that it ought to be reversed.

The present case is one for the application of that useful principle.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Haegel & Bonnar.*

Solicitors for respondent: *Ewart, Fisher & Wilson.*

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*May 11.
*Dec. 13.

THE NOVA SCOTIA CENTRAL RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE HALIFAX BANKING COMPANY, FLETCHER B. WADE AND JAMES D. EISENHAUER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mortgage—Railway bonds—Security for advances—Second mortgagee—Purchase by—Trust.

W. having agreed to advance money to a railway company for completion of its road an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes endorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company with which they were deposited and sell the same to the best advantage applying the proceeds as set out in the agreement.

The railway company did not repay W. as agreed and the bank obtained the bonds from the trust company and having threatened to sell the same the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out but that the bank should substitute E. & W. as the attorneys irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. & W. agreed to this and extended the time for payment of their claim and made further

PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

advances and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank on certain terms.

At the expiration of the extended time the railway company again made default in payment and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained.

Held, affirming the decision of the court below, that the bank and E. & W. were respectively first and second encumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale.

Held further, that if E. & W. should purchase at such sale they would become absolute holders of the bonds and not liable to be redeemed by the company.

Held also, that the dealing by the bank with the bonds was authorized by the Banking Act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment of the trial judge who had granted an interim injunction to restrain the Halifax Banking Company from selling the bonds of the appellant company's road.

The facts upon which the judgment of the Supreme Court is founded are fully set out in the reasons for judgment given by Mr. Justice Strong.

Henry Q.C. and *Newcombe* for the appellants.

Borden Q.C. for the respondents, Eisenhauer and Wade and *Russell* Q.C. for the Halifax Banking Company.

STRONG J.—The facts of this case are not in dispute, and the importance of it consists wholly in the large amounts involved and not in any difficulty in the law applicable to the facts as they appear in the documentary and other evidence.

The appellants are a railway company incorporated by the legislature of Nova Scotia, and are owners of a

(1) 23 N. S. Rep. 172.

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line of railway extending from Middleton to Lunenburg in that province.

Being in want of money for the completion of their line of railway, which was then in course of construction, the appellants, for the purpose of raising loans and advances, and securing the repayment of the same, entered into the agreements and transactions hereinafter stated:—

By an agreement between the appellants and the defendant Wade, bearing date the 13th February, 1889, it was agreed, among other things, that the defendant Wade should furnish the appellants with money for the completion of their railway in an amount not to exceed at any one time $200,000, and with a bank credit or guarantee in any amount necessary for the purchase of rails, rolling stock, etc, not to exceed $200,000; that the defendant Wade should carry $130,000 of the said cash advance for six months after 1st January, 1890; that the appellants should pay for the use of said money the ordinary bank rate of interest, and for the said guarantee or credit whatever the regular bank charge therefor should be, and in addition should pay the defendant Wade $27,500; that if the appellants should require more than $200,000 the defendant Wade should furnish such further sum, not to exceed $50,000, upon which the appellants should pay interest at the same rate as on the $200,000, and in addition to the defendant Wade an amount equal to ten per cent upon the said further sum so to be advanced; that out of the said sum of $200,000 the amount due to the defendants Wade and Eisenhauer for notes then in the bank to secure previous advances made by the defendants Wade and Eisenhauer should be paid at once, also the amount of a note then outstanding to the defendant Eisenhauer for commissions upon said past advances; that as to said sum of $27,500 one-third thereof should

be paid to the defendant Wade out of the first advances made in respect of said sum of $200,000, one-third on 1st October, 1889, and the balance with the commission aforesaid upon further advances beyond said sum of $200,000, if any, on 15th December, 1889; that the total amount of all said advances and guarantee including said commission should be secured upon the appellants' entire bond issue and the subsidies granted, or to be granted, to the appellants by the Dominion and Provincial Governments.

At or shortly before the time of this agreement the appellants, by virtue of the powers granted in their charter, executed bonds amounting in all to $740,000. These bonds and the interest coupons thereunto attached were payable to bearer and were secured upon the appellants' railway, rolling stock, franchises and other property by a first mortgage executed by the appellants to the Farmer's Loan and Trust Company, of New York, as trustees, and the bonds were placed in the possession of said Farmer's Loan and Trust Company as such trustees.

In order to comply with this agreement the defendant Wade agreed with the defendant Eisenhauer and the defendant, The Halifax Banking Company, that the money required should be advanced by the bank upon promissory notes of the defendants Wade and Eisenhauer, and the appellants, in pursuance of the said agreement, entered into an agreement, or power of attorney under seal, with the defendants, dated 4th July, 1889, whereby, after reciting that the defendant Wade had agreed to furnish to the plaintiff certain funds, to raise which the defendant Eisenhauer had agreed to endorse the promissory notes of the defendant Wade, which the bank had agreed to discount, and that the appellants had agreed to pledge the said bonds to secure the said advances, the appel-

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lants appointed the bank its attorney irrevocable in case the appellants should fail to carry out their said agreement with the defendant Wade, or should fail to pay the said advances at the times and in the manner agreed, to receive the said bonds from the said Farmer's Loan and Trust Company, and dispose of the same to the best advantage, and out of the proceeds pay first the expenses incident to obtaining the said bonds from the said Farmer's Loan and Trust Company, secondly the amount of any paper then held by the bank as security for said advances, thirdly any further advances made by the defendants Wade and Eisenhauer including amounts due them for commission and remuneration, and fourthly the balance to the appellants. And it was also provided by the said power of attorney that in case the defendants Wade and Eisenhauer should require the bank to proceed with the sale of said bonds for the purposes aforesaid, that the bank should then forthwith proceed to sell said bonds, or forthwith substitute the defendants Wade and Eisenhauer as the attorneys irrevocable of the appellants, with as full and ample authority in the premises as was by the said power of attorney granted and conferred upon the bank. Also that the said power of attorney should in no case be revoked without the consent of the defendants Wade and Eisenhauer.

Afterwards, on 12th August, 1889, it was agreed between the appellants and the defendant Wade, that the defendant Wade should advance additional funds for the appellants, and that if required by the defendants Wade and Eisenhauer the appellants should increase their bond issue to an amount not exceeding $1,000,000 which should be exchanged for the said bonds then already executed and which said new bonds should be delivered as security to the bank for all moneys then or thereafter to be advanced by the

defendants, including the commissions of the defendant Wade.

In accordance with the last mentioned agreement, and at the request of the defendants Wade and Eisenhauer, the previous issue of bonds was re-called, and a new issue of bonds was made by the appellants on or about 1st January, 1890. This new issue comprised 1,000 bonds of $1,000 each, payable with interest semi-annually at the rate of five per cent within forty years. These bonds, with the coupons for interest attached, were payable to bearer, and were secured and deposited with the Farmer's Loan and Trust Company in like manner as the previous issue of $740,000 had been.

In pursuance of this agreement of the 13th February, 1889, the defendants Wade and Eisenhauer, from time to time, advanced on the appellants' account large sums of money.

The appellants did not pay the advances or commissions as agreed, and about the month of May, 1890, the defendants Wade and Eisenhauer paid to the bank $100,000 or thereabout on account of the said indebtedness to the bank. The bank then also, at the request of the defendants Wade and Eisenhauer, and under the provisions of the power of attorney of the 4th July, 1889, procured the said 1,000 bonds from the said Farmer's Loan and Trust Company, and have since held the same.

The statement so far is taken from the appellants' statement of claim.

On the 13th of May, 1890, the appellants being then indebted to the defendants Wade and Eisenhauer in a very large amount for money paid by them to the bank, and in respect of their liability to the bank for advances made to the appellants' company, and they having threatened to sell the bonds under a substi-

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tution as attorneys in pursuance of the power given to the bank so to constitute them, contained in the instrument of the 4th July, 1889, a further agreement was entered into in the form of a letter written by Mr. George W. Bedford, the general manager of the company, to Messrs. Eisenhauer and Wade.

This agreement was as follows:

HALIFAX, N. S., May 13th, 1890.

James Eisenhauer, Esq., and F. B. Wade

DEAR SIR,—On behalf of the Nova Scotia Central Railway Company, and as their duly authorized agent or attorney, I have to request that you will not carry out the purchase of the bonds of said railway as this day contemplated, but that instead you will, if possible, arrange to have the Halifax Banking Company substitute you for them as the attorneys irrevocable of the railway company for the sale of the bonds, and in case you do so the said railway company agrees as follows:

1. That you shall have the sole and absolute right to sell said bonds at such price, upon such terms, and subject to such conditions as you, in your judgment, may deem best in the interest of all concerned.

2. That out of the proceeds of the sale of said bonds, after deducting all expenses incurred in connection therewith, you shall first deduct,

(a) All sums advanced or hereafter to be advanced by you or either of you on account of said railway, and all commissions due or to grow due in connection therewith.

(b) A reasonable commission or charge for carrying said loan after the 1st of January, 1890, and for the extra trouble, labour, etc., etc., occasioned thereby, and by the circumstances arising out of the same, and for making said sale.

(c) You shall deduct and pay to F. B. Wade a sum as an equivalent for his services and efforts in connection with the enterprise, which sum up to the 1st January, 1889, has been agreed upon as $20,090, in addition to his charge for legal services and expenses; his services from that time to the present not being yet determined.

3. That you have the power to hypothecate said bonds pending a sale, and that in order to carry the present loan you are at liberty to pay to any bank, and charge to commission account against the railway, a bonus not to exceed $1,000 per month until bonds sold.

4. That during the continuance of this arrangement and until the bonds are sold and the money paid, the railway to remain under its present management.

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5. That in case the earnings of the road are not sufficient to pay the operating expenses during said time, the railway company will pay the deficit promptly, in order that the credit of the company may be maintained.

6. That in case the local government makes payment of any subsidy upon representations or promises of yours or either of you as to the final completion of the road, the company will, to your satisfaction, secure the performance of said representations or promises.

7. That the company will execute and deliver to you any documents or papers necessary to carry this proposal and agreement into effect.

8. These things being performed out of the balance of funds in your hands from the sale of the bonds, you are to pay C. O. Stearns the sum of $70,000, and the balance pay over to G. S. Hutchinson, or the railway company.

9. That you shall have power to settle the Vickers suit upon the best terms possible, if you find it necessary, in order to facilitate the sale of the bonds.

10. The company will agree to put a siding in at Morgan's, if the new road opened from there to Kaizer's or Bare's corner.

Yours truly,

(Sgd.) GEO. W. BEDFORD,
Nova Scotia Central Railway Co.

The authority of Mr. Bedford to bind the company by this letter is impeached by the statement of claim, but in the argument at the bar of this court that point was not raised or insisted upon, and the learned counsel for the appellants, in answer to an inquiry from the court, distinctly stated that on behalf of the railway company they waived all question as to Mr. Bedford's authority in this respect.

This new agreement of the 13th of May, 1890, was accepted and adopted by the respondents Wade and Eisenhauer, and on the faith and security of it they not only extended the time for payment, but also made further advances.

In pursuance of the power so to do, contained in the 3rd clause of the letter or agreement of the 13th of May, 1890, the respondents Wade and Eisenhauer re-hy-

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pothecated the bonds to the bank by an instrument dated the 15th of May, 1890, which is as follows:—

This agreement made this 15th day of May, A.D. 1890, between James D. Eisenhauer, of Lunenburg, merchant, and Fletcher B. Wade, of Bridgewater, barrister-at-law, both in the county of Lunenburg, of the first part; and the Halifax Banking Company, of the second part.

Witnesseth:—Whereas, the said James D. Eisenhauer and Fletcher B. Wade are indebted to the said Halifax Banking Company in the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, for advances made to James D. Eisenhauer and Fletcher B. Wade, on account of Nova Scotia Central Railway construction and equipment.

And whereas, the said Fletcher B. Wade has given the promissory note of him, the said Fletcher B. Wade, in favour of James D. Eisenhauer, or order, for the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, payable on demand with interest at the rate of seven per centum to the said James D. Eisenhauer, and the said James D. Eisenhauer has endorsed the said promissory note to the said Halifax Banking Company, and the said James D. Eisenhauer and Fletcher B. Wade, attorneys of the said Nova Scotia Central Railway Company, have hypothecated the first mortgage bonds of the said Nova Scotia Central Railway Company to said Halifax Banking Company as collateral security for the payment of the said sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, the said James D. Eisenhauer and Fletcher B. Wade having, under a certain agreement or power of attorney, required the said Halifax Banking Company to proceed with the sale of the said bonds for the purposes mentioned in said agreement or power of attorney, and the said Halifax Banking Company under said agreement or power of attorney have substituted said James D. Eisenhauer and Fletcher B. Wade as attorneys irrevocable of the said Nova Scotia Central Railway Company, with as full and ample power and authority in the premises as have been granted and conferred upon the Halifax Banking Company.

It is hereby agreed by and between the same James D. Eisenhauer and Fletcher B. Wade, parties of the first part, and the Halifax Banking Company, parties of the second part, that the said James D. Eisenhauer and Fletcher B. Wade shall pay in addition to the sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, and interest thereon after the rate of seven per centum per annum, or upon such portion of the same as may be due and remaining and unpaid to the Halifax Banking Company, a commission of one thousand ($1,000) dollars per month on said sum

of three hundred and forty-five thousand, six hundred and eighty-three dollars and fifty-eight cents, or any part thereof, and any part or fraction of a month during which said sum or any part thereof shall remain unpaid shall be considered and taken to be one whole month. And the said Halifax Banking Company, the party of the second part, doth hereby agree to allow the said James D. Eisenhauer and Fletcher B. Wade the period or time not exceeding six months from the date of these presents for the payment of the said three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, together with interest thereon at the rate of seven per centum per annum and the commission aforesaid; and it is hereby expressly agreed between the said James D. Eisenhauer and Fletcher B. Wade, the parties of the first part, and the said Halifax Banking Company, the party of the second part, that the giving of the aforesaid time, or the agreement to give or extend said time for the payment of the aforesaid sum or any part thereof, shall not in any way release or discharge the endorser, said James D. Eisenhauer, on the aforesaid note made by Fletcher B. Wade in favour of said James D. Eisenhauer, or order, and endorsed by said James D. Eisenhauer to said Halifax Banking Company, nor shall it discharge or release any security or securities which the said Halifax Banking Company have, or which they may have, for the payment of the said sum of three hundred and forty-five thousand six hundred and eighty-three dollars and fifty-eight cents, with interest thereon at the rate of seven per centum per annum and commission aforesaid, or any portion thereof.

And it is also hereby agreed by the said James D. Eisenhauer and Fletcher B. Wade that they shall not in any way interfere with the possession of the said bonds by the said Halifax Banking Company, nor shall the said Halifax Banking Company be required to deliver said bonds into the possession of any person or persons whatsoever, until the whole amount due by said James D. Eisenhauer and Fletcher B. Wade is paid to the said Halifax Banking Company, and the said James D. Eisenhauer and Fletcher B. Wade do hereby covenant and agree with the said Halifax Banking Company that they, the said James D. Eisenhauer and Fletcher B. Wade, have full power and authority to hypothecate and deliver the first mortgage bonds of the Nova Scotia Central Railway Company to the said Halifax Banking Company.

In witness whereof the said James D. Eisenhauer and Fletcher B. Wade have hereunto set their hands and affixed their seals, and the Halifax Banking Company has executed these presents by Robie Uniacke, President, and Wilson L. Pitcaithly, cashier of said Halifax Banking Company, subscribing their names to these presents and affixing thereto the corporate seal of said bank at Halifax.

(Sgd.) JAMES D. EISENHAUER [L.S.]
(Sgd.) FLETCHER B. WADE [L.S.]

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A large sum of money being due to the bank for advances, which were secured to them by the hypothecation of the bonds already mentioned by the respondents, Eisenhauer and Wade, under the agreement of the 13th of May, 1890, amounting to $319,213.84, the bank, on the 17th of December, 1890, gave a written notice to the railway company that they would at once proceed to sell the bonds unless before the 29th December, 1890, the amount of their debt should be paid. At this time there was due to Wade and Eisenhauer a large sum for advances which they had made and money which they had paid to the bank in reduction of the debt of the latter, in respect of which sum of money Wade and Eisenhauer were entitled to a charge upon the bonds, subordinate in point of priority to the lien or charge of the bank.

On the 29th day of December, 1890, the appellants brought the present action, claiming that the sale of the bonds by the Halifax Banking Company should be restrained.

An interlocutory injunction having been granted was dismissed by the Supreme Court of Nova Scotia sitting *en banc*; subsequently the cause was heard before Mr. Justice Ritchie, who dismissed the action, and on appeal to the Supreme Court this judgment was affirmed.

From this latter decision the appeal now in judgment has been brought.

The view taken by the Supreme Court was that the Halifax Banking Company and the respondents Eisenhauer and Wade were in the relative positions of first and second encumbrancers, the respondents being to all intents and purposes mortgagees, and this being so, that there was no rule or doctrine of equity which forbade the Banking Company from selling and the respondents Wade and Eisenhauer from purchasing

under that sale. The contention of the appellants was that the respondents Eisenhauer and Wade were under a disability to purchase because they were by the original power of attorney of the 4th of July, 1889, made trustees for the appellants in case they should themselves sell the bonds.

It is, I think, very clear that there is no foundation, equitable or otherwise, for the action

However informal some of the documents constituting the security may be we must look at the substance of the several transactions, and doing this we cannot fail to see that the respondents Wade and Eisenhauer, having ample authority so to do under the express power conferred upon them by the 3rd clause of the agreement contained in the letter of the 13th May, 1890, pledged or hypothecated the bonds in question by the instrument of the 15th of May, 1890, with the Banking Company to secure the debt for which the latter proposed to sell. In my opinion Wade and Eisenhauer are, as I have said, to be regarded as successive mortgagees or encumbrancers. In respect of the $100,000 and upwards which they had actually paid in cash to the bank they had no security but these bonds. In respect of their security for this debt it is true they were subordinated in point of priority to the bank, but subject to that they had an effectual charge upon the bonds. There could, therefore, be nothing to interfere with the right of the Banking Company to sell for the realization of the debt, nor with the right of Wade and Eisenhauer to purchase.

The fact that under the first power of attorney, that of 4th July, 1889, they were to sell for the benefit of and as trustees for the railway company, in case the bank should decline to sell, cannot possibly make any difference between the present case and that of successive mortgagees.

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In the first place the sale which it is sought to restrain was not a sale by the respondents Eisenhauer and Wade under the power of attorney, but by the Banking Company under the hypothecation of the 15th of May, 1890, executed by Eisenhauer and Wade in pursuance of the 3rd clause of the new agreement of the 13th of May, 1890.

Next it is clear, upon the authorities referred to in the judgment of the Supreme Court, that if property is substantially mortgaged, charged or hypothecated to secure a debt it makes no difference that the mortgagee, chargee, or hypothecary creditor may be called a trustee. Being a creditor he has the rights of one just as much as if his security was created by a mortgage deed expressed in the most regular and conventional form. *Kirkwood* v. *Thompson* (1); *Locking* v. *Parker* (2) are conclusive authorities to this effect.

The case then just resolves itself into one of a sale by a first mortgagee or pledgee and a purchase by a second mortgagee or pledgee.

The appellants do not merely insist that the second mortgagees, Eisenhauer and Wade, having purchased are liable to be redeemed and are not the absolute purchasers, but further that the sale was absolutely void and liable to be set aside on the ground that the relationship of Eisenhauer and Wade to the appellants was such that they were disabled from purchasing. As I have before shown, and as the courts below have held, this last position is wholly untenable.

The first contention, however, is equally so. Eisenhauer and Wade, having purchased, are entitled to hold the bonds absolutely and are not liable to be redeemed in turn by the railway company. The authorities upon this head are decisive. The cases of

(1) 2 H. & M. 392; 2 DeG. J. & S. 613.

(2) 8 Ch. App. 30; Re Alison, 11 Ch. D. 284.

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Kirkwood v. *Thompson* (1) and *Shaw* v. *Bunny* (2) are conclusive of the question. Of course any surplus of the purchase money which would remain after paying off the bank would, in this view, belong to the railway company. The court below are, therefore, in all respects right upon these points.

It was further said that the transaction was *ultra vires* of the Banking Company. A sufficient answer to this is, however, given by Mr. Justice Ritchie in his judgment at the hearing, an answer which I adopt.

It was also made a point by the statement of claim, though it was not argued before this court, that the railway company had no power to borrow and that, therefore, the securities were wholly void. The plain answer to this is that they were authorized by statute to make a mortgage, and issue the bonds in question secured by it, for the very purpose of raising a fund of borrowed capital in order that they might be enabled to complete the construction of the line of railway.

No fraud or want of good faith is proved.

As regards want of authority in Mr. Bedford to enter into the agreement of the 13th May, 1890, of which the appellants got the benefit, all objection on that score was, as I have said, expressly waived by the learned counsel for the appellants upon the argument at the bar of this court.

The appeal must be dismissed, but the judgment to be drawn up must be prefaced with a recital of the waiver by counsel of all objections to the authority of Mr. Bedford to bind the railway company by the agreement of the 13th of May, 1890.

The dismissal must, of course, be with costs.

TASCHEREAU J.—I would dismiss this appeal. The appellants' whole contention seems to be that Eisen-

(1) 2 H. & M. 392. (2) 33 Beav. 494.

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hauer and Wade were in the position of trustees and could not become purchasers under the sale by the bank. But they were not mere trustees. Their position is more analogous to that of a second mortgagee. The whole purpose of the transaction was not to create any trust for the benefit of the railway company but to secure, in the first place, the advances made by the bank to Wade, and by Wade to the railway company, and in the second place, after this claim was satisfied, to secure the amounts over and above this amount due to Wade and Eisenhauer and to Wade personally.

The original power of attorney of 4th July, 1889, expresses that the bonds are to be held by the Trust Company " in trust to secure the Halifax Banking Company and the said James D. Eisenhauer and Fletcher B. Wade the payment of the amount of their respective advances." This purpose colours the whole transaction and distinguishes it clearly from the case of a trust for the benefit of the railway company. In effect there is no fiduciary relation between Eisenhauer and Wade and the appellant railway company, nor between the respondent Banking Company and the appellant railway company, and the principle that a trustee for sale cannot purchase the subject matter of the trust for his own advantage has no application in this case.

GWYNNE J.—This is an action instituted in the name of the Nova Scotia Central Railway Company as plaintiffs who in their statement of claim pray for an injunction to restrain the defendants Wade and Eisenhauer from purchasing from the defendants the Halifax Banking Company certain bonds issued by the plaintiff company and pledged to the bank for advances made to the company by the bank and Wade and Eisenhauer respectively, upon the allegation that Wade and Eisenhauer to whom

the bank contemplated selling the bonds had, by divers transactions between them and the company since the first advances for which the bonds were pledged as security, become trustees of the said bonds for the sale thereof for the plaintiffs and could not therefore become purchasers thereof, or in the alternative that an account may be taken of what is due by the plaintiffs to the defendants and each of them in respect of which the defendants or any of them are entitled to hold the said bonds as security, and that it may be adjudged and declared that the plaintiffs are entitled to redeem the new bonds upon payment of the amount so found due. And that the proposed sale may be restrained and stayed, &c. The whole merits of the case were entered into upon the motion for the injunction upon the affidavits of one Bedford who deposed as general manager of the plaintiff company, and one Stearn who deposed as president of the company who says nothing in addition to what is stated in Bedford's affidavit in support of the motion, and upon the affidavits of the defendants Wade and Eisenhauer and one Pitcaithly who deposes as cashier of the bank in answer to the motion. The motion for the injunction having been refused the case went down to trial, upon substantially the same evidence as that contained in the affidavits on the motion for injunction, when a verdict and judgment were rendered for the defendants which has been sustained by the Supreme Court of Nova Scotia. From that judgment the present appeal is taken and the sole question appears to be whether such relationship of trustees for sale as prevented Wade and Eisenhauer becoming purchasers of the bonds which in point of fact were sold by the bank existed between them and the plaintiffs. Apart from this question it must, I think, be conceded that there is no merit whatever in the case to justify an avoidance of the sale in the interest of the plaintiffs.

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By the deed of the 4th July, 1889, the Halifax Banking Company were made mortgagees of the bonds of the railway company therein mentioned upon trust and as attorneys irrevocable of the railway company, in the event of the latter failing to pay the Banking Company by the 1st January, 1890, and Eisenhauer and Wade their respective advances made by Eisenhauer and Wade through the Banking Company to the railway company upon the discounted paper of Eisenhauer and Wade, to sell the bonds and from the proceeds thereof to pay themselves and to retire any of the said paper of Eisenhauer and Wade then held by the said Banking Company, and then upon trust to pay the said Eisenhauer and Wade any further advances that might have been made by them over and above the amount discounted by the Banking Company and any sums remaining due to them for commissions for making such advances, and upon the further trust to pay any balance remaining from the sale of the bonds to the railway company. By the deed it was agreed and provided that the Banking Company should not be compelled to act in the premises any further than they were willing, from time to time, to do, but that in case they should be required by Eisenhauer and Wade to proceed with the sale of the said bonds for the purpose aforesaid, they should, thereupon, either proceed forthwith to sell the same, in which case they should be entitled to be placed in funds and guaranteed for expenses, or they should forthwith substitute said Eisenhauer and Wade as attorneys irrevocable of them the said railway company, with as full and ample power and authority in the premises as were by the said deed granted and conferred upon the said Banking company. The railway company having made default in the payments by them to be made to the Banking Company, the latter was proceeding to sell the bonds

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in the month of May, 1890, when to prevent that sale the railway company, through their manager, made a proposition to Messrs. Eisenhauer and Wade which was accepted by them whereby, amongst other things, it was agreed that Messrs. Eisenhauer and Wade should arrange with the Banking Company to substitute them for the bank as the attorneys irrevocable of the railway company for the sale of the bonds at such price, upon such terms and upon such conditions as in their judgment they might deem best in the interest of all concerned, with power to the said Messrs. Eisenhauer and Wade to hypothecate the said bonds until sold, and that in order to carry the then existing loan they should be at liberty to pay any bank a bonus not to exceed $1,000 per month until the bonds should be sold and to charge such sum to the railway company. In pursuance of this agreement and to give effect thereto, Messrs. Eisenhauer and Wade negotiated with the Halifax Banking Company to obtain from them time to endeavour to effect sale of the bonds. The bank agreed with them that upon their paying $100,000 to the bank on account of the debt then due the bank, amounting then to $445,683.48, and giving their promissory note for the balance with interest thereon at 7 per cent and also paying the bank a commission of $1,000 per month so long as such balance should remain unpaid, and hypothecating the bonds to the bank as security for the payment of such balance and interest thereon and said commission they would give to the said Messrs. Eisenhauer and Wade six months time to pay such balance, during which period Messrs. Eisenhauer and Wade should have power to sell the bonds for that purpose, and that the Banking Company would constitute them, the said Eisenhauer and Wade, attorneys irrevocable of the said railway company under the powers in that behalf vested in the

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bank by the deed of July, 1889. Accordingly Messrs. Eisenhauer and Wade paid the bank the said sum of $100,000 and the terms of the above agreement were perfected by two deeds bearing date the 15th of May, 1890, executed by and between Messrs. Eisenhauer and Wade and the bank with, as there can be no doubt whatever, the full knowledge and approbation of and for the benefit of the railway company. Now the effect of this arrangement was to deprive the bank of all power to sell the bonds so hypothecated with them for the said period of six months at the expiration of which time, in case default should be made in fulfilment of the terms of the said agreement, their power to sell the bonds to the extent that they had such power under the deed of July, 1889, would revive and be in full force. During the six months it appears by the evidence that Messrs. Eisenhauer and Wade did their utmost to procure a sale of the bonds beneficial to the Railway Company in which, however, they failed, not from any default of their own but, I think that it may be fairly said, by reason of their endeavour to meet the views of the company and the impracticability of dealing with the company. The six months, however, expired without a sale having been made and thereupon the right of the bank as mortgagee and pledgee of the bonds accrued, which right the bank gave to the railway company and to Messrs. Eisenhauer and Wade notice they intended to exercise. Messrs. Eisenhauer and Wade thereupon endeavoured to procure the railway company and the persons composing the company to make a payment on account which might be satisfactory to the bank and to endeavour to get further time for sale of the bonds. This the railway company and the persons composing the company refused to do and there was no alternative left but for the bank to sell the bonds.

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Under the circumstances above detailed Messrs. Eisenhauer and Wade were not in any sense trustees or attorneys of the railway company to effect the sale contemplated by the bank. That sale was conducted by the bank in their own right and in this sale there was nothing, in my opinion, to prevent Messrs. Eisenhauer and Wade becoming purchasers in their own right and there is nothing in the evidence offered by the plaintiffs to displace the evidence of the defendants that the sale was as good a sale as could have been made and in fact that a better price was given by Messrs. Eisenhauer and Wade than could have been got from any other persons. The plaintiffs have been repeatedly offered the bonds if they would pay the amount paid for them; this they have always declined to do. The judgment, therefore, of the court below must, in my opinion, be sustained and this appeal dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Drysdale, Newcombe & McInnes.*

Solicitors for respondent Halifax Banking Company: *Russell & Ross.*

Solicitors for respondents Wade and Eisenhauer: *Borden, Ritchie, Parker & Chisholm.*

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*June 22, 23.

*Dec. 13.

THE WATEROUS ENGINE WORKS COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

THE CORPORATION OF THE TOWN OF PALMERSTON (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Exercise of powers—By-law—Executory contract.

The Ontario Municipal Act (R.S.O. [1887] c. 184) by s. 480 authorizes any municipal council to purchase fire apparatus of any kind, and by s. 282 the powers of a council must be exercised by by-law.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that a contract under the corporate seal for purchase of a fire-engine which was not authorized by by-law and not completed by acceptance of the engine, could not be enforced against the corporation. *Bernardin* v. *North Dufferin* (19 Can. S. C. R. 581) distinguished.

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

This action was for the recovery of the price of a steam fire engine manufactured by the plaintiffs for the defendants, and five hundred feet of fire hose, known as the " Waterous " brand.

The defendants are a municipal corporation incorporated under the Municipal Act of the province of Ontario.

On the 12th of April, 1890, the defendants passed a resolution in council: " Moved by Deputy-Reeve Freeland, seconded by councillor McLean, that this council

*PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

(1) 19 Ont. App. R. 47. (2) 20 O. R. 411.

recommend the fire and water committee to ask for the lowest price and terms from the Waterous Engine Works Company, the Ronald Company, or any engine offered for sale for fire engine, and report at the next meeting of this council."

On the 19th of May, 1890, the committee reported as follows : " The Fire and Water Committee beg leave to report that according to instructions we have received communications from the Waterous and Ronald Fire Engine Companies, and would recommend that your committee be empowered to purchase a fire engine and five hundred feet of hose, price not to exceed $2,150.00."

This report was received by the council and adopted.

In pursuance of this report a contract was entered into under the corporate seal of the plaintiffs and of the defendants for the construction of a steam fire engine for the defendant corporation. This contract was signed by the mayor and countersigned by the clerk, and the seal of the corporation attached thereto. The contract was also signed by the plaintiff company and the seal of the company affixed thereto.

Full and particular specifications of this engine were attached to the said contract.

No by-law of the defendant corporation was ever passed sanctioning the purchase of a fire engine, or sanctioning the said contract.

The plaintiffs proceeded to prepare an engine for the defendants pursuant to this contract and specifications attached thereto.

By the terms of this contract the engine and 500 feet of hose was to be delivered free on board the cars at Palmerston on or before the 19th June, 1890.

The engine was duly delivered by the plaintiffs to the defendants free on board the cars at Palmerston before the 19th of June, 1890, pursuant to the contract, and was placed in the town hall of the defendant corporation.

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On the 2nd June, 1890, at a meeting of the council of the defendant corporation, the contract between the plaintiffs and the defendants was read, and the committee reported that they had purchased an engine and 500 feet of hose pursuant to the report adopted at the meeting of the council on the 19th of May. The said report was thereupon adopted by the council. It was thereupon moved and carried that McLean, Robbins and Best, three members of the council, should be a committee to engage experts to investigate the working of the engine on the day of the test.

On June 19th, 1890, the engine was tested in the presence of the experts appointed by the committee, and on June 20th the experts reported favourably upon the test.

On 21st July, 1890, a resolution of the council was passed that all negotiations with the plaintiffs with reference to the fire engine be dropped, and that the plaintiffs be notified to remove the engine from the town hall.

On the trial the presiding judge found as a fact that the engine had answered the test and complied with the requirements of the contract, but he held that plaintiffs could not recover for want of a by-law of the council authorizing the purchase, the Municipal Act, R.S.O., (1887) ch. 184, providing by sec. 282, that "all the powers of the council shall be exercised by by-law unless otherwise expressly authorized or provided for" and the power to purchase fire apparatus, which is expressly given to a municipal council by section 482 of the act, coming under the said provision. The Divisional Court and the Court of Appeal affirmed the decision of the trial judge. The plaintiffs appealed to this court.

Wilkes Q.C. for the appellants. The contract contains all the requirements of a by-law and should be construed as such.

A by-law was not necessary. The powers to be exercised under section 282 are legislative powers only.

The corporation is estopped from setting up want of a by-law. *Agar* v. *Athenæum Life Assurance Society* (1); *Prince of Wales Assurance Company* v. *Harding* (2); *Doe d. Pennington* v. *Taniere* (3); *Bernardin* v. *North Dufferin* (4).

A. M. Clark for the respondents.

STRONG J.—The appellants brought this action to recover the price of a fire engine which, as they allege, the respondents contracted to purchase from them. Mr. Justice Rose, before whom the cause was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In this conclusion I entirely agree. The much debated question as to the liability of a corporation on an executed contract not entered into with the requisite formalities imposed either by common law or by statute does not, therefore, arise here.

The question we have to determine is whether the municipal corporation of an incorporated town is liable on a contract for the purchase of a fire engine which has been entered into without the authority of a by-law under seal, and which contract has remained unexecuted.

By sec. 480 subsec. 1 of the Municipal Act power is given to a municipal council to purchase or rent for a term of years, or otherwise, fire apparatus of any kind,

(1) 3 C.B.N.S. 725.
(2) E.B. & E. 216.
(3) 12 Q.B. 998.
(4) 19 Can. S.C.R. 581.

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and fire appliances and appurtenances belonging thereto respectively.

A fire engine is manifestly an appliance and apparatus within the meaning of this section.

By sec. 282 the powers of a municipal council shall be exercised by by-law when not otherwise authorized or provided for, and sec. 288 requires that every by-law shall be under the seal of the corporation and shall be signed by the head of the corporation, or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation.

It requires no demonstration to show that the purchase of a fire engine by a municipal corporation is the exercise of a power conferred upon it by the statute. Then no by-law was ever passed authorizing the purchase of the fire engine in question, although the Fire and Water Committee passed a resolution to that effect. This resolution does not, however, appear to have been followed by a by-law with the formalities of signing and sealing required by the statute.

Under the circumstances the result is inevitable that there never was any contract legally binding on the municipality respecting the purchase of this fire engine.

The statute of 1890, authorizing the special fund for fire protection purposes, so far from dispensing with a by-law expressly requires one.

The only possible escape from the conclusion that there never was a contract would be by holding that the formalities presented by secs. 282 and 288 were not indispensable but merely directory.

We cannot, however, do this in the face of such clear and distinct authorities to the contrary as we find in the cases of *Young* v. *Leamington* (1) and *Hunt* v. *Wimbledon Local Board* (2), cases which are express decisions on the point that contracts of a municipal

(1) 8 App. Cas. 517. (2) 4 C.P.D. 48.

corporation are absolutely void, whether executed or executory, unless they comply with all statutory requirements as regards formality of execution, a result which I should have thought clear unless the courts have power to override and dispense with statutory provisions in their discretion. In the cases referred to decisions holding contracts with corporations void for want of statutory formalities were, indeed, unsuccessfully impugned even as regards executed contracts, to which class of contracts, however, this contract does not belong. For further reasons and authorities I refer to my judgment in *Bernardin* v. *North Dufferin* (1) which was, it is true, not in accordance with the opinion of the majority of the court in that case, but the contract there was executed. There is nothing, however, in the judgment of the court in that case against applying the principle of *Young* v. *Leamington* (2) and *Hunt* v. *Wimbledon* (3) to an executory contract such as the present.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—Upon 12th April, 1890, a resolution was passed by the municipal council of the corporation of the town of Palmerston, in council assembled, that a committee of the council named the fire and water committee should ask for the lowest price and terms from the Waterhouse Engine Works Company, the Ronald Company or any engine offered for sale for fire engine and report at next meeting of council. Upon the 19th of May following the said fire and water committee, in accordance with the above resolution, reported to the council that they had received communications from the Waterous and Ronald Fire Engine

(1) 19 Can. S. C. R. 581. (2) 8 App. Cas. 517.
(3) 4 C. P. D. 48.

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Companies, and recommended that they, the committee, should be empowered to purchase a steam fire engine and 500 feet of hose at a price not to exceed $2,150.00. This report was based on a proposition in writing which the committee had, and which was signed by the Waterous Engine Works Company by D. J. Waterous, for building a steam engine and for supplying therewith 500 feet of hose for the municipality. Upon the same 19th of May the above report of the fire and water committee was received and adopted by the council and an entry to that effect was made in the minutes of the proceedings of the council. In pursuance of the adoption by the council of the said report a contract bearing date the same 19th May, under the corporate seal of the said municipality thereto attached, was signed and executed by the mayor of the said municipal corporation and the clerk of the municipality and is in the words following:—

This agreement, made this 19th day of May, 1890, by and between the Waterous Engine Works Company, of Brantford, Ont., the party of the first part, and the Corporation of the Town of Palmerston, party of the second part, witnesseth: that the party of the first part agrees to sell to the party of the second part the following fire apparatus, to wit: one No. 2 Waterous steam engine as described in the attached proposal, and 500 feet of 2½ inch cotton rubber lined fire hose known as the "Waterous" brand, all to be in accordance with the specifications and guarantees set forth in the proposal of the party of the first part hereunto annexed and dated this 19th day of May, 1890, the same to be delivered free on board cars at Palmerston on or before the 19th day of June, 1890. The party of the second part agrees to purchase and pay for the aforesaid property delivered as aforesaid, the sum of twenty-one hundred and fifty dollars to be paid in manner following, that is to say: the above amount, viz.: twenty-one hundred and fifty dollars in sixty days from date of delivery. It is further agreed that the parties of the second part will not hold the parties of the first part responsible for delay in delivering the apparatus, such delay being occasioned by fire or other causes unforeseen that could not be prevented by reasonable diligence. In witness whereof the said party of the first part has caused these presents to be executed by

David J. Waterous, its duly authorized agent for that purpose, and the party of the second part has caused its corporate seal to be hereunto affixed attested by its mayor, R. Johnston, the day and year first above written.

RICHARD JOHNSTON, Mayor,
Chairman of Committee.

Seal of Town of Palmerston.

E. A. DUMAS, Clerk.

WATEROUS ENGINE WORKS CO., L'D.,
Per DAVID J. WATEROUS,
General Manager.

Seal of Waterous Engine Works Co., Ltd.

At the next meeting of the council, namely, on the 2nd June, 1890, the Fire and Water Committee reported that they had purchased a fire engine and five hundred feet of hose from the Waterous Engine Works Company, as per report adopted at the last meeting of council. At this meeting the contract so entered into between the Waterous Engine Works Company and the town of Palmerston was read in council; and the said report of the Fire and Water Committee was read a second time and thereupon a committee of three members of the council was appointed to engage experts to investigate the working of the engine on the day of the test, and entries to the above effect respectively were made in the minutes of the council. The engine with the 500 feet of hose was duly forwarded and delivered free on board the cars at Palmerston within the time specified in the contract for that purpose and delivered to the officers of the corporation to be subjected to the test specified in the proposal attached to the contract, and upon the 19th June, 1890, the engine was subjected by the authorities of the corporation to such test in the presence of experts appointed by the committee of council for that purpose who, upon the next day, reported that the engine fully came up to the specifications of the contract with the exception as to the time taken to get up steam and

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throw water, which was eleven and one-half minutes; the contract specified ten minutes as the limit. But the experts reported that this could be partly accounted for by the fact that 600 feet of hose were attached, whereas the contract specified only 100 feet. Upon this point the learned judge who tried the case found as a fact that the engine did answer the test, and did fully comply with the contract and was capable of getting up steam and throwing water within the ten minutes specified as limit. Upon the close of the test to which the engine was submitted it was taken to and left in the engine house belonging to the municipality where it has ever since remained, and still is, but on the 21st of July, 1890, the council passed a resolution to the effect that all negotiations with reference to the fire engine with the plaintiffs be dropped, or at least,

> so far as this council can legally do so, and that they be notified to remove the engine from the town hall and further that a copy of this resolution be forwarded to the Waterous Engine Works Company properly attested with the signature of the mayor and clerk and the corporation seal attached thereto.

A copy of this resolution was received by the plaintiffs on or about the 6th August, but they, instead of complying with the notification therein to remove the engine from the premises of the municipality where it had been ever since the 19th June, commenced this action on the 6th September, 1890.

Now it cannot be, and has not been, contended that this contract so executed by and under the direction and authority of the governing body of the corporation was not executed in such a manner as to make it a valid contract binding on the corporation unless there be some provisions in the Municipal Institutions Act of Ontario which invalidates it; but it is contended that there is a clause in the Municipal Act, ch. 184 R. S. O. of 1887,

which renders it wholly null, void and *ultra vires*. The section referred to is that numbered 282 of said ch. 184 which is identical with sec. 186 of 22 Vic. ch. 99, an act passed on the 16th day of August, 1858, when it was first introduced; which act is incorporated in the Consolidated Statutes of Upper Canada as ch. 54. The section is as follows :—

> The jurisdiction of every council shall be confined to the municipality the council represents except where authority beyond the same is expressly given ; and the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.

The contention is that this last sentence covers contracts made by the corporation, the power to make which, it is contended, can be exercised by by-law only.

The question thus raised is certainly a very grave one for if the contention be maintained it wholly, as it appears to me, revolutionizes the law as heretofore understood and administered for thirty-four years for then no contract whatever entered into by and with the corporation, even though under the corporate seal, and however trifling or necessary might be the subject of such contract, namely, whether it be for executing absolutely necessary repairs in a highway or sidewalk or for the purchase of fuel or other necessary articles for the use of the officers of the municipality in the discharge of their duties in their offices or elsewhere, or for the employment of menial officers or day labourers, or, in short, for anything whatever, could have any validity whatever unless, in the words of the section, the power of the council to enter into the contract should "be exercised by by-law" and further, the corporation could never be made liable for any work whatever, whether contracted for orally or under the seal of the municipality, though set thereto by direction of the council, and although the work had been executed and the corporation had had and received the

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full benefit and enjoyment thereof, unless the power of the council to enter into such contract should " be exercised by by-law," for this is the principle involved in *Hunt* v. *Wimbledon* (1), affirmed irrevocably to be law by the House of Lords in *Young & Co.* v. *Leamington* (2.) Where a statute requires a contract, in order to its being binding upon a corporation, to be entered into in a particular manner it cannot be entered into validly otherwise than as prescribed by the statute. There can not be recognized any judicial exception from a statutory obligation, so that in the case of municipal corporations not only the doctrine which, after much judicial contention, had become firmly established, to the effect that corporations may be held liable upon oral contracts which have been executed, and of which the corporation had had full benefit and enjoyment, must be expunged from the jurisprudence of the province of Ontario, but contracts also entered into under the common seal of the municipality must be pronounced to have no validity whatever unless the municipal corporation in entering into the contract exercised their power to do so by by-law. The principle upon which the cases that affirm as against corporations the validity of oral executed contracts of which the corporations have received the benefit proceed is that it is competent for the courts to recognize such cases as constituting an exception from the *common law* rule that corporations can contract only under their common seal, but no such exception can be made from a statutory provision which prescribes a particular mode for corporations to enter into valid contracts. *Young & Co.* v. *Leamington* (2) is conclusive authority that such a provision is mandatory and not directory and cannot be dispensed with by any court. If, therefore, the contention of the defendants

(1) 4 C. P. D. 48. (2) 8 App. Cas. 517.

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be well founded there can be no contract whatever which shall be binding upon a municipal corporation entered into by the corporation whether orally or under the corporate seal unless by force of a by-law for that purpose first passed. No such construction of the clause in question appears to have been entertained when the clause was first introduced into the act of 1858. In *Perry* v. *The Corporation of Ottawa* (1) an engineer sued the corporation for the value of services rendered by him in making survey estimates and plans, &c., of the necessary expenditure for supplying the city with water, under the following circumstances: In 1860 a committee of the council of the corporation had reported to the council making certain recommendations, among others that the same or some other committee should be appointed with power, among other things, to treat with and recommend to the council an engineer to make the requisite survey, plan and estimates of the intended expenditure for supplying the city with water, for applying to Government to grant a site for a reservoir and water power and generally to superintend the matter. This report was adopted and a committee appointed in June, 1860. In August, 1861, an alderman named Skead being in Quebec wrote to urge the plaintiff to come to that city to assist in pressing for the site for the proposed reservoir and an alderman named Goodwin was a witness at the trial and stated that he was a member of the waterworks committee and acted as chairman and that they (the committee) employed the plaintiff to make plans of the hill and of the reservoir proposed to be constructed on it, to be laid before the Commissioner of Public Works. This witness told the plaintiff to go to Quebec. A Mr. Boucher, chairman of the street committee in 1861, proved that by the authority of that

(1) 23 U.C. Q.B. 391.

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committee he employed the plaintiff to make a copy of a certain plan which was in the registry office, which the plaintiff made but was not paid for. The plaintiff also proved a report prepared by him for the water works committee which they submitted to the council of the corporation with their own report, and he proved the value of those services. For the defendants it was contended that the plaintiff could not recover as the contracts in respect of which the plaintiff brought his action were not executed under the corporate seal of the municipality. But Draper C. J. held that the court, notwithstanding the passing of the Municipal Act of 1858 which contained the clause now under consideration, was bound by the judgment in *Pim* v. *The County of Ontario* (1), and Hagarty J. was of the opinion that the plaintiff was entitled to recover for his plans and reports simply on the ground that he was employed to make them by a duly appointed committee of the council which committee reported what had been done by them and by the plaintiff under their orders, and the council by resolution adopted the action of the committee; as to the plantiff's claim for services in going to Quebec rendered under the direction of the chairman of the committee he doubted, but finally concurred as to the plaintiff's claim for these services also for the reason that in the report of the committee which was adopted by the council in October it appeared that the chairman of the committee and the plaintiff had interviews with the commissioner of crown lands on 17th September, so that the council when adopting the report must have known that those interviews took place at Quebec, and not at Ottawa. Now, if the clause under consideration includes within its purview contracts made by the corporation, it comprehended the contract made with

(1) 9 U. C. C. P. 304.

Perry and upon which he recovered in that action, equally as it does the contract entered into with the plaintiff in the present action, yet it never occurred to any one to contend that the contract with Perry was null, void and *ultra vires* because the municipal council of the city of Ottawa had not first passed a by-law for the purpose of giving itself authority to enter into the contract. Again, in *Broughton* v. *The Corporation of the Town of Brantford* (1), it was held by Hagarty C.J. in 1869 that the plaintiff, under and in virtue of a contract entered into with him by the corporation under their corporate seal for the performance of certain services to be rendered to the corporation by him at a salary of $900.00 per annum, was entitled under the contract contained in the instrument executed under the corporate seal to maintain an action against the corporation for wrongful dismissal. Hagarty C.J. giving the judgment of the court said that he considered the plaintiff up to the date of his dismissal held his office "under and upon the terms of his original appointment."

We find, he says, a report of a committee of council to the whole body in December, 1865, recommending plaintiff's appointment at this salary ($900.00 per annum.) We also find a resolution of the council authorizing the mayor to execute the bonds between plaintiff and the town.

And upon this the plaintiff was held entitled to recover against the corporation for a wrongful breach of their contract so made with him. Now, here again if the clause under consideration has the effect now contended for it cannot, I think, be doubted that it applied to the contract in that case equally as it does to the contract in the present case.

Then, in the case of *Brown* v. *The Town of Belleville* (2), it appeared that on the 6th May, 1868, a report of

(1) 19 U. C. C. P. 434.

(2) 30 U. C. Q. B. 373.

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a committee of the town council was made to the council which stated that the committee had put themselves in communication with one Alexander Brown, who owned a steam dredge, which was then in the state of New York, and which he had consented to loan to the corporation to use for dredging the harbour, and also to build a scow to receive the dredge when it should arrive, on condition that the corporation would pay the cost of transport to Belleville and pay him for the use of the dredge a sum not exceeding ten per cent per annum on the actual cash value of the dredge and the scow, while the same were employed by the corporation ; the corporation to keep the machinery in good order and to return the dredge in good condition, ordinary wear and tear alone excepted ; the agreement to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith, and that the committee considered the offer a very favourable one and recommended the same for acceptance by the council.

This report of the committee was adopted by the council in due form by resolution. After the adoption of the report the chairman of the committee saw Mr. Brown, the plaintiff in the action. The clause in the report that the agreement should be subject to a vote of the people authorizing funds to be raised for dredging the harbour was introduced into the report when it was before the council and before the resolution was passed adopting the report. For this reason the chairman of the committee drew the attention of the plaintiff to the clause and to the risk he ran of the by-law for raising the funds not passing, but assured him he thought it would pass. Finally the chairman concluded the arrangement with the plaintiff and told him to bring the dredge, which the plaintiff thereupon sent for and had it brought to Belleville. The action was for the

expense of bringing it, viz., $373.50. The defendants never used the dredge for the reason that after the above arrangement between the chairman of the committee and the plaintiff was made and entered into, and on the 17th June, 1868, the committee again reported that they had under consideration the cheapest and best mode of carrying out the work of dredging the harbour, and had consulted persons of experience and had recommendations as to the propriety of letting the same out by contract at so much a cubic yard or at a round sum for the whole work, and that the committee was not prepared to recommend the conclusion of any negotiations until the by-law for raising the money for the work was confirmed and finally passed. At this time a by-law for raising the money was provisionally passed and advertised for taking the votes of the people thereon, which were taken on the 6th July, and although it went through the form of being passed by the council on the 15th July, upon which day the committee again reported to the council that they had unanimously decided that it was desirable that the work of dredging the harbour should be let out by contract at a certain sum per cubic yard measured on the scow after the same had been excavated, the work to be executed as the committee might, from time to time, direct, duly reporting to the council as the work progressed; and the committee desired to be authorized to advertise for tenders for the work, requiring those who tendered to state at what price per cubic yard they would perform such work, providing the dredge, scow and all necessary apparatus. This report was in due form adopted by the council. The committee in the meantime had seen a plan of dredge which it was thought would be better for working in saw-dust than the plaintiff's, and they finally decided to let the contract for dredging the har-

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bour to a Mr. Hayden, who used the new style of dredge, and a contract under seal of the corporation was entered into with Hayden. In the meantime the plaintiff's dredge had been brought to Belleville but it was never used by the contractor. The by-law which had been submitted to the vote of the people on the 6th July proved to be defective and a new by-law for raising the necessary funds for drainage of the harbour was introduced into the council and passed in the month of December following. The plaintiff brought his action for the recovery of $373.50 the expense of bringing his dredge to Belleville under the contract for that purpose entered into with him by the chairman of the committee of council. The defence was that the corporation had never used the dredge, had never received it from the plaintiff and that they were not liable as there was no contract made with the plaintiff by the defendants under their corporate seal. Now, here again it is to be observed that there was no by-law passed by the council authorizing the committee or their chairman to enter into any contract with the plaintiff. The plaintiff had done what he had undertaken to do under his contract although the defendants never had received the dredge or intermeddled with it; and he was held to be entitled to recover notwithstanding. The terms in which the judgment of the court was delivered by Richards C. J. impress my mind with the conviction that the defendants would have been held liable in damages for breach of their agreement in not employing the plaintiff and using his dredge if an instrument under the corporate seal had been executed embodying the terms of the agreement as expressed in the plaintiff's proposal reported by the committee to the council notwithstanding that there had been no by-law authorizing

the contract to be entered into. The learned Chief Justice says, delivering the judgment of the court :—

The plaintiff was the owner of a dredge which was then in the United States, the committee persuaded him to offer to send for it and to let them have it on certain terms, the first stipulation in the agreement being that he should send for the dredge and bring it to Belleville, doubtless that there might be no delay in the matter.

Again :

The committee report the offer to the council, say they consider it very favourable and recommend the same for acceptance to the council. The council adopt the report of the committee, and the chairman informs the plaintiff of it and persuades him to send for the dredge at once which he does and expends money to the extent of over $300 in bringing it to Belleville. In the meantime the committee think a more favourable arrangement can be made for the interest of the town and, after the arrival of the dredge, advertise for proposals to do the dredging, the committee furnishing the dredge and all implements, etc., etc. They do not carry out the arrangement to use the plaintiff's dredge, and finally decline paying pay him the money he has expended in good faith in carrying out the arrangement entered into with their express approval.

Again :

There may be some nice distinctions drawn between this case and some of the decided cases, but we think the law now has gone so far that when a contract has been entered into by the express direction of the corporation and has been performed by the party and the corporation has received the advantage of it, the corporation cannot set up as a defence that the contract was not under seal, always assuming, of course, that what was contracted for was a matter within the scope and powers of the corporation to contract for. Now, here the plaintiff did bring his dredge to Belleville to be used by the defendants.

Now these cases, as already observed, must have been all ill decided if the contention of the defendants in the present case be correct. But that the construction contended for by the defendants is not a sound construction of the section, I think the fact that it was not suggested in any of the above cases, nor so far as I have seen since the passing of the clause in the act of 1858 until very recently, is strong evidence of a common consensus of opinion that it is not, and I am of

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opinion that the clause is not open to the construction contended for.

The clause is found inserted under the head or title "general jurisdiction of councils;" so associated the words "powers of the councils" in the section appear to me to refer naturally and reasonably to the governing legislative powers of the councils in the matters over which jurisdiction or legislative authority is vested in them by the Municipal Act, which powers are to be found in part 7 of the act under the title "powers of municipal councils" and nothing there is said as to the mode of entering into contracts. The section under consideration therefore has not, in my opinion, any reference to the mode in which contracts shall be entered into by municipal councils; that is a matter provided for by the common law, namely, by a contract *inter partes*, executed under the corporate seal by authority of the governing body. This is a matter, more properly speaking an executive power of the corporation, incidental to its incorporation, whereas "the powers of the councils" referred to in sec. 282 appear to me to be those governing or legislative powers conferred upon the municipal councils by the Municipal Act itself.

The contention of the defendants has two aspects, namely, that the section either imperatively requires that a contract to be entered into by a municipal corporation with an individual must be entered into by a by-law, that is to say by an instrument to which by reason of its nature the person with whom the contract is to be entered into cannot by possibility be a party, or else that the corporation can by a by-law give to itself a power to contract which before it had not.

As to the first of these propositions I confess to being unable to appreciate what is meant by the expres-

sion, "entering into a contract by by-law." I cannot understand how an agreement between a corporation and an individual can be entered into by an instrument to which such individual can not by possibility be a party, nor can I understand the sense of construing the section as enacting that a municipal corporation can confer upon itself a power, which before it had not, of entering into a contract. Up to the present time it has not been so construed by the courts. Of course, if it be necessary for the corporation to raise money by a rate to pay for the thing contracted for by a municipal corporation that must be done by the exercise by the council of their legislative power, that is to say, by a by-law, but such a by-law might be passed as well after as before the execution of the contract, and if the corporation had funds to pay for the thing contracted for without imposing a rate to pay for it such a by-law would be unnecessary. Now, it sufficiently appears in evidence, I think, that the defendants at one time had control of funds sufficient to have enabled them to pay for the engine built for them by the plaintiffs which funds, however, they seem to have misapplied to other purposes under circumstances, however, which make them responsible to replace the funds so misapplied; but whether the corporation had funds or not when the contract was signed, or would be in funds to pay for the thing contracted for in the terms of the contract when it should be fulfilled by the plaintiffs, does not raise a point affecting the validity of a contract entered into under the corporate seal in respect of a matter for which they had power to contract. Unless, therefore, all contracts of whatsoever nature, and how much soever they may be within the purposes for which the municipal corporation is incorporated, are absolutely null and void unless they are entered into under or in virtue of a by-law first passed

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for the purpose by the municipal council the contract made with the plaintiffs under the corporate seal of the defendants cannot be pronounced to be void. That the corporation had power to enter into that contract is, I think, placed beyond doubt by section 480 of said chapter 184. What greater power the corporation could obtain by a by-law passed by the council than that conferred on them by the legislature by that section I am unable to see. It is argued, however, that this section 480 is limited by the section 282 construed as the defendants construe it. I have already stated my reasons for thinking the section 282 not open to the construction put upon it by the defendants; but the difference between the language of that section and of the sections 479 and 489 and all other sections relating to the exercise of legislative powers seems to show that the legislature intended by section 480 to confer the right to contract in respect of the matters therein mentioned in the ordinary manner; that is to say, that they recognized the distinction between what I think may be properly called an executive power from a legislative power. By section 479 it is said: "The council, etc., may pass by-laws for, etc." In section 480: "Every municipal council shall have power to contract for, etc." And again by section 489 and all other sections relating to legislative power: "The council, etc, etc., may pass by-laws for, etc." So that, as I have already said, the words "powers of the council" in section 282 appear to me to refer solely to the governing or legislative powers vested in the jurisdiction of the council by the Municipal Act, and do not at all refer to the power of entering into contracts, the mode of exercising which is prescribed by the common law to be by an instrument *inter partes* under the corporate seal, which power is a common law incident to the corporation as a corporate body,

and is, more properly speaking, an executive than a legislative power. Upon the whole, I am of opinion that the contract entered into with the plaintiffs under the corporate seal of the defendants set to the contract by the authority of the governing body, the council, and being for a matter for which the corporation had power to contract, is a good and valid contract, and as its terms have been fulfilled by the plaintiffs they are entitled to have judgment for the full amount. Indeed, upon the authority of *Brown* v. *Belleville*, (1) everything appears to me to have been done to give the defendants the benefit of the contract, and to have entitled the plaintiffs to have recovered as upon an executed contract of which the defendants had received the benefit if the contract had been an oral one and not under seal, for the plaintiffs delivered the engine which they had built for the defendants to them at Palmerston free on board; the defendants received the engine and subjected it to the test agreed upon, which the learned judge has found that the engine answered; and after subjecting it to the test the defendants took it and kept it in their engine house (where it still is) although the defendants, upon the 6th August, or thereabouts, communicated to the plaintiffs a resolution of council which substantially was to the effect that they repudiated the contract which they had procured the plaintiffs to enter into and which they had fulfilled.

PATTERSON J.—I do not think that any sufficient reason has been shown for holding that the judgment of the Ontario courts has misinterpreted the Municipal Institutions Act of that province (2). The general doctrine touching the mode in which a corporation can be bound by contract is not really in question.

(1) 30 U. C. Q. B. 373.

(2) R.S.O. (1887) c. 184.

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We have to deal with two distinct bodies. One is the corporation, which consists of all the inhabitants of the municipality, and the other is the council which is not a corporation.

By section 8 the powers of the corporation are to be exercised by the council.

By section 282 the powers of the council are to be exercised by by-law.

What is the full scope and extent of this word "powers," and whether it includes all the administrative functions of the council which necessarily embrace the most trivial details of every day affairs as well as more important matters, need not now be discussed. It may be that the discussion of that question, when there arises a necessity for discussing it, may develop some difficulties in working the law in strict obedience to the letter of it, and may throw doubt on the wisdom of maintaining an enactment so sweeping and so imperative.

The English Public Health Acts of 1848 and 1875 have very stringent provisions respecting contracts by local boards of health, requiring them always to be under seal. These statutes were the subject of decision in *Frend* v. *Dennett* (1); *Hunt* v. *Wimbleton Local Board* (2), and *Young* v. *Mayor and Corporation of Royal Leamington Spa* (3), and were construed so strictly as to apply even to executed contracts. I had occasion to refer particularly to those cases in *Bernardin* v. *North Dufferin* (4) But those English statutes did not apply to contracts in small and every day matters. In the act of 1848 the rule was confined to contracts whereof the amount or value should exceed £10. That amount was probably found to be so small as to be too restrictive, and in the act of 1875 it was increased to £50. It may possibly be found expedient to modify

(1) 4 C. B. N. S. 576.
(2) 4 C. P. D. 48.
(3) 8 Q. B. D. 579; 8 App.Cas. 517.
(4) 19 Can. S. C. R. 581, 644.

section 282, or, as the Manitoba legislature has done, omit it altogether.

There is nothing necessarily incongruous in requiring the two things which, it is argued, cannot both be necessary, viz., the contract under seal and the by-law which must also be authenticated by a seal.

The contract is the contract of the corporation. By what authority is the common seal of the corporation affixed to that contract? It must be by the action of the council, and section 282 requires that the resolution of the council shall be evidenced by by-law. The by-law is the by-law of the council not of the corporation. The decision to purchase the fire engine was a matter of sufficient importance to deserve whatever amount of deliberation and care the law aims at securing by requiring the action of the council to take the form of a by-law.

I do not take the first subsection of section 480 of the Municipal Institutions Act to imply any departure from the general rule in making contracts of this kind. It gives power to a council to purchase fire apparatus, &c., and subsection 2 speaks, at the same time, of the powers of a municipal corporation for lighting, &c. The powers under both subsections must be exercised by the council and, as I understand it, in accordance with the rule of section 282.

The argument from the alleged acts of the mayor or the council, which are relied on as amounting to an acceptance of the engine, does not seem to me to advance the appellants' case. It strikes me as being the same discussion of section 282 in a slightly different form.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants : *Hardy, Wilkes & Hardy.*

Solicitor for respondents : *Alister M. Clark.*

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*Oct. 18, 19.

*Dec. 13.

J. A. WEBSTER & H. V. EDMONDS (DEFENDANTS)..... } APPELLANTS;

AND

JOHN A. FOLEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Master and servant—Use of dangerous machinery—Defective system of usage—Liability of master for—Notice to master of defect.

A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself.

At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using the same by reason of his failure to give notice to the employer of such defect.

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

The plaintiff was in the employment of the defendants as a "chainer" or "log roller" in their saw-mill at the city of Vancouver, and the action was brought in consequence of injuries received by the plaintiff in the course of such employment.

The grounds of the action, as set out in the statement of claim, were that the plaintiff, in the course of his employment, had to work on a rolling tier or rollway for logs which by the negligence of defendants was in an unsafe condition and unfit for the purpose of rolling logs; that defendants knew of the unsafe condition of the rollway but plaintiff did not; that it

* PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 2 B.C. Rep. 137.

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was the duty of plaintiff, by the use of machinery provided for the purpose, to move saw-logs across the rollway and place them on a carriage on the opposite side; that to do so it was necessary for plaintiff to be provided with proper rolling blocks to check the motion of the logs; that plaintiff had frequently informed defendants that the rolling blocks furnished him were worn out and unfit for the purpose and that he would refuse to work longer unless proper blocks were supplied, defendants promising on each occasion to furnish same and requesting plaintiff to continue working; that defendants neglected to furnish the same and in consequence plaintiff was injured by a log falling upon him.

By their statement of defence the defendants denied that plaintiff was employed as alleged and that the rollway was unsafe or if it was they claimed to be ignorant of it; they alleged the same thing as to the rolling blocks and denied that they were ever notified by plaintiff as alleged; and they claimed that if plaintiff was injured as alleged it was through his own negligence and that they were not responsible therefor.

The action was tried before a special jury to whom certain questions were put which, with the answers thereto, were as follows:—

1. Were machinery and build of mill good as regards safety of workmen? No.

2. Were chock blocks sufficient? No.

3. (a) Was slant of rollway dangerous, (b) or did it require sufficient blocks to render it safe? Yes to both.

4. What was the inducing cause or causes of accident, having regard to slant, chock blocks, and alleged negligence? Slant of rollway and defective chock blocks were inducing causes.

5. Could the plaintiff by the exercise of such care and skill as he was bound to exercise have avoided the

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injury, having regard to the proper discharge of his duties as chainman ? No.

6. Did plaintiff complain of the chock blocks to the person or persons who appeared to be the authorized person or persons to whom he should complain ? Yes.

7. Did plaintiff know of slant ? No.

8. Did Burns promise to make chock blocks good ? Yes.

9. What was Burns's position and authority in the mill ? Millwright in charge of machinery.

10. (a) Apart from machinery, were discipline and management of mill good, (b) and was want (if any) of such an inducing cause of accident ? (a.) No. (b.) Yes.

11. Was plaintiff aware of the state of the chock blocks ? Yes.

12 Were defendants, or either of them, cognizant of defect in chock block ? No.

13. If they were not cognizant ought they, or either of them, to have been so ? Yes ; as manager and foreman the defendant, Mr. Webster, should have taken cognizance of this matter.

14. Did they exercise due care as to rollway and blocks being in a safe and proper condition ? In his capacity of manager and foreman, the defendant, Mr. Webster, appears not to have exercised due care as to rollway and blocks.

15. If the rollway and blocks were defective, was it by reason of the personal negligence of the defendants, or either of them, or did they, or either of them know it ? The defective conditions of the rollway and blocks appears to have been due to personal negligence on the part of one of the defendants, Mr. Webster, in his capacity of manager and foreman.

Judgment was reserved by the trial judge and the plaintiff afterwards moved for judgment in accordance

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with the findings and the defendant moved for a non-suit and for the findings as to the amount of damages and negligence to be set aside. Plaintiff's motion was granted and judgment entered for him with $5,000— damages as found by the jury. The full court affirmed this judgment and the defendants appealed to this court.

Cassidy for the appellants. There was no evidence of negligence for the jury; if there was it was not negligence of the defendants but that of fellow-workmen of the plaintiff.

Up to 1868 the law governing the liability of a master to his servants was that with regard to defects, &c., in machinery and materials the master was bound to use personal diligence and could not protect himself by any delegation of authority. See *Priestley* v. *Fowler* (1) and subsequent cases. In 1868 the law was altered by the decision of the House of Lords in *Wilson* v. *Merry* (2) which necessitated the passing of The Employers' Liability Act.

The use by an employer of dangerous machinery is not in itself wrongful. *Dynen* v. *Leach* (3).

The following cases in Ontario on this subject were decided before the passing of The Employers' Liability Act. *Jarvis* v. *May* (4); *Plant* v. *The Grand Trunk Railway Co.* (5); *Rudd* v. *Bell* (6); *Miller* v *Reid* (7).

In *Hamilton* v. *Groesbeck* (8) the decision was in favour of the employer even under the act.

The following cases also were referred to on the general question of liability: *Matthews* v. *Hamilton Powder Co.* (9); *Ross* v. *Cross* (10); *Canada Southern Railway Co.* v. *Jackson* (11).

(1) 3 M. & W. 1.
(2) 19 L. T. N. S. 30.
(3) 26 L. J. Ex. 221.
(4) 26 U. C. C. P. 523.
(5) 27 U. C. Q. B. 78.
(6) 13 O. R. 47.
(7) 10 O. R. 419.
(8) 19 O. R. 76.
(9) 14 Ont. App. R. 261.
(10) 17 Ont. App. R. 29.
(11) 17 Can. S. C. R. 316.

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In *Rajotte* v. *Canadian Pacific Railway Co.* (1) which was a common law action similar to the present, the authorities are all collected.

The jury found that the defendants did not know that rollers were unsafe but that they ought to have known it. That was an improper finding in the present state of the law. *Wilson* v. *Merry* (2). The employer is only bound to have competent persons to exercise his authority and if there is such a person his competency will be presumed and the onus is on plaintiff to disprove it. See *Rajotte* v. *Canadian Pacific Railway Co.* (1) and cases there collected, and the late case of *Hedley* v. *The Pinkney S.S. Co.* (3).

The court improperly held that they had no jurisdiction to grant a new trial. Even if this was so this court could grant it. Supreme Court Act sec. 61.

Ewart Q.C. for the respondent. This appeal is against the findings of the jury as well as the judgment. As to the former the defendants are precluded by the statute which requires notice to be given within eight days which was not done. R.S.B.C. ch. 31 secs. 60, 61 and 67. *Davies* v. *Felix* (4).

The master was bound to exercise due care to have his machinery in proper condition. *Smith* v. *Baker* (5).

The jury found that defendant Webster knew of the defective condition of the roadway and his negligence is binding on his partners. *Dublin and Wicklow Railway Co.* v. *Slattery* (6).

The learned counsel also referred to *Weems* v. *Mathieson* (7); *Black* v. *Ontario Wheel Co.* (8); Smith on Master and Servant (9).

(1) 5 Man. L. R. 365.
(2) 19 L. T. N. S. 30.
(3) 8 Times L. R. 61.
(4) 4 Ex. D. 32.
(5) [1891] A. C. 325.
(6) 3 App. Cas. 1155.
(7) 4 Macq. H. L. Cas. 215.
(8) 19 O. R. 582.
(9) P. 212.

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Strong J.

STRONG J.—I am of opinion that this appeal may be disposed of on a very short ground.

There was ample evidence for the consideration of the jury that the " rolling and chock blocks " were in a dangerous condition. There is, therefore, no ground for displacing the finding of the jury in favour of the plaintiff on this head. There being no evidence of contributory negligence the only question was, it seems to me, one of law, that which was principally insisted upon by the appellant's counsel, namely, whether or not it was incumbent on the plaintiff to prove that the appellants had notice of the dangerous nature of the " rolling and chock blocks " at which he had to work.

This question may be answered in the negative on the very high authority of Lord Watson in the late case of *Smith* v. *Baker & Sons* (1). The whole law applicable to the present case is covered by two paragraphs in this opinion of Lord Watson. His Lordship says:—

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this house by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this house, long before the passing of the Employers' Liability Act (2), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron* (3) the First Division of the Court of Session found a master liable in damages to a quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Company* v. *Reid* (4) in support of the proposition that the doctrine of collaborateur was unknown to the law of Scotland; but Lord Cranworth pointed out that the decision

(1) [1891] A. C. 348.
(2) 43 & 44 Vic. c. 42.
(3) 1 Sc. Sess. Cas. 2 Ser. 493.
(4) 3 Macq. H. L. Cas. 273.

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did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosion." The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Company* v. *McGuire* (1). The judgment of Lord Wensleydale in *Weems* v. *Mathieson* (2) clearly shews that the noble and learned Lord was also of the opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

And at page 355 Lord Watson pointed out that at common law notice to the employer of the unsafe state or the unsafe working of appliances or apparatus was not required, and that he was bound at his peril to make proper provision in these respects, but that the Employers' Liability Act had, in this respect, altered the law in favour of the employer by requiring that the workman should give information of the dangerous or defective state of the appliances.

The language of Lord Watson as to this point is as follows :—

It is material to notice that the Employers' Liability Act, under which the present action was brought, by sec. 2 subsec. 3, provides that a workman shall have no right to compensation for injuries caused by reason of any defect or negligence which is specified in sec. 1 in any case where he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but, as was pointed out by Lord Esher in *Thomas* v. *Quartermaine* (3) in cases where the employer and his deputies were personally ignorant

(1) 3 Macq. H. L. Cas. 310. (2) 4 Macq. H. L. Cas. 226.
(3) 18 Q. B. D. 685.

of the defect it is made a condition precedent of the workman's right to recover that he should have given them information of it before he was injured.

This is conclusive upon the point made by the appellant's counsel that the appellants had no notice or knowledge of the dangerous character of the rolling and chock blocks, and of the risk of injury incurred in working them, and this was the only material point argued before us.

There was, therefore, no ground for a new trial, and the appeal must be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—I should have preferred to send this case down for a new trial for the elucidation of some facts which do not appear to me to have been sufficiently brought out at the former trial, but as my learned brothers are unanimous in a contrary opinion I do not dissent from their judgment.

PATTERSON J. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for appellants : *A. S. Black.*

Solicitor for respondents : *Adolphus Williams.*

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*Nov. 3.
*Dec. 13.

DAVID ARCHIBALD (DEFENDANT).....APPELLANT.

AND

DAVID McLAREN AND MARGARET McLAREN (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Malicious prosecution—Reasonable and probable cause—Belief of prosecutor—Duty to make inquiry—Questions for jury.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred but the inference must be drawn by the judge. *Lister* v. *Perryman* (L. R. 4 H. L. 521) followed; *Abrath* v. *North Eastern Railway Co.* (11 Q.B. D. 79, 440; 11 App. Cas. 247) considered.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court by which a non-suit at the trial was set aside and a new trial granted.

The defendant is inspector of police for the city of Toronto who caused plaintiffs to be arrested on a charge of keeping a house of ill-fame. The information was laid by a woman named Dale who had boarded with the plaintiffs for a time and plaintiffs claimed that she did so with a view of regaining possession of her trunks which had been held by plaintiffs for payment of her bill for board. The case was tried three times, resulting each time in a non-suit which was afterwards set aside and a new trial ordered. From the last order defendant appealed to the Court of Appeal, and the judges of that court being equally divided the order stood confirmed. Defendant then appealed to this court.

*PRESENT:—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

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The principal question raised on the appeal is whether or not the trial judge should have submitted to the jury questions as to the defendant's belief in the truth of the information and as to whether or not he had made proper inquiries before causing the warrant to issue.

MacLaren Q.C. for the appellant. The question of want of reasonable and probable cause is for the court alone, and there were no facts in dispute on which the jury should have passed. See *Lister* v. *Perryman* (1); *Abrath* v. *North Eastern Railway Company* (2); *Brown* v. *Hawkes* (3).

Tytler for the respondents cited *Hamilton* v. *Cousineau* (4) and authorities there collected by Hagarty C. J. O.

STRONG J.—This is an action for malicious prosecution brought by the respondents against the appellant for having caused their prosecution and arrest on a warrant issued by the police magistrate of the city of Toronto, on the information of the appellant, on a charge of keeping a house of ill-fame. The charge was founded on the information of one Alice Dale, who had been an inmate of the respondents' house, and who, on the 11th of October, 1889, furnished to the appellant, who is staff inspector in the Toronto police force, and as such specially charged with the suppression of houses of ill-fame, a statement in writing signed by him in the following words:—

POLICE DEPARTMENT, Toronto, Oct. 11th, 1889.

Mrs. John Dale, at present rooming on Victoria Street, between Queen and Shuter, west side, with a woman who takes in washing, "Laundry" over door, vs. Mrs. McLaren, of 292 Adelaide Street West, with whom she (Mrs. Dale) has been rooming for about five

(1) L.R. 4 H.L. 521.
(2) 11 Q.B.D. 440; 11 App. Cas. 247.
(3) [1891] 2 Q.B. 718.
(4) 19 Ont. App. R. 203.

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weeks, from 2nd September to 8th October, keeping an house of assignation, allowing, and, in fact, soliciting, the complainant to bring men into the house and pay her fifty cents for use of room with each man. This she (Mrs. Dale) did on several occasions, giving Mrs. McLaren fifty cents each time; in addition to this, Mrs. McLaren made arrangements with Mrs. Dale to go with another man, from whom she received twenty dollars on four different occasions, and gave Mrs. McLaren five dollars on three different occasions; and on Mrs. Dale refusing to give the five dollars on the fourth occasion, she was ordered by Mrs. McLaren to pack up and leave the house; and she now refuses to give up Mrs. Dale's two trunks.

I have had the foregoing read over to me by Staff Inspector Archibald, and I subscribe to it as being correct.

(Signed) ALICE DALE.

Upon this information received from Alice Dale the respondent laid and swore to the following information and complaint:—

CANADA,
Province of Ontario,
County of York,
City of Toronto,
To Wit:

The information and complaint of David Archibald, of the City of Toronto, staff inspector, taken on oath before me, George Taylor Denison, Esquire, police magistrate in and for the said city, the fourteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

The said informant, upon his oath, saith he is informed and believes that Mr. and Mrs. Duncan and Margaret McLaren within the past three months, to wit: on the fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and on divers other days and times between that day and the day of the laying of this information, at the City of Toronto, in the County of York, unlawfully did keep a certain house of ill-fame at 292 Adelaide Street West, in the said City of Toronto, contrary to the form of the statute in such cases made and provided.

Complainant prays that a warrant may issue, and justice be done in the premises.

(Signed) D. ARCHIBALD.

Sworn before me, this fourteenth day of October, 1889.

(Sgd.) G. T. DENISON, *P.M.*

The prisoners plead not guilty.

Discharged.

(Sgd.) G. T. DENISON, *P. M.*

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The respondents having been arrested on the warrant issued on this complaint the charge was heard before the police magistrate and by him dismissed.

Subsequently to the laying of the information and before the hearing of the case the appellant was informed by another inspector of the Toronto force—Inspector Johnston—that he did not think there was much in Alice Dale's charge, and also what he had learned upon a visit to the house, viz., that disturbances which had occurred there and which had called for the interference of police had been occasioned by quarrels between the respondents themselves. It is, however, distinctly proven that this ultimate report from Inspector Johnston was made after the information had been sworn to.

The action was first tried before Mr. Justice Street, who gave judgment dismissing the action. This judgment was set aside by the Common Pleas Division and a new trial was ordered. The second trial took place before Mr. Justice McMahon, who again non-suited the plaintiffs. This second judgment having been also set aside by the Common Pleas Division, a third trial was had before the learned Chief Justice of the Queen's Bench, at the Toronto autumn assizes of 1890, who held that the plaintiffs had failed to prove a want of reasonable and probable cause, and dismissed the action. From this judgment the respondents again appealed to the Common Pleas Division who ordered a third new trial. The appellant then appealed to the Court of Appeal, and the judges of that court being equally divided in opinion the appeal was dismissed.

From this latter judgment the present appeal has been taken.

The well known case of *Lister* v. *Perryman* (1) had,

(1) L.R. 4 H.L. 521.

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as I have always supposed, settled the law as regards this class of action, to be that the question of reasonable and probable cause was, although a question of fact, one to be determined by the court and not by the jury. That in such cases the respective functions of the trial judge and jury were these, that whilst the jury were to find all the facts from which the inference was to be drawn, yet that the inference itself, deducible from those facts, was one to be drawn, not by the jury, but by the judge.

This is certainly most clearly laid down in the case of *Lister* v. *Perryman* (1), and the apparent anomaly and exceptional character of the rule by which a question of fact was thus withdrawn from the jury, who, generally speaking, were judges of the facts, and left to be decided by the court, occasioned expressions of surprise from some of the law lords, who, having been trained in courts of equity, or in the Scottish tribunals, had not been practically familiar with such questions. It has, however, been suggested in a little book written by Mr. Stephens, on the law of Malicious Prosecutions, that this rule of *Lister* v. *Perryman* (1) was displaced by the decision in the case of *Abrath* v. *The North Eastern Railway Company* (2). Having repeatedly read this last mentioned case, and having also read Mr. Stephens's book, I am clearly of opinion that there is no warrant for this proposition. The judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and he is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them the case is not properly tried.

In the late case of *Brown* v. *Hawkes* (3) decided in

(1) L. R. 4 H. L. 521.
(2) 11 Q.B. D. 79, 440; 11 App. Cas. 247.
(3) [1891] 2 Q.B. 718.

June, 1891, and therefore, long since the judgment of Armour C.J. in the present action which is now under appeal was pronounced, Lord Esher M.R. thus states the law:

> The question whether there is an absence of reasonable and probable cause is for the judge and not for the jury, and if the facts on which that depends are not in dispute there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, these facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause.

Now it appears to me that if the learned Chief Justice had had this clear enunciation of the law as to the respective functions of judge and jury in these cases of malicious prosecution before him at the trial and had expressly adopted it for his guide, he could not have followed the rule laid down by the Master of the Rolls more exactly than he actually did.

There were no disputed facts. The only question of fact could have been whether Alice Dale signed the written statement which she gave to the appellant, a fact which was not disputed. It was not and could not have been in dispute that Inspector Johnston's report was not handed to the appellant until after the charge was laid and the warrant issued.

There were then no facts in dispute to leave to the jury, and the learned judge could not have left any question material to be decided in the case to them without abdicating the functions which the law had delegated to himself.

Then it only remains to inquire whether the statement of the woman Dale warranted the appellant, as a police officer, in adopting the course he pursued. This is the inference from the facts which it was for the learned judge to draw, and his finding in respect to it

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is, I take it, open to review on appeal. As to this I entirely agree with the remarks of both the Chief Justice at the trial and of Mr. Justice Burton in the Court of Appeal. If a police officer in the position of the appellant is not warranted in acting without further inquiry on such information as he receives from a woman who had been an inmate of a suspected house, as Alice Dale had been, his efforts to perform his duty in the suppression of such places would obviously be fruitless. There was ample evidence of probable cause deducible from the undeniable facts of the case, and the conclusion of the Chief Justice at the trial was, in my judgment, altogether right.

I may add that it would not have made the slightest difference in my conclusion if the second report of Inspector Johnston had been communicated to the appellant before he swore to the complaint before the police magistrate. The charge made by Alice Dale was not that the respondents kept a disorderly house, but that they kept a house of ill-fame, a house of assignation as she calls it, which was resorted to for purposes of prostitution. The facts communicated by Inspector Johnston would only apply to contradict a charge of a disorderly house which was not the charge which led to the prosecution.

On the whole I do not see how the appellant, if he had omitted to act as he did on the statement of Alice Dale, could have justified himself before his superior officer if he had been charged with neglect of duty.

Upon this question of probable cause the cases of *Lea* v. *Charrington* (1); *Hope* v. *Evered* (2); and *Brougton* v. *Jackson* (3) seem to me to be authorities for the appellant in the present case and to support the conclusion I have arrived at. In the case last

(1) 16 Cox C.C. 705, affd. in appeal. (2) 17 Q.B.D. 338.
(3) 18 Q.B. 378.

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cited Lord Campbell C.J., says the defendant must show facts which would create a reasonable suspicion in the mind of a reasonable man. Applying this test the evidence before us was amply sufficient to show probable cause.

The appeal must be allowed, and the judgment of the Chief Justice of the Queen's Bench Division pronounced at the trial restored with costs to the appellant in all the courts.

FOURNIER J. concurred.

TASCHEREAU J.—I dissent. I would dismiss this appeal. For the reasons given by Mr. Justice Rose in the Divisional Court, I think that a new trial should be ordered. Upon the evidence, the judge presiding at the trial should have left it to the jury to say if the defendant believed the story of Alice Dale and if he took such precautions as a reasonable man should have done to satisfy himself if her story was at least plausible. The character of that woman, which he well knew, should have made him more cautious.

GWYNNE J.—This appeal must, I think, be allowed and upon the grounds stated by Justices Burton and Maclennan in the Court of Appeal for Ontario. There was no contradiction in the evidence upon any matters of fact upon which the non-existence of reasonable and probable cause necessarily depended. It was for the learned judge who tried the case to determine whether or not there was anything in the evidence or in the manner in which it was given which created a doubt in his mind as to the defendant's belief in the truth of the statement made to him by the woman Dale, or which cast a doubt in his mind as to the *bona fides* of the defendant in laying the charges against the plaintiffs which he did before the police magistrate. It was

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upon the learned judge, and, in the absence of contradictory evidence upon essential facts on which the question of existence or non-existence of probable cause depended, upon him alone, that the duty of determining whether the defendant had or had not reasonable and probable cause for making the charges which he did rested. If he saw in the evidence no grounds to doubt the belief or *bona fides* of the defendant, and was of opinion that the evidence failed to establish a want of reasonable and probable cause or to cast a doubt upon its existence, I do not think that a new trial should be granted because a judge who had not tried the case or heard and seen the witnesses should see something in the evidence which he thinks would have induced him to submit to the jury a question as to the belief of the defendant in the facts stated to him and as to his *bona fides* in laying the charge—or which he thinks would have made it proper for the learned trial judge, though not absolutely necessary,—to have submitted to the jury such a question. For my own part I must say that I do not see anything in the evidence which I can say ought to have created such a doubt in the mind of the learned trial judge that he should have submitted a question to the jury as to the belief of the defendant in the facts stated to him and as to his *bona fides* in laying the charge. In the absence of evidence which manifestly ought to have created a doubt as to such belief and *bona fides* of the defendant, I do not think that a judge who has not presided at the trial should interfere with the judgment of the learned trial judge because he did not submit to the jury a question upon a matter which, by the law, it was his duty to pronounce upon and as to which the evidence had failed to create any doubt in his own mind.

The appeal must, I think, be allowed with costs and the judgment of the learned trial judge sustained.

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PATTERSON J.—This is an action by the respondents, husband and wife, against the appellant for malicious prosecution.

At the trial before Chief Justice Armour the action was dismissed on the ground that the plaintiffs had failed to establish the absence of reasonable and probable cause. A divisional court of the Common Pleas Division set aside that judgment and ordered a new trial on the ground that some question touching the good faith of the defendant ought to have been submitted to the jury.

On the appeal to the Court of Appeal there was a division of opinion, in consequence of which the decision of the divisional court remained undisturbed.

The trial was the third trial of the action. The three trials resulted in the same way, and in each case a new trial was ordered. It appears to have been understood by the divisional court, or at all events by the learned judge who delivered the judgment of the court, that at the last trial the attention of the presiding judge had not been called to the opinions expressed by the court in ordering the new trial. We are told by counsel on both sides that this was a misapprehension, the fact being that the judgment of the divisional court was communicated to the trial judge, which fact would have been stated to the Court of Appeal if the matter had been spoken of during the argument in that court where the learned Chief Justice, in ignorance of the explanation, comments on the statement as contained in the judgment delivered in the divisional court, justly characterizing it as almost incredible.

At the trial of the action the only evidence given was that adduced by the plaintiffs. The facts shown may, therefore, be fairly treated, for all purposes of the present inquiry, as undisputed facts.

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The defendant is a police inspector of the city of Toronto.

A woman called Alice Dale came to the defendant on the eleventh of October, 1889, and gave him information which he wrote down, Alice Dale signing the paper, which reads thus:

POLICE DEPARTMENT,

TORONTO, October 11, 1889.

Mrs. John Dale, at present rooming on Victoria Street, between Queen and Shuter, west side, with a woman who takes in washing, "Laundry" over door, vs. Mrs. McLaren, of 292 Adelaide Street West, with whom she (Mrs. Dale) has been rooming for about five weeks, from 2nd September to 8th October, keeping an house of assignation, allowing, and in fact soliciting, the complainant to bring men into the house and pay her fifty cents for use of room with each man. This she (Mrs. Dale) did on several occasions, giving Mrs. McLaren fifty cents each time; in addition to this, Mrs. McLaren made arrangements with Mrs. Dale to go with another man, from whom she received twenty dollars on four different occasions, and gave Mrs. McLaren five dollars on three different occasions; and on Mrs. Dale refusing to give the five dollars on the fourth occasion, she was ordered by Mrs. McLaren to pack up and leave the house; and she now refuses to give up Mrs. Dale's two trunks.

I have had the foregoing read over to me by Staff Inspector Archibald, and I subscribe to it as being correct.

(Signed) ALICE DALE.

The eleventh of October was Friday.

On Monday, the fourteenth of October, the defendant laid an information against the two plaintiffs, Margaret McLaren and her husband, for keeping a house of ill-fame.

The plaintiffs were arrested at an early hour on the morning of Tuesday, the 15th. They were brought before the police magistrate on the forenoon of the same day and were discharged.

The question of reasonable and probable cause, or of the absence of it which is what the plaintiffs had to establish, does not depend on Mrs. Dale's statement alone. There are other things to be presently men-

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tioned, but we may first note something of what the plaintiff, Mrs. McLaren, tells in her evidence, though it may only indirectly affect the defendant who was a stranger to her and her history. Her story is that she had entertained Mrs. Dale as a lodger whom she considered respectable for a couple of weeks, and then Mrs. Dale and her husband for some three weeks more; until the evening of Tuesday, the eighth of October, when she discovered, by reading a letter that Mrs. Dale gave to Mr. McLaren to mail but had left open, that Mrs. Dale was a person of bad character, when she promptly made her leave the house, but kept her trunks on account of five dollars due for the two weeks before the husband came. On Wednesday, the 9th, Mrs. Dale had tried ineffectually to get her trunks, and on Thursday, the 10th, she got a lawyer to write a letter which she took to Mrs. McLaren who produced it at the trial. The defendant had, of course, nothing to do with all this, nor is it his concern which is the true version of the relations between the two women, that told him by Mrs. Dale or that given by Mrs. McLaren. But it is evident from the lawyer's letter that his client told him the same story on Thursday that she told on Friday to the defendant, and that the defendant did not misinterpret her statement when he laid the information.

This is what the lawyer wrote:

TORONTO, October 10th, 1889.

DEAR MADAM.—I have had a conference with Miss Dale who has explained to me the difficulty between you, and the relations between you.

You have no right to hold her trunks and clothing. If you do not give them up at once proceedings will be taken. If any exposure occurs the fault will be your own.

Now, what occurred between Friday, when Mrs. Dale made her statement, and Monday when the information was laid?

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The defendant took no immediate action on the statement, but he asked Inspector Johnston, who was the police inspector for division no. 3 which included the plaintiff's house, to procure information as to the character of the house. Johnston learned from other policemen that disturbances occurred in the house which had to be quelled by the police, and he told this to the defendant on the Monday before the information was laid. Johnston's information seems to have been that the disturbances were fights between the husband and wife occasioned by the wife's intemperance. He intimated that to the defendant on the Tuesday morning after the arrest of the plaintiffs, expressing at the same time his own opinion that there was not much in the charge of keeping a house of ill-fame.

It has been regarded as an open question in the courts below whether the information as to the nature of the disturbances was given by Johnston to the defendant before the laying of the information on Monday, or not until Tuesday, and the question has been regarded as almost a crucial test of the good faith of the defendant. I do not attach so much importance to the time when the communication was made, but at the same time I am unable to see that upon any fair reading of the evidence, which, as I have said is all adduced by the plaintiffs, and which, on this topic, is the evidence of Johnston and of the defendant, it can be doubted that the only information conveyed to the defendant on the Monday was the general fact that rows had occurred in the house, or that the character of the rows was only mentioned on Tuesday just before and in reference to the trial of the charge which Johnston thought had not much in it.

Another fact brought out was that, after the defendant had taken Mrs. Dale's statement and before he

had heard from Johnston, his attention was called by the Mayor and by an alderman to the necessity for further police protection in division no. 3, several streets being particularized, but none in the immediate vicinity of the plaintiffs' house. The use made of this incident in argument is in support of the charge of malice rather than that of want of reasonable and probable cause, the suggestion being that the defendant was stimulated into action by imputations on his efficiency as the inspector more particularly assigned to the duty of suppressing houses of ill-fame, and did not act from an honest belief in the truth of Mrs. Dale's information.

This is, however, only argument and suggestion. The evidence which connects in any way the two incidents is, as far as it goes, affirmative evidence of the defendant's belief in Mrs. Dale's story, and it certainly implies no doubt of the truth of what she had stated.

I shall read the passage:

47. Q.—Tell me, Inspector, had the information that you received from the Mayor and Alderman Verral anything to do with your laying this information against the McLarens? A.—It certainly had, for in making the report to the Chief that this complaint had been made by the Mayor and Alderman, and the request for special police protection in No. 3 Division, I stated that I had positive information about a house in this neighborhood.

48. Q.—Stated to whom? A.—To the Chief.

49. Q.—What house had you in your mind? A.—I had the McLaren's house in my mind, and he said: "Then if you have evidence, why not bring it up?"

50. Q.—When you had McLaren's house in your mind, it was from the information that you had received from Inspector Johnston and Alice Dale—that put it in your mind? A. It was the information I had received from Alice Dale.

51. Q.—And Inspector Johnston? A.—I had not yet received the information from Inspector Johnston.

52. Q.—Then, the Chief told you if you had any positive evidence why not bring them up? A.—Yes; to which I replied: "I will make

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further inquiries of the inspector of the division, and if that information is corroborated, I will do so."

53. Q.—You did make further inquiries from the inspector of the division, who is Inspector Johnston? A.—Yes.

54. Q.—You got his report, and with that report and the evidence from Alice Dale you took these proceedings? A.—Yes.

A number of decisions on the subject of the respective functions of the court and the jury in dealing with the question of reasonable and probable cause have been cited and commented on at the bar, as well as by learned judges in the courts below. I do not think it necessary to discuss those cases, because the law as settled by them is to be found fully and correctly stated in several treatises of recognized learning and accuracy.

I shall quote from two of those treatises, viz., Taylor on Evidence (1) and Pollock on Torts.

Judge Taylor, after discussing the general nature of the class of cases termed "mixed cases," gives the following summary of the decisions that had been reported on the subject down to the year 1884:—

§28. First: It is now clearly established, albeit the wisdom of the rule has been stoutly disputed, that the question of *probable* cause must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inference to be drawn therefrom, really exist. For instance, in an action for malicious prosecution the jury, provided the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged; and if they negative either of these facts the judge will decide, as a point of law, that the defendant had no probable cause for instituting the prosecution. This rule, which is based on the assumption that judges are far more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution, is equally binding however numerous and complicated the facts and inferences may be; for although in some cases

(1) 8 ed. ss. 26, 27, 28.

it would doubtless be attended with great difficulty to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction, yet the task is not impracticable; and it would obviously savour of gross inconsistency to hold that a rule which is undisputed in a simple case should not equally apply when the facts were complicated. For where could the line be drawn, and who should determine what degree of complexity would transfer the burden of decision from the judge to the jury. The difficulty, too, is more apparent than real, for it rarely happens but that some leading facts exist in each case, which present a broad distinction to the view without having recourse to the less important circumstances; and as the judge has a right to act upon all the uncontradicted facts, it is only when some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.

I read from Mr. Pollock's work, which was published, I think, in 1887, the concluding passage of the section that treats of false imprisonment (1).

What is reasonable cause of suspicion to justify arrest is, paradoxical as the statement may look, neither a question of law nor of fact. Not of fact, because it is for the judge and not for the jury; not of law, because "no definite rule can be laid down for the exercise of the judge's judgment." It is a matter of judicial discretion such as is familiar enough in the classes of cases which are disposed of by a judge sitting alone; but this sort of discretion does not find a natural place in a system which assigns the decision of facts to the jury and the determination of the law to the judge. The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority, but it is too well settled to be disturbed unless by legislation. The only thing which can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connection is that on the one hand a belief honestly entertained is not of itself enough; on the other hand a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so. It is obvious also that the exist-

(1) Pollock on Torts, p. 192.

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ence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time.

The numerous cases cited by Judge Taylor as authority for the propositions he lays down include all those cited to us down to the date of *Abrath* v. *N. E. Railway Co.* in which the decision of the Court of Appeal (1) pronounced in 1883, was affirmed in 1886 by the House of Lords (2).

That case is not cited by Mr. Pollock in connection with the passage I have read from his treatise, but he cites it when dealing with actions for malicious prosecution (3) and gives the following extract from the judgment of Lord Justice Bowen (4):—

> In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is from an indirect and improper motive, and not in furtherance of justice.

In the present case there is no conflicting evidence. The facts on which the defendant acted are uncontradicted facts. The main fact is that Mrs. Dale made the statement, but this must, of course, be taken along with the fact that it was made to the defendant in his official character as police inspector and as the officer whose special duty it was to look after houses such as Alice Dale described. She had been referred to the defendant by the lawyer already mentioned, and the defendant's special line of duty appears from his examination.

(1) 11 Q.B.D. 440.
(2) 11 App. Cas. 247.
(3) 11 Q.B.D. at p. 455.
(4) Pollock on Torts, p. 264.

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If these were all the facts, that is to say, if the defendant had laid the information immediately after taking Alice Dale's statement, I could not say that a judge who held that there was reasonable and probable cause for making the charge was wrong in so holding. The facts stated by Alice Dale respecting her tenancy of the room she had in the plaintiff's house, are of the same character as those on which in *Reg.* v. *Rice* (1) a conviction for keeping a disorderly house was sustained by the Court of Criminal Appeal although there was no evidence of indecency or disorderly conduct perceptible from outside the house.

The great contention is that the jury should have been asked to say if the defendant believed what Alice Dale told him. But there is not a word in the evidence on which to found a suggestion of bad faith, and it is, in my judgment, impossible to say that the Chief Justice gave too much effect to the fact that the defendant acted throughout in his official character.

The other facts, the inquiry made through Inspector Johnson and the report of disturbances at the house, certainly do not aid the plaintiffs in their attempt to negative the existence of reasonable and probable cause for laying the information, nor do I see that even if Johnston's full intelligence had been given at once, and the defendant had, therefore, laid the information understanding that the female plaintiff was addicted to excessive drinking which led to quarrels with her husband by which the peace of the neighbourhood was disturbed, the gravamen of Alice Dale's imputations against the female plaintiff, and by consequence against the husband who would naturally be credited with complicity in the purposes for which it was alleged his house was used, was at all done away with.

(1) L.R. 1 C.C.R. 22.

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I agree with the learned judges of appeal who considered that the non-suit ought not to have been set aside and I am of opinion that we should allow the appeal (1).

Appeal allowed with costs.

Solicitor for appellant: *C. R. W. Biggar.*

Solicitors for respondents: *Murdoch & Tytler.*

(1) As to whether or not there was anything to leave to the jury see *Kimber* v. *Press Association* [1893] 1 Q.B. 65.

JOSEPH MOISE DUFRESNE *et al.*, (CONTESTANTS)..... } APPELLANTS ;

AND

TOUSSAINT PRÉFONTAINE (CLAIMANT)..... } RESPONDENT.

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*Oct. 12.

*Dec. 13.

J. B. VALLÉE (CONTESTANT)... .....APPELLANT.

AND

TOUSSAINT PRÉFONTAINE (CLAIMANT)..... } RESPONDENT.

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

Builder's Privilege—Arts. 1695, 2013, 2103 *C. C.—Expert—Duties of—Procès-verbal—Arts.* 333 *et seq. C. C. P.*

Held, 1. That it is not necessary for an expert when appointed under under art. 2013 C.C., to secure a builder's privilege on an immovable to give notices of his proceedings to the proprietor's creditors such proceedings not being regulated by arts. 322 et seq. C. C. P.

2. That there was evidence in this case to support the finding of fact of the courts below, that the second *procès-verbal* or official statement, required to be made by the expert under art. 2013, had been made within six months of the completion of the builder's works.

3. That it was sufficient for the expert to state in his second *procès-verbal* made within the six months, that the works described had been executed and that such works had given to the immovable the additional value fixed by him. The words "exécutés suivant les règles de l'art" are not *strictissimi juris.*

4. That if an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity but will only entitle the interested parties to ask for a reduction of the expert's valuation.

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*PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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DUFRESNE v. PRÉFONTAINE.

VALLÉE v. PRÉFONTAINE.

APPEALS from two judgments of the Court of Queen's Bench for Lower Canada (appeal side) (1) which confirmed judgments dismissing appellants' contestations of the respondent's claim against the insolvent estate of C. & N. Vallée.

The following are the material facts:—

On December 19th, 1887, a notarial contract was passed between Cyrille Vallée, one of the insolvents, and Levesque & Désy, contractors, by which the latter undertook to construct, according to the plans and specifications prepared by Vallée's architect, all the wood work in a hotel to be built for Vallée, on cadastral lot 237 of the parish of Vaudreuil. The work was to be completed on May 1st, 1888, and the contractors to be paid $10,975.00.

Before the beginning of the work, on the 14th of January, 1888, Levesque & Désy presented to one of the Superior Court judges for the district of Montreal, a petition to have an expert appointed to establish the value of the land upon which the work was to be done and have a *procès-verbal* of the same drawn up in order to take a builder's privilege on said land.

Mr Justice Gill granted the petition on the same day and appointed as such expert Peter O'Cain, of the town of St. John, district of Iberville, contractor.

Peter O'Cain, having first been sworn, went to visit "La Pointe Masson," known as official number 237 of the parish of Vaudreuil; and by deed passed before notary Decary, on the 16th of January, 1888, he prepared a *procès-verbal* stating he had found out that there were about 172,574 feet in superficies; on said building lot were stone foundations 92 feet in front and 9 feet and 7 inches in width; a first range of beams had been laid on these foundations with a rough floor on

(1) Q.R. 1 Q.B. 330.

and he valued the whole land and improvements at the sum of $1,939.61. This *procès-verbal* was registered on the 17th of January, 1888,

The contractors executed their contract, which the appellants claimed was completed and accepted by C. & N. Vallée on the 1st May, 1888, but which was found by the courts below to have only been completed in August as claimed by the respondent.

On December 5th, 1888, Levesque & Désy petitioned the same judge for the appointment of another expert, to receive and accept the work in question, and to establish, by an official statement, the additional value given the property by such work, and one Aubry was accordingly appointed.

On 6th December, 1888, Aubry made a *procès-verbal* by which he declared that on examining all the work done by the contractors, to wit., "*tous les ouvrages en bois dans la construction d'un hôtel*" built on the land in question, he values this work at $13,050.00, at which sum he also fixed the additional value.

On the 10th of January, 1889, C. & N. Vallée made a judicial abandonment of their property and on March 14th, 1889, the curator sold *en bloc* all the immovables of the estate, consisting of lots 237 and three little islands being lots 372, 373, 374, of the parish of Ste. Jeanne de l'Isle Perrot for $12,650.

On the 23rd February, 1889, Levesque & Désy transferred, for value, to respondent all their rights, claims and privileges against C. & N. Vallée and against said lot 237 for the payment of the sum of $7,693.07, balance due them for the execution of the works.

On the 20th of May, the respondent filed in the hands of the curator, Desmarteau, his sworn claim against the estate for $7,436.32; the curator prepared his dividend sheet and collocated respondent for $7,288.14, on the ground that his claim was secured by

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builder's privilege. Appellant, Dufresne, who had a mortgage on the property for $2,257.50, registered on the 9th August, 1888, and appellant, L. Vallée, who had another mortgage on the same property for $3,077.50, and registered on 17th October, 1888, contested the respondent's alleged privilege, and the collocation made by the curator, and further contested the dividend sheet itself, because of the distribution of the above price of sale between the respondent, and the *bailleur de fonds* creditors, without a previous relative valuation (*ventilation*). The grounds urged by the contestation were:

1. The second *procès-verbal*, was made too late, having been prepared and registered more than six months after the completion of the work.

2. The second *procès-verbal*, was null, because it omitted to state that the works in question were accepted by the expert, Aubry.

3. By their first petition the contractors only demand a privilege for the work to be done under the contract. But, as a matter of fact, they did extra work, not contemplated by nor connected with the contract, and the second expert, instead of fixing the additional value given by the contract work, established the additional value conferred by all the work done by Levesque & Désy, without distinguishing between the contract and non-contract work.

4. The petitions for appointment of experts are null, not having been filed in the prothonotary's office, nor entered in the minute book.

5. At all events, the respondent was collocated for too much, not more than $5,000.00 remaining due for work done under the contract.

6. In any case, a relative valuation should have been made before dividing the price of the several immovables sold *en bloc*.

The respondent joined issue on the contestation in so far as they attacked his privilege, but consented that a *ventilation* be made, asking, however, that the contestation be dismissed with costs.

The Superior Court (Tellier J.) set aside the collocation in respondent's favour, because no previous *ventilation* had been made, and ordered such *ventilation*. The judgment, however, maintained respondent's privilege, ordered that he be collocated for whatever sum might be fixed by the *ventilation*, and condemned appellants to pay the costs. On appeal this judgment was confirmed by the Court of Queen's Bench. Both appellants appealed to the Supreme Court of Canada, and the two appeals were argued together.

The articles of the Civil Code bearing on the subject are referred to in the judgments hereinafter given.

Geoffrion Q.C., and *Beique* Q.C., appeared for the appellants, Dufresne *et al.* and *Geoffrion*, Q.C. and *Beaudoin*, Q.C., appeared for the appellant Vallée and contended that arts. 1695, 2013, 2103, C.C., and arts. 333 and 334 C.C. P. had not been complied with, it being necessary for the respondent to show

1. That a statement of the original condition of the premises be prepared by a judicial expert, who—as nothing is said to the contrary—must be deemed subject to the rules governing experts generally, and among others to that rule which requires notice to the parties interested.

2. That the work done be in fact accepted and received by another judicial expert, within six months of its completion.

3. And the fact of such acceptance,—*i. e.* of an acceptance by such person and within such time—be established by a second statement, which must also establish the value of the work, and that none of the

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above requirements had been complied with in the present case.

The learned counsel cited and relied on the following authorities:

Lepage—Lois des bâtiments (1); Frémy-Ligneville—Législation des bâtiments (2); *Brown* v. *Smith* (3); *Farmer* v. *O'Neill* (4); Carré & Chauveau (5); Dalloz Rep. (6); Laurent (7); Aubry & Rau (8); Pont (9); Troplong (10).

Girouard, Q.C., and *Madore*, appeared for the respondent, and contended that all the requirements of the law had been sufficiently complied with, adopting the reasoning of Mr. Justice Blanchet in the court below (11), and in addition cited and relied on *Gilbert et al.* v. *de Lachèze* (12); *Vauger* v. *Carny* (13); Ravon & Collet, Dictionnaire de la Propriété bâtie (14); Dalloz Codes Annotés (15); Troplong, Privilèges & Hypothèques (16), and art. 345, C. C. P.

Geoffrion in reply cited *Robert et al.* v. *Rieutord* (17).

STRONG J. concurred with Fournier J.

FOURNIER J.—Le présent appel est d'un jugement de la Cour du Banc de la Reine confirmant celui de la Cour Supérieure maintenant la réclamation de l'intimé contre la société en faillite de C. et N. Vallée. Cette réclamation était fondée sur un privilège de construction obtenu en vertu de l'article 2013 du Code Civil. L'appelant a contesté le privilège réclamé et sa contestation a été renvoyée.

(1) 2 vol. p. 88.
(2) 2 vol. p. 608, No. 917.
(3) 6 L. C. Jur. 126.
(4) 22 L. C. Jur. 76.
(5) 3 vol on art. 315, Q. 186.
(6) 74-1-334.
(7) 28 vol. 317.
(8) 3 vol. p. 125.
(9) 10 vol. No. 216.
(10) 1 vol. 245.
(11) Q.R. 1 Q.B. 340.
(12) S.V. 39, 1, 904.
(13) S.V. 69, 2, 40.
(14) P. 580, s. 20.
(15) P. 975, No. 148.
(16) P. 387 No. 264.
(17) Ramsay App. Cas. 98.

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Les faits suivants ont donné lieu aux diverses questions soulevées en cette cause.

Le 19 décembre 1887, Lévesque et Désy, entrepreneurs-menuisiers, s'engagèrent par acte authentique

A faire, exécuter et parfaire, sur le lot numéro 237 du cadastre de Vaudreuil, pour le compte de Cyrille Vallée, propriétaire d'icelui, tous les travaux et ouvrages nécessaires et requis pour la construction d'un hôtel que le dit C. Vallée était à faire construire et ériger au dit endroit, et ce, en bons matériaux, suivant les règles de l'art et aux dires de l'architecte, sous la surveillance duquel les travaux devaient être faits, pour la somme de $10,975.00.

Conformément aux dispositions de l'art. 2003 C.C. ils s'adressèrent à un juge de la Cour Supérieure et en obtinrent un ordre nommant Peter O'Cain, expert pour constater l'état des lieux où devaient être érigées les constructions projetées. Celui-ci fit rapport par acte notarié constatant :

1° Qu'il existait sur le terrain en question un solage en pierre mesurant 92 pieds de front sur 99 pieds et sept pouces de profondeur ; qu'un premier rang de soliveaux y était posé, ainsi qu'un plancher brut ; 2° qu'il évaluait le terrain à la somme de mille piastres et le solage, le rang de soliveaux et le plancher à $931.61. Ce procès-verbal a été enregistré le lendemain, 17 janvier 1888.

Après l'accomplissement de ces formalités et l'hôtel étant alors terminé Désy et Lévesque demandèrent au juge la nomination d'un autre expert pour accepter et recevoir les dits ouvrages. Ferdinand Aubry fut nommé le 5 décembre 1888, par ordonnance du juge :

Aux fins de recevoir et accepter les dits ouvrages, et faire le procès-verbal requis par la loi en pareil cas.

Le 6 décembre 1888, Aubry par un procès-verbal notarié fit rapport :

Qu'après avoir examiné le terrain et les travaux faits, par Lévesque et Désy, savoir : tous les travaux en bois nécessaires dans la construction d'un hôtel bâti sur l'emplacement susdit, il estimait les travaux et les ouvrages faits, par les dits Lévesque et Désy, dans la construction du dit hôtel, à la somme de $13,050.00, étant cette dite somme la plus-value donnée à l'emplacement, par les ouvrages faits par les dits

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Lévesque et Désy dans la construction du dit hôtel, pour laquelle dite somme, les dits Lévesque et Désy ont droit d'avoir privilège et hypothèque de constructeurs.

Le 11 Décembre 1888, enregistrement du second procès-verbal conformément à l'art. 2103 C.C.

Le 10 janvier 1889 la société C. N. Vallée, propriétaire de l'hôtel en question fit cession de biens pour le bénéfice de ses créanciers, le 14 mars 1889. Le curateur duement autorisé vendit en bloc tous les immeubles appartenant à la dite faillite, consistant dans le lot 237 et aussi dans les lots 372, 373, 374, de la paroisse de Ste. Jeanne de l'Isle Perrot, pour une somme totale de $12,650.

L'intimé comme cessionnaire de Lévesque et Désy produisit une réclamation de $7,436.32 pour balance due sur la construction de l'hôtel. Dans son projet de loi de distribution des deniers, le curateur a d'abord colloqué les créanciers bailleurs de fonds au montant de $3,678.10 et ensuite, l'intimé, pour $7,288.14 sur le principe que sa réclamation était fondée sur le privilège de constructeur.

L'appelant créancier hypothécaire sur le lot n° 237 a contesté le privilège réclamé par l'intimé, ainsi que la collocation faite par le curateur et le projet de distribution du prix de vente entre l'intimé et les bailleurs de fonds, parce qu'il n'avait pas été préalablement fait une ventilation des dits immeubles.

Les moyens de contestation invoqués sont 1° que le second procès-verbal a été fait trop tard ; ayant été préparé et enregistré plus de six mois après que les ouvrages eurent été complétés et qu'avis des procédés de l'expert n'a pas été donné aux parties.

2° Nullité du second procès-verbal parce qu'il n'y est pas dit que les ouvrages en question ont été acceptés par l'expert Aubry.

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3° Parce que dans l'estimation de la plus-value, l'expert Aubry n'a pas fait la distinction entre les ouvrages faits conformément aux stipulations du contrat et ceux qui ont été faits en addition et hors du dit contrat.

4. Que les nominations d'experts sont nulles parce que les requêtes n'ont pas été produites au bureau du protonotaire ni entrées dans les registres de la cour.

5. L'intimé a été colloqué pour un montant trop élevé, parce qu'il n'était dû que $5,000 sur les ouvrages du contrat.

6. Qu'il aurait dû être fait une ventilation des dits immeubles avant le partage du prix de la vente faite en bloc. L'intimé a lié contestation et a consenti à ce qu'il fut fait une ventilation des dits immeubles et elle a été ordonnée par le juge de la cour Supérieure.

Les principales dispositions de la loi concernant le privilège des architectes et constructeurs sont les suivantes :

Art. 1695. Les architectes, constructeurs et autres ouvriers ont un privilège sur les édifices et autres ouvrages par eux construits pour le paiement de leurs ouvrages et matériaux, sujets aux règles contenues au titre des privilèges et hypothèques et au titre de l'enregistrement des droits réels.

Art. 2013. Le constructeur ou autre ouvrier, et l'architecte ont droit de préférence seulement sur la plus-value donnée à l'héritage par leurs constructions, à l'encontre du vendeur et des autres créanciers, pourvu qu'il ait été fait par un expert nommé par un juge de la cour Supérieure dans le district, un procès-verbal constatant l'état des lieux où les travaux doivent être faits, et que dans les six mois à compter de leur achèvement, les ouvrages aient été acceptés et reçus par un procès-verbal contenant aussi une évaluation des ouvrages faits, et dans aucun cas le privilège ne s'étend au delà de la valeur constatée par le second procès-verbal, et il est encore réductible au montant de la plus-value qu'a l'héritage au temps de la vente. Au cas d'insuffisance des deniers pour satisfaire le constructeur et le vendeur ou de contestation, la plus-value donnée par les constructions est constatée au moyen d'une ventilation faite conformément aux prescriptions contenues au code de procédure civile.

Art. 2103. Le privilège du constructeur ne date que du jour de l'enregistrement du procès-verbal constatant l'état des lieux tel

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que requis au titre des privilèges et hypothèques, et il n'a d'effet à l'égard des autres créanciers enregistrés que par l'enregistrement du second procès-verbal constituant l'évaluation et la réception des ouvrages faits, dans les trente jours à compter de sa date.

La plus sérieuse des objections faites par l'appelant contre la procédure de l'intimé pour obtenir le privilège de construire est celle, sans doute, alléguant que le second procès-verbal constatant l'évaluation et la réception des ouvrages n'a pas été fait dans les six mois à compter de l'achèvement des travaux. Cette condition est de rigueur et s'il était vrai que le second procès-verbal n'a été fait qu'après l'expiration des six mois le constructeur n'aurait pas de privilège. Il en serait de même s'il n'avait pas été enregistré dans le même délai, car le privilège ne date que du jour de l'enregistrement du premier procès-verbal constatant l'état des lieux, et le privilège n'a d'effet à l'égard des autres créanciers enregistrés, que par l'enregistrement du second procès-verbal constatant l'évaluation et la réception des ouvrages.

Ce second procès-verbal a été fait le 6 décembre 1888, en forme notariée par Aubry nommé expert par ordonnance du juge Gill; et a été dûment enregistré le 11 décembre même année. L'appelant prétend qu'il s'était alors écoulé plus de six mois depuis l'achèvement des travaux.

D'après lui, les ouvrages ont été terminés le 1er mai 1888, et il cite à l'appui de ce fait, un reçu de Lévesque et Désy reconnaissant avoir reçu de C. Vallée la somme de $7,657.07 par billet pour travaux faits à Vaudreuil, et mentionnant le 1er mai comme date de la livraison de l'hôtel. Dans ce règlement qui n'était pas final, il n'est pas fait mention que les ouvrages entrepris sont achevés.

Il est vrai que vers cette époque Vallée a pris possession de l'hôtel et qu'il a été ouvert au public, mais de

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cela on ne peut conclure que les ouvrages étaient achevés. Il est au contraire prouvé par de nombreux témoins que les travaux se sont continués très tard dans la saison. Pour établir cette date il est nécessaire de recourir à la preuve faite sur ce point. C'est une question de fait qui peut être prouvée par la preuve testimoniale. L'enquête établit que les travaux étaient assez avancés pour que Vallée pût prendre possession de l'hôtel au mois de mai,—mais elle établit aussi que les ouvriers des constructeurs ont continué d'y travailler pendant les mois de mai, juin et juillet, c'est-à-dire pendant un temps assez long après le 1er mai, pour que le délai de six mois n'ait pas été expiré lors de la confection du second procès-verbal.

Il est encore fait une autre objection à la légalité de ce second procès-verbal, c'est que, dit l'appelant, les privilèges étant de droit étroit, les formalités pour les obtenir doivent être rigoureusement observées,—et il n'est pas fait mention dans ce second procès-verbal que l'expert a accepté les ouvrages en question. Il est vrai que les privilèges sont de droit étroit;—dans ce sens qu'on ne doit pas les étendre d'un cas à un autre,—mais il ne s'ensuit pas moins qu'ils sont soumis aux règles d'interprétation et qu'on ne peut leur appliquer des nullités qui ne sont pas prononcées par la loi. Ils doivent comme les autres transactions être interprétées de manière à produire leur effet. L'article 2013, en disant que les ouvrages doivent être acceptés et reçus dans les six mois, imposait-il à l'expert Aubry, l'obligation de se servir des termes mêmes de l'article, "acceptés et reçus." Ces expressions sont-elles sacramentelles, ne pouvait-il pas y substituer d'autres expressions rendant tout aussi bien l'idée de l'acceptation et de la réception que s'il avait fait usage de ces deux mots.

L'appelant s'est aussi plaint qu'aucun avis n'a été donné aux parties intéressées par les experts avant de

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procéder à l'expertise. Quelles sont ici les parties intéressées ? L'appelant a voulu sans doute indiquer les créanciers de Vallée, et non les propriétaires de l'hôtel au nom desquels il n'a aucun droit de prendre une telle objection, et encore moins les contracteurs qui faisaient eux-mêmes la demande d'expertise. Les parties intéressées dans ces procédures ne peuvent être autre que le propriétaire d'un côté et les contracteurs de l'autre. Les créanciers antérieurs n'ont aucun intérêt à être appelés lors de ces procédures qui ne peuvent en aucune manière affecter leurs intérêts. Il ne s'agit que de créer au profit d'un tiers une hypothèque ou plutôt un privilège sur une propriété qui n'existe pas encore, mais qui va être créée par le travail et la valeur des ouvrages que ce tiers se propose de continuer. Rien n'est plus juste que le tiers soit préféré à tous autres sur la propriété qu'il va créer par son travail. Il n'intervient donc nullement avec les droits existant antérieurement sur cette propriété et ceux qui les possèdent sont absolument sans intérêt à recevoir avis des procédés qu'il fait pour s'assurer un privilège sur le produit de son travail.

Pour les créanciers postérieurs à l'enregistrement du premier procès-verbal, comme ils prennent rang après le privilège du constructeur, lorsque le second procès-verbal a été fait et enregistré, la loi les traite comme parfaitement étrangers à l'opération de l'expertise. N'y ayant pas été parties, la loi leur donne le droit de l'attaquer, de contester la plus-value rapportée par l'expert et même de la faire mettre de côté comme étant à leur égard *res inter alios acta*. Lepage Lois des bâtiments (1) dit que lors de la première opération, il n'y a aucune contradiction ; pour la seconde il ne mentionne comme parties intéressées que le proprié-

(1) 2 vol. p.p. 86, 90.

taire et tous ceux qui ont droit au privilège. A la page 91 il ajoute.

Cette seconde opération qui se fait toujours entre le propriétaire et ceux qui ont travaillé a la construction a pour but de fixer ce qui est dû a ces derniers.

Frémy de Ligneville (1) est aussi du même avis et dit formellement que les tiers intéressés à contester les privilèges, c'est-à dire les autres créanciers du propriétaire, ne sont pas présents à la confection des procès-verbaux.

Troplong sur art. 2103 (2) dit en toutes lettres que les créanciers ne sont pas appelés à la confection des procès-verbaux.

L'expert Aubry après avoir décrit dans son procès-verbal l'emplacement sur lequel ont été faites les constructions déclare :

Qu'après avoir examiné le dit emplacement et les travaux faits par les dits Lévesque et Désy, savoir : tous les ouvrages en bois dans la construction d'un hôtel bâti sur le dit emplacement.

Que le dit comparant estime les travaux et ouvrages faits par les dits Lévesque et Désy dans la construction du dit hôtel à la somme de treize mille cinquante piastres, étant cette dite somme la plus-value donnée au dit emplacement par les ouvrages faits par les dits Lévesque et Désy dans la construction du dit hôtel, pour laquelle dite somme, les dits Lévesque et Désy ont droit d'avoir un privilège et hypothèque de construction.

Les termes dont s'est servi l'expert Aubry ne laissant aucun doute sur un examen sérieux de sa part des travaux faits par les dits Lévesque et Désy,—il est évident qu'en se servant des expressions "faits par les dits Lévesque et Désy," il a voulu faire voir qu'il en faisait la distinction d'avec les travaux antérieurement faits et constatés par le premier procès-verbal ; afin d'en mieux faire sentir la distinction, il ajoute "savoir tous les ouvrages en bois dans la construction d'un hotel bâti sur le dit emplacement." Cette dernière

(1) P. 190 n° 171. (2) C. N. n° 245.

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distinction, "tous les ouvrages en bois," doit suffire pour faire voir qu'il n'a pas estimé les ouvrages du solage en pierre mentionné dans le premier procès-verbal. Son estimation de $13,050 est uniquement pour les travaux et ouvrages faits par les dits Levesque et Désy dans la construction du dit hôtel, étant la dite somme, comme le dit le rapport, la plus-value donnée au dit emplacement par les ouvrages faits par les dits Levesque et Désy, dans la construction du dit hôtel. Cette opération était sans doute une acceptation des plus formelles. C'était la tâche officielle qu'il avait à remplir et ne l'a-t-il pas fait lorsqu'il dit qu'il a vu et visité les ouvrages, qu'il en estime la plus-value à la somme de $13,050. Il déclare enfin sa parfaite satisfaction et la réception des ouvrages en disant que les dits Levesque et Désy ont droit d'avoir un privilège et hypothèque pour la dite somme. Se serait-il exprimé de cette manière s'il n'avait pas été d'avis que les dits ouvrages devaient être acceptés. Il les a donc acceptés en déclarant que les dits Levesque et Désy devaient avoir un privilège de constructeur pour ces dits ouvrages.

Ces observations répondent aux deux premiers moyens de l'appelant en faisant voir que le second procès-verbal a été fait dans les six mois après l'achèvement des ouvrages,—et que le dit procès-verbal prouve aussi de la manière la plus satisfaisante que les dits ouvrages ont été acceptés par l'expert Aubry.

L'appelant par sa troisième objection se plaint que les ouvrages du contrat n'ont pas été estimés séparément des ouvrages extra. Par le contrat et les spécifications du 19 décembre 1887, il fut stipulé que tous les ouvrages en bois, changements ou extra qui seraient faits dans l'estimation du contrat, seraient considérés comme faisant partie du contrat. L'hon. juge Blanchet est d'opinion que la glacière, la buanderie et la baignoire ne doivent pas être compris comme rentrant dans les

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extra pourvus par le contrat; mais il est aussi d'opinion que le procès-verbal d'Aubry ne fait pas voir qu'ils ont été estimés et il ajoute:

Mais supposons pour un instant qu'il aurait inclus tous les ouvrages en question dans son estimation, ceci vicierait-il l'estimation qu'il a faite et la rendrait-elle absolument nulle? Je ne le pense pas. Les travaux en bois pour la construction de l'hôtel ont de fait été évalués; ils pouvaient même l'être à une somme plus considérable que le montant du privilège réclamé d'abord ou à une somme moindre sans que l'on puisse prétendre que telle estimation suffirait pour annuler en entier les procédés de l'expert; car le privilège est toujours réductible a la demande de ceux dont les intérêts peuvent être lésés, au montant de son chiffre vrai et ne peut jamais dépasser le montant mentionné au premier procès-verbal. La loi n'oblige pas l'expert en ce cas à suivre l'opinion d'un autre, mais à donner la sienne et s'il commet une erreur d'appréciation, il n'y a pas nullité. La loi ne la prononce pas, et en l'absence de telle disposition, il serait injuste de mettre de côté le privilège de l'ouvrier parce que l'expert aurait ou estimé les travaux à un prix trop élevé ou aurait inclus dans son estimation des ouvrages qui ne devaient pas y être, surtout lorsque comme dans le cas actuel la valeur des travaux faits avant le premier procès-verbal est si clairement constatée. Dalloz rep. vo Priv. et Hyp. No 472 et Dalloz R. P. Arrêt du 17 août 1838. Il n'y a d'ailleurs aucune fraude ni connivence d'alléguée par les appelants soit de la part du propriétaire, soit de la part des constructeurs. Il est établi au contraire, et c'est là un des moyens de contestation des appelants, que l'hôtel était en grande partie construit dès le 1er mai 1888, longtemps avant le second procès-verbal; que Vallée en avait pris possession sans protêt contre la manière dont l'ouvrage avait été fait et que le contrat entre lui et ses ouvriers était dès lors terminé et rempli.

La loi en exigeant les formalités de deux procès-verbaux a pour but de faire constater la valeur des améliorations faites sur l'immeuble et de limiter à la plus-value ajoutée à l'immeuble le privilège du constructeur,— et, dans aucun cas, dit l'article 2013:

Le privilège ne s'étend au delà de la valeur constatée par le second procès-verbal, et il est encore réductible au montant de la plus-value qu'a l'héritage au temps de la vente.

Les créanciers ont encore, nonobstant l'estimation de l'expert, le droit de faire réduire le montant de son

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estimation au montant seulement de la plus-value. Le rapport de l'expert n'est pas concluant par rapport à eux, car ils n'y étaient point parties.

Il est à peine nécessaire de mentionner l'objection que les nominations d'experts sont nulles pour n'avoir pas été produites au bureau des protonotaires. Elles l'ont été en temps utile, et cela suffit. Elles n'ont pas pour cela perdu leur caractère judiciaire.

La cinquième objection, que la collocation de l'intimé est pour un montant trop élevé, n'est pas fondée. La preuve constate spécialement par les billets promissoires de Vallée, tous produits en cette cause, que le montant réclamé est encore dû.

Quant à la sixième objection, au sujet de la ventilation, la prétention de l'appelant a été maintenue par le jugement de la cour Supérieure. Le curateur a déclaré qu'il n'a pas fait cette ventilation à cause du peu de valeur des trois immeubles vendus en bloc avec l'hôtel. C'est probablement pour cette raison que l'appelant n'en a pas fait la demande lorsqu'il a produit sa réclamation, mais la cour Supérieure la lui a accordé, et vu que son jugement a été confirmé, l'appelant en aura le bénéfice parce que le jugement de la cour du Banc de la Reine est confirmé en entier.

TASCHEREAU J.—This is a contestation of a builder's privilege by the appellants, hypothecary creditors of one Cyrille Vallée, an insolvent. The respondent is the assignee of the builder's claims. The appellants' claims were registered after the first *procès-verbal*, but before the second.

The special provisions of the Code bearing on the subject are the following:—

Art. 1695, C. C.: Architects, builders and other workmen, have a privilege upon the buildings or other works constructed by them, for the payment of their work and materials, subject to the

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rules contained in the title of privileges and hypothecs, and the title of registration of real rights.

Art. 2013 C. C.: Builders or other workmen, and architects have a right of preference over the vendor and all other creditors, only upon the additional value given to the immovables by their works, provided an official statement, *procès verbal*, establishing the state of the premises on which the works are to be made, have been previously made by an expert appointed by a judge of the Superior Court in the district, and that, within six months from their completion, such works have been accepted and received by an expert appointed in the same manner, which acceptance and reception must be established by another official statement containing also a valuation of the work done; and in no case does the privilege extend beyond the value ascertained by such second statement, and it is reducible to the amount of the additional value which the immovable has at the time of the sale. In case the proceeds are insufficient to pay the builder and the vendor or in cases of contestation, the additional value given by the buildings is established by a relative valuation effected in the manner prescribed in the Code of Civil Procedure.

2103 C. C.: The privilege of the builder dates only from the registration of the statement establishing the condition of the premises, as required in the title of privileges and hypothecs, and takes effect against other registered claims by means only of its registration within thirty days after the date of the second statement establishing the valuation and acceptance of the works done.

See also *La Corporation du Séminaire de St. Hyacinthe* v. *La Banque de St. Hyacinthe* (1).

This privilege has always existed from the time of the Roman law, but subject always, in France, to certain formalities and conditions, Pothier Hyp. ch. 2, par. 2, sec. 3. It is, however, only by 4 Vic. ch. 30, secs. 31 and 32, I believe, that the formalities required by the above cited article 2013 were for the first time enacted in the province of Quebec. They originated, it would appear, in an *arrêt du Parlement de Paris* of August, 1766, reproduced in Guyot Rep. vo. Bâtiments, and in Ancien Dénizart vo. Privilèges, No. 42, and which the Code Napoléon also subsequently adopted. 2 Grenier, Hyp. 255.

(1) 29 L. C. Jur. 261.

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The builders in the present case did get the two *procès-verbaux* or official statements required by art. 2013, but the legality of these documents is impeached by the appellants on various grounds, and they ask that it be declared that the respondent has no priority over them for his claim, notwithstanding the registration of the two *procès-verbaux*.

I will examine these grounds in the order in which I find them in their factum.

The first is, "because it does not appear that notice of the proceedings of either expert was given to any of the parties interested." This ground was, in the courts below, unanimously held not to be fatal to these documents, assuming it could be invoked by the appellants, though they have not specially pleaded it in their contestation. The respondent urged, with great force, that if such an issue had been directly raised by the appellants, he might have proved either that notice to the parties had in fact been given, or that these formalities had been waived by conduct, either by their presence at, and acquiesence in, the expert's proceedings, or otherwise. However, assuming that the objection can be taken by the appellants, I am not prepared to reverse the judgment of the courts below on that point, though it would have been more regular, on general principles, that such notices should have been given,—and that the fact should appear on the face of the *procès-verbaux*. Nowhere are such notices now required by express enactment, though they were in France by the law of 1766, and are now in Belgium as to the first *procès-verbal*. Laurent, Avant-projet (1). The proceedings by experts as regulated by articles 322 and following of the Code of Procedure, to which we have been referred by the appellants, have no application. The *expertises* there provided for are those in cases pending before a court. Here, the expert,

(1) 6 vol. p. 184.

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under art. 2013, is of a totally different character. He has not the power to examine witnesses and his report binds no one specially if he proceeds *ex parte*. The similarity between the two kinds of *expertises* ends where it begins, at the word "expert."

Then the appellants, who here invoke this ground of nullity, became creditors of Cyrille Vallée, subsequently to the registration of the first *procès-verbal*, and consequently were informed of the builders' claim. The registration of the said *procès-verbal* was also, it is conceded, effected as required by law. And they do not allege or prove that they have suffered, or that their rights have in any way been affected from the want of such notice. In France, the commentators are not all agreed on the necessity under the code of a notice to the creditors; Delvincourt for instance says, (1) that the experts are named by the judge, so as to protect the creditors who, he adds, are not notified of the proceedings on the *procès-verbaux*. Mourlon (2), says: "Les conditions substantielles d'un acte sont évidemment celles qu'il doit réunir pour remplir son objet, ou en autres termes, pour atteindre le but auquel la loi l'a préposé."

In the present case, the object of the law has been attained, and to defeat these builders' claim for the omission of secondary or accessory formalities would, it seems to me, be to create nullities and to forget that: "Les nullités ne s'étendent pas par analogie d'un cas à un autre." (3)

The second ground of objection taken by the appellants is that the second *procès-verbal* or official statement, was not, as a matter of fact, made within six months of the completion of the work as ordered by art. 2013 C. C.

(1) Vol. 3, p. 286, no. 7, Notes.
(2) Vol. 1 transcript. no. 257.
(3) 7 Boileux, sur. arts. 2103-2110; 30 Laurent, 47, 107, 109, 114.

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That clearly involves a pure question of fact, which has been found in favour of the respondent by the two courts below. And we cannot be expected, according to the consistent jurisprudence of this court, to reverse such a finding upon contradictory evidence.

The third ground urged by the appellants against the validity of these documents is "because even if the work were in fact accepted within the six months, neither the acceptance nor the fact of its having been made within that time appear from the second *procès-verbal* or official statement, which is the only legal proof of these matters."

This ground is untenable. It has been said that the *procès-verbal* must state that the works have been completed, "suivant les règles de l'art." That was so under the *arrêt du Parlement* of 1766, but it is not so under art. 2013, where no such words are to be found. All that is now required is that the works be accepted and received by the expert within six months from their completion, and that such acceptance and reception be established by his *procès-verbal*. I have already said that the second *procès-verbal* here, as found by the courts below, has, in fact, been made within six months after the completion of the works. The contention that this should appear, on pain of penalty, by the *procès-verbal* is unfounded. How can the expert know anything of the date when the works were completed? I should think it more correct to say that it must be assumed that the order of the judge for the second *expertise* has been granted only upon an affidavit that the works had been completed within six months. As to the contention that the expert Aubry does not say, in so many words, in this *procès-verbal*, that he has accepted and received the works, I cannot think it serious. He was expressly named by the judge for that very purpose.

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Nous, juge soussigné, accordons la dite requête et nommons Ferdinand Aubry, entrepreneur de la cité de Montréal, expert aux fins de recevoir et accepter les ouvrages mentionnés ci-dessus et faire le *procès-verbal* requis par la loi en pareil cas pour établir la plus-value.

CHARLES GILL,
J. C. S.

Upon that nomination, the *procès-verbal* says that he proceeded to the valuation required, and found the works done to be worth $13,050.00, the said sum being the increased value given to the lot by these works for which increased value the said builders have a right to claim a priority.

I cannot see in those words anything else but an acceptance by the expert of these works. He went there for that purpose, and that purpose only. Did he refuse to accept the works? Clearly not. And how could he refuse to accept works which the proprietor had accepted himself and received long before? And, under the circumstances, not refusing them was, by itself, accepting them, it seems to me. As the proprietor was satisfied with the builders' works, he, the expert, had to rest satisfied. Then, when he reports that the builders have a right of priority for $13,050, value of their works, does he not accept such works? The appellants argue that, privileges being *strictissimi juris*, equivalents will not do.

But they must not forget that "nullities are odious, and that "il n'existe pas de nullité sans grief (1)."

The appellants here have no *grief* whatever. They took mortgages on this insolvent's property with their eyes opened, fully aware of the buildings he was erecting thereon and of the builder's registered first *procès-verbal*. They never had a mortgage on these buildings. That is what the law amounts to. If they succeeded in their demand to rank before these builders they

(1) Solon, vol 1, Nullités 361, 407.

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would clearly get all the benefit of their labour, and pocket their earnings.

On ne peut, (dit Grenier (1)) surtout lorsqu'il s'agit de prononcer une déchéance de privilège ou d'hypothèque, donner une extension aux formalités prescrites par la loi (2).

Lepage, *Lois des bâtiments*, (3) has been cited by both parties on this point, as well as on the other points of the case, but I do not attach much weight to that book, at least to that passage of it. The author seems there to have made a code of procedure in the matter. It may not be a bad one, but it is not to be followed on pain of nullity. Then the book is full of errors. He says, for instance, page 86, that the proprietor alone has the right to petition for the appointment of the first expert, except where it has been agreed in the contract that the builders would also have that right. See 1 Pont P. & H. 220.

Now, that was so under the law of 1766, but it is not so now, either in France or here. The same may be said of the passage of this book where the author says that the expert must declare if the works have been done "suivant les règles de l'art." Those are the words of the law of 1766, as I have remarked, but not of the code. The more recent work of Frémy Ligneville, on the subject is more reliable. It would undoubtedly be better to serve notice of the petition either for the first or for the second *procès-verbal*, and when made either by the proprietor or by the builders, on all the other parties, and that of all their proceedings, the experts should also give notice to every party interested, including the party upon whose petition they have been appointed. The *procès-verbaux* should mention all these formalities, and the second one should state in express

(1) Hyp. p. 257.

(2) See also Pont, P. & H. No. 218, 281.

(3) Page 86 et seq.

terms, besides the valuation of the works, that the expert has accepted and received them; also stating when they have been completed. However, I repeat it, I am not prepared to reverse the judgments of the two courts below in the cases which hold that the *procès-verbaux* of the builders are not nullified by the want of these formalities. Ravon, Code des Bâtiments (1); Pandectes Francaises (2).

As a fourth ground of nullity against the second *procès-verbal*, the appellants say that the value of the contract work does not appear from it, as it includes in its valuation other work which is valued in one lump sum with the contract work. The judgment appealed from disposes of this objection on two grounds. First, that, as a matter of fact, it appears by the *procès-verbal* itself, that the expert has not included in his valuation anything else but that for which the builders could legally claim priority, and secondly that even if he had wrongly included certain works, that would not be a cause of nullity of the *procès-verbal*, but could only entail the reduction of such valuation at the instance of the interested parties, *Doutre* v. *Green* (3). In my opinion these reasons against the appellant's contentions are unimpeachable. We must leave it to the law to decree nullities; see Merlin (4); and besides, art. 2013 itself provides for the case of reduction of the expert's valuation, or in case of contestation, for the mode of establishing contradictorily, the amount of the increased value given by the works to the property. In fact, the appellant's objection is not to me intelligible.

I do not see that the contract price agreed upon between the builders and the insolvent has anything

(1) 3 vol. p. 549.
(2) No. 132.
(3) 5 L. C. Jur. 152.
(4) Quest. de dr. vo. douanes, par. 7, et vo. procès verbal, par. 3.

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to do with the questions in controversy here. The expert's duty was to establish the value of the work done, but it is not on that value that the builder's right of preference is to be fixed, but only upon the additional value, at the time of the sale, given to the immovable by their works *in quantum res pretiosior facta est*, which additional value the expert Aubry had not the power to determine, as he has done. Too long (1). And that is what is ordered by the judgment in this case.

Appeals dismissed with costs (2).

Sollicitors for appellants, Dufresne, *et al.* : *Beïque, Lafontaine, Turgeon & Robertson.*

Solicitors for appellant Vallée : *Beaudin & Cardinal.*

Solicitors for respondent : *Madore and Larochelle.*

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(1) Priv. &. Hyp. No. 244; *Laineville* v. *Lecours*, 2 Steph. Digest. 108.

(2) Two other appeals *Hamilton et al.* v. *Préfontaine*, and *Fortier* v. *Préfontaine*, raising the same points were not heard on their merits as they are governed by the decison in these cases.

THE ATTORNEY-GENERAL OF ONTARIO AND THE MUNICIPALITY OF THE TOWNSHIP OF VAUGHAN (PLAINTIFFS)..... } APPELLANTS;

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*Nov. 9.

*Dec. 13.

AND

THE VAUGHAN ROAD COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE CHANCELLOR OF ONTARIO.

Statute—Application of—R.S.O. (1887) *c.* 159—53 *V. c.* 42 (O)—*Application to company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.*

The provision of the General Road Companies Act of Ontario (R. S. O. [1887] c. 159) as amended by 53 V. c. 42 relating to tolls and repair of roads apply to a company incorporated by special acts and on the report of an engineer as provided by the general act that the road of such company is out of repair it may be restrained from collecting tolls until such repairs have been made.

Judgment of the Court of Appeal on motion for entering injunction (19 Ont. App. R. 234) overruled and that of the Divisional Court (21 O. R. 507) approved.

APPEAL by leave of the court from a decision of the Chancellor of Ontario without an intermediate appeal to the Court of Appeal.

The action is brought for an injunction restraining the defendants from collecting tolls upon their road and from keeping the toll-gates closed or otherwise maintained, so as to obstruct persons travelling along the road until the county engineer appointed under the provisions of 53 Vic. ch. 42 (O.), shall have examined the road in connection with certain proceedings alleged to have been taken under the provisions of that act, and shall have certified that the defendants' road had been repaired in a good and efficient manner.

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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THE ATTORNEY-GENERAL OF ONTARIO. v. THE VAUGHAN ROAD COMPANY.

The respondents, the Vaughan Road Company, are incorporated by special charter, 13 & 14 Vic. cap. 134, and own a road in the township of Vaughan, and the question to be decided is: Does 53 Vic. ch. 42 (O.) "An Act to amend the General Road Companies Act" (R. S. O. [1887] ch. 159) apply to this company? The amending act authorizes such proceedings as were taken in this case when a road subject to the General Road Companies Act is out of repair. The general act provided that certain sections only should extend to companies incorporated by private acts.

An application was made to a Divisional Court for an interim injunction which was granted (1), but the Court of Appeal reversed the order (2) holding that the provision extending a part of the general act to private companies did not make them subject to that act and, therefore, that 53 Vic. ch. 42 did not apply to this company. As this decision was given on the application for the interim injunction the plaintiffs could not appeal therefrom so they proceeded to trial before the Chancellor who, following the decision of the Court of Appeal on the question of law, dismissed the action. The plaintiffs then, by leave of the Supreme Court, appealed directly to that court from the judgment of the Chancellor.

S. H. Blake Q.C., and *Lawrence* for the appellants referred to Endlich on Interpretation of Statutes (3); *Luckraft* v. *Pridham* (4).

Bain Q.C. and *Kappele* for the respondents cited *The Queen* v. *Inhabitants of Merionethshire* (5); *The Queen* v. *Stock* (6); *Seward* v. *Vera Cruz* (7).

The judgment of the court was delivered by:

(1) 21 O. R. 507.
(2) 19 Ont. App. R. 234.
(3) P. 308 sec. 230.
(4) 6 Ch. D. 205.
(5) 6 Q. B. 343.
(6) 8 A. & E. 405.
(7) 10 App. Cas. 59.

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Patterson J.

PATTERSON J.—It is not improbable that the fuller discussion before this court has directed attention to some features of the provincial legislation respecting road companies which were not made so prominent in the argument of the interlocutory motion before the Court of Appeal. Since the argument before us I have carefully examined the various statutes, and with the greatest respect for the opinions of the learned judges who concurred in the judgment which is in fact, though not in form, the subject of this appeal, I find myself unable to adopt their conclusion. I interpret the statutes in very much the same way as did the divisional court of the Common Pleas Division and the learned Chief Justice of Appeal.

A short glance at some of the statutes will suffice to explain the grounds of my opinion.

I may observe that the terms "Charter" and "Act of Incorporation" seem to be used in the statutes interchangeably. Whether any road companies in the province exist, or ever existed, by royal charter I do not know, but it is evident that from the act of 1849 (1) to that of 1890 (2) the terms are used indifferently to denote a private act of incorporation (3).

The private act 13 & 14 Vic. ch. 134, adopting for the Vaughan Road Co. the terms of the act of 9 Vic. ch. 88, which incorporated the Albion Road Company of which the Vaughan Company was an offshoot, provided for the corporate existence and certain functions and powers of the company, but made no provision for the important subject—important as far as the public was concerned—of enforcing the proper maintenance and repair of the road.

(1) 12 V. c. 84.
(2) 53 V. c. 32.
(3) Sec. 12 V. c. 84 s. 1; 16 V. c. 190 ss. 2, 6, 59; 18 V. c. 139 s. 1; C.S.U.C. c. 49 ss. 67, 121; 35 V. c. 33 s. 10; R.S.O. (1877) c. 152 ss. 127, 152; R.S.O. (1887) c. 159 ss. 128, 157.

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In 1853 the act 16 Vic. ch. 190 was passed,

An Act to amend and consolidate the several Acts for the formation of joint stock companies for the construction of roads and other works in Upper Canada.

That act recognized and dealt with two classes of companies:

1st. Companies incorporated under general acts;

2nd. Companies for which charters had been obtained or which are otherwise described as having private acts of incorporation.

The 59th section of the act provided that certain enumerated sections and no other sections of the act should extend to companies of the second class.

The excluded sections were those which regulated the powers and functions of corporations as bodies politic formed under general acts. In the case of companies having special acts of incorporation those things were provided for by the private acts. In excluding the excluded sections the act of 1853 simply left each of those companies to live its own corporate life uninterfered with by enactments meant for companies of another class; but every provision of the act which bore on the conduct of the enterprise which was the basis of the contract between the company and the public applied to all companies alike.

The sections that did not apply to companies which had special acts dealt with the subjects of the incorporation and ordinary corporate powers of companies (1); directors, shares, calls and actions for calls (2); the time within which works were to be completed (3); rate of tolls, width of tires, and intersection of roads (4); certain exemptions from paying toll (5); competency of officers and shareholders as witnesses (6); cure of informalities in the incorporation of some com-

(1) Ss. 1 to 5.
(2) Ss. 13 to 18.
(3) S. 27.
(4) Ss. 29-30.
(5) S. 91.
(6) S. 54.

panies (1); and the reports which the directors were to make to the municipality (2).

The subjects dealt with by the sections which applied to all companies alike may, in a general way, be thus specified:—

Expropriation of land and materials; arbitration; borrowing money or issuing new stock to facilitate the extension of the works; union of companies; dealings with municipalities; tolls; repair of road; protection of road; recovery of fines, &c.; limitation of actions; power of municipality to purchase the stock after 21 years from completion of the work.

Some of the learned judges in the courts below intimated an opinion that these provisions thus made applicable, or, to use the language of the statute, "extended" to companies having private acts of incorporation, became in effect parts of those private acts, and would so remain even if the general act was repealed, just as if enacted by way of direct amendment of the private act, and it was so contended before us on the part of the respondents. I notice the contention merely in order to say that I do not accede to it. There is nothing in the force of the language of the statute or in the necessity of the case to indicate that such was the intention of the legislature. The legislature, having at the moment in contemplation certain artificial bodies created for a certain purpose, laid down rules for their government as it might have done in the case of natural persons, and which rules it did in fact apply, in 1859, (3) to natural persons who purchased roads or other works at a sale under legal process. In the individual's case the rules could create no natural right, nor did they enter into the essence of the legal entity so as to prevent their being changed or superseded by other general rules at the will of the legislature.

(1) S. 55. (2) S. 56.

(3) 22 V. c. 43.

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Patterson J.

It will tend to clearness, and will do no violence to the act of 1853, to separate the two objects of the statute, which are not necessarily connected though they happen to be covered by the one document.

One of these objects is the incorporation of the companies which I have classed as no. 1, and providing for their ordinary corporate functions.

If we set on one side these companies of the first class, and range with them the companies of the second class, we have an array of corporate bodies undistinguishable from each other as legal entities, and differing only in the mode of their creation.

Over against this array of companies set the other part of the statute, containing the rules which are to govern all the companies alike.

It is manifest that, in respect of these rules, any one of the companies is subject to the statute in the same sense as any other of them.

The respondent company thus comes literally within the act of 1890, being "subject to the General Road Companies Act," the provisions of the act of 1853 having, in the particulars in discussion, been carried forward by way of the Consolidated Statutes of 1859 and the Revised Statutes, 1877, to the Revised Statutes, 1887, where they now appear in chapter 159.

In my opinion we should allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Lawrence, Ormiston & Drew.*

Solicitors for respondents: *Bain, Laidlaw & Kappele.*

JOHN R. BOOTH, PERLEY & PATTEE AND BRONSON & WESTON (DEFENDANTS) ..... } APPELLANTS;

AND

ANTOINE RATTÉ (PLAINTIFF) ..... RESPONDENT.

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*Nov. 4.

*Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Judgment of court—Withdrawal of opinion—Master's report—Credibility of witnesses — Apportionment of damages — Irrelevant evidence.

The Court of Appeal for Ontario, composed of four judges, pronounced judgment in an appeal before the court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at.

Held, that the Appellate Court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed.

In an action against several mill owners for obstructing the River Ottawa by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages.

Held, affirming the decision of the Court of Appeal, that the master rightly treated the defendants as joint tort feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant; and he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff.

Held further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

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*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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BOOTH v. RATTÉ.

On a reference to a master the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of, his report to the court.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Chancellor who upheld the report of a master on a reference to assess damages.

The defendants are respectively proprietors of saw-mills on the Ottawa River, and the action is brought for damage to plaintiff's business by the sawdust and refuse from the mills being thrown into the river where it accumulated so as to obstruct the navigation thereon. The plaintiff claimed that he was not only prevented from running his boats on the river as formerly, but that his business as a letter of boats for hire was injured by reason of the sawdust and refuse accumulating in front of his boat-house. The defendants pleaded a prescriptive right to put sawdust in the river and that they should not have been joined as joint tort-feasors.

On the trial judgment was given for defendants, which was set aside by the Divisional Court and the decision of the latter affirmed by the Court of Appeal and the Privy Council. The case was then referred to a master to take an account and his report adjudged each of the defendants liable to pay $1,000. An appeal was taken against this report, defendants claiming that the master should have considered how much of the damage was caused by other mill-owners and apportioned the damages against defendants severally; also that he should have found how much was due on each head of damage claimed by plaintiff. The report was affirmed by the Chancellor and by the Court of Appe a and defendants appealed to this court.

In addition to the objections made to the report it was argued on this appeal that the Court of Appeal

pronounced no judgment on the case, two of the four judges being in favour of dismissing the appeal and the other two withholding their opinion.

Gormully Q.C. for the appellant. As to the court interfering in matters of evidence affecting the quantum of damage see *Bigsby* v. *Dickinson* (1).

The loss of custom should have been proved. *Fritz* v. *Hobson* (2). *Iveson* v. *Moore* (3).

Appellants were entitled to the decision of all the judges in the Court of Appeal.

O'Gara Q.C. for the respondent. It was sufficient for plaintiff to prove general loss of custom. *Ratcliffe* v. *Evans* (4). *McArthur* v. *Cornwall* (5).

The formal judgment of the appeal court is all this court can look at for the decision.

Gormully Q.C. in reply. All the cases are collected in *Benjamin* v. *Storr* (6).

The judgment of the court was delivered by

STRONG J.—This is an appeal from the judgment of the Court of Appeal for Ontario, dismissing the appeal of the present appellants from the judgment of the Chancellor, who had dismissed an appeal against the master's report.

This action was commenced on the 9th September, 1884.

The respondent claimed damages against each of the appellants for throwing into the Ottawa River sawdust and refuse from their mills at the Chaudière Falls, which formed a bank in front of the respondent's property fronting on the river on which he resided and carried on the business of a boatman, and thereby injured the respondent and his business by destroying

(1) 4 Ch. D. 28.
(2) 14 Ch. D. 542.
(3) 1 Ld. Raym. 486.
(4) (1892) 2 Q. B. 524.
(5) (1892) A. C. 75.
(6) L. R. 9 C. P. 400.

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access to his property to and from the river, and polluting the water of the river.

The defences set up by the appellants to the action are not printed by them in the case. They only pleaded that they had the right by prescription to put sawdust into the Ottawa River, and that they ought not to be joined together in the same action.

Mr. Justice Proudfoot at the trial gave judgment in favour of the appellants, on a technical ground as to the respondent's title to the land, but this judgment was set aside by the Divisional Court.

The appellants then appealed to the Court of Appeal for Ontario, but that court dismissed the appeal and confirmed the judgment in favour of the respondent.

The appellants then appealed direct to the Privy Council and that appeal was also dismissed.

In pursuance of these judgments the decree was carried into the master's office to determine the amount of the respondent's damages and the amounts respectively that the appellants should pay.

The particulars of the respondent's account brought into the master's office are set forth in the case before us.

The appellants objected before the master that the particulars were not sufficient, but the master overruled the objection.

From this ruling the appellants appealed, alleging that the particulars were too vague, and because one amount only was claimed for the injury complained of instead of several amounts under the various aspects in which the respondent's injury was presented.

This appeal came on before Mr. Justice Ferguson, who held that the particulars followed the judgment and were sufficient, and he dismissed the appeal.

The reference then proceeded before the master and he awarded one thousand dollars damages against each

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of the appellants, and five hundred dollars against the defendant Gordon, who does not now appeal.

The appellants then started a fresh series of appeals against the report on the ground that the amount allowed was too large and against the weight of evidence, and that it should be subdivided under various heads, and that the master did not take into account damages from sawdust thrown into the river by other mill owners on the north side of the river.

This appeal was dismissed by the Chancellor.

The appellants then appealed to the Court of Appeal on the same grounds. The Court of Appeal also dismissed this appeal, Chief Justice Hagarty and Mr. Justice Osler holding with the Chancellor that the evidence clearly supported the master's finding, and that, after the several appeals already had, the objection as to the want of particularity in the pleadings, and that respecting the non-distribution of the damages, ought not to prevail, especially as the report of the master was according to the statement of the claim and the form of particulars carried in before the master and approved of by Mr. Justice Ferguson, whose decision the appellants did not appeal against. Mr. Justice Burton and Mr. Justice Meredith agreed that the evidence warranted the findings as to amount, but that the report ought to have stated how much was allowed under each aspect of the claim.

The appellants now appeal from the last mentioned judgment to this court.

It thus appears that the present is the seventh appeal in the cause.

The preliminary objection urged by the learned counsel for the appellants, that by reason of two of the learned judges of the Court of Appeal having withheld their opinions no judgment could properly have been pronounced, is not well founded for two reasons:

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first, we have before us the formal judgment of the Court of Appeal dismissing the appeal, and we ought not to look behind that judgment; secondly, because the respondent ought to be in no worse position than if the two learned judges had dissented (if indeed the judgments they pronounced in favour of sending the case back to the master does not amount to a dissent), and in case of their dissent the court would have been equally divided, and in that event the proper order to have been made would have been that which was actually made, namely, one dismissing the appeal.

As regards the merits I entirely agree in the judgment of the learned Chancellor and of the Chief Justice and Mr. Justice Osler affirming it.

The original decree declared that the defendants were guilty of, and that the plaintiff was entitled to recover damages from the defendants for, the wrongful acts and grievances in the pleadings mentioned, and it was referred to the master to inquire and state the amount of damages which the plaintiff had sustained by reason of the wrongful acts and grievances aforesaid, and the amount of such damages for which the said defendants were respectively liable to the plaintiff.

The wrongful act in the pleadings mentioned was the causing a public nuisance in the Ottawa River by creating an obstruction in that river consisting of a solid mass formed by sawdust, slabs, edgings and refuse thrown into the channels of the river by the defendants, and which obstruction caused peculiar damage to the plaintiff. The wrongful act was thus, not the mere throwing this refuse matter into the river, but the formation by means of such refuse of the mass of sawdust and matter causing the obstruction and pollution of the river, which was complained of. This must have been sufficiently proved before decree, sa

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the Privy Council affirmed the judgment (though the record before us does not contain the evidence taken at the trial), and it has been also proved again in the evidence before the master. The defendants were, therefore, properly treated by the master as joint tort-feasors, and the master was not, strictly speaking, called upon to apportion the damages so as to restrict the liability of each defendant to the proportion in which he may have contributed to the nuisance. Neither was it incumbent on the master to have distinguished between the heads of damage under which he found apportioning so much to the head of injury to the plaintiff's personal enjoyment as a riparian proprietor, caused by the pollution of the water and otherwise, and so much to the injury to his business as a letter of boats, caused by the state of the river produced by the conjoint acts of the appellants.

The damages found are entirely warranted by the evidence, and I have never understood it to be the duty of the master, provided he sufficiently follows the directions of the decree, to give his reasons or to enter into a detailed explanation of his report.

That the evidence sufficiently warrants the master's finding is apparent when we read the evidence of the plaintiff's witnesses, including, particularly, the plaintiff, Ratté, himself, Lett, Maingy, Emile Asselin, Josephine Asselin and Gisbourne. These witnesses show that damages not too remote were sustained by the plaintiff under both the heads of inquiry referred to in Mr. Justice Burton's judgment. The master was, of course, according to the well established practice in Ontario, the final judge of the credibility of these witnesses and he gave credit to their testimony. The defendants met this case by endeavouring to show that the loss of custom was attributable, not to the obstructions in the river caused by the deposit of mill rubbish,

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but in consequence of the public taste having undergone a change which induced persons boating for pleasure to resort to the Rideau Canal instead of to the Ottawa River. This led the plaintiff, in reply, to give evidence in rebuttal of the defendant's line of evidence. As could scarcely have been avoided some irrelevant evidence crept in, but I am bound to say, after reading the depositions, that this was but trifling, and not such as was likely to have affected the master's judgment. At all events the defendants might have objected to it *in limine*, and if they chose they could have appealed from the master's ruling, but this they did not do. I think it would be monstrous now to send this report back and thus further to prolong this litigation, which has already lasted upwards of eight years and in the course of which there have been no less than seven appeals, four of these by the defendants, all of which latter have been unsuccessful, merely because some evidence not strictly admissible may possibly have found its way into the depositions.

It is clear that the master has not erred in principle, and that, if we are to believe the witnesses he has accredited, there was ample evidence to warrant the amount of damages he has reported. Had I myself now to deal with this evidence I should be disposed to award much larger damages than the master has given.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants, Booth and Perley & Pattie: *Christie, Christie & Greene.*

Solicitors for appellants, Bronson & Weston: *Gormully and Sinclair.*

Solicitors for respondent: *O'Gara, MacTavish and Gemmill.*

PAUL CAMPBELL, ASSIGNEE OF DANFORD ROCHE & CO. AND S. F. McKINNON & CO. (PLAINTIFFS) ..... APPELLANTS;

AND

BRADFORD PATTERSON (DEFENDANT) ..... RESPONDENT.

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*Oct. 25, 26, 27, 28, 31.
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*Feb. 20.

WILLIAM MADER (DEFENDANT) .....APPELLANT;

AND

S. F. McKINNON & CO. AND PAUL CAMPBELL, ASSIGNEE OF ROCHE & CO. (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Application—R. S. O. (1887) *c.* 124 *ss.* 2 *and* 4—*Chattel mortgage—Preference—Bonâ fide advance—Mortgage void for part of consideration—Effect on whole instrument.*

Section 2 of R. S. O. [1887] c. 124 which makes void a transfer of goods, etc., by an insolvent with intent to, or having the effect of, hindering delay or defeating creditors or giving one or more creditors a preference over the others, does not apply to a chattel mortgage given in consideration of an actual *bonâ fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay or hinder his creditors.

If part of the consideration for a chattel mortgage is a *bonâ fide* advance and part such as would make the conveyance void as against creditors the mortgage is not void as a whole but may be upheld to the extent of the *bonâ fide* consideration. *Commercial Bank* v. *Wilson* (1) decided under the statute of Elizabeth, is not law under the Ontario statute. Decision of the Court of Appeal following that case overruled, but the judgment sustained on the ground that it was proved that no part of the consideration was *bonâ fide*.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor in the first case and affirming his judgment in the second case.

The following statement of facts is taken from the judgment of the court delivered by Mr. Justice Gwynne:—

"On the 28th of January, 1890, the plaintiff, S. F. McKinnon, in the name of S. F. McKinnon & Co., commenced an action by a writ issued from the Queen's Bench Division of the High Court of Justice for Ontario against Danford Roche and the above appellant, Bradford Patterson.

"On the 3rd February following the said Danford Roche, at the pressing instance and request of the plaintiff Campbell acting on his own behalf as a creditor of the said Roche, and also on behalf of the plaintiffs McKinnon & Co., other creditors of the said Roche, executed a deed of assignment of all the real and personal estate, effects and choses in action of him the said Roche, for the benefit of his creditors. Upon the 20th of the said month of February the said S. F. McKinnon & Co. filed their statement of claim in the said action, whereby they claimed, on behalf of themselves and of all other creditors of the said Danford Roche, the right to have avoided and declared null a chattel mortgage on a stock of goods of the said Roche in a store of his at Barrie executed by the said Roche to the appellant Patterson, bearing date the 24th of December, 1889, for securing payment to the said Patterson of the sum of $5,000 with interest as therein mentioned, which chattel mortgage was duly registered as required by the statute in that behalf. Such right was claimed upon the allegation and charge that the said chattel mortgage was voluntary and that it was made by the said

(1) 18 Ont. App. R. 646 *sub nomine Campbell* v. *Roche* and *McKinnon* v. *Roche*.

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Roche when in insolvent circumstances and unable to pay his debts in full, with intent to defeat, delay and prejudice his creditors or to give to one or more of them a preference over his other creditors or over one or more of them, and that the said chattel mortgage had the effect of defeating, delaying and prejudicing the creditors of the said Roche.

To this statement of claim the defendants Roche and Patterson pleaded separately but substantially to the same tenor and effect. The appellant in his statement of defence averred that the said chattel mortgage was given for a present actual, *bonâ fide* advance of money, namely, $5,000, paid by the said Patterson to the said Roche for the purpose of helping and assisting the said Roche in his business and not for the purpose or with intent to defeat, delay or defraud the creditors of the said Roche, and that since the action was commenced, to wit on or about the 5th day of February, 1890, the said Roche had executed an assignment for the general benefit of creditors under ch. 124 of the Revised Statutes of Ontario, and thereupon the said Patterson submitted that the said plaintiff McKinnon had no right of action in the matter.

Issues were joined on these pleadings and afterwards the above statement of claim was amended by the said Campbell being added as a co-plaintiff with the said McKinnon & Co.

In other respects the pleadings remained as before, and the case was brought down for trial before the Chancellor of Ontario, together with another action similarly framed between the same parties as plaintiffs and the said Danford Roche and one William Mader as defendants, for the purpose of setting aside another chattel mortgage upon other property executed by the said Roche to the said William Mader.

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The learned Chancellor in the case of *Campbell and McKinnon* v. *Roche and Patterson* pronounced judgment as follows: "This court doth declare that the chattel mortgage given by the defendant Roche to the defendant Patterson is fraudulent and void as against the plaintiffs and doth order and adjudge the same accordingly, and it appearing that pending the trial of this action the goods covered by the said mortgage had been sold with the consent of all parties and $2,500, portion of the proceeds of such sale, had been paid to the defendant Patterson to abide the result of this action, this court doth order and adjudge that the said defendant Patterson do forthwith pay to the said Paul Campbell the said sum of two thousand five hundred dollars with interest from the 14th day of March, 1890, to be dealt with by him as part of the estate of the said Danford Roche, and it appearing that a further sum of $2,500, portion of the said proceeds of said sale, has been deposited to the joint credit of the plaintiff Campbell and said defendant Patterson, this court doth order that the said defendant Patterson do join in all necessary cheques to obtain payment of the same to the plaintiff Campbell, to be dealt with by him in like manner and that the said Campbell do forthwith after receiving the same pay the said several sums of money and interest as aforesaid into court to the credit of this action to abide further order. And this court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of this action forthwith after taxation thereof."

From that judgment the defendant Patterson appealed to the Court of Appeal for Ontario, which court, by the unanimous judgment of all the judges, allowed the said appeal with costs, and adjudged that the action against the appellant, Patterson, should be dis-

missed with costs. From that judgment appeal is taken.

In the case of *McKinnon* v. *Roche* (*Mader* v. *McKinnon* in this court) the Chancellor found as a fact that for part of the consideration given by Mader for his chattel mortgage the same could not be upheld against creditors and that the mortgage was, therefore, void as a whole. The Court of Appeal affirmed the decision of the Chancellor following *Commercial Bank* v. *Wilson* (1). The defendant Mader appealed.

McCarthy Q.C., and *McDonald* Q.C., for the appellants in *Campbell* v. *Patterson*.

In determining the validity of a chattel mortgage under the Ontario Act only the statutory definition of preference can be considered and not preference generally. *Ex parte Griffith* (2); *Ex parte Hill* (3); Yate-Lee and Wage on Bankruptcy (4).

As to intent see *Gottwalls* v. *Mulholland* (5); *Boldero* v. *London and Westminster Discount Co.* (6); In *re Johnson* (7); and as to the expression "*bonâ fide*," see *Tomkins* v. *Saffery* (8).

The learned counsel referred also to *Ex parte Taylor* (9), following *Ex parte Stubbins* (10), and *Atterbury* v. *Wallis* (11).

Moss Q.C., and *Thomson* Q.C. for the respondents. Proof of intent to prefer cannot be inferred. *Nobel's Explosives Co.* v. *Jones* (12). See also *Ex parte Official Receiver*. In *re Mills* (13); In *re Mapleback* (14).

In *Mader* v. *McKinnon* *Moss* Q.C. and *Thomson* Q.C. for the appellants referred to *Pickering* v. *Ilfra-*

(1) 3 E. & A.Rep. 257.
(2) 23 Ch. D. 69.
(3) 23 Ch. D. 695.
(4) 3 ed. p. 424.
(5) 3 E. & A. Rep. 194.
(6) 5 Ex. D. 47.
(7) 20 Ch. D. 389.
(8) 3 App. Cas. 213.
(9) 18 Q. B. D. 295.
(10) 17 Ch. D. 58.
(11) 8 DeG. M. & G. 454.
(12) 17 Ch. D. 721.
(13) 58 L. T. N. S. 871.
(14) 4 Ch. D. 150.

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combe Railway Co. (1); *Goodeve* v. *Manners* (2); *Kerrison* v. *Cole* (3); *Taylor* v. *Whittemore* (4).

McCarthy Q. C., and *McDonald* Q. C., for the respondents.

The judgment of the court was delivered by

GWYNNE J.—In the judgment of the Court of Appeal for Ontario I entirely concur, and for the reasons given by Justices Burton and Osler. There was no evidence which would justify the imputation to Patterson of knowledge that Roche entertained, if he did entertain, any intent, by means of the transaction entered into with Patterson, to defeat, delay or prejudice his creditors. There was no evidence sufficient to impute to Patterson knowledge of the insolvency of Roche when the mortgage which is impeached was executed. The imputation of his having had such knowledge seems to rest upon the fact that he was married to a sister of Roche's mother. There is no evidence that Patterson knew that Roche entertained any intent to apply the money advanced by Patterson in any way that would be a fraud upon or prejudicial to his creditors, or by way of preference of one or more over others, if Patterson's knowledge of such intent could avoid the mortgage. In *Ex parte Stubbins* (5), it was held by the Court of Appeal that even under the Bankruptcy Act of 1869, a sale of goods made for money actually paid could not be impeached as a fraud against creditors, upon the ground that the vendees knew that the motive and intent of the vendor in making the sale was to use the purchase money in making a payment to a preferred creditor. *Johnson* v.

(1) L. R. 3 C. P. 235.
(2) 5 Gr. 114.
(3) 8 East 231.
(4) 10 U. C. Q. B. 440.
(5) 17 Ch. D. 58.

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Hope (1) is to the like effect in the case of a chattel mortgage executed to secure an actual present loan.

In short, there is no evidence, in so far as Patterson can be affected, that the mortgage was executed for any other purpose or with any other intent than that it should operate *bonâ fide* by way of security for a present actual, *bonâ fide* advance of money made by Patterson. Such a transaction never was avoided under the law as it stood prior to the passing of ch. 124 R. S. O. (1887) the second section of which, under which the chattel mortgage in the present case is assailed, is almost a transcript of the law as it then was; however, *ex majori cautelâ* as it would seem, the third section of the same ch. 124 declares such a transaction to be one to which the preceding section, number two, has no application, and which therefore could not be impeached by reason of anything contained in that section.

What Roche's intent was in entering into the transaction with Patterson appears from the use made by him of the money advanced by Patterson, and the evidence admits of no doubt that the whole of that money was applied by Roche in payment, *pro tanto*, of the claims of creditors, and four-fifths of the amount in payment of claims of S. F. McKinnon & Co. themselves. Money so paid to creditors, although paid before the date at which the claims became exigible at law, could be assailed, if assailable at all, only as preferential payments to one or more of Roche's creditors over others, but this section three of the same ch. 124 enacts that nothing in section number two shall apply to "any payment of money to a creditor."

Now, whether this provision in the act did or did not, in point of law, authorize a debtor in insolvent circumstances to mortgage his chattel property to raise

(1) 17 Ont. App. R. 10.

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money for the purpose of enabling him to pay one or more of his creditors in preference to others, the evidence, I think, shows that Roche believed that it did. He does not appear to have concealed anything from the plaintiff Campbell when, upon the 6th of January, 1890, he was urging Roche to make an assignment for the benefit of his creditors. He told Campbell all about the chattel mortgage already executed, and the purpose for which it had been executed, and of the manner in which the money raised upon the security of it had been applied, and that he was endeavouring to effect another loan upon a mortgage of other chattels for the purpose of paying his mother money which he owed her for a loan made by her to him; but whatever may have been his belief as to the construction of the act, and whether that belief was well or ill-founded, and whatever may have been his intent, and whatever the character attached by the law to such intent, none of these considerations can operate to deprive the appellant of a security given to him for an actual present advance of money *bonâ fide* made by him, which the Court of Appeal for Ontario, and in my opinion correctly, have found the money received by the mortgage which is impeached to have been.

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If this case must necessarily turn upon the question whether, where a chattel mortgage is given as security for a sum of money a part of which only was an actual present advance made *bonâ fide* by the mortgagee, and the balance was in respect of a transaction for which the mortgage could not be sustained against creditors impeaching it, such mortgage could or could not be sustained as good for this *bonâ fide* advance, I should be obliged to say that, in my opinion, such a case was not governed by the judgment in the *Commercial Bank* v. *Wilson* (1). That was the case of a judgment by de-

(1) 3 E. & A. Rep. 257.

fault recovered under the Common Law Procedure Act for an amount exceeding the sum of $2,800, of which sum $2,000 was the amount of a promissory note long previously made, and the balance was in respect of matters for which the judgment could not be maintained, and it was held, under the statute of Elizabeth, that as the judgment could not be sustained for a portion of the amount for which it was recovered it must be held to be wholly void as against the plaintiffs who were judgment creditors impeaching it as a fraud against them. But the statute of Elizabeth upon which that case was decided contains no such exception as that contained in the 3rd sec. of ch. 124, R.S.O., which enacts that nothing in sec. no. 2 of the act shall apply to "*any* assignment, &c., &c., of *any* goods or property "&c., &c., of any kind made by way of security for "*any* present actual, *bonâ fide* advance of money." This language appears to me to be sufficient to validate an assignment, &c., &c., to the extent of *any* present actual, *bonâ fide* advance to secure which the assignment, &c., &c., was given, although as to the residue of the amount covered by the security it could not be maintained. If, then, any portion of the amount to secure which the chattel mortgage in the present case was given could be held to have been a present actual, *bonâ fide* advance of money made by the mortgagee, William Mader, I should be of opinion that to such extent the mortgage would be good and valid, although as to the residue it could not be sustained, and that such a case was quite distinguishable from the *Commercial Bank* v. *Wilson* (1); but I can see no sufficient ground for holding that the transaction involved *any* actual, *bonâ fide* advance made by the mortgagee William Mader, who appears to have placed himself wholly as a puppet in the hands of his brother to be dealt with as the latter pleased, for the

(1) 3 E. & A. Rep. 257.

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purpose of effecting a matter in which William Mader in reality had not and was not intended to have any *bonâ fide* interest and in respect of which he was not intended to be subject to any real obligation but to be simply a tool in the hands of his brother, as the learned Chancellor has, and not without sufficient reason, found him to have been. In truth the money obtained from the bank on Pierson's endorsement of the note which Julien Mader procured his brother William to sign as maker was obtained wholly upon the security of Pierson. It was not the money of William Mader. He never had nor did his brother ever intend that he should have any actual possession and control of the money. It is impossible to hold that William Mader ever did, in truth, make any actual *bonâ fide* advance upon the security of the mortgage. In so far as his name was used in the transaction it is all a sham.

I have arrived at this conclusion apart from all consideration of the question whether Mrs. Roche was or was not a *bonâ fide* creditor of her son Danford; that is a question which I do not think it at all necessary to be decided in the present case, and which, therefore, cannot be concluded by the judgment herein.

The appeals in both cases must, in my opinion, be dismissed with costs.

No question was raised in the present cases, and for that reason none has been considered by me in the judgment which I have formed, as to whether the provisions of ch. 124 R.S.O., which profess to vest in an assignee under a voluntary assignment for the benefit of creditors made by a person unable to pay his debts in full, and so in insolvent circumstances, the power of maintaining an action to avoid, and of avoiding, as fraudulent against creditors a deed which the debtor had previously executed and which he himself could

not avoid, are or are not provisions relating to "Bankruptcy and Insolvency."

And whether such legislation by the legislature of the province of Ontario does or does not constitute an encroachment upon the exclusive legislative authority in relation to bankruptcy and insolvency which by the constitution of the Dominion is vested in the Dominion Parliament.

And whether, therefore, such provisions in the said ch. 124 are or are not *ultra vires* of the provincial legislature. The judgment in the present cases must not be considered as affecting in any way such questions if they should be raised in any future cases.

Appeals dismissed with costs.

Solicitors for appellants and respondents respectively: *Bain, Laidlaw & Kappele.*

Solicitors for respondents and appellants respectively: *Thomson, Henderson Bell.*

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*Oct. 31.

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

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*Feb. 20

AND

JACOB P. CLARK AND JOHN R. BARBER (SUPPLIANTS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Limitation of time—Final judgment.

On the trial in the Exchequer Court in 1887 of an action against the crown for breach of a contract to purchase paper from the suppliants no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court and judgment was given against the crown for the amount thereby found due. The crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887.

Held, Gwynne and Patterson JJ. dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of time granted by the Exchequer Court on its face only refers to an appeal from the judgment pronounced in 1891.

Held, per Gwynne and Patterson JJ. that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings and on appeal therefrom all matters in issue are necessarily open.

APPEAL from a decision of the Exchequer Court of Canada awarding to the suppliants damages to the amount reported by referees under order of the court.

The facts of the case, which are fully stated in the judgments of the court, may be summarized as follows:—

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

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The petition of right was filed to recover damages for an alleged breach of contract for the supply of paper to the crown required for use by the various departments at Ottawa. On the trial in 1887 the crown offered no defence and the case was sent to referees to ascertain the damages. A question as to the scope of the inquiry before the referees was raised and decided against the suppliants and an interim report was made to the court, an appeal against which resulted in the ruling of the referees being reversed (1). In 1891 the referees reported to the court the amount of damages found by them, which report was confirmed and judgment entered against the crown for the said amount.

The crown wishing to appeal to the Supreme Court but not having taken the necessary steps within the time limited by statute, an order was made by the Exchequer Court extending the time (2) and the appeal was duly brought. On this appeal the crown claimed the right to impugn, not only the ultimate judgment pronounced in 1891, but also the judgment given on the trial in 1887, and the court directed the question as to the scope of the appeal to be first argued.

Robinson Q.C. and *Hogg* Q.C. for the appellant. There was no right of appeal from the original judgment when it was given. Rule 147 of Exchequer Court rules; *Danjou* v. *Marquis* (3); and on appeal from the final judgment the whole case must be open.

McCarthy Q.C. and *McDonald* Q.C. for the respondents referred to *Wilson* v. *Metcalfe* (4); *Shaw* v. *St. Louis* (5).

Judgment was reserved on this question and argument on the merits postponed until it was decided.

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

(1) 2 Ex. C.R. 141.
(2) 3 Ex. C.R. 1.
(3) 3 Can. S.C.R. 251.
(4) 1 Russ. 530.
(5) 8 Can. S.C.R. 385.

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Strong C.J.

THE CHIEF JUSTICE.—This was a petition of right by which Jacob P. Clarke, executor of James Barber, deceased, and John R. Barber, the suppliants, the present respondents, sought to recover damages for an alleged breach of contract entered into by James Barber with the crown for the supply of paper for various purposes to the officers of the Dominion Government at Ottawa. Various defences were pleaded on behalf of the crown. Upon the cause coming on for hearing before the judge of the Exchequer Court on the 14th of November, 1887, the contracts as set forth in the petition of right were admitted by counsel for the crown, and no evidence in support of the defence being offered a judgment was pronounced in accordance with the practice of the Exchequer Court, as prescribed by the 26th sec. of 50 & 51 Vic. ch. 16, and by the 128th general rule of the Exchequer Court. By this judgment it was ordered and adjudged that it be referred to Robert Cassels, Esq., Q.C., and Brown Chamberlin, Esq., to ascertain and report to the court the items and the particulars of the paper required for departmental and other reports, forms and documents of the civil service departments of the Government of Canada during the periods embraced under the contracts already referred to, furnished or supplied by any person or persons, corporation or corporations, other than the respondents. And, further, to report the profit, if any, which was lost to the respondents by not being permitted or allowed to furnish or supply such paper. And further consideration and costs were reserved.

An objection having been made on behalf of the crown to the reception of evidence tendered by the respondents in the course of the reference, and this objection having been sustained by the referees, who thereupon made an interim report dated 18th June, 1888, an appeal was taken by the respondents to the

Exchequer Court against that report, whereupon and upon the 20th June, 1890, this appeal was allowed, the decision of the referees was overruled and reversed and the referees were ordered to receive the evidence objected to.

The reference then proceeded upon the merits and the evidence objected to having been received the referees made their report bearing date the 8th day of May, 1891. This last report having been appealed against by the crown that appeal was set down to be heard at the same time as the cause on further directions, and both the appeal and the cause on further directions came on to be heard before the Exchequer Court on the 16th of December, 1891, when the court dismissed the appeal and confirmed the report of the referees, and ordered and adjudged that the suppliants were entitled to recover from the crown the sum of $37,990.77 being the amount found by the referees as and by way of damages for the breach of the contracts in the petition of right mentioned.

The crown has now appealed to this court and seeks to impugn not the judgment of the 16th December, 1891, but the original judgment of the 14th of November, 1887. This, I am clearly of opinion, it is not open for the crown to do, and that for the reason that the time for appealing against that judgment had long passed before this appeal was instituted.

The time for appealing against the judgment of November, 1887, was by the statute limited to thirty days from the day on which the judge had given his decision, and this appeal not having been instituted until the 23rd March, 1892, was, therefore, manifestly too late. The enlargement of time ordered by the judge of the Exchequer Court by his order of the 18th of March, 1892, manifestly and on its face only refers to an appeal from the final judgment of the Exchequer

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Court pronounced on the 16th December, 1891, whereby the appeal against the referees' final report was dismissed and damages as before mentioned were awarded against the crown.

It is quite open to the crown now to proceed with their appeal but it must be restricted to an appeal against the last mentioned judgment. Upon such an appeal it will, of course, be open to the crown to impugn the correctness of the finding of the referees as to the amount of damages, but if they fail on this they must fail altogether since, if the report stands unvaried, the final order of the Exchequer Court declaring that the amount awarded by the referees ought to be paid was of course, and cannot be successfully impeached. I understood the counsel for the crown upon the argument before us to say that they had no objections to offer to the report of the referees, but that they desired to attack the original judgment which, for the reason mentioned, it is, I think, clear they have no right to do.

If the crown do not desire now to proceed with the appeal, confining it to an attack upon the report, the appeal may be at once dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—This is an appeal by Her Majesty the Queen, as representing the Government of the Dominion of Canada, against a judgment of the Court of Exchequer pronounced on the 16th December, 1891, in a petition of right instituted at the suit of the respondents as suppliants therein, and the sole question now before us is as to what is open upon such appeal, for until that be decided the hearing of the appeal on the merits has been deferred.

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The contention upon behalf of the appellant is that everything which was in issue on the petition of right is open upon the appeal, while the contention of the respondents is that there were two other decisions of the Court of Exchequer in the cause embodied in orders of the court of the respective dates of the 14th November, 1887, and the 20th January, 1890, and that there were matters decided by those orders respectively, and among such matters the liability of the appellant to the respondents in respect of the allegations contained in the petition of right which, as those orders were not appealed from, cannot be entertained and inquired into on the present appeal.

The suppliants, in their petition of right, alleged that tenders for printing and the supply of printing paper were called for by the Government of Canada in the months of April, 1874, and September, 1879, respectively, and that one James Barber, in reply thereto, made tenders for such work at such respective times, which tenders were accepted by the Government, and that in pursuance thereof the said James Barber in the months of October, 1874, and December, 1879, respectively, entered into two several contracts with the Dominion Government whereby he covenanted with Her Majesty that he should and would well, truly and faithfully and from time to time and when and so often as application or order might be given to him for the same and during the term of five years from the date of the said respective contracts, supply and deliver to the person or persons appointed to take charge thereof at Ottawa such quantity or quantities of paper and of such qualities or varieties as might be required or desired from time to time for the printing and publishing of the Canada Gazette, of the statutes of Canada, and of such official and other reports, forms, documents and other papers as might at any time be required to be printed

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and published, or as might be ordered from time to time by the proper authority therefor according to the requirements of Her Majesty in that behalf. The petition then alleged that on the 19th May, 1880, the said James Barber departed this life whereby he made the suppliant, Jacob P. Clark, to be executor of his last will and testament, and that the suppliant, John R. Barber, a son of the said James Barber, has since the death of his father, the said James Barber, continued the business of paper manufacturer carried on by his father in his life time, and that he, the said John R. Barber, at the request of and on behalf of the said Jacob P. Clark and with the assent of the Government, furnished, supplied and delivered all paper applied for, ordered or required under the last mentioned of the said two contracts. The suppliants then in the 15th and subsequent paragraphs of their petition of right alleged:

15. Shortly after the said James Barber had entered upon the performance of the said first mentioned contract and during the year 1874, and from time to time during each of the ten years thereafter covered by the said two contracts hereinbefore particularly mentioned, large quantities of paper required during said years for the purposes aforesaid were ordered and obtained from certain individuals and companies other than the said James Barber or your suppliants, without the knowledge or consent of the said James Barber or your suppliants, and without any public notice of tenders therefor and without any order in council authorizing the same and contrary to and in violation of the act respecting the office of Queen's Printer and the public printing, 32 & 33 Vic. ch. 7, to the great and serious loss of the said James Barber and your suppliants.

16. The said James Barber, and your suppliants after his decease, were at all times ready and willing to furnish, supply and deliver the paper supplied, ordered and obtained as in the last preceding paragraph mentioned.

17. That profits would have been made and realized by the said James Barber and your suppliants, had they been allowed to furnish, supply and deliver the last mentioned paper.

The petition of right then sets forth particulars of some of the paper alleged to have been purchased from other persons which the suppliants claimed should, under the contracts, have been obtained from the said James Barber in his life time and from the suppliants since his decease, and by the 19th paragraph of the petition of right the suppliants

submit that the paper aforesaid should have been ordered from the said James Barber in his life time or from your suppliant Jacob P. Clark, as his executor, after his death, and that by reason of the default in ordering the same the said James Barber in his life time and your suppliant Jacob P. Clark as his executor after his decease, and your suppliant, John R. Barber, as the beneficiary under the said will, have been unlawfully and unjustly deprived of the profits which would have been derived from furnishing and supplying said paper.

And thereupon they prayed for relief.

To this petition of right the Attorney-General for the Dominion of Canada, by way of defence thereto, in the 4th and 5th paragraphs of his statement of defence alleges as follows:

4th. Her Majesty's Attorney-General denies that Her Majesty committed any breach of the contracts or agreements for supplying and delivering of the paper for the printing of the Canada Gazette, statutes and orders in council and for pamphlets and other work required by the several departments of the Government of Canada, as in the 15th paragraph of the petition of right is alleged. And Her Majesty's Attorney-General denies that large quantities of paper required during the said period of the said contracts for the purposes aforesaid were ordered and obtained from certain individuals and companies other than the said James Barber and the suppliants, without the knowledge and consent of the said James Barber or the suppliants and without any public notice of tender therefor, and Her Majesty's Attorney-General states that no persons or companies other than the said James Barber and the suppliants did supply, furnish and deliver any portion of the said paper which by the tenders set out in the first and seventh paragraphs of the said petition and the contracts set out in the fourth and ninth paragraphs of the said petition were to be furnished, supplied and delivered by the said James Barber and the suppliants.

5th. Her Majesty's Attorney-General alleges, and the fact is, that the said James Barber and the suppliants were not under the said tenders

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and contracts in the said petition of right set out, entitled to supply, deliver and furnish all the paper required for the printing of the Canada Gazette, the statutes and the orders in council and for pamphlets and other work required by the several departments of the Government of Canada, and it is denied that the said James Barber, in his life time, and the suppliants have been unlawfully and unjustly deprived of the profits which would have been derived from furnishing and supplying the said paper by reason of the said paper having been furnished, supplied and delivered by persons and companies other than the said James Barber and the suppliants.

Before it could be adjudged by the court that any breach of the contracts set out in the petition of right had been committed by the Dominion Government, and before, therefore, any judgment could be rendered against Her Majesty upon the issues joined in these pleadings, it is obvious that the issue upon matters of fact must be first determined by evidence in the cause, namely, whether any, and if any what, paper had been, and under what circumstances, purchased by the Government from other persons than the said James Barber and the suppliants during the periods mentioned. Upon this fact being ascertained then would arise the question of law raised, namely, whether such paper was paper the procuring of which from other persons than the said James Barber and the suppliants constituted a breach by the Government of the contracts set out in the petition of right. Now, before any evidence was taken in the cause the order of the 14th November, 1887, was made by the court, whereby it was ordered:

That it be referred to Robert Cassels and Brown Chamberlin to ascertain and report to this court, giving items and particulars, what, if any, paper for the printing and publishing of the Canada Gazette, of the statutes of Canada and of such official, departmental and other reports, forms, documents and other papers as have been required by the several Departments of the Government of Canada were, during the periods embraced by the contracts in the fourth and ninth paragraphs of the petition of right herein set forth, furnished or supplied by any person or persons, corporation or corporations other than James Barber in

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the said contracts mentioned, or the above named suppliants—to ascertain and report what profit, if any, was lost to the said James Barber, in his life time, or to the said suppliants since his decease, by not being permitted or allowed to furnish or supply the said paper, if any, furnished or supplied by any person or persons, corporation or corporations, other than said James Barber or said suppliants; and to report any special circumstances that may be deemed necessary. And that the further consideration of this cause and the costs do stand over until the referees shall have made their report with liberty to either party to apply.

Whatever may have been intended by this order we can judge of it only by the terms in which it is expressed, and to my mind it is very clear that it contains no adjudication whatever upon any of the issues raised by the pleadings in the cause. It treats as a matter of fact, yet unascertained, whether any, and if any what, quantity of paper and of what value had been, during the periods named, procured by the Dominion Government from any person or persons other than James Barber and the suppliants. Until that matter of fact should be ascertained no judgment could be rendered in the cause, and if it should be found in the negative judgment must have been rendered for the respondent in the petition of right dismissing the petition. The reference, therefore, would seem to have been made under section 26 of 50 & 51 Vic. ch. 16, for the purpose of enabling the referees to take the evidence in the cause with a view to their reporting to the court their finding upon the matters of fact upon which the suppliants rested their claim to have a judgment rendered in their favour, and as that was a point necessary to be determined preliminary to the rendering of judgment upon the issues joined the respondent in the petition of right had no occasion to appeal against an order which adjudicated nothing to the respondent's prejudice in the suit.

The referees having proceeded to take evidence under that order the suppliants tendered certain evi-

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dence to the reception of which the now appellant objected upon the contention that it did not relate to paper which was covered by the contracts. In this view the referees concurred and they made their certificate to that effect. Upon the matter being brought before the court an order was made by the court whereby it was ordered that the said certificate be remitted back to the referees to report to the court their reasons for their ruling and any evidence on which the same was founded or which might tend to explain the contract. With this order the referees complied and thereupon the order of the 20th January, 1890, was made by the court whereby the certificate of the referees was set aside and it was ordered by the court:

> That the said referees do, upon the reference made to them by the order of this honourable court on the 14th day of November, 1887, admit without any such limitation as is in such certificate mentioned all evidence that may be tendered by the suppliants of the purchase by the crown, from parties other than the contractor, of paper for the printing and publishing of such official, departmental and other reports, forms, documents and other papers as have been required by the several departments of the Government of Canada during the period embraced by the contracts in the fourth and ninth paragraphs of the petition of right, and that the costs of and incidental to the said appeal be costs in the cause to the successful party.

Now, this order does not, any more than did that of the 14th November, 1887, adjudicate anything upon any matter upon which issue was joined between the parties in the suit. It did not in its terms conclude or decide anything as to the liability of the respondent to the suppliant in respect of the matters in issue. It simply referred back the matter to the referees under the order of the 14th November, 1887, with directions to them to take all the evidence which should be tendered by the suppliants under that order. It decided nothing whatever as to what the result should be upon

the evidence being taken and the report thereof being made to the court. That nothing further was intended to be decided by the order of the 20th January, 1890, appears from the fact that the costs of it were reserved as costs in the cause and to the successful party therein, a point which could only be determined when, upon all the evidence being taken and considered by the court, the whole question as to the liability of the respondent upon the law and the evidence bearing upon the issues raised should be decided by the court.

The referees accordingly proceeded under this order and took all the evidence tendered by the suppliants and made their report as directed by the order of the 14th November, 1887. Upon this report coming up before the court the judgment now appealed from was rendered and thereby the court ordered and adjudged that the suppliants are entitled to recover from the defendant the sum of $37,990.77 with costs. This is the first and only judgment in the suit in respect of the matters put in issue by the pleadings or which adjudges the now appellant to be liable in any respect to the suppliants; and as it is the only decision in the suit which fixes the now appellant with any liability to the suppliants it is the only decision in the suit the now appellant had any occasion to appeal against.

The provision of law as to appeals from judgments of the Exchequer Court is contained in sections 51 and 53 of 50 & 51 Vic. ch. 16, namely:

> Any party to a suit in the Exchequer Court who is dissatisfied with the decision therein may appeal, etc.

Now, while I am of opinion that these words "the decision therein" can mean nothing but the final judgment therein, I am also of opinion that, however that may be, as there is no decision in the suit here which adjudicates upon and decides the matters put in issue by the pleadings in the suit other than the judgment

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and decision embodied in the order of 16th December, 1891, upon an appeal from that judgment all the matters which were put in issue by the pleadings in the cause are necessarily open.

It may be that these matters are concluded by authority; whether they are or are not is one of the questions to be raised by the appeal and it cannot be determined until the appeal is heard upon the merits.

PATTERSON J. concurred in the judgment of Mr. Justice Gwynne.

Appeal dismissed with costs unless the crown signified its intention to proceed with it as restricted.

Solicitors for appellant: *O'Connor, Hogg & Balderson.*

Solicitors for respondents: *MacLaren, MacDonald, Merritt & Shepley.*

WILLIAM HUSON (PLAINTIFF)... .....APPELLANT; 1892

*Nov. 7, 8.

AND

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*Feb. 20.

THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF SOUTH NORWICH (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—Submission to ratepayers—Compliance with statute—Imperative or directory provisions—Authority to quash.

The Ontario Municipal Act (R.S.O. [1887] c. 184) requires, by sec. 293, that before the final passing of a by-law requiring the assent of the ratepayers a copy thereof shall be published in a public newspaper either within the municipality or in the county town or published in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich, in the county of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich which does touch said boundaries.

Held, affirming the decision of the Court of Appeal, that as the village of Norwich was geographically within the adjoining municipality the statute was sufficiently complied with by the said publication.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Galt C. J., who quashed a by-law of the township of South Norwich as being *ultra vires*.

The by-law in question was passed under the Ontario act 53 Vic. ch. 56 known as the Local Option Act, sec. 18 of which enacts that:

2. "The council of every township, city, town and incorporated village, may pass by-laws for prohibiting the sale by retail of spirituous, fermented or other manu-

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

(1) 19 Ont. App. R. 343.

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factured liquors, in any tavern, inn or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment: Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the municipal act; Provided, further, that nothing in this section contained shall be construed into an exercise of jurisdiction by the legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal."

The provision of the Municipal Act R.S.O. (1887) ch. 184, relating to the passing of by-laws by a municipality is sec. 293 which provides that:

"The council shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper, published either within the municipality, or in the county town, or in a public newspaper published in an adjoining local municipality."

The by-law in question was published in the Norwich "Gazette," a newspaper published in the village of Norwich, an incorporated village which is not within the municipality of South Norwich but in the county of Oxford which does not adjoin South Norwich, there being another municipality intervening. The plaintiff Huson moved to quash the by-law on the grounds that it was really a prohibitory measure which only the Dominion Parliament could enact and that it was void for irregularity in not being published as the act requires. The motion was heard before Galt C. J. who quashed the by-law on the first ground, namely, that it was *ultra vires*. The Court of Appeal reversed that judgment holding the by-law *intra vires* and refusing

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to give effect to the technical objection. The plaintiff appealed to the Supreme Court.

The court directed the question as to the validity of the by-law in view of the manner in which it was published to be first argued and the constitutional question to stand over until the other was decided.

Robinson Q.C. and *Du Vernet* for the appellant. The statute is imperative in requiring publication in a certain manner which must be strictly followed. *Simpson* v. *Corporation of Lincoln* (1); *Fenton* v. *Corporation of Simcoe* (2); *Gibson* v. *United Counties of Huron and Bruce* (3); *In re Armstrong* and *City of Toronto* (4); *Canada Atlantic Railway Co.* v. *City of Ottawa* (5).

McLaren Q.C. and *Titus* for the respondents. The non-publication under the act has not been affirmatively shown and cannot be urged. *In re Lake* and *Prince Edward* (6); *In re White* and *Corporation of Sandwich East* (7); *Lafferty* v. *Stock* (8).

It is in the discretion of the court to quash or not and they will not quash for irregularity if it appears that all the votes were polled and the object of publication secured. See *In re Revell* and *Corporation of Oxford* (9); *In re Gallerno* and *Township of Rochester* (10); *Boulton* and *Town Council of Peterboro'* (11).

The court only proceeds under the statutes and does not exercise a common law power. *Re Boulton* and *Peterboro'* (11); *Sutherland* v. *Municipal Council of East Nissouri* (12).

Robinson Q.C. in reply. That the common law power can still be exercised in quashing by-laws, see *Hill* v. *Walsingham* (13).

(1) 13 U. C. C. P. 48.
(2) 10 O.R. 27.
(3) 20 U.C.Q.B. 111.
(4) 17 O.R. 766.
(5) 12 Can. S.C.R. 365.
(6) 26 U. C. C. P. 173.
(7) 1 O. R. 530.
(8) 3 U. C. C. P. 9.
(9) 42 U. C. Q. B. 337.
(10) 46 U. C. Q. B. 279.
(11) 16 U. C. Q. B. 380.
(12) 10 U. C. Q. B. 626.
(13) 9 U. C. Q. B. 310.

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The judgment of the court was delivered by:

THE CHIEF JUSTICE.—Upon the point as to the validity of the by-law, which was fully argued and upon which judgment was reserved, I am of opinion that the respondents are entitled to our judgment. The publication of the advertisement in the Norwich "Gazette," a newspaper published in the village of Norwich, was in my opinion, as the Court of Appeal have held, a sufficient compliance with the requirements of the statute. The enactment requiring publication is as follows (1):—

> The Council shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper either within the municipality or in the county town, or in a public newspaper published in an adjoining local municipality.

I am of opinion that we may safely hold the village of Norwich to be in an adjoining local municipality. It is what may be called an *enclave* in the township municipality of North Norwich, which latter township is in the strictest sense within the municipality adjoining that of South Norwich. Now, what the legislature had in view in requiring publication in a newspaper published in an adjoining municipality was to ensure the insertion of the advertisement in a paper published in the near neighbourhood of the municipality whose ratepayers were to be called on to vote, a purpose with which the contiguity of municipal jurisdictions had nothing whatever to do, and inasmuch as in a geographical sense the Norwich "Gazette" was published within the limits of the adjoining township of North Norwich, I think the statute was sufficiently complied with.

The word "adjoining" although in some criminal cases it has been very strictly construed, has yet in

(1) R. S. O., cap. 184, s. 293.

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other cases received a wider and more liberal construction.

I refer to the cases of *London & South Western Railway Co.* v. *Blackmore* (1); *Hobbs* v. *Midland Ry. Co.* (2); *Coventry* v. *London, Brighton and South Coast Railway Co.* (3); *Hooper* v. *Bourne* (4); *Harrison* v. *Good* (5), and *Stroud's Judicial Dict.* (6).

The objection to the by-law must, therefore, be overruled, and the argument of the appeal must proceed upon the constitutional question which the appellants raised.

Objections to validity of by-law over-ruled and argument ordered to proceed upon the constitutional question.

Solicitors for appellant: *Du Vernet & Jones.*

Solicitors for respondents: *O'Donohoe, Titus & Co.*

(1) L. R. 4 H. L. 610.
(2) 51 L. J. Ch. 324.
(3) L. R. 5 Eq. 104.
(4) 5 App. Cas. 1.
(5) L. R. 11 Eq. 338.
(6) Vo. "Adjoining."

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*Nov. 14.
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*Feb. 20.

A. WELLESLEY PETERS (AGENT FOR THE STANDARD LIFE ASSURANCE COMPANY) ..... APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assessment and taxes—Insurance co.—Net profits—Reserve fund—Deposit with Government for protection of policy-holders.

The amount deposited by an insurance company with the Dominion Government for protection of policy-holders may properly be deducted from the gross income of the company in ascertaining the net profits liable to taxation under the assessment law of the city of St. John (53 V. c. 27 s. 125 [N.B.])

The act requires the agent or manager of such company to furnish the assessors each year with a statement under oath, in a prescribed form, showing the gross income for the year preceding and the amount of certain specified deductions, the difference to be the net income, and if such statement is not furnished the assessors may assess according to their best judgment. W. furnished a statement in which, in place of the deductions of one class specified, he inserted, "an amount, equal to 75 per cent of the premiums received, as deposited with the Dominion Government for security to policy-holders." The assessors disregarded this statement and assessed the company in an amount fixed by themselves, and on application for *certiorari* to quash such assessment it was shown by affidavit that the deposit of the company was equal to about 75 per cent of the premiums.

Held, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that the agent was justified in departing from the form prescribed to show the true state of the company's business; that the deposit was properly deducted; and that the assessors had no right to disregard the statement and arbitrarily assess the company as they saw fit.

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

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APPEAL from a decision of the Supreme Court of New Brunswick refusing a writ of *certiorari* to quash the assessment upon the net profits of the Standard Life Assurance Company.

The appellant is agent at the city of St. John for the said company, and was assessed as such under 52 Vic. c. 27, s. 126, upon the net profits made by him as such agent during the year 1891. By the act the agent was required to furnish the assessors with a statement, in a prescribed form, showing the total receipts and specified deductions therefrom for payment of reinsurance, matured claims, &c., the difference to be the net profits. The appellant furnished a statement, in which he substituted for payment of matured claims an amount equal to 75 per cent of the premiums received, as deposited with the Dominion Government as security to policy-holders, as required by the Insurance Act (1). The assessors classed this amount with the net profits and assessed the appellant accordingly, and a writ of *certiorari* to quash the assessment was refused on the authority of *Ex parte Fairweather* when the same question was before the court and decided in favour of the assessment.

The present appeal is from the refusal to grant a *certiorari*, and the only question to be decided is: Is the amount deposited by an insurance company for the protection of policy-holders, as required by the Insurance Act, a part of the profits of the company?

Weldon Q.C., and *Bruce* Q.C., for the appellant. As to what are to be considered net profits see *Caine* v. *Horsfall* (2).

The latest case is *New York Life Assurance Co.* v. *Styles* (3), in which the case relied upon by the re-

(1) R.S.C. c. 124.

(2) 1 Ex. 519.

(3) 14 App. Cas. 381.

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spondent, *Last* v. *London Assurance Co.* (1), is distinguished. See also *Gresham Life Assurance Soc.* v. *Styles* (2); *Kingston* v. *Canada Life* (3).

Jack Q.C. for the respondent. The agent in his statement departed so widely from the prescribed form as to entitle the assessors to disregard it. See *Ex parte Stanford* (4).

The form shows that the deductions were to consist only of moneys paid out by the company over which they entirely ceased to have any control.

As to whether or not this money is net profits see *Last* v. *London Assurance Co.* (1); *Russell* v. *Town and County Bank* (5); *Forder* v. *Handyside* (6); *Imperial Continental Gas Association* v. *Nicholson* (7); *Coltness Iron Co.* v. *Black* (8).

Bruce Q.C. in reply. As to variation from form see *Thomas* v. *Kelly* (9); *Kelly* v. *Kellond* (10); C. S. N. B. c. 118 s. 1 s.s. 16.

THE CHIEF JUSTICE.—I have read the judgment prepared by Mr. Justice Patterson, and for the reasons stated by him I am of the opinion that the appeal should be allowed.

FOURNIER J.—I would dismiss this appeal. I think the assessors took the proper course.

TASCHEREAU J.—I also dissent, and adopt the reasoning of Mr. Justice King in the court below.

GWYNNE J.—The question raised by this appeal involves the construction of a statute of the Province of New Brnswick, 52 Vic. ch. 27.

(1) 12 Q.B.D. 389; 14 Q.B.D. 239; 10 App. Cas. 438.
(2) 25 Q.B.D. 351; [1892] A.C. 309.
(3) 19 O.R. 453.
(4) 17 Q.B.D. 259.
(5) 13 App. Cas. 418.
(6) 1 Ex. D. 233.
(7) 37 L.T.N.S. 717.
(8) 6 App. Cas. 315.
(9) 13 App. Cas. 506.
(10) 20 Q.B.D. 569.

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Reading it as applying to Life Insurance Companies, with which alone we are at present concerned, it enacts as follows :—

Sec. 126. The agent or manager of any Life or Accident Insurance Company, whether incorporated or not, doing business abroad or out of the limits of this Province, who shall carry on any such insurance business within the city of St. John or who shall have an office or place of business in the city of St. John for any such company or corporation, shall be rated and assessed upon the amount of *net profits* made by him as such agent or manager from premiums received on all insurances effected by him at the office or agency.

The subjects thus proposed to be assessed are the *net profits* realized by the company from the business transacted at their St. John office. The Standard Life Insurance Company, the one affected, is a company established in Scotland, having its head office in Edinburgh, and its chief office for the Dominion of Canada in Montreal. By the Canada Insurance Act, ch. 124, R.S.C., the company was obliged, as are all Life Insurance Companies formed or incorporated out of Canada and doing business in Canada, to take out a license from the Dominion Government to carry on such business, renewable from year to year, for which upon its first being issued the company was required by the statute to deposit and did deposit with the Government the sum of $100,000 in securities of the character mentioned in the statute, by way of security to the holders of policies issued in Canada. It is enacted by the statute that such securities are to be estimated at their market value at the time of their being deposited, and that if any should fall below such market value the company may be required to make a further deposit so that the market value of all the securities shall always be equal to the sum of $100,000.

The statute further enacts that every such company shall make annual statements under the oath of its chief agent of the condition of its Canada business in

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forms to be furnished to the company by a Government officer called the Superintendent of Insurances, and that the company shall also make annual statements in a separate schedule of its general business in such form as such company is required by law to furnish to the Government of the country in which its head office is. Towards defraying the expenses of the office of the superintendent the company is further required to pay annually a sum in proportion to the gross premiums received by it in Canada during the previous year, for the purpose of realizing from all the companies together a sum not exceeding $8,000. The statute then declares that the assets within Canada of a company formed or incorporated elsewhere than within Canada shall be taken to consist of all deposits which the company has made with the Government under the provisions of the statute and of such assets as have been vested in trust for the company for the purposes of the statute in two or more persons resident in Canada, appointed by the company and approved by the Government. Then the statute provides that if it should appear from the annual statements, or from an examination by the superintendent, which he was authorized to make, of the affairs and condition of the company, that its liability to policy-holders in Canada, including matured claims and the full reserve or reinsurance value for outstanding policies after deducting any claim the company may have against such policies, exceeds its assets in Canada, including the deposit in the hands of the Government, the company shall be required to make good the deficiency. Then once in every year, or oftener in the discretion of the Government, the superintendent is required to value, or to procure to be valued under his supervision, the Canadian policies of all Life Insurance Companies licensed to transact business in Canada, and that such valuation shall be

based on the mortality table of the Institute of Actuaries of Great Britain and on a rate of interest at 4½ per cent per annum, and that if the reserve necessary to be held by the company in order to cover its liability to policy-holders in Canada, as calculated by the company, should fall materially below that as calculated on the above basis by the superintendent then the amount as calculated by the superintendent shall be substituted in the annual statements of the assets and liabilities of the company.

Now, it has been testified upon oath in the present case, and not disputed and, therefore, I take it as admitted or established as a fact, that to meet the requirements of the above Dominion statute and to create the reserve fund necessary to be held to cover the company's liability to its policy-holders in Canada 75 per cent of all the premiums received in any year upon all the policies issued in Canada is necessary to be appropriated to the creation and maintenance of such reserve fund. This being so it is obvious that no part of the premiums so required to be appropriated to the maintenance of such reserve fund can constitute net profits of the company and there is nothing to the contrary in *Last* v. *London Assurance Corporation* (1), or in any of the cases cited. We must, therefore, as it appears to me, proceed upon this basis as an incontrovertible proposition and as a first principle to be adopted in any calculation made for the purposes of the New Brunswick statute under consideration of the net profits, if there be any realized by the company from the premiums received at its St. John office in any year, that such 75 per cent of such premiums must of necessity be treated as appropriated and set apart for such reserve fund before the amount under the name of net profits the New Brunswick act subjects to taxation can by possibility be arrived at.

(1) 10 App. Cas. 438.

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To assist the assessors in arriving at this amount so made liable to assessment the statute enacts that:—

The better to enable the assessors to rate such company under this section the agent or manager shall, on or before the first day of May in each year, furnish to the assessors a true and correct statement in writing under oath in form in the schedule E as appended to this Act setting forth the whole amount of gross income and the particulars of the deductions and losses claimed therefrom and showing the ratable *net profits* made by such company within said city during the fiscal year last preceding.

The form given under schedule E is as follows:—

Whole amount of gross income received in cash for premiums for life or accident policies (including all life, short term endowment or tontine) issued or renewed during the fiscal year of the company next preceding the first day of April at the agency of the company at the city of St. John.....

Amount of bills and notes taken for premiums for life or accident policies (including all life, short term endowment or tontine) issued or renewed during the fiscal year preceding the first day of April at the agency in St. John.....

DEDUCTIONS.

Reinsurance, rebate, return premiums, surrender values and bonuses actually paid during the fiscal year preceding the first day of April, on all life or accident policies issued at the agency of the company in the city of St. John.....

Amount paid during the fiscal year preceding the first day of April on matured claims whether by death or otherwise (deducting reinsurance if any), on life and accident policies issued at the agency of the company in the city of St. John.....

Agency commission on net premiums received during the fiscal year preceding the first day of April, at the agency of the company in the city of St. John.....

Fees of medical officers, salaries of canvassing agents and travelling expenses actually paid during the fiscal year preceding the first day of April, on business connected with the agency of the company in the city of St. John.....

Office expenses of the agency at the city of St. John, for the fiscal year preceding the first day of April.....

Amount of net profits.....

The agent of the company at St. John made a statement in the above form with an additional item inserted by him for appropriation of premiums for reserve fund for the protection of policy-holders.

For total income received from premiums during the year he inserted the total sum of $20,183.23.

Opposite the first of the above items of deductions, without saying how much for any and which of the particular subjects therein mentioned, he inserted the sum of $11,606.79.

Opposite the second item he inserted nothing but substituted therefor underneath the item the additional item of—

75 per cent of premiums deposited with the Government, for the protection of policy-holders..... $15,146.57

Opposite the third of the above items he inserted the sum of..... .....$1,171.23

Opposite the fourth of the above items he inserted the sum of..... 1,009.16

And opposite the words "amount of net profits," he inserted "none."

This statement he verified under oath, in form in schedule E as required by the statute, to be full, true and correct to the best of his knowledge and belief.

This statement under oath made by the agent setting forth the whole amount of gross income received by him for premiums within the year and the particulars of deductions therefrom claimed by the company was required, as appears by the express terms of the statute, for the purpose of enabling the assessors to discharge their duty of arriving as accurately as possible at the true amount of *net profits*, if any, realized within the year from the premiums received at the St. John office. The statute further required the agent to answer under oath such inquiries as the assessors might deem it to be necessary to make to him relating to the

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said statement made by him, for the like purpose of assisting them in making their assessment for the just and true amount of such *net profits*. They did not avail themselves of this power of making any inquiries of the agent relating to his statement, but having before them his statement upon oath they utterly disregarded the item inserted by him for 75 per cent of the premiums as an appropriation for the maintenance of the reserve fund and assessed the company, through their agent, for the sum of $6,300 as the amount of *net profits* realized by the company from the premiums received at their St. John office during the fiscal year terminating the 1st April, 1891.

How precisely they arrived at this amount we are not informed further than that they expunged and disregarded altogether the item of 75 per cent of the premiums for the reserve fund for the protection of policy-holders; and, in as far as we can see, what they did was to add together the three items of $11,606.79 and $1,171.23 and $1,009.16 amounting to the sum of $13,787.18 which they deducted from the sum of $20,183.23 whereby they found a balance of $6,396.05 from which they arbitrarily struck off the odd $96.05 and in this manner they arrived at the sum of $6,300 which they treated as *net profits* realized by the company out of their St. John business and as such rated them therefor through their agent.

Now the material questions which arise are:—

1st. Was it or was it not competent for the agent of the company, in the statement made by him for the purpose of setting forth the amount of deductions claimed by the company to be made from the total amount received during the year at their St. John office, and of thus showing the amount, if any there was, of "*net profits* made by the company within said city during the fiscal year last preceding" (in the words

of the statute), to insert the claim which he did for the proportion of premiums as absolutely necessary to be appropriated to the purpose of maintaining in perfect efficiency, as required by the Dominion Statute, the reserve fund to be held and maintained by the company to cover its liability to policy-holders in Canada?

2nd. Was it proper or competent for the assessors, when estimating the net profits made by the company during the year at their St. John office, to expunge wholly from their consideration an item so necessary to be taken into account for the purpose of arriving, with any degree of accuracy, at the true amount of *net profits*, if any, made at said office during the year?

In my opinion the former of these questions must be answered in the affirmative and the latter in the negative.

The form in schedule E must, I think, be regarded as intended to be merely a specimen or sample of the mode in which the agent should set forth the deductions claimed by the company, and as best calculated to show with accuracy whether in truth any *net profits* were made at this office in the fiscal year preceding, and the amount, if any, of such net profits. If the items in respect of which the deductions were provided for in the form given in the schedule E did not comprehend an item in respect of which the company claimed a deduction, and which was necessary to be considered in an inquiry whether there were or not any net profits made, and if any to what amount, such item, as it appears, must of necessity be supplied in order to enable the assessors to discharge their duty of arriving at the truth in such inquiry and to prevent their falling into manifest error.

So if there was any item mentioned in the form in schedule E, in respect of which money had been paid by the company, but which should not properly be, and

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for that reason was not claimed by the company to be, deducted from the annual premiums received, upon an inquiry whether there were any, and if any, what amount of net profits realized within the year from such premiums, the statute cannot, I think, be construed as not permitting the agent of the company so to frame his statement as to omit any claim in respect of such item, and to substitute for such item another not mentioned in the form in schedule E, in respect of which the company did make a claim and which was absolutely necessary to be taken into consideration upon the inquiry into the amount of net profits, if any were made within the year from the premiums received. What the agent of the company did was to decline to make any claim for "amount paid during the fiscal year on matured claims," and to insert, instead of a claim upon that item, a claim of 75 per cent of the premiums received as a necessary appropriation to a reserve fund for the protection of policy-holders. For this action he had, in my opinion, a most sufficient reason, even assuming that a large sum may have been paid within the year on matured claims, namely, that for the purpose of determining with truth whether any *net profits* were made within the year from the premiums received by him within the year the company did not claim, nor was it proper that they should claim, any deduction from such premiums in respect of payments made by the company for matured claims, because matured claims were payable and paid out of the reserve fund then already realized from the premiums received in previous years and the investment thereof; but, in lieu of such item of deduction, the agent claimed for the company, as a proper deduction, the proportion of the annual premiums absolutely necessary to be appropriated for the purpose of maintaining in efficiency that reserve fund for the payment of claims, as they

should mature. This alteration in, and deviation from, the form given in schedule E was calculated to assist the assessors in arriving at the truth and to prevent their falling into error upon their inquiry as to the *net profits* which they had in hand, instead of to mislead them; and in chap. 118 of the Revised Statutes of New Brunswick it is expressly enacted that, "forms when prescribed" (in an act of the legislature), "shall admit of deviations not affecting the substance or calculated to mislead." In the light of this enactment it seems to be impossible to construe the 126th sec. of 52 Vic. c. 27 as enacting, by implication or otherwise, that no claim of deduction, however calculated and indeed necessary to enable the assessors to arrive with accuracy at the true amount of *net profits* made within the year, should be entertained or taken into consideration by the assessors unless they came under one or other of the items mentioned in the form in schedule E.

Such a construction, which would, in effect, be that a conclusion which, in point of fact, must necessarily be false shall be accepted as true, and as such be binding upon the company, cannot, in my opinion, be entertained.

It was competent for the assessors to make such inquiries as they should think necessary of the agent as to the particulars of the several items comprising the $11,606.79 set opposite to the first paragraph of deductions claimed in his statement, for the purpose of enabling them to determine whether any of them were covered by the item of 75 per cent of the annual premiums for maintenance of the reserve fund. Such inquiries would have been very reasonable and proper but none appear to have been made. As the case now stands we do not know whether or not any, and if any what, part of the above amount consisted of sums claimed in respect of each of the several subjects

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mentioned in such first paragraph, or for some only, and which of them. It would no doubt be a matter of importance for the assessors to show whether any sums claimed in respect of such items were covered by the 75 per cent deduction, or should be charged against the remaining 25 per cent of the annual premiums; for example as to "reinsurance," we do not know whether any deduction was claimed for that item. If any was claimed it would have been, I apprehend, for premiums paid by the company upon the reinsurance by them of the lives or life of some persons or person insured by some or one of the policies which had been issued by the company through their St. John office. Now it seems to be, to say the least, questionable that such reinsurance premiums should be charged against, or deemed to be covered by, the 75 per cent of premiums received every year which is appropriated to the maintenance of the reserve fund because any reinsurance effected by the company was for their own indemnity only and might prove utterly valueless to them, as in the case of the insolvency of the party issuing the reinsurance policy, and reinsurance does not in any respect diminish the responsibility of the company upon the policy issued by them to the person originally insured and cannot, therefore, relieve them from the responsibility of maintaining in efficiency the reserve fund necessary to be held in order to cover the company's liability to policy-holders. So as to the item of "rebate;" if any claim for such item was made it would be necessary to be informed as to the transaction in respect of which the loss was suffered before it could be held to be justly entitled to be compensated at the costs or prejudice of the 75 per cent for the maintenance of the reserve fund for the protection of policy-holders. As to the item of claim, if any there was, "for bonuses actually paid during the fiscal year"

there could be no pretense whatever for treating this as covered by the 75 per cent of premiums received appropriated to the reserve fund, nor indeed can there, as it appears to me, be any reason or propriety in charging anything paid on such item as a deduction at all in the inquiry as to whether there was any, and if any what, amount of *net profits* made within the year.

"Bonuses actually paid" within any year—are not in any sense a charge upon the premiums in such year. They come into existence only as *profits* already realized from the successful investment of the premiums received by the company over a series of years in excess of the fund required to meet the estimate of liabilities for policies maturing. They are payable and paid out of such realized profits and are in no sense a charge upon the annual premiums received within the year in which they are paid, and should not be deducted from the premiums received in any year upon an inquiry as to the *net profits*, if any, made in that year. They are, however, enumerated in schedule E of the statute as if they constituted an item of deduction upon such inquiry.

Upon the whole, then, the proper conclusion appears to me to be that the assessors erred in expunging from the statement of deductions claimed by the company and from their consideration the item claimed by the company as for appropriation to the maintenance of the reserve fund and that, therefore, the conclusion at which they arrived of there having been *net profits* realized to the amount of $6,300, or to any amount, was erroneous. I am of opinion, therefore, that the appeal must be allowed with costs, and that the rule in the court below be ordered to be made absolute with costs.

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PATTERSON J.—The taxation of personal property, and more particularly the taxation of income, for local municipal purposes has never struck me as defensible on any principle which is at once sound and intelligible. I have often had occasion to express this opinion. Nearly all the inequalities, some of them sufficiently glaring, incident to our system of municipal taxation are connected with the assessment of personal property; and when one looks at the gross assessment of any of our cities the amount which comes from personal property seems much out of proportion to the inequalities, the injustice and the litigation arising from making property of that description the subject of municipal assessment.

We have in the present case one phase of the ever-recurring difficulty.

The local agent or manager in St. John of a life insurance company is to be

> Rated and assessed upon the amount of net profits made by him as such agent or manager from premiums received from all insurances effected by him.

It is to use words without meaning to talk of net profits made by a local agent from premiums received from insurances effected by him. The agent makes no such profits.

The agent is to furnish a statement to the assessors setting out certain particulars. He is to specify the amount of cash and notes received for premiums during the year, and is to make deductions for outlays according to a form prescribed by the statute.

Now I could understand a law which said that the gross amount received for premiums should be taxable as the personal property of the company or the agent. Such an enactment would be open to obvious objections but it would be intelligible.

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I could also understand a declaration that the gross amount of premiums, less certain specified deductions, should be the taxable amount. That would be an arbitrary mode of imposing the burden but it would also be intelligible. That is what the respondents in effect contend has been done here, and it is the view acted on by the court below.

If the enactment had been simply to the effect of what I have stated it might appear arbitrary and open to objections more proper for consideration by the legislature than by the court, but being a plain enactment there would be no choice as to our duty to enforce it.

But the statute does not profess to fix, arbitrarily, the balance of the items it specifies as the figure at which the net profits are to be assessed. It professes to tax only net profits, and we must read the law which imposes a tax with reasonable strictness.

My brother Gwynne has discussed the question of the deduction of 75 per cent from the premiums received and I need not follow or repeat that discussion. I do not think that by making that deduction, as made by the agent in his return to the assessors, the statement becomes a true profit and loss account, nor do I think that such an account could be made without going farther afield than this statute contemplates, and perhaps farther than the local legislation could demand. Still, the 75 per cent having to be set apart before profits can be declared by the company as payable to its shareholders it is proper to bring it into the account.

All that we have at present to decide is that the agent is not necessarily confined to the items detailed in the schedule but may properly include in his return any receipts or outlays which bear on the question of what are net profits of his agency.

We must give effect to the expressed object of the statute—the governing object—which is to tax net

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profits only, and not an amount arbitrarily ascertained by the manipulation of the items specified in the schedule form. If the intention should be to fix the amount by that line and rule method the legislature can say so and drop or modify the reference to net profits.

The result cannot be considered satisfactory or quite in accord with one's ideas of logic and precision, but it is an outcome of the attempt, which has always seemed to me to be a hopeless attempt, to frame a symmetrical system of local municipal assessment which includes as subjects for taxation intangible personal property and incomes.

I agree that we should allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Weldon & McLean.*

Solicitor for respondent: *I. Allan Jack.*

HENRY P. TIMMERMAN.....APPELLANT; 1892

AND *Nov. 14, 15.

THE CITY OF ST. JOHN.....RESPONDENT. 1893

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Feb. 20.

Assessment and taxes—Tax on corporation—Railway companies—Statutory form—Departure from—52 V. c. 27 s. 125 (N.B.)

By 52 V. c. 27 s. 125 (N.B.) the agent or manager of any joint stock company or corporation established out of the limits of the province who has an office in the city of St. John for such company or corporation may be assessed upon the gross income received for his principals with certain specified deductions therefrom, and to enable the assessors to rate such company or corporation the agent or manager is required, on May 1st of each year, to furnish them with a statement under oath in a form prescribed by the act showing such gross income for the year preceding and the details of the deductions; in the event of neglect to furnish said statement the assessors may rate the agent or manager according to their best judgment and there shall be no appeal from such rate.

The general supt. of the Atlantic division of the C. P. R. has an office for the company in St. John and was furnished by the assessors with a printed form to be filled in of the statement required by the act; the form required him to state the gross and total income received for his company during the preceding year as to which he stated that no such income had been received, and he erased the clause "this amount has not been reduced or offset by any losses" etc; the other items were not filled in. This was handed to the assessors as the statement required and they treated it as neglect to furnish any statement and rated the supt. on a large amount as income received. The Supreme Court of New Brunswick refused to quash the assessment on *certiorari*.

Held, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that it was sufficiently shown that the company had no income from its business in St. John liable to assessment;

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

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that the supt. was justified in departing from the prescribed form in order to show the true state of the company's business; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the supt. in any sum they chose without making inquiry into the business of the company as the statute authorizes.

Held, further, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against over-valuation under C. S. N. B. c. 100 s. 60 and not to an appeal against the right to assess at all.

Held, per Gwynne J., that s. 125 of 52 V. c. 27 does not apply to railway companies.

APPEAL from a decision of the Supreme Court of New Brunswick discharging a rule *nisi* for a *certiorari* to quash an assessment on the appellant Timmerman as general supt. of the Atlantic division of the C. P. R.

The facts necessary for a proper understanding of the case are sufficiently set out in the above head-note and fully stated in the following judgments.

Weldon Q.C. for the appellants. By 33 Vic. ch. 46 (N.B.) the road in New Brunswick now leased to appellants is exempt from taxation and that act is not repealed. *Thorpe* v. *Adams* (1); *Taylor* v. *Oldham* (2).

The appellants are not brought within the letter of the law. *Partington* v. *Attorney General* (3).

Jack Q.C. for the respondent.

THE CHIEF JUSTICE.—I have read the judgment of my brother Gwynne and for the reason first assigned by him, namely, that the assessors acted illegally, I am of opinion that the appeal should be allowed; on the second point, as to whether or not the act applies to railway companies, I express no opinion.

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

(1) L. R. 6 C. P. 125. (2) 4 Ch. D. 395.
(3) L. R. 4 H. L. 100.

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GWYNNE J.—The questions raised by this appeal are the construction of the 125th section of the New Brunswick statute 52 Vic. ch. 27 and its applicability to the Canadian Pacific Railway Company. The section enacts that:

Sec. 125.—The agent or manager of any joint stock company or corporation established abroad or out of the limits of this province, or of any person or persons, whether incorporated or not, doing business abroad or out of the limits of this province who shall carry on business within the city of St. John for, or who shall have an office or place of business in the city of St. John for, any such company, corporation, person or persons, shall be rated and assessed in respect of real estate owned by any such company, corporation, person or persons, in like manner as any inhabitant *and in addition thereto* shall be rated and assessed upon the gross and total income received for such company, person or persons, deducting only therefrom the reasonable costs of *management of the business*, such as office rent, salaries and wages paid, and contingent expenses of such agent or manager, and the whole amount of income after such reasonable deduction shall be ratable and shall be capitalized for assessment as personal estate in the manner following that is to say: Every dollar of such ratable income shall be held to represent and shall be valued at five dollars of capital, and the amount so capitalized shall be assessed at its full value as personal estate of the agent or manager for the purposes of assessment; and the better to enable the assessors *to rate such company* or corporation, person or persons, the agent or manager shall, on or before the first day of May in each year, furnish to the assessors a true and correct statement in writing under oath, *setting forth the gross amount of income* and the particulars of deduction claimed therefrom for cost of management and showing the ratable amount received for such company, corporation, person or persons, during the fiscal year last preceding according to schedule B appended to this Act. In the event of any such agent or manager neglecting to furnish such statement on or before the first day of May as hereinbefore mentioned, or to answer under oath any inquiries of the assessors relating to such statement if furnished, the assessors shall proceed to rate and assess such agent or manager according to their best judgment and there shall be no appeal from such rate or assessment. For the purposes of this section the agent or manager shall be deemed to be the owner of the real estate and of the ratable income capitalized as personal estate and shall be dealt with accordingly, but he may recover from the company or corporation, person or persons he represents any assessment which he may be called upon to pay

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as aforesaid ; such assessment shall be made separately from any other assessment to which such agent or manager shall be liable. The provisions of this section shall not extend or apply to fire, marine, life, accident or other insurance companies or their agents or managers but they shall be rated as in the next following section, is provided.

The schedule *B* referred to in the above section, and inserted in appendix to the act, is as follows :—

STATEMENT of the real estate and income for taxable year 18 , of as agent or manager of .

Gross and total income and amount received for during the fiscal year of , next preceding the first day of April. This amount has not been reduced or offset by any losses, debts or other liabilities, or by charges of any kind or other deductions whatever. In case of banking institutions add, with the exception of interest paid or dues upon deposits held by.....

DEDUCTIONS.

Amount actually paid during the fiscal year preceding the first day of April for office rent of the agency of , in the city of St. John or, if the premises are owned by the company, the rental value of the part occupied for the business of the agency.....

Amount actually paid during the fiscal year preceding the first day of April for salaries of agents, clerks and other employees of the agency in the city of St. John.....

Amount actually paid during the fiscal year preceding the first day of April for light, fuel, stationery, printing and other contingent expenses (in the rotation enumerated of the agency in the city of St. John).....

Ratable income.

Real estate within the city of St. John on the first day of April, making no deduction whatever from the full and fair value, by reason of any mortgage or other liability.....

Detailed description of real estate.....

.....

.....

At the foot is inserted a form of oath to be taken, and instructions for filling the blanks in the form, opposite the figure 4 of which is the following :—

"At this point insert the word 'none' if no income, deductions or property are returnable."

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The assessors of the city handed one of these printed forms to H. P. Timmerman, the agent and superintendent of the Atlantic division of the Canadian Pacific Railway Company, for the purpose of his showing therein a statement of the ratable amount of income, if any there was, received by him for the company in the fiscal year 1891. This he did by inserting the word "no" before the words "gross and total," and the words "has been" after the word "amount" in the first line; and by drawing a line across and so erasing all after the words "first day of April," and by inserting an additional paragraph and the word "none" in the column for amount of income, if any, to indicate, as directed by the instructions at the foot of the form, that there was no income received by the agent. Opposite the items of deductions in the form he did not insert anything, and opposite the item for real estate he inserted, as directed by the instructions, the word "none," with the following explanation :—

The said company has no real estate in the city of St. John, nor any personal estate beyond office furniture ; the cars of the said company run through and into the city the same as cars of other companies.

The statement as to income, so returned, read as follows :—

No gross and total income and amount has been received for this company during the fiscal year of the company next preceding the first day of April. In St. John the income of the company is derived from its railway from Fairville to Vancouver, and no statement of income or revenue is kept in St. John beyond the returns made to the head office of the company in Montreal of moneys collected on the Atlantic division, extending from Fairville to Megantic, in Quebec.

This statement was sworn to by Mr. Timmerman as being full, true and correct according to the best of his knowledge and belief.

The statute gave authority to the assessors, in all cases coming within the contemplation of the sec. 125,

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to make any inquiries they might think necessary of every agent furnishing any statement, the better to enable them to make the assessment authorized by the section, which inquiries the agents of all companies or coporations liable to assessment were required to answer under oath. In the present case the assessors made no such inquiries of Mr. Timmerman, but treating his statement to be absolutely null by reason of the alterations made therein and its deviation from the precise letter of the form in the schedule B, they proceeded to assess the agent as in the case of neglect to furnish any statement, and what they did (as alleged in the factum of the respondent filed upon this appeal which is the only statement offered upon the subject), was to "make their assessment upon their estimate of actual profits, after deducting expenses at the city of St. John," of neither of which particulars had they before them any information whatever from which to make their estimate. In point of fact they arbitrarily, that is to say, without any apparent data to go upon, assessed the company in the name of their agent for $140,000 income for the year, which amount, if capitalized in the manner mentioned in sec. 125, would have represented, and have been equivalent to, $700,000 of personal estate of the company in the city of St. John assessable for municipal purposes.

Upon a rule to quash this assessment it has been maintained by the Supreme Court of New Brunswick upon the ground that the deviation in Mr. Timmerman's statement from the precise form given in schedule B constituted, within the meaning of section 125, "neglect to furnish" a statement as required by the section; and that, therefore, the company and their agent were deprived of all right to object to the assessment, and that the court had no jurisdiction to interfere wih it.

Mr. Justice King in his judgment expressed the opinion that the striking out of the words in the form namely—

> This amount has not been reduced or offset by any losses or other liabilities or by charges of any kind or any deductions whatever

prevented Mr. Timmerman's statement from being a statement made under the terms of the act He adds:

> If Mr. Timmerman's statement had been in all respects substantially according to the statute I am not prepared to say that it would not have been conclusive upon the assessors who chose not to require further answer upon oath respecting the statement furnished, but for want of the distinct and positive allegation that the gross income as given viz., "none" had not been reduced or brought into that state by offsets or losses or liabilities or by charges of any kind whatever, it is impossible to treat the statement that there was no gross or total income as one that binds the assessors.

Mr. Justice Palmer was of opinion that the deviations from the form given in the schedule B left the assessors no alternative but to proceed independently and to make their assessment according to the best of their judgment from which there could be no appeal, and that the court had no jurisdiction to interfere. Then as to the point that the statute, as the appellants contend, did not apply to railway companies at all, or to the Canadian Pacific Railway in particular because no part of their line is within the city of St. John, Mr. Justice King said:

> Every corporation established abroad is liable to be rated in the city of St. John if it carries on business in the city through an agent or manager or if through its agent or manager it has an office or place of business in the city. The Canadian Pacific Railway Company has an office of management in St. John and does business in the city. It does a railway and transportation business in St. John inwards and outwards for goods and passengers. It does this over the road of the St. John Bridge and Railway Company and also over the Intercolonial Railway. Its cars continually pass in, through and out of the city under its own management and control as fully as if the company owned the road.

Again he says:—

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It is true that the receipts at St. John for passengers and freight represent, in large part, compensation for services performed or to be performed outside of the province and either upon the company's road outside of the province or upon other roads; but still there is a gross income received for or earned by the company and the share apportionable to the company is readily ascertainable by the methods known to the railway companies in settlement of their traffic accounts. In the same way it may be possible to approximate to the value of the business of the Canada Pacific Railway in the province. Certain it is, however, that the provisions of sec. 125 of 53 V. ch. 27 are very inadequate to the exact determination of this. The three heads of deductions particularized in the schedule are too narrow.

Again he says:—

In *Russell* v. *Town & County Bank* (1), Lord Herschell defines the profits of a trade or business to be the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning the receipts.

Then he adds:—

This would indicate the line of inquiry, but in the case of a railway company whose line extends across the continent with connections over Canada and the United States the determination of it is a matter of difficulty, towards the solution of which the legislature has not furnished much help.

Again he says:—

In this province, by 33 Vic. ch. 46, the railway rolling stock, station houses and grounds and other property used in the running of trains of railway companies are exempt, but the actual profits derived from the running of the railway after deducting expenses are left ratable. It is in the dealing with actual profits in the case of long line of railway that it seems pretty obvious that the intervention of the legislature is needed if any uniformity is to be arrived at in local rating of income derived from the running of railways. The income derived by the Canadian Pacific Railway at St. John might (he adds) perhaps be roughly determined by first deducting from the gross or total receipts derived from its running the total amount of expenditure incurred in the earning of such receipts, and then by taking such proportion of the excess of receipts over expenditure as the gross receipts from freight and passengers at St. John bear to the gross receipts from freight and passengers over the entire line; this would

(1) 13 App. Cas. 424.

not do more than give an approximate result but exact results cannot be expected.

However, (he says) in this state of difficulty as to getting at results the legislature having enacted that every foreign corporation doing business in St. John shall be rated in a certain way, and the agent or manager of the company not having made the statement such as he was required to make, in case he made any, the assessors had to do their best to arrive at a correct result.

And after observing that counsel for the railway company withdrew any objection to the fact that in the assessment roll the amount assessed was placed under the column headed "income," instead of "personal estate," he concludes thus :—

Although the income, when capitalized, as it is styled, is to be placed in a column headed "personal estate," the rating is still in respect of income, and not of personal property. By 33 Vic. ch. 46, already alluded to, railway companies are not ratable in respect of personal property used in the running of trains. The only doubt shown is whether by this mode of taxing income it is not in effect a taxing of personal property, which by the above Act is exempt from taxation in the case of railway companies, supposing the Act 33 Vic. ch. 46 extends to the case of the Canadian Pacific Railway Company.

Mr Justice Palmer was of opinion that 33 Vic. c. 46 applied only to railway companies incorporated within the province, and so did not apply to the Canadian Pacific Railway Company, but he says that act does not exempt actual profits derived from the railway after deducting expenses. "This," he says, "would appear to be what the legislature has authorized to be taxed," and having regard to the condition of the Canadian Pacific Railway Company as proprietors of a railway of great length, extending across the continent and having connections with divers other railways extending over the United States and all Canada, he says that, in his opinion,

the just and equitable principle by which the property of such a corporation should be taxed would be by dividing it up in such a way as that each province should tax only the portion of the corporation property that was substantially used within it, and if the basis of assess-

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ment was such proportion then the proportion that the number of miles over which its cars ran within each province bore to the whole number of miles of the railway over which its cars ran, it appears to me, would be a just and equitable method of assessment, and if adopted by all the provinces through which the company's cars run, it would be assessed upon the whole value of the personal property, and no more.

Then he states what he considers to be what sec. 125 authorized to be assessed as regards the Canadian Pacific Railway Company, namely :—

The amount of money earned by the portion of the road controlled by the office and officers at St. John, from which should be deducted the cost of management.

And he adds :—

In my opinion the duty of the agent of this company was to make up the earnings of that portion of the road that was run under the management of the officers whose offices are at the city of St. John, without reference to where the money is collected, and deduct therefrom the cost of management, not of the operation but of the management, which practically would include the salary of the agent at St. John, the wages and the office expenses.

He would thus exclude all cost of the operation or working of the road and trains, that is to say, of the most material part of the expenditure necessary for the purpose of earning receipts. And he adds :

As in this case the agent has not furnished the statement according to schedule B appended to the Act there is no appeal from the rate or assessment ;

and he arrives at the conclusion that the assessors had no alternative but to do as they did and that if the company desire to escape from such a state of things—

they must take care to comply with the law by keeping a statement of the amount of money earned by that portion of the railway under the management in St. John no matter where collected and deducting therefrom the reasonable cost of the management of the business such as for office rent, salaries and wages paid and contingent expenses as such agent or manager. It may be doubtful (he says) whether the Act does not direct the assessors to assess the gross total income of the company no matter where earned but as such a construc-

tion would lead to the whole income of the company being taxed upon its property in every province through which it ran it would be so manifestly unjust that I would not like to be compelled to put such a construction upon it, and if that is the fair meaning of the words used by the legislature I am not at present prepared to give an opinion either one way or the other as to their power to make such a law.

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I have extracted thus largely from the judgment of the learned judges in the Supreme Court of New Brunswick for the purpose of showing the difficulty which the court entertained in determining what the section in question (assuming it to apply to railway companies) authorized to be assessed as the income of such companies, and of showing also the unanimity of opinion of the learned judges as to the utter inadequacy of the mode provided by the section for arriving with any degree of accuracy or justice at whatever it was as regards railway companies which, if anything, the section authorized to be assessed: and for the purpose also of showing that in this state of difficulty and doubt what the judgment of the court rests upon is, that the deviations from the form in schedule B in the statement furnished by the company's agent nullified that statement wholly and left the assessors no alternative but to act independently of it, as if none at all had been made, as they did, from whose assessment there is no redress, however monstrously extravagant the assessment may be, or whatever may have been the principle upon which it was made, although it is not suggested that they had, but on the contrary it is apparent that they had not and could not have had, any clear conception as to how they should proceed nor any data whatever to govern them in the exercise of their judgment in determining the amount for which, if any, the section authorized the company or its agent to be assessed.

I am unable to concur in this view. The New Brunswick statute for the construction of acts of the legis-

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lature and the interpretation of terms used therein, viz. ch. 118 of the Consolidated Statutes of New Brunswick, enacts that "forms" when prescribed in acts of the legislature "shall admit of deviations not affecting the substance or calculated to mislead."

Now the words in the form in schedule B which Mr. Timmerman erased, namely "this amount has not been reduced, &c., &c." plainly, as it appears to me, apply to a case in which some amount of income is inserted in the column for that purpose as having been received, and have no application, but on the contrary are meaningless and unnecessary, in a case where the statement is that no income has been received. The form points to the possibility of there being no income at all returnable as having been received for the directions at the foot of the form under the head "instructions for filling the above return" expressly direct the party making the return to insert the word "none" in the column for that purpose if there were no income or real property returnable. With this direction Mr. Timmerman complied, and his statement as made could not have failed to convey to the assessors what it was intended to convey and what it, in point of fact, expressed, namely, that there was no income or property returnable; the erasion of the words "this amount" &c., &c., when in point of fact the agent denied that any amount had been received, tended in truth to make the return conformable to the actual state of things as represented in the return and could not by possibility mislead the assessors. The deviation, therefore, from the form which was caused by the erasion was authorized by the above provision in ch. 118 of the Consolidated Statutes. It might have required explanation if the assessors had asked for any, and upon inquiries being made by them of Mr. Timmerman it might have proved to be incorrect, but that the assessors

should be at liberty because of such deviation from the form to treat the statement as an absolute nullity, and to abstain from making any inquiries of the agent in explanation of the statement, and arbitrarily to assess the company and their agent at any rate they pleased without showing upon what data they proceeded, which is what they have done, and that the party so assessed should have no remedy whatever or means of redress, however monstrous and extravagant the assessment may be, is a construction which I do not think can be put upon the statute; the provision of the section that there shall be no appeal from a rate or assessment made by the assessors "according to their best judgment" in the case of an agent of a company neglecting to furnish a statement as required by the section has relation, as it appears to me, to the appeal for over-valuation given by sec. 60 of ch. 100 of the Consolidated Statutes of New Brunswick as to rates and taxes, and does not in any respect abridge the power of the court to do justice if the assessors appear to have proceeded in an arbitrary manner without any exercise of judgment, or to have made the assessment upon a wrong principle, or upon no principle, or for an amount so extravagant under the circumstances as to shock the sense of justice, under sec. 112 and the subsequent sections of the ch. 100 upon a motion for a *certiorari* to bring up an assessment with a view to its being quashed.

When we consider that the only business carried on by the Canadian Pacific Railway Company within the city of St. John is that so much of the freight and passenger traffic, carried over its 6,000 miles of railway, as to reach their destination must necessarily pass through the city does so for the distance only of about three miles over railways over which the Canadian Pacific Railway Company has running powers, it is incon-

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ceivable that the assessors, in assessing $140,000 for a year's net income as being received from such business, equivalent to $280,000,000 net income on the whole 6,000 miles, could have proceeded upon any principle or upon any data, or in the exercise of any judgment. I am of opinion, therefore, that even if the section under consideration can be construed as applying to the Canadian Pacific Railway Company the assessment in the present case, which appears to have been made at the arbitrary will of the assessors, upon no principle whatever and without any data upon which to base their judgment, and in utter disregard, upon insufficient grounds, of the statement under oath made by the company's agent, cannot be maintained.

But the material question, namely, whether the section has any application to a railway company, still remains to be considered.

The utter inadequacy of the method provided by the statute for arriving at the net income of a railway company, for the purpose of subjecting it to assessment by a municipal corporation, affords in itself, without more, a strong argument that the legislature never could have contemplated railway companies as being within the purview of the section, and in my opinion, upon a sound construction of the statute, they are not. It may be laid down as a sound principle that the power conferred upon a municipal corporation to levy a tax upon any particular occupation, business or industry must be expressed in clear, unmistakable terms.

In the United States it is held that the general rule that the powers of municipal corporations are to be construed with strictness is peculiarly applicable to the case of taxes on occupations, industries, &c., and the authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give

authority for collecting revenue by taxes on specified occupations any exaction for that purpose will be illegal. See Cooley on taxation. (1)

Now the plain intention of the legislature in enacting the sec. 125 as to foreign corporations was, as it appears to me, to subject to municipal assessment only the net annual amount received by the agent of a foreign corporation who carries on, within the city of St. John, for the corporation, the business for the purpose of carrying on which the corporation was established, such net amount being ascertained by deducting from the gross amount received by the agent from such business so carried on by him his reasonable costs and charges attending his carrying on such business, as office rent, salaries and wages paid, and contingent expenses. The language of the section seems designed to cover the business of banking and all business of such a nature that, being carried on by the agent, is capable of being regarded as an independent business complete in itself as carried on within the city, and by deducting from the agent's gross receipts from which business the particular deductions specified will truly show the net annual amount of the receipts which is authorized to be assessed, and which when ascertained is to be assessed as the personal estate of the agent who carries on the business; but the language is wholly inappropriate to the business of a railway company. The business of the Canadian Pacific Railway Company, for example, which is carried on within the city of St. John, consists wholly of the freight and passenger traffic which is carried on the trains of the company across the fractional part of the system of the company consisting of the three miles or thereabouts of railway within the city over which the Canadian Pacific Railway Company has running powers. That traffic

(1) P. 574, *et casus ibi.*

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consists of freight and passengers conveyed, it may be, from the city of Victoria in British Columbia or from some points on the Canadian Pacific Railway between Fairville in the province of New Brunswick and Vancouver in British Columbia, or from some places in the United States with which the Canadian Pacific Railway has connections, it may be, from San Francisco, New Orleans, New York, Boston, &c., to some place or places in the province of New Brunswick, Nova Scotia or Canada east or north of St. John, or *vice versâ*, or received at St. John to be conveyed to places outside of the city and of the province of New Brunswick to places along the line of the Canadian Pacific Railway and of its connections in the United States; or received at such places for delivery in St. John. Such being the nature of the Canadian Pacific Railway business carried on within the city of St. John it would be impossible to say how much of the gross receipts of the company received within the city, or whether received within the city or at other stations along its entire line, could be attributed to the transit over the short piece of railway within the city over which the Canadian Pacific Railway Company conveys such traffic. So, likewise, the deductions specified in the section, which are limited to expenditures within the city, have no application to the nature of the business of a railway company whose operations extend over the entire continent, and the proportion of whose annual income as attributable to being realized at each particular station along the entire system of the company is incapable of being determined by the method specified in the act, or indeed by any method unless, perhaps, upon the basis of a calculation of the proportion which the distance run over in any particular municipality bears to the whole mileage of the entire undertaking from which the net income, if any there

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be, is earned. The legislature of New Brunswick, by 33 Vic. ch. 46, has exempted from taxation in the several counties in the province through which railways shall pass the railway, rolling stock, station houses, grounds and other property used in the running of trains of all railway companies in the province. That this enactment extends to the railway companies running trains in the province whether incorporated by the provincial legislature or by the Dominion Parliament, and so to the Canadian Pacific Railway Company, cannot, I think, admit of a doubt, but whether it does or not is of little importance for none of the things above exempted is professed to be affected by the sec. 125 under consideration. But the statute 35 Vic. ch. 46 also enacted that the exemption provided by the act should not extend to actual profits. Now a railway being a great commercial artery, and as such one entire indivisible undertaking, the actual profits of such an undertaking can only be ascertained by taking an account of the whole of the business carried on throughout its entire length; and for this reason it is held in the United States that although railroads may be taxed for state revenue they are not subject to coercive severance or dislocation and cannot, therefore, be a fit subject for local taxation by the separate counties through which they run (1).

The question in the present case, however, is not whether the actual profits of the Canadian Pacific Railway Company realized from its undertaking can be so severed into parts as to define what proportion can be attributed to having been realized from the three miles or thereabouts of railway within the city of St. John over which some of the traffic of the company is conveyed in such a manner as to enable the provincial legislature to subject such proportion to municipa taxation by the city, but whether the sec. 125 of 52

(1) See 3 *Bush* 648—35 Ill. 460.

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Vic. ch. 27 purports to invest the municipal council of the city of St. John with power to tax the Canadian Pacific Railway Company as for actual profits realized by it within the city of St. John from the business carried on therein, and that it does authorize an assessment of such profits is the judgment of the Supreme Court of New Brunswick as I understand it. I am of opinion, however, that it is impossible to attribute to the legislature by such language an intention to authorize for the purpose of municipal taxation a subdivision of the actual profits of the railway company, if any there were, into parts and the appropriation of one of such parts to the city of St. John as realized within the city. If that had been the intention of the legislature, assuming it to have the power, the process enacted for ascertaining the amount so realized within the city would have been appropriate to the purpose instead of being so utterly inappropriate for such a purpose as that provided by the act is. The legislature, by 33 Vic. ch. 46, has shown that it deals with railway companies in an especial manner and by name, and by that act has impliedly exempted all property of railroads from taxation except actual profit. In any legislation, therefore, intended to affect railway companies the legislature would naturally be expected to mention them, *eo nomine*, and to make such provision for attaining the purpose expressed to be contemplated by the act as would be suitable to the nature of railway business so as plainly to convey the intention of affecting the companies, and to prescribe a mode of doing so suitable to the nature of railway business and the purpose expressed in the act.

The language of sec. 125 is so utterly inappropriate to railway business that I am of opinion that the section cannot be construed as applying to railway companies and that this appeal must be allowed with costs and a rule absolute be ordered to be issued from the court below quashing the assessment with costs.

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PATTERSON J.—I concur in allowing this appeal on the grounds discussed by my brother Gwynne.

On the first ground, viz., that the assessors were not justified in treating the statement made by the appellant as a nullity and proceeding arbitrarily to fix an amount as the income of the office without data on which to form a judgment, I cannot say that I feel any doubt.

There was a statement furnished in writing and under oath. It was, according to sec. 125, to set forth the gross amount of income and the particulars of the deduction claimed therefrom for cost of management. It set forth that there was no gross income. That may have been true or it may not. The explanation added may or may not have seemed satisfactory. Take either way of it. If it was true that there was no gross income attributable to the office in St. John there was a substantial compliance with the requirements of section 125. The answer might have been the bald statement "none" according to the form, but the substance of it is the information that there was no income. The added information by the agent of his reason for saying there was no income, although moneys were passing through his hands, cannot relieve the assessors of the duty which obviously would have existed if the answer had simply been the one word "none," and if that answer had been supposed to be untrue, of making the "inquiries relating to such statement" which section 125 speaks of, and then, if that course properly resulted from their inquiries, proceeding "to rate and assess such agent according to their best judgment."

The functions of the assessors are to some extent judicial, and the statute does not countenance the idea of a discretion so unrestrained as to be liable to abuse from caprice or prejudice or temper or other unjudi-

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cial influences. They cannot rate or assess *according to their best judgment*, without exercising their judgment upon some basis of facts. The expression "according to their best judgment," though plain enough in itself, may be treated as the common phrase "to the best of his knowledge and belief" was treated in the Court of Exchequer in *Roe* v. *Bradshaw* (1). Speaking of an affidavit in which those words occurred Pollock C.B. said:

> But then it is objected that this is only an affidavit *to the best of the belief* of the maker. I think, however, that the man who makes such a statement imports that he is entitled to entertain the belief that he expresses, and that we must not take him to mean that the "best" of his belief is no belief at all.

And Bramwell B. said:

> A man who swears to the "best" of his belief swears that he has a belief.

As to the very important point made by my brother Gwynne, that section 125 does not apply to railway companies, I agree with him in the reasoning on which he founds his opinion. This appeal may be disposed of on the other ground, so that this latter question need not be finally decided. I should prefer leaving it open for further discussion if it should again arise. We discuss it now without as full information as may possibly be supplied in some other case as to railway matters, and further discussion may possibly bring out considerations not now fully before us, tending on the one hand to support the view of the present respondents, or on the other hand to supply stronger reasons for holding that the section does not apply to railway companies, or at all events not to those companies which are under the legislative jurisdiction of the Parliament of Canada.

One point that will perhaps bear further discussion is the meaning of "income," as used in the section.

(1) L. R. 1 Ex. 106.

Does it mean all money received by the agent as agent for the company, not merely as the money belonging to the company, still less as the earnings of the company, but simply all money that passes through the agent's hands? That would seem to be what he is intended to set down in his return, deducting from it only what may be generally called office expenses. If this is what the section means by gross income we shall probably find that arguments will suggest themselves against the power of the provincial legislature thus to deal with a Dominion railway. The discussion of that question would follow some of the lines of the discussion in the Ontario Court of Appeal in *Leprohon* v. *Ottawa* (1). The Parliament of Canada authorizes a company to construct its line, or to use the line of another railway, in one of the cities and thereupon to conduct its traffic. Can the provincial legislature, in addition to asserting its right to tax all the property of the company which benefits by municipal expenditure, impose another burden on the company in the name of assessment for income, and thereby impair the value of the franchise granted by the Dominion? Whatever may be the correct answer to this question it is as well to leave it open for discussion.

There are manifest difficulties in the way of reading section 125 as intended to tax profits only—one being the fact that when profits, or net profits, are meant, as in the case of insurance companies under section 126, they are called net profits, although there is room to argue, by reading the statute in connection with 33 Vic. ch. 46 (N.B.), that it is not intended to tax any income except "actual profits derived from the running of any railway, after deducting expenses." But understanding profits only as being the property or income meant to be taxed under section 125, we should have

(1) 2 Ont. App. R. 522.

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the same difficulty as in *Peters* v. *St. John*, created by the certainty that the taxable amount indicated by the form in schedule B is not profits, and we should again encounter the Railway Act (1), several provisions of which would have to be considered, as e.g. s. 120, which deals with dividends payable out of clear profits; s. 107, which declares what is meant in that statute by "working expenditure;" various forms of returns given in schedules to the act, and some other provisions, all demonstrating the fatuity of talking of the profits of an isolated agency, and strengthening the conclusion that section 125 cannot be intended to apply to railway companies.

I concur in allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *I. Allan Jack.*

(1) R.S.C. c. 109.

PENMAN MANUFACTURING CO. *v.* BROADHEAD. 1892

*Feb. 5, 8, 9
*June 28.

Contract — Patent — Agreement for manufacture—Substitution for new agreement—Evidence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favour of the plaintiff.

The action was brought by the respondent to recover the amount of royalties claimed to be due to her under an agreement by which appellants were to manufacture certain goods on a machine patented by respondent. Before the patent expired, and while the agreement was in force respondent patented another device for making the same class of goods, and after some correspondence with appellants as to the same the latter agreed to take both patents for a year paying a specified sum for royalty, which the appellants accepted. At the end of the year the appellant, claiming that the original agreement was still in force, brought an action for royalties thereunder and obtained a verdict which was affirmed by the Divisional Court and the Court of Appeal

The Supreme Court reversed the decision of the Court of Appeal and held, Taschereau J. dissenting, that the correspondence and other evidence showed that the agreement by the respondents to take the two patents for a year was in substitution for and superseded the original agreement and appellant could not claim royalty under the latter.

Crerar Q.C. for the appellants.

F. C. Moffatt and *Masten* for the respondent.

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

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*June 23.
*Dec. 13.

DRAPER *v.* RADENHURST.

Title to land—Purchaser at tax sale—Cloud upon title—Purchase money—Distribution—Trustee.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiffs.

John Radenhurst died leaving his estate to his widow and, in the event of her dying without disposing of it, to his surviving children. The estate having become involved an absolute deed of the realty was executed in favour of one of the testator's children by the widow and other children, and the grantee undertook to pay off the liabilities and reconvey the lands on repayment of the amounts advanced for the purpose. The grantee managed the estate for some years but was eventually obliged to convey it to trustees for the benefit of creditors, it then owing her some $18,000.

A portion of the land so conveyed was sold for taxes and the purchaser, to perfect his title, obtained quit-claim deeds from the heirs of the original testator of such portion and of one hundred acres of timber land adjoining. The latter was not included in the assignment for benefit of creditors. Similar quit-claim deeds had previously been given for other portions of the estate and the moneys paid for the same equally distributed among the surviving children and grandchildren of the testator. Before the distribution of the purchase money in the last case, however, the deed executed by the widow and children of the testator, which had been mislaid for several years, was dis-

*PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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covered, and the children of the grantee under it, who had died, claimed the whole of the money. The other heirs brought an action for their respective shares and obtained a verdict therefor at the trial, which was affirmed by the Divisional Court, on the ground that an agreement for the equal division of the money was proved. The judgment of the Divisional Court was reversed by the Court of Appeal.

The Supreme Court held, Gwynne J. dissenting, that the purchaser at the tax sale paid the money to obtain a perfect title, and as the defendants were the only persons who could give such title, the legal estate being in them, plaintiffs could not claim any part of the money, and that the agreement to apportion the money was not proved, any agreement made by plaintiffs with the purchaser not binding the defendants.

The decision of the Court of Appeal was accordingly affirmed.

Marsh Q.C. for the appellants.

Donovan for the respondent.

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*Nov. 8, 9.

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*Feb. 20.

GRAND TRUNK RAILWAY CO. *v.* COUNTY OF HALTON.

Railway Co.—Bonus—Bond—Condition—Breach.

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

The action was brought by the County of Halton to recover a bonus paid to the Hamilton and North-Western Railway Co. in aid of their road, the company having executed a bond in favour of the county one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." Four years after the company became merged in the Grand Trunk system, and on the trial it was held that it had ceased thereby to be an independent line. Judgment was accordingly given in favour of the county which was affirmed by the Divisional Court and the Court of Appeal.

The Supreme Court affirmed this decision for the reasons given in the Court of Appeal, and held that the county was entitled to recover the whole amount of the bonus as unliquidated damages under the bond.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellants.

Robinson Q.C. and *Bain* Q.C. for the respondents.

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

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APPEAL — *Practice — Misdirection — New trial ordered by court below— Interference with order for—Negligence—Damage by fire—Spark arrester.*] On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside by the court *en banc* and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada: *Held*, Strong J. dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with. PEERS *v.* ELLIOTT. — 19

2——*Road repair—Municipality--By-law--Validity of--Rights in future--Supreme and Exchequer Courts Act, sec.* 29 (*b*).] In an action brought by the respondent corporation for the recovery of the sum of $262.14 paid out by it for macadam work on a piece of road fronting the appellants' lands, the work of macadamizing the said road and keeping it in repair being imposed by a by-law of the municipal council of the respondent, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the appellants' plea: *Held*, that the appellants' obligation to keep the road in repair under the by-law not being "future rights" within the meaning of section 29 (*b*) the case was not appealable. *County of Verchères* v. *Village of Varennes* (19 Can. S. C. R. 365) followed and *Reburn* v. *Ste. Anne* (15 Can. S. C. R. 92) distinguished. Gwynne J. dissenting. DUBOIS *v.* CORPORATION OF STE. ROSE — — 65

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3——*Monthly allowance of* $200—*Amount in controversy—Annual rent—R. S. C. ch.* 135 *sec.* 29 (*b*) *—Jurisdiction.*] B. R. claimed, under the will of Hon. C. S. Rodier and an act of the legislature of the province of Quebec (54 Vic. ch. 96), from A. L. testamentary executrix of the estate the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada, and on an appeal to the Supreme Court: *Held*, that the amount in controversy being only $200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in section 29 (*b*) of the Supreme and Exchequer Courts Act, the case was not appealable. Annual rents in subsec. (*b*) of R. S. C. ch. 135 mean "ground rents" (*rentes foncières*) and not an annuity or any other like charges or obligations. RODIER *v.* LAPIERRE. — — — 69

4——*Jurisdiction—Security for costs—Final judgment—Admission of attorney.*] An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the court. There being no person interested in opposing the application or the appeal no security for costs was given. *Held*, Gwynne J. dissenting, that the court had no jurisdiction to hear the appeal—Per Ritchie C. J. and Taschereau J.—Excepting in cases specially provided for no appeal can be heard by this court unless security for costs has been given as provided by s. 46 of The Supreme and Exchequer Courts Act (R. S. C. c. 135)—Per Strong and Taschereau JJ.—It was never intended that this court should interfere in matters respecting the admission of attorneys and barristers in the several provinces—Per Taschereau and Patterson JJ.—The judgment sought to be appealed from is not a final judgment within the meaning of the Supreme Court Act. *In re* CAHAN — — — — — 100

5——*Solicitor—Bill of costs—Order for taxation—R.S.O.* (1887) *ch.* 147 *s.* 42—*Appeal—Jurisdiction—Discretion—Proceeding originating in Superior Court—Final judgment.*] By R.S.O. (1887) ch. 147 s. 42 any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court, or of the County Court, for an order for taxation. An action was brought against school trustees and a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The

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application was refused, but on appeal to the Divisional Court the judgment refusing it was reversed. There was no appeal as of right to the Court of Appeal from the latter decision but leave to appeal was granted and the Court of Appeal reversed the judgment of the Divisional Court and restored the original judgment refusing the application. From this last decision an appeal was sought to the Supreme Court of Canada: *Held*, per Ritchie C.J., Strong and Gwynne JJ., that assuming the court had jurisdiction to entertain the appeal the subject matter being one of taxation of costs this court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters.—Per Ritchie C.J., Strong and Patterson JJ., that a ratepayer is not entitled to an order for taxation under said section.—Per Taschereau J.—The court has no jurisdiction to entertain the appeal as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the court below; and the proceedings did not originate in a Superior Court.—Per Patterson J.—The making or refusing to make the order applied for is a matter of discretion and the case is, therefore, not appealable. McGugan *v.* McGugan — — — — — 267

6——*Supreme and Exchequer Courts amending Act*, 1891—54 & 55 *Vic. ch.* 25 *s.* 3—*Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts.* 1178 *&* 1178*a C. C. P.*] In an action brought by respondents against the appellant for $2,006, which was argued and taken *en délibéré* by the Superior Court sitting in review on the 30th September, 1891, the day on which the Act 54 & 55 Vic. ch. 25 s. 3 giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada: *Held*, per Strong, Fournier and Taschereau JJ., that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise* v. *Desmarteau* (19 Can. S. C. R. 562) followed.—Per Gwynne and Patterson JJ.—That the case did not come within the words of s. 3 ch. 25 of 54 & 55 Vic. inasmuch as the judgment, being for less than £500 sterling, was not a judgment from which the appellant had a right to appeal to the Privy Council in England. Arts. 1178, 1178*a* C. C. P. Couture *v.* Bouchard — — — 281

7——*Solicitors—Action on bill of costs—Set-off—Mutual debts—Special services—Retainer—Appeal—Jurisdiction.*] In action by a firm of attorneys for costs due from clients the defendants cannot set off against the plaintiffs' claim a sum paid by one of them to one of the solicitors for special services to be rendered by him there being no mutuality and the payment not being for the general services covered by the retainer to the firm.—*Held*, per Taschereau, J.—A decision of the

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Court of Appeal affirming the judgment of the Divisional Court which refused to allow such set-off is not a final judgment from which an appeal will lie to the Supreme Court of Canada. Strong J. also expressed doubt as to the jurisdiction. McDougall *v.* Cameron } — — — 379
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8——*Mining lands—Bornage—Appeal—Jurisdiction—R. S. C. ch.* 135 *s.* 29 (*b*)]. In a case of a dispute between adjoining proprietors of mining lands where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a *bornage*, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*. On appeal to the Supreme Court of Canada: *Held*, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound the case was not appealable. R. S. C. ch. 135 s. 29 (*b*). Emerald Phosphate Co. *v.* Anglo-Continental Guano Works — — — — 422

9——*Final judgment—Action en reprise d'instance—Art.* 439 *C.C.P.—R.S.C. ch.* 135, *secs.* 2, 24 *and* 28.] The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that the last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was: *Held*, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. R.S.C. ch. 135 secs. 2 and 28. *Shaw* v. *St. Louis* (8 Can. S.C.R. 385.) followed. Baptist *v.* Baptist—425

10——*Practice—Judgment of court—Withdrawal of opinion.*] The Court of Appeal for Ontario, composed of four judges, pronounced judgment in an appeal before the court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at: *Held*, that the Appellate Court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed. Booth *v.* Ratté — — — — — 637

11——*Appeal—Limitation of time—Final judgment.*] On the trial in the Exchequer Court in 1887 of an action against the crown for breach of a contract

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to purchase paper from the suppliant no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court and judgment was given against the crown for the amount thereby found due. The crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute and sought to impugn on such appeal the judgment pronounced in 1887: *Held*, Gwynne and Patterson JJ. dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of time granted by the Exchequer Court on its face only referred to an appeal from the judgment pronounced in 1891.—*Held*, per Gwynne and Patterson JJ. that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings and on appeal therefrom all matters in issue are necessarily open. The Queen *v.* Clarke — 656

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ASSESSMENT AND TAXES—*Insurance Co.—Net profits—Reserve fund—Deposit with Government for protection of policy-holders.*] The amount deposited by an insurance company with the Dominion Government for protection of policy-holders may properly be deducted from the gross income of the company in ascertaining the net profits liable to taxation under the assessment law of the City of St. John (52 V. c. 27 s. 125 [N.B.])—The act requires the agent or manager of such company to furnish the assessors each year with a statement under oath, in a prescribed form, showing the gross increase for the year preceding and the amount of certain specified deductions, the difference to be the net income, and if such statement is not furnished the assessors may assess according to their best judgment. W. furnished a statement in which, in place of the deductions of one class specified, he inserted, "an amount equal to 75 per cent of the premiums received, as deposited with the Dominion Government for security to policy-holders." The assessors disregarded this statement and assessed the company in an amount fixed by themselves, and on application for *certiorari* to quash such an assessment, it was shown by affidavit that the deposit of the company was equal to about 75 per cent of the premiums: *Held*, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that the agent was justified in departing from the form prescribed to show the true state of the company's business; that the deposit was properly deducted; and that the assessors had no right to disregard the statement and arbitrarily assess the company as they saw fit. Peters *v.* City of St. John. — 674

2——*Tax on corporation—Railway companies—Statutory form—Departure from—52 V. c. 27, s. 125 (N.B.)*] By 52 V. c. 27, s. 125 (N.B.) the agent or manager of any joint stock company or corporation established out of the limits of the province, who has an office in the city of St. John for such company or corporation, may be assessed upon the gross income received for his principals with certain specified deductions therefrom, and to enable the assessors to rate such company or corporation the agent or manager is required, on May 1st of each year, to furnish them with a statement under oath in a form prescribed by the act showing such gross income for the year preceding, and the details of the deductions; in the event of neglect to furnish said statement the assessors may rate the agent or manager according to their best judgment, and there shall be no appeal from such rate. The general supt. of the Atlantic Division of the C.P.R. has an office for the company in St. John, and was furnished by the assessors with a printed form to be filled in of the statement required by the act; the form required him to state the gross and total income received for his company during the preceding year, as to which he stated that no such income had been received, and he erased the clause "this amount has not been reduced or offset by any losses," etc.; the other items were not filled in. This was handed to the assessors as the statement required and they treated it as neglect to furnish any statement, and rated the supt. on a large amount as income received. The Supreme Court of New Brunswick refused to quash the assessment on *certiorari*. *Held*, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that it was sufficiently shown that the company had no income from its business in St. John liable to assessment; that the supt. was justified in departing from the prescribed form in order to show the true state of the company's business; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the supt. in any sum they chose without making inquiry into the business of the company as the statute authorizes. *Held* further, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against overvaluation under C. S. N. B. c. 100, s. 60, and not

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sections of the act 54 & 55 V. c. 25 which empower the Governor-General in Council to refer certain matters to this court for an opinion. *Re* COUNTY COURTS OF BRITISH COLUMBIA — — 446

CONTRACT — *Specific performance — Agreement for service—Remuneration.*] S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses. *Held*, reversing the decision of the Court of Appeal, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance but: *Held* further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. MCGUGAN *v.* SMITH — — 263

2——*Construction of—Cutting ice—Ownership of property.*] An agreement by which M. undertook to cut and store ice, provided:—That said ice houses and all implements were to be the property of P., who, after completion of the contract, was to convey same to M., and that M. was to deliver said ice to vessels to be sent by P., who was to be obliged to accept only good merchantable ice so delivered and stored. *Held*, affirming the judgment of the court below, that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. under the agreement, and not the ice which was at M.'s risk and shipped by him. NORTH BRITISH AND MERCANTILE INS. CO. *v.* MCLELLAN — — — — — 288

3——*Application for insurance—Agreement to forward—Evidence—Escrow.*] B. wishing to insure his vessel, the C. U. Chandler, went to a firm of insurance brokers who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at $2,500 and the rate of premium was fixed at 11 p.c. K. refused to forward the application unless the valuation was raised to $3,000 or 12 p.c. premium was paid. This was not acceded to by the brokers, but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost, and four days after K. received a telegram from the attorney of the company at the head office, as follows: "Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received

CONTRACT—*Continued.*

by K. next day and returned at once; he did not show it to the brokers nor to B., nor inform them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy: *Held*, affirming the judgment of the court below, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at $3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence.—*Held*, further, that as the property in the policy prepared at the head office and sent to K. never passed out of the company, and was at the most no more than an escrow in the hands of K., the agent, trover would not lie against K. for its conversion. BUCK *v.* KNOWLTON — — 371

4——*Specific performance—Time for completion—Extension—Rescission—Conduct of party seeking relief—Laches.*] The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the person seeking relief.—H. and R. agreed to exchange land and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days if possible. R. at the time had no title to the property he was to transfer but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void. Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him, and that the lands were subject to an annuity; R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange. *Held*, reversing the judgment of the Court of Appeal, Taschereau J. dissenting, that the action could not be maintained; that R. not having title when the agreement was made H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that even if there had been no rescission the conduct of R. in relation to the completion of the contract was such as to disentitle him to relief by way of specific performance.—*Held*, also, affirming in this respect the judgment of the courts below, that time was originally of

CONTRACT—*Continued.*

the essence of the contract, but there was a waiver by H. of a compliance with the provision as to time by entering into negotiations as to the title after its expiration. HARRIS *v.* ROBINSON 390

5——*Municipal corporation—Exercise of powers—By-law—Executory contract.*] The Ontario Municipal Act (R.S.O. [1887] c. 184) by s. 480 authorizes any municipal council to purchase fire apparatus of any kind, and by s. 282 the powers of a council must be exercised by by-law. *Held*, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that a contract under the corporate seal for purchase of a fire-engine which was not authorized by by-law and not completed by acceptance of the engine, could not be enforced against the corporation. *Bernardin* v. *North Dufferin* (19 Can. S. C. R. 581) distinguished. WATEROUS ENGINE WORKS CO. *v.* TOWN OF PALMERSTON — 556

6——*for building—Materials supplied to contractor—Mechanic's lien—Payment by note—Suspension of lien* — — — — — 406

See MECHANIC'S LIEN.

7——*Patent—Agreement for manufacture—Substitution for new agreement—Evidence.*] PENMAN MFG. CO. *v.* BROADHEAD — — — 713

CONTRIBUTORY NEGLIGENCE—*Use of engine—Discharge of steam—Nuisance* — 337

See NEGLIGENCE 1.

CONTROVERTED ELECTIONS—*Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act, R. S. C., ch. 8 sections 30 (b), 31, 33, 41, 54, 58 and 65—The Electoral Franchise Act, R. S. C. ch. 5 section 32.*] *Held*, affirming the decision of Gill J., that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election or a copy thereof certified by the clerk of the Crown in Chancery (R. S. C. ch. 8 sections 41, 58 and 65, R. S. C. ch. 5 section 32), and the production at the *enquête* of a copy, certified by the revising officer, of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof. Gwynne and Patterson JJ. dissenting. RICHELIEU ELECTION CASE (PARADIS *v.* BRUNEAU) — — — — — 168

2——*Election petition—Commencement of trial—Six months limitation—R. S. C. c. 9 s. 32—R. S. C. c. 135 s. 52* — — — — — — — BAGOT AND ROUVILLE ELECTION CASES — 28

3——*Election petition—Judgment on—Appeal—Discontinuance—Certificate of registrar—New writ.* L'ASSOMPTION ELECTION CASE — — 29

CORPORATION—*Public Company—Act of incorporation—Forfeiture of—44 Vic. c. 61 (D.)—Attorney-General of Canada—Information—R.S.C. c. 21 s. 4—Scire Facias—Form of proceedings—Arts. 997 et seq. C.C.P.—Subscription to capital stock—Canadian precedent.*] The appellant company by its act of incorporation 44 Vic. c. 61 (D.) was authorized to carry on business provided $100,000 of its

CORPORATION—*Continued.*

capital stock were subscribed for, and thirty per cent paid thereon, within six months after the passing of the act, and the Attorney-General of Canada having been informed that only $60,500 had been *bonâ fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. *in trust*, who subsequently surrendered a portion of it to the company, and that the thirty per cent had not been truly and in fact paid thereon, sought at the instance of a relator by proceedings in the Superior Court for Lower Canada to have the company's charter set aside and declared forfeited. *Held*, affirming the judgment of the court below: 1. That this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada. 2. That such proceedings taken by the Attorney-General of Canada under arts. 997 *et seq.* C. C. P. if in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a *scire facias*. 3. That the *bonâ fide* subscription of $100,000 within six months from date of the passing of the act of incorporation, and the payment of the 30 per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited. Gwynne J. dissenting. Dominion Salvage and Wrecking Co. *v.* The Attorney-General of Canada — — — 72

2——*Incorporated company—Manager—Promissory note signed by—Liability of members of company* — — — — — 484

See Promissory Note 2.

3——*Foreign—Doing business in St. John, N.B.—Taxation—Agent—Statement of income—Statutory form* — — — — — — 691

See Assessment and Taxes 2.

COSTS—*Taxation—Order for—R.S.C.* (1887) *c.* 147 *c.* 42—*Appeal—Jurisdiction—Discretion—Proceedings originating in superior court—Final judgment* — — — — — 267

See Appeal 5.

" Solicitor 1.

2——*Solicitor and client—Exchequer Court—Tariff—Quantum meruit—Parol evidence* — 419

See Practice 5.

" Solicitor 2.

CRIMINAL LAW—*Speedy Trials Act*, 51 *V. c.* 47 (D.)—*Criminal procedure—Jurisdiction.*] The Speedy Trials Act, 51 V. c. 47 (D.) is not a statute conferring jurisdiction but is an exercise of the power of Parliament to regulate criminal procedure. *Re* County Courts of British Columbia — 446

2——*Notary—Commission of crime—Civil remedy—Discipline by board of notaries* — — 409

See Practice 4.

DEBTOR AND CREDITOR—*Registry Act—R. S.N.S. 5th ser. c.* 84 *s.* 21—*Registered judgment—Priority—Mortgage—Rectification of mistake.*] By R. S. N. S. 5th ser. c. 84 s. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment.—A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure judgment was registered against the mortgagor and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditor from levying: *Held*,—affirming the judgment of the court below, Strong and Patterson JJ. dissenting, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage which, by the statute, was void as against the registered judgment of the creditor. *Grindley* v. *Blakie* (19 N. S. Rep. 27), approved and followed. Miller *v.* Duggan — 33

DEED—*Fraudulent conveyance—Action by creditor to set aside—Appeal.*

Flatt *v.* Ferland. — — 32

2——*Foreshore of harbour—Grant from local government—Conveyance by grantee—Innocent conveyance—Estoppel—Mutuality—Validating act* — 152

See Title to land 1.

" Estoppel 1.

DISCRETION—*Solicitor's costs—Order for taxation—Appeal* — — — — 267

See Appeal 5.

DRAINAGE—*Of lands—Injury to adjoining property—Remedy—Arbitration—Notice of action—Mandamus* — — — — — 103

See Municipal Corporation 2.

ESCROW—*Application for policy—Agreement by agent to forward—Conversion—Trover* — 371

See Contract 3.

ESTOPPEL—*Title to land—Foreshore of harbour—Grant from local government—Conveyance by grantee—Claim of dower by wife of grantee—Objection to.*] After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot, through the C. B. Coal Co. to the S. & L. Coal Co. S. having died his widow brought an action for dower in said lot, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion government. *Held*, affirming the judgment of the court below, Strong and Gwynne JJ. dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.—Per Strong and Gwynne JJ. dissenting. The conveyance by S. to the C. B. Coal Co.

ESTOPPEL—*Continued.*

was an innocent conveyance by which S. himself would not have been estopped and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and an estoppel could not be created by the covenants. SYDNEY AND LOUISBURG COAL AND RAILWAY CO. *v.* SWORD — — — — 152

2——*By conduct — Booms — Proprietary rights— Replevin—Revendication* — — — 415

See PROPRIETARY RIGHTS.

EVIDENCE—*Guarantee against loss—Proof of claim—Account sales* — — — 23

See GUARANTEE.

2——*Election petition — Preliminary objection — Status of petitioner—Proof—Voters' lists—Copy* — — — — — — 168

See CONTROVERTED ELECTIONS 1.

3——*Of possession of land—Statute of limitation— Sale under execution—Judgment against estate for debt of executor—Purchase by executor* — 201

See TITLE TO LAND 2.

4——*Mortgage—Description of property—Omission by mistake—Rectification* — — — 218

See MORTGAGE 2.

5——*Promissory note—Maker or endorser—Security—Intention* — — — — 256

See PROMISSORY NOTE 1.

6——*Action on policy— Condition—Secondary evidence* — — — — — 288

See INSURANCE, FIRE.

7——*Bill of sale—Affidavit of bona fides—Statutory form—Description of grantor—Onus of proof*—355

See BILL OF SALE.

8——*New trial—Death of plaintiff—Reading evidence to jury—Misrepresentation* — — 359

See SHIPS AND SHIPPING 1.

9——*Action for libel—Improper admission — Rebuttal—General verdict—New trial* — 518

See LIBEL.

" PRACTICE 6.

EXECUTION — *Writ of — Husband and wife— Judgment against husband—Seizure of goods— Action by wife against sheriff—Justification*— 342

See HUSBAND AND WIFE.

" MARRIED WOMAN'S PROPERTY.

EXECUTORS AND ADMINISTRATORS — *Executor—Action against—Legacy—Trust—Claim on assets—Charge on realty.*] T. H. and his brother were partners in business and the latter having died T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having encumbered both his own share of the partnership property and that devised to him one of his creditors, and a mortgagee of the property, obtained judgment against him and procured

EXECUTORS AND ADMINISTRATORS — *Continued.*

the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of T. H. *Held*, affirming the judgment of the court below, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors.—*Held*, also that the legacy of E. H. was a charge upon the realty of the testator the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either of the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees who were shown to have had notice of the will. CAMERON *v.* HARPER — — — — — — 273

EXPERT—*Builder's privilege—Duties of Expert— Procès-verbal—Arts.* 322 *et seq. C. C. P.* — 607

See BUILDER'S PRIVILEGE.

EXPROPRIATION—*of land — Value — Award — Appeal* — — — — — — 31

CORPORATION OF TOWN OF LEVIS *v.* THE QUEEN.

FINAL JUDGMENT—*Appeal from—Attorney— Refusal to admit* — — — — 100

See APPEAL 4.

2——*Appeal from—Costs—Solicitor—Order for taxation—Proceeding originating in superior court— Discretion* — — — — — — 267

See APPEAL 5.

3——*Action en reprise d'instance—Res judicata* 425

See APPEAL 9.

4——*Appeal from—Interlocutory decision— Limitation of time* — — — — — 656

See APPEAL 11.

FIRE INSURANCE — — — — 288

See INSURANCE, FIRE.

FORESHORE—*of harbour—Title to—Grant from local government—Conveyance by grantee—Dower —Estoppel—Validating act* — — — 152

See TITLE TO LAND 1.

" ESTOPPEL 1.

FRANCHISE—*Toll-bridge—Sole franchise—Erection of free bridge—Injunction* — — 456

See TOLL BRIDGE.

FUTURE RIGHTS—*Municipal by-law—Validity of—Repair of road—R.S.C. c.* 135 *s.* 29 (*b*) — 65

See APPEAL 2.

2——*Mining lands—Bornage—Injunction* — 422

See APPEAL 8.

GUARANTEE—*Letter of guarantee by bank— Claim for loss—Proof of claim—Account sales.*] H. *et al.* upon receipt of an order by telegram from

GUARANTEE—*Continued.*

the Exchange Bank to load cattle on a steamer for M. S., with guarantee against loss, shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of $7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss. *Held*, affirming the judgment of the court below, that assuming that there was a valid guarantee given by the bank, upon which the court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover.—Per Taschereau J.—That the guarantee was subject to a delivery of the cattle to M. S. and that H. *et al.* having shipped the cattle in their own name could not recover on the guarantee. HATHAWAY *v.* CHAPLIN — — 23

2——*Evidence of—Misrepresentation — Consideration—Pleading* — — — — 359

See SHIPS AND SHIPPING 1.

HUSBAND AND WIFE—*Married woman—Execution against husband—Replevin—Justification by sheriff—Married Woman's Property Act, R. S. N. S. 5th ser. ch.* 94.] In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act (R. S. N. S. 5th ser. ch. 94) the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names, and that A.'s right to the goods seized was acquired from her husband after marriage, which would not make it her separate property under the act. *Held*, reversing the judgment of the court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment; *Hannon* v. *McLean* (3 Can. S.C.R. 706) followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. CROWE *v.* ADAMS — — — — — 342

INSURANCE — *Company doing business in Canada—Deposit with Government — Taxation—Gross income—Deduction—Tax on agent—Statement to assessors* — — — — 674

See ASSESSMENT AND TAXES.

INSURANCE, FIRE—*Ownership of property—Insurable interest—Transfer by insurer—Construction of agreement—Condition in policy—Insurance by other parties—Evidence.*] An agreement by which M. undertook to cut and store ice provided:—That said ice houses and all implements were to be the property of P. who after the completion of the contract was to convey

INSURANCE, FIRE—*Continued.*

same to M., and that M. was to deliver said ice to vessels to be sent by P. who was to be obliged to accept only good merchantable ice so delivered and stored. The ice was cut and stored and M. affected insurance thereon and on the buildings and tools. In the application for insurance in answer to the question "Does the property to be insured belong exclusively to the applicant, or is it held in trust or on commission or as mortgagee?" the written reply was "Yes, to applicant." At the end of the application was a declaration "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value and risk of property to be insured so far as the same are known to the applicant, and are material to the risk." The property was destroyed by fire and payment of the insurance was refused on the ground that the property belonged to P. and not to M. the insured. On the trial of an action on the policy the defendants also sought to prove that P. had effected insurance on the ice and that under a condition of the policy the amount of M.'s damages, if he was entitled to recover, should be reduced by such insurance by P. This defence was not pleaded. The policies to P. were not produced at the trial and verbal evidence of the contents was received subject to objection. A verdict was given in favour of M. for the full amount of his policy.—*Held*, affirming the judgment of the court below, that the property in the ice was in M.; that it was the building and implements only which were to be property of P. under the agreement and not the ice which was at M.'s risk and shipped.—*Held*, further, Gwynne J. dissenting, that the insurance to P. and the condition of the policy should have been pleaded but if it had been the evidence as to it was improperly received and must be disregarded. *Held*, per Ritchie, C.J., that the application of M. for insurance not being made part of the policy by insertion or reference the statements in it were not warranties, but mere collateral representations which would not avoid the policy unless the facts mis-stated were material to the risk. If materiality was a question of law the non-communication of the agreement with P. could not affect the risk; if a question of fact it was passed upon by the jury.—Per Strong J.—The application, being properly connected with it by verbal testimony, formed part of the policy and the statements in it were warranties, but as M. only pledged himself to the truth of his answers "so far as known to him and material to the risk" and as such knowledge and materiality were for the jury to pass upon, the result was the same whether they were warranties or collateral representations. THE NORTH BRITISH AND MERCANTILE INSURANCE CO. *v.* MCLELLAN — 288

INSURANCE, MARINE—*Subject of insurance—Insurance on advances—Wording of policy—Insurable interest.*] A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co. do cause to be insured, lost or not lost, the sum of $2,000, *on advances*, upon the body, etc., of the Lizzie Perry. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners

INSURANCE, MARINE—*Continued.*

who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which was not insurable. *Held*, affirming the judgment of the court below, that the instrument must, if possible, be construed as valid and effectual and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship. THE BRITISH AMERICA ASSURANCE CO. *v.* LAW — 325

2——*General average—Insurance on hull—Cost of saving cargo—Average bond.*] A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given to the underwriters on the hull. The cargo was not insured. The owners of the cargo offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the said loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the province in similar cases by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond to recover this amount: *Held*, affirming the decision of the Court of Appeal, that the owners of the cargo were only liable, under the bond, to pay such amount as would be legally due according to the principles of the law relating to general average; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average; that the money expended, beyond what was the actual cost of the salvage of the cargo saved, was in no sense expended for the benefit of the cargo owners; and the defendants having paid into court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount. —WESTERN ASSURANCE CO. *v.* ONTARIO COAL CO. OF TORONTO — — — — 383

3——*Application—Agreement by agent to forward policy—Damages for neglect—Conversion of policy—Trover—Escrow* — — — — 371

See CONTRACT 3.

JOINT STOCK COMPANY—*Dominion charter—Forfeiture—Proceedings to set aside—Scire facias—Stock subscription—Condition precedent* — 72

See CORPORATION 1.

—— PRACTICE 2.

JUDGMENT—*Registry of—Lands bound by—Priority over unregistered mortgage—R. S. N. S. 5th ser. c. 84 s. 21* — — — — 33

See DEBTOR AND CREDITOR 1.

—— REGISTRY LAWS.

JURISDICTION—*Criminal law—Speedy Trials Act—Judge of county court—Territorial jurisdiction.*] The Speedy Trials Act, 51 V. c. 47 (D.) is not a statute conferring jurisdiction but is an exercise of the power of parliament to regulate criminal procedure.—By this act jurisdiction is given to "any judge of a county court" to try certain criminal offences.—*Held*, that the expression "any judge of a county court," in such act, means any judge having, by force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a county court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the provincial legislature so to do. *Re* COUNTY COURTS OF BRITISH COLUMBIA — — — 446

And *See* CONSTITUTIONAL LAW.

JURY — *Charge to — Misdirection—Negligence—Damage by fire—Spark arrester—New trial—Appeal* — — — — — — 19

See APPEAL 1.

" PRACTICE 1.

LEGACY—*Residuary devise to Executor—Encumbering estate—Receiver—Assets of testator—Charge on realty* — — — — — 273

See EXECUTORS AND ADMINISTRATORS.

LESSOR AND LESSEE—*Lessee of mortgagor—Foreclosure—Interest of lessee—Right to redeem—Sale of property* — — — — 139

See MORTGAGE 1.

LIBEL—*Personal attack on Attorney-General—Pleading—Reception of evidence—Fair comment—General verdict—New trial.*] In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the attorney-general of the province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendant pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants and in answer to the trial judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial: *Held*, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. MANITOBA FREE PRESS CO. *v.* MARTIN — — — 518

LIEN—*Mechanic's—Materials supplied to contractor—Payment by note—Suspension by lien*— 406

See Mechanic's Lien.

MALICIOUS PROSECUTION—*Reasonable and probable cause—Belief of prosecutor—Duty to make inquiry—Questions for jury.*] In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred but the inference must be drawn by the judge. *Lister* v. *Perryman* (L. R. 4 H. L. 521) followed; *Abrath v. North Eastern Railway Co.* (11 Q.B. D. 79, 440; 11 App. Cas. 247) considered. Archibald *v.* McLaren — — — — — — 588

MANDAMUS — *Municipal Corporation—Drainage—Injury to land by—Remedy—R. S. O.* (1887) *c.* 184 *s.* 583—*R. S. O.* (1887) *c.* 44 — 103, 305

See Municipal Corporation 2, 3.

" Statute 1.

MARINE INSURANCE — 325, 371, 383

See Insurance, Marine.

MARRIED WOMAN'S PROPERTY—*R.S N.S. 5th ser. ch.* 74—*Title to goods—Married woman—Execution against husband—Replevin—Justification by sheriff.*] In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act (R. S. N. S. 5th ser. ch. 74) the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found hat he was well known by both names and that A.'s right to the goods seized was acquired from her husband after marriage which would not make it her separate property under the act. *Held*, reversing the judgment of the court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment; *Hannon* v. *McLean* (3 Can. S.C.R. 706) followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband which was a complete answer to the action. Crowe *v.* Adams — — 342

MASTER AND SERVANT—*Use of dangerous machinery—Defective system of usage—Liability of master for—Notice to master of defect.*] A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using the same by reason of his failure to give notice to the employer of such defect. Webster *v.* Foley — — 580

MASTER AND SERVANT—*Agreement for service—Remuneration—Specific performance* — 263

See Specific Performance 1.

MECHANIC'S LIEN—*Materials supplied to contractor—Payment by promissory note—Suspension of lien.*] E. supplied a contractor with materials for building a house for W. and took the contractor's note for $1,100 at thirty days for his account. The note was discounted but dishonoured at maturity and E. took it up and registered a mechanic's lien against the property of W. While the note was running W. paid the contractor $500 and afterwards, but when was uncertain, $600 more. In an action by E. to enforce his lien: *Held*, affirming the judgment of the court below, that as the lien was suspended during the currency of the note it was absolutely gone there being nothing in the Lien Act to show that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor. Edmonds *v.* Tiernan — — — 406

MINING LANDS — *Bornage — Injunction — Appeal—Future rights* — — — 422

See Appeal 8.

MISDIRECTION—*Damage by fire—Negligence—Spark arrester—New trial—Appeal* — 19

See Appeal 1.

" Practice 1.

MORTGAGE—*Mortgagor and mortgagee—Foreclosure of mortgage—Practice—Addition of parties—Lessee of mortgagor—Protection of interest of—Staying proceedings—Order for sale of mortgaged lands.*] In an action for foreclosure of mortgage defendants were the administrator and heirs at law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the Queen Hotel, part of the mortgaged property, under lease from some of the heirs, were not made parties. None of the defendants appeared and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed and the lands ordered to be sold on a day named, On that day, on application of the lessee of the Queen Hotel, an *ex parte* order was made by the Chief Justice directing that on payment into court of $37,019 by S. & K., further proceedings by plaintiff should be stayed until further order and that plaintiff should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K., which direction was complied with. On Dec. 26th, 1889, defendants moved to rescind this order. The motion was refused and the order amended by a direction that the lessee should be made a defendant to the action and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On Jan. 4th, 1890, a further order was made directing that the Queen Hotel property be sold subject to the rights of the lessee. From the two last mentioned orders defendants appealed to the full court which affirmed that of Dec. 26th and set aside that of Jan. 4th. Both parties appealed to this court. *Held*, that the order of 26th Dec., 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of *fi-fa*, and being made at the instance of a lessee, and as such a purchaser *pro tanto*, of the mortgaged lands who had a right to

redeem it was in the discretion of the Chief Justice so to order. To the direction that plaintiff should convey the lands to S. & K. defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor had defendants a right to object to the removal of the stay of proceedings and any right subsequent incumbrancers not before the court might have to complain would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal to the full court the property having been sold under the decree the purchaser not being before the court was a sufficient ground for dismissing the appeal. *Held* further, that the order of Jan. 4th, 1890, should also have been affirmed by the full court. In selling the mortgaged property the court had a right to endeavour to preserve the rights of the lessee by selling first the portions in which she had no interest. COLLINS *v.* CUNNINGHAM. CUNNINGHAM *v.* DRYSDALE — 139

2——*Description of property—Omission by mistake—Rectification—Subsequent purchase—Conditions—Notice.*] M. & B. owners of certain village lots of land were in possession of an adjoining water lot in a lake, the title to which was in the crown and to which, according to the practice of the Crown Lands Department, they had a right of pre-emption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to R. of the village lots and certain other lands was intended to comprise the water lot and mill, but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons. M. & B. having become insolvent assigned all their property for the benefit of their creditors, and the assignee sold at auction all their property, including the mill. The sale was made subject to certain printed conditions, one of which was that as all the information relating to the titles of the property was set out in the schedules, stock list and inventory, the vendor would not warrant the correctness of the same and that no other claims existed, "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale, paying the amount out of the purchase money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages. R., the mortgagee of the village lots, brought an action to have his mortgage rectified so as to include the water lot and mill property, omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice. *Held*, affirming the decision of the Court of Appeal, Gwynne and Patterson

JJ. dissenting, that there being ample evidence to establish, and the trial judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R.'s equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal and they established R.'s right to have his mortgage reformed.—*Held*, per Strong J.—1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently decribed, and the description "mill property" in the mortgages in question would pass the land covered with water on which the mill was erected. 2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such chargees take rank according to priority in point of time, but R. not having an actual charge, but merely an equitable claim for rectification, such defence was not precluded. 3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without showing that the original mortgagees, in whose shoes they stood, were also purchasers for valuable consideration with notice. 4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence. UTTERSON LUMBER CO. *v.* RENNIE — — 218

3——*Railway bonds—Security for advances—Second mortgagee—Purchase by—Trust.*] W. having agreed to advance money to a railway company for completion of its road an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes endorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company with which they were deposited and sell the same to the best advantage applying the proceeds as set out in the agreement. The railway company did not repay W. as agreed and the bank obtained the bonds from the trust company and having threatened to sell the same the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out but that the bank should substitute E. & W. as the attorneys irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. & W. agreed to this and extended the time for payment of their claim and made further advances and, as the last last mentioned agreement authorized, they rehypothecated the bonds to the bank on certain terms. At the expiration of the extended time

MORTGAGE—*Continued.*

the railway company again made default in payment and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained. *Held*, affirming the decision of the court below, that the bank and E. & W. were respectively first and second encumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. and W. to purchase under that sale.—*Held* further, that if E. & W. should purchase at such sale they would become absolute holders of the bonds and not liable to be redeemed by the company.—*Held* also, that the dealing by the bank with the bonds was authorized by the Banking Act. N. S. Central Ry. Co. *v* Halifax Banking Co. — — — — — 536

4——*Unregistered—Judgment against land covered by—Registry of—Priority—Mistake in description—Rectification* — — — — — 33

See Debtor and Creditor 1.

" Registry Laws.

5——*Chattel mortgage—Affidavit of bona fides—Adherence to statutory form* — — 355

See Bill of Sale.

MUNICIPAL CORPORATION—*Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence not pleaded—34 V. c. 11 (N.B.)—25 V. c. 16 (N.B.)*] The act incorporating the town of Portland (34 V. c. 11 [N.B.]) gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By s. 84 the provisions of 25 V. c. 16, and amending acts, relating to highways apply to said town and the powers, authorities, rights, privileges and immunities vested in commissioners and surveyors of roads in said town are declared to be vested in the council. By another act no action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, remaining subject to the said provisions, and eventually a part of the city of St. John. An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a sidewalk in said city and breaking his leg. More than a month before the action was commenced plaintiff's solicitor wrote to the council notifying them of the injuries sustained by plaintiff, and concluding: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:" except this no notice of action was given, but want of notice was not pleaded. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said sidewalk. After Portland became a part of St. John the latter city became defendant in the case

MUNICIPAL CORPORATION—*Continued.*

for subsequent proceedings. *Held*, Strong J. dissenting, that the city was liable to C. for the injuries so sustained.—*Held*, per Ritchie C.J. and Strong J., that the letter of the solicitor was not a sufficient notice of action under the statute.—Per Ritchie C.J. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.—Per Taschereau, Gwynne and Patterson JJ. Notice was not necessary; the liability of the city did not depend on s. 84 of 25 V. c. 16, but on the sections making it the duty of the council to keep the streets in repair; and the only privilege or immunity possessed by the commissioners and surveyors of roads was that of exemption from the performance of statute labour.—Per Strong J. One of the "immunities" declared to be vested in the council was that of not being subject to an action without prior notice and no notice having been given in this case C. could not recover. The City of St. John *v.* Christie — 1

2——*Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—Mandamus.*] By sec. 483 of the Ontario Municipal Act (R. S. O. [1887] ch. 184) if private lands are injuriously affected by the exercise of municipal powers the council shall make due compensation to the owner, the claim for which, if not mutually agreed upon, shall be determined by arbitration. *Held*, reversing the judgment of the Court of Appeal, that it is only when the act causing the injury can be justified as the exercise of a statutory power that the party injured must seek his remedy in the mode provided by the statute; if the right infringed is a common law right and not one created by the statute the remedy by action is not taken away.—By sec. 569 of the same act the council, on the petition of the owners for drainage of property, may procure an engineer or surveyor to survey the locality and make a plan of the work, and if of opinion that the proposed work is desirable may pass by-laws for having it done. *Held*, reversing the judgment of the Court of Appeal, that the council has a discretion to exercise in regard to the adoption, rejection or modification of the scheme proposed by the engineer or surveyor and if adopted the council is not relieved from liability for injuries caused by any defect therein or in the construction of the work or from the necessity to provide a proper outlet for the drain when made thereunder.—The act imposes upon the council, after the construction of work proposed by the engineer or surveyor, the duty to preserve, maintain and keep in repair the same. The township of R., in pursuance of a petition for draining flooded lands and a surveyor's report, constructed a number of drains and an embankment. These drains were led into others formerly in use which had not the capacity to carry off the additional volume of water, but became overcharged and flooded the land of W. adjoining. *Held*, that the municipality was guilty of neglect of the duty imposed by the act and W. had a right of action for the damage caused to his land thereby.—*Held*, per Strong and Gwynne JJ., Ritchie C.J. and Patterson J. contra, that the drain causing the injury being wholly within the limits of the municipality in which it was com-

MUNICIPAL CORPORATION—*Continued.*

menced, and not benefiting lands in an adjoining municipality, it did not come under the provisions of s. 583 of The Municipal Act, and W. was not entitled to a mandamus under that section.—Per Ritchie C.J. and Patterson J. Sec. 583 applied to the said drain but W. could not claim a mandamus for want of the notice required thereby.—*Held* per Strong and Gwynne JJ., that though W. was not entitled to the statutory mandamus it could be granted under the Ontario Judicature Act (R.S.O. [1887] c. 44.) WILLIAMS *v.* CORPORATION OF RALEIGH — — — — — 103

3——*Ontario Municipal Act—R.S.O.* [1887] *c.* 184 *s.* 583—*Drainage works—Non-completion—Mandamus—Maintenance and repair—Notice.*] The township of C., under the provisions of the Ontario Municipal Act (R.S.O. [1887] c. 184) relating thereto, undertook the construction of a drain along the town line between the townships of C. and S. but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township in which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains and a mandamus to compel the completion of the drain undertaken to be constructed by C. as well as damages for the injury to M.'s land and other land in S. *Held*, affirming the decision of the Court of Appeal, that M. was entitled to damages, and, reversing such decision, Taschereau J. dissenting and Patterson J. hesitating, that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient. *Held*, per Ritchie C.J., Strong and Gwynne JJ., that s. 583 of the Municipal Act providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act (R.S.O. [1887] c. 44.)—*Held*, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away.—*Held*, per Patterson J. that it might be better to leave the decision of the Court of Appeal undisturbed and let the township of S. give notice to repair under sec. 583 of the Municipal Act and work out its remedy under that section. THE CORPORATION OF SOMBRA *v.* TOWNSHIP OF CHATHAM — 305

4——*Exercise of powers—By-law—Executory contract.*] The Ontario Municipal Act (R.S.O. [1887] c. 184) by s. 480 authorizes any municipal council to purchase fire apparatus of any kind, and by s. 282 the powers of a council must be exercised by by-law. *Held*, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that a contract under the corporate seal for purchase of a fire-engine which was not authorized by by-law and not completed by acceptance of the engine, could not be enforced against the corporation. *Bernardin* v. *North Dufferin* (19 Can. S. C. R. 581) distinguished. WATEROUS ENGINE WORKS CO. *v.* TOWN OF PALMERSTON — — — 556

5——*By-law—Submission to ratepayers—Compliance with statute—Imperative or directory provisions—Authority to quash.*] The Ontario Municipal Act (R.S.O. [1887] c. 184) requires, by sec. 293, that before the final passing of a by-law requiring the assent of the ratepayers a copy thereof shall be published in a public newspaper published either within the municipality or in the county town or in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich, in the county of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich which does touch said boundaries. *Held*, affirming the decision of the Court of Appeal, that as the village of Norwich was geographically within the adjoining municipality the statute was sufficiently complied with by the said publication. HUSON *v.* TOWNSHIP OF SOUTH NORWICH — — — — — 669

6——*Repair of road—By-law—Validity of—Appeal—Rights in future* — — — — 65

See APPEAL 2.

7——*Maintenance of road—Road Co.—General act—Special charter—R.S.O.* (1887) *c.* 159—53 *V. c.* 42 (*O.*) — — — — — — 631

See STATUTE 4.

NEGLIGENCE—*Action for damages—Use of engine—Discharge of steam—Nuisance—Contributory negligence.*] The pipe from a condenser attached to a steam engine used in the manufacture of electricity passed through the floor of the premises and discharged the steam into a dock below some twenty feet from an adjoining warehouse, into which the steam entered and damaged the contents. Notice was given to the electric company, but the injury continued and an action was brought by the owners of the warehouse for damages. *Held*, affirming the decision of the court below, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured were entitled to damages therefor, more especially as the injury continued after notice to the company. CHANDLER ELECTRIC CO. *v.* FULLER — — — — — — 337

2——*Steam engine—Damage by fire from—Spark arrester—Charge to jury—Misdirection—New trial—Appeal* — — — — — 19

See APPEAL 1.

" PRACTICE 1.

3——*Application for insurance—Agreement by agent to forward policy—Action for neglect* — 371

See CONTRACT 3.

NEW TRIAL—*Appeal from order for—Misdirection—Negligence—Damage by fire—Spark arrester* — — — — — — 19

See APPEAL 1.

" PRACTICE 1.

2——*Appeal from order for—Discretion*

SCOTT *v.* BANK OF NEW BRUNSWICK. 30

3——*Action on guarantee—Misrepresentation—Plea of fraud—Death of plaintiff* - — 359

See SHIPS AND SHIPPING 1.

4——*Action for libel—General verdict—Evidence—Improper admission* — — — 518

See PRACTICE 6.

NOTARY—*Notarial Code—R.S.Q. Art.* 3871—*Board of Notaries—Disciplinary powers—Prohibition.*] When a charge derogatory to the honour of his profession is made against a notary under the provisions of the Notarial Code, R. S. Q. Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate without waiting for the sentence of a court of criminal jurisdiction. TREMBLAY *v.* BERNIER — 409

NOTICE—*of action—Form of—Municipal corporation—Plea of want of.*] In an action against a municipal corporation for injuries caused by the defective state of a sidewalk the following letter from plaintiff's solicitor was relied on as a sufficient notice of action: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:" *Held*, per Ritchie C.J. and Strong J., that the letter of the solicitor was not a sufficient notice of action under the statute.—Per Ritchie C.J. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.—By 25 V. c. 16 s. 84 (N.B.) and amending acts, relating to highways, the .....privileges and immunities formerly vested in commissioners of roads are declared to be vested in the council of the town of Portland. By another act no action could be brought against a commissioner of roads unless notice thereof was given. The Town of Portland afterwards became part of the city of St. John and an action was brought for injuries caused by a broken plank on a sidewalk in what was formerly the town of Portland. *Held*, per Strong J. —One of the "immunities" vested in the council was that of not being subject to an action without prior notice.—Per Taschereau, Gwynne and Patterson JJ.—Notice was not necessary; the liability did not depend on s. 84 of 25 V. c. 16 but on the statutory duty of the council to keep the streets in repair; the only "privilege or immunity" to the commissioner was exemption from performance of statute labour. CITY OF ST. JOHN *v.* CHRISTIE - 1

2——*Charge on equitable property—Purchaser for valuable consideration.*]—In the case of a charge upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such chargees take

NOTICE—*Continued.*

rank according to priority in point of time. UTTERSON LUMBER CO. *v.* RENNIE - — 218

And see MORTGAGE 2.

3——*Master and servant—Dangerous machinery—Defective system of usage—Notice to master of defect.*]—At common law a workman was not precluded from obtaining compensation for injuries received by means of defective machinery or a defective system of using the same by reason of failure to give notice to his employer of such defect. WEBSTER *v.* FOLEY — — — 580

4——*Will—Residuary devise to executor—Mortgagee of executor—Legacy—Charge on realty* 273

See EXECUTORS AND ADMINISTRATORS.

5——*Use of engine—Discharge of steam—Nuisance—Notice of injury—Continuance* — — 337

See NEGLIGENCE.

6——*Of rescission of contract—Want of title—Time for completion—Laches* — — — 390

See CONTRACT 4.

NUISANCE—*Use of engine—Discharge of steam—Negligence* — — — — 337

See NEGLIGENCE.

2——*Mill-owner—Obstruction to river—Mill refuse—Tort feasors* — — — 637

See PRACTICE 8.

PLEADING—*Action against municipal corporation—Repair of streets—Notice—Want of* — 1

See MUNICIPAL CORPORATION 1.

2——*Estoppel—Title to land—Grant of local legislature—Conveyance by grantee—Dower—Validating act* — — — — — 152

See STATUTE 2.

3——*Action on policy—Condition—Defence—Want of plea* — — — — 288

See INSURANCE, FIRE.

4——*Action on guarantee—Misrepresentation—Plea of fraud—Defence under* — — 359

See SHIPS AND SHIPPING 1.

PLEDGE—*Opposition à fin de charge—Pledge—Art.* 419 *C. C.—Agreement—Effect of—Arts.* 1977, 2015 *and* 2094 *C. C.*] The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal and Sorel Railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *à fin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal and Sorel Railway and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had

PLEDGE—*Continued.*

neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *à fin de charge*. On appeal to the Supreme Court the respondents moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the court. The court without deciding the question of jurisdiction heard the appeal on the merits, and it was: *Held*, 1. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal and Sorel Railway Company. 2. That as the agreement granting the lien or pledge affected immovable property and had not been registered it was void against the anterior creditors of the Montreal and Sorel Railway Company. Arts. 1977, 2015 and 2094 C. C. 3. That art. 419 C. C. does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972 C. C. Great Eastern Railway *v.* Lambe — — — — 431

POLICY—*Of fire insurance—Ownership of property—Insurable interest—Condition—Insurance by other parties* — — — — 288

See Insurance, Fire.

2——*Of Marine insurance—Subject of insurance—Advances—Insurable interest* — — 325

See Insurance, Marine 1.

PRACTICE—*Misdirection—New trial ordered by court below—Interference with order for—Negligence—Damage by fire—Spark arrester.*] On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside by the court *en banc* and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada: *Held*, Strong J., dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with. Peers *v.* Elliott *et al.* 19

2——*Joint stock co.—Dominion charter—Forfeiture—Proceedings to set aside.*] Proceedings to set aside the charter of a company incorporated by Act of the Dominion Parliament may be taken by the Attorney-General of Canada. Dominion

PRACTICE—*Continued.*

Salvage & Wrecking Co. *v.* Attorney-General of Canada — — — — — 72

3——*Solicitors—Action on bill of costs—Set-off—Mutual debts—Special services—Retainer—Appeal—Jurisdiction.*] In an action by a firm of attorneys for costs due from clients the defendants were not allowed to set off against the plaintiff's claim a sum paid by one of them to one of the solicitors for special services to be rendered by him there being no mutuality and the payment not being for the general services covered by the retainer to the firm. McDougall *v.* Cameron, Bickford *v.* Cameron — — — — — 379

4——*Notarial Code—R. S. Q. Art.* 3871—*Board of Notaries—Disciplinary powers—Prohibition.*] When a charge derogatory to the honour of his profession is made against a notary under the provisions of the Notarial Code, R. S. Q. Art. 3871, which amounts to a crime or felony the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of a court of criminal jurisdiction. Tremblay *v.* Bernier. — — — 409

5——*Proceedings before Exchequer and Supreme Courts of Canada—Solicitor and client—Costs—Quantum meruit—Parol evidence—Art.* 3597 *R. S. Q.*] In proceedings before the Exchequer and Supreme Courts there being no tariff as between attorney and client an attorney has the right in an action for his costs to establish the *quantum meruit* of his services by oral evidence. Paradis *v.* Bossé — — — — — 419

6——*Libel—Personal attack on Attorney-General—Pleading—Rejection of evidence—Fair comment—General verdict—New trial.*] In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the Attorney-General of the province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty." and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants, and in answer to the trial judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial: *Held*, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. Manitoba Free Press Co. *v.* Martin — — — — — 518

PRACTICE—*Continued.*

7——*Malicious prosecution—Reasonable and probable cause—Belief of prosecution—Duty to make inquiry—Questions for jury.*] In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred but the inference must be drawn by the judge. *Lister* v. *Perryman* (L. R. 4 H. L. 521) followed; *Abrath* v. *North Eastern Railway Co.* (11 Q. B. D. 79, 440; 11 App. Cas. 247) considered. ARCHIBALD *v.* MCLAREN — — — — — 588

8——*Judgment of court—Withdrawal of opinion—Master's report—Credibility of witnesses—Apportionment of damages—Irrelevant evidence.*] The Court of Appeal for Ontario, composed of four judges, pronounced judgment in an appeal before the court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at. *Held*, that the appellate court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed.—In an action against several mill owners for obstructing the River Ottawa by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages. *Held*, affirming the decision of the Court of Appeal, that the master rightly treated the defendants as joint tort feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant; and he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Held* further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.—On a reference to a master the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of, his report to the court. BOOTH *v.* RATTÉ. — — — — — — — 637

9——*Addition of parties—Substitution—Prejudice—Locus standi—Foreclosure of mortgage* — 139

See MORTGAGE 1.

10——*Action against sheriff—Trespass or trover—Goods seized under execution—Justification* —342

See HUSBAND AND WIFE.

" MARRIED WOMAN'S PROPERTY.

PREFERENCE—*Chattel mortgage—Bonâ fide advance—Mortgage void for part of consideration—Effect on whole instrument—R.S.O.* (1887) *c.* 124 *ss.* 2 *and* 4 — — — — — 645

See STATUTE 5.

PROMISSORY NOTE—*Liability on—Maker or endorser—Intention—Evidence.*] W. having agreed to become security for a debt wrote his name upon the back of the promissory note drawn in favour of the creditors and signed by the debtor. The note was not endorsed by the payees, and no notice of the dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial of which a nonsuit was entered with leave reserved to plaintiffs to move for judgment in their favour, if there was any evidence to go to the jury as to W.'s liability. *Held*, affirming the judgment of the court below, that there was no evidence to go to the jury that W. intended to be as a maker of the note, and plaintiffs were rightly nonsuited.] THE AYR AMERICAN PLOUGH CO. *v.* WALLACE — 256

2——*Form of—" We Promise to Pay" and signed by manager of Co.—Descriptive words—Liability of members of Co.*] The manager of an incorporated company, in payments for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay" and signed "R., manager O. L. Co." In an action against the individual members of the company the defence was that R. alone was liable on the note and that the words "manager," etc., were merely descriptive of his business. *Held*, affirming the decision of the court below, that as the evidence established that both R. and the payees of the note intended to make the co. liable; and as R. had authority, as manager, to make a note on which the co. would be liable; and as the form of the note was sufficient to effect that purpose; the defence could not prevail and the holders of the note were entitled to recover. FAIRCHILD *v.* FERGUSON — — — 484

PROPRIETARY RIGHTS—36 *Vic. ch.* 81 *P.Q.*—*Booms—Proprietary rights—Replevin—Revendication—Estoppel by conduct.*] O'S. claiming to be the legal depositary and T. McG. claiming to be usufructuary of certain booms, chains and anchors in the Nicolet River under 36 Vic. ch. 81 P. Q., and which G. B., being in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same and for $5,000 damages. *Held*, affirming the judgment of the court below, that O'S. and T. McC. were not entitled to the possession as alleged and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. See *Ball* v. *McCaffrey* (20 Can. S. C. R. 319). O'SHAUGNESSY *v.* BALL — 415

RAILWAY—*Opposition à fin de charge—Pledge—Art.* 419 *C. C.—Agreement—Effect of—Arts.* 1977, 2015 *and* 2094 *C. C.*] The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal and Sorel Railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *à fin de charge* for the sum

RAILWAY—*Continued.*

of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal and Sorel Railway and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *à fin de charge*. On appeal to the Supreme Court the respondents moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the court. The court without deciding the question of jurisdiction heard the appeal on the merits: *Held*, 1. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal and Sorel Railway Company. 2. That as the agreement granting the lien or pledge affected immovable property and had not been registered it was void against the anterior creditors of the Montreal and Sorel Railway Company. Arts. 1977, 2015 and 2094 C. C. 3. That art. 419 C. C. does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledgor's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972 C. C. Great Eastern Railway *v.* Lambe — — — — — 431

2——*Taxation of income—St. John, N.B.—Agent or manager—Statement—Statutory form* — 691

See Assessment and Taxes 2.

3——*Railway Co. — Bonus — Bond—Condition—Breach.*] Grand Trunk Railway Co. *v.* County of Halton — — — — — 716

RECTIFICATION—*Mortgage—Mistake in description—Registry—Judgment against lands of mortgagor* — — — — — 33

See Debtor and Creditor 1.

" Registry Laws.

2——*Mortgage—Description of property—Omission by mistake* — — — — — 218

See Mortgage 2.

REGISTRY LAWS—*Registry Act—R.S.N.S. 5th ser. c. 84 s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.*] By R.S.N.S. 5th ser. c. 84, s. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment. A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before

REGISTER LAWS—*Continued.*

the foreclosure judgment was registered against the mortgagor, and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditor from so levying: *Held*, affirming the judgment of the court below, Strong and Patterson JJ. dissenting, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage which, by the statute, was void as against the registered judgment of the creditor. *Grindley* v. *Blakie* (19 N. S. Rep. 27), approved and followed. Miller *v.* Duggan – 33

REPLEVIN—*Booms—Proprietary rights—Revendication—Estoppel by conduct* — — 415

See Proprietary Rights.

RES JUDICATA—*Action en reprise d'instance—Petition for continuance—Judgment—Appeal* – 425

See Appeal 9.

ROAD COMPANY—*General Road Companies Act of Ontario—Application of to special charter—Collection of tolls—Maintenance of road—R. S. O.* (1887) *c.* 159—53 *V. c.* 42 (*O.*) — — 631

See Statute 4.

SALE OF GOODS—*Guarantee against loss—Claim on—Proof—Account sales* — — 28

See Guarantee.

SALE OF LAND—*Under execution—Judgment against estate for debt of executor—Purchase by executor—Title—Possession—Statute of limitations* — — — — — — 201

See Title to Land 2.

" Trustee 1.

2——*Sheriff's sale—Estate property—Construction of will* — — — — — 499

See Will 2.

SALVAGE—*Marine insurance—Insurance on hull—Salvage of cargo—Apportionment of cost—Average bond* — — — — 383

See Insurance, Marine 2.

SCIRE FACIAS — *Joint Stock Company—Dominion charter — Forfeiture — Proceedings to set aside* — — — — — — 72

See Corporation 1.

" Practice 2.

SECURITY—*For costs—Admission of attorney—Refusal of court below.*] Per Ritchie C.J. and Taschereau J.—Except in cases specially provided for no appeal can be heard by this court unless security for costs has been given as provided by s. 46 of the Supreme and Exchequer Courts Act (R.S.C. c. 135). In re Cahan — 100

SET OFF—*Solicitors—Action on bill of costs—Mutual debts—Retainer* — — — 379

See Practice 3.

SHERIFF—*Action against—Trespass or trover—Goods seized under execution—Justification—Proof of judgment* — — — — 342

See Husband and Wife.

" Married Woman's Property.

SHIPS AND SHIPPING — *Disbursements — Difference in freight — Bill of exchange — Guarantee — Evidence — Misrepresentation.*] — On a ship under charter being loaded it was found that a sum of £173 was due the charterer for the difference between the actual freight and that in the charter party and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £753 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection to request that the matter should stand over until the ship arrived at St. John where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges and also of the payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft and to an action on his said guarantee he pleaded payment and that he was induced to sign the same by fraud. By order of a judge the pleas of payment were struck out. On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by showing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him. *Held*, affirming the decision of the court below, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that if available without plea it was not proved; that nothing could be gained by ordering another trial as, V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him.—*Held*, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. Vaughan *v.* Richardson — — 359

2——*Owner of ship—Insurance by—Advances—Insurable interest* — — — — 325

See Insurance, Marine 1.

SOLICITOR—*Bill of costs—Order for taxation—R. S. O.* (1887) *ch.* 147 *s.* 42—*Appeal—Jurisdiction—Discretion—Proceeding originating in superior court—Final judgment.*] By R. S. O. (1887) ch. 147 s. 42 any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the

SOLICITOR—*Continued.*

High Court, or of the County Court, for an order for taxation. An action was brought against school trustees and a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court the judgment refusing it was reversed. There was no appeal as of right to the Court of Appeal from the latter decision but leave to appeal was granted and the Court of Appeal reversed the judgment of the Divisional Court and restored the original judgment refusing the application. From this last decision an appeal was sought to the Supreme Court of Canada. *Held*, per Ritchie C.J., Strong and Gwynne JJ., that assuming the court had jurisdiction to entertain the appeal the subject matter being one of taxation of costs this court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters.—Per Ritchie C.J., Strong and Patterson JJ., that a ratepayer is not entitled to an order for taxation under said section.—Per Taschereau J.—The court has no jurisdiction to entertain the appeal as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the courts below; and the proceedings did not originate in a superior court.—Per Patterson J.—The making or refusing to make the order applied for is a matter of discretion and the case is, therefore, not appealable. McGugan *v.* McGugan — 267

2——*Proceedings before Exchequer and Supreme Courts of Canada—Solicitor and client—Costs—Quantum meruit—Parol evidence—Art.* 3597 *R.S.Q.*] In proceedings before the Exchequer and Supreme Courts there being no tariff as between attorney and client an attorney has the right in an action for his costs to establish the *quantum meruit* of his service by oral evidence. Paradis *v.* Bossé 419

3——*Admission of—Appeal from refusal* — 100

See Appeal 4.

4——*Action on bill of costs—Set-off—Mutual debts—Retainer—Appeal—Jurisdiction* — — 379

See Appeal 7.

" Practice 3.

SPECIFIC PERFORMANCE—*Contract—Agreement for service—Remuneration.*] S., a girl of fourteen, lived with her grandfather who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five when she married. The grandfather died shortly after leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for the daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such service as tending cattle, doing field work, managing a reaping machine, and breaking in and

SPECIFIC PERFORMANCE—*Continued.*

driving wild and ungovernable horses. *Held*, reversing the decision of the Court of Appeal, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance, but: *Held* further, that S. was entitled to remuneration for her services and $1,000 was not too much to allow her. MCGUGAN *v.* SMITH — — — — — 263

2——*Contract — Specific performance — Time for completion — Extension — Rescission — Conduct of party seeking relief—Laches.*] The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the person seeking relief. HARRIS *v.* ROBINSON — — — — — 390

And see CONTRACT 4.

3——*Municipal corporation—Exercise of powers—Executory contract* — — — — 556

See CONTRACT 5.

STATUTE—*Municipal corporation—Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—Mandamus.*] By sec. 483 of the Ontario Municipal Act (R.S.O. [1887] ch. 184) if private lands are injuriously affected by the exercise of municipal powers the council shall make due compensation to the owner, the claim for which, if not mutually agreed upon, shall be determined by arbitration. *Held*, reversing the judgment of the Court of Appeal, that it is only when the act causing the injury can be justified as the exercise of a statutory power that the party injured must seek his remedy in the mode provided by the statute; if the right infringed is a common law right and not one created by the statute the remedy by action is not taken away.—By sec. 569 of the same act the council, on petition of the owners for drainage of property, may procure an engineer or surveyor to survey the locality and make a plan of the work, and if of opinion that the proposed work is desirable may pass by-laws for having it done. *Held*, reversing the judgment of the Court of Appeal, that the council has a discretion to exercise in regard to the adoption, rejection or modification of the scheme proposed by the engineer or surveyor and if adopted the council is not relieved from liability for injuries caused by any defect therein or in the construction of the work or from the necessity to provide a proper outlet for the drain when made thereunder. —The act imposes upon the council, after the construction of work proposed by the engineer or surveyor, the duty to preserve, maintain and keep in repair the same. The township of R., in pursuance of a petition for draining flooded lands and a surveyor's report, constructed a number of drains and an embankment. These drains were led into others formerly in use which had not the capacity to carry off the additional volume of water, but became overcharged and flooded the land of W. adjoining. *Held*, that the municipality was guilty

STATUTE—*Continued.*

of neglect of the duty imposed by the act and W. had a right of action for the damages caused thereby. *Held*, per Strong and Gwynne JJ., Ritchie C.J. and Patterson J. contra, that the drain causing the injury being wholly within the limits of the municipality in which it was commenced, and not benefiting lands in an adjoining municipality, it did not come under the provisions of s. 583 of the Municipal Act and W. was not entitled to a mandamus under that section.—Per Ritchie C.J. and Patterson J. Sec. 583 applied to the said drain but W. could not claim a mandamus for want of the notice required thereby.—*Held*, per Strong and Gwynne JJ., that though W. was not entitled to the statutory mandamus it could be granted under the Ontario Judicature Act (R.S.O. [1887] c. 44.) WILLIAMS *v.* CORPORATION OF RALEIGH — — — — 103

2——*Title to land—Foreshore of harbour— Grant from local government—Conveyance by grantee—Claim of dower by wife of grantee—Objection to—Estoppel—Act of local legislature—Confirming title —Validity of—Pleading.*] After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot, through the C. B. Coal Co., to the S. & L. Coal Co. S. having died, his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion government. *Held*, affirming the judgment of the court below, Strong and Gwynne JJ. dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective. Per Strong and Gwynne JJ. dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped, and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants.—After the conveyance to the defendant company an act was passed by the legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co. *Held*, that if the legislature could by statute affect the title to this property which was vested in the Dominion government, it had not done so by this act in which the crown is not expressly named. Moreover the statute should have been pleaded by the defendants. SYDNEY AND LOUISBURG COAL AND RAILWAY CO. *v.* SWORD — — — — — 152

3——*Municipal corporation—Ontario Municipal Act—R.S.O.* [1887] c. 184 *s.* 583—*Drainage works—Non-completion — Mandamus — Maintenance and repair—Notice.*] The township of C., under the provisions of the Ontario Municipal Act (R. S. O. [1887] c. 184) relating thereto, undertook the construction of a drain along the town line between the townships of C. and S., but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M and the township of S. joined in an action against the township, in

STATUTE—*Continued.*

which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains and a mandamus to compel the completion of the drain undertaken to be constructed by C. as well as damages for the injury to M.'s land and other land in S. *Held*, affirming the decision of the Court of Appeal, that M. was entitled to damages, and, reversing such decision, Taschereau J. dissenting and Patterson J. hesitating, that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient. *Held*, per Ritchie C.J., Strong and Gwynne JJ., that s. 583 of the Municipal Act providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act (R.S.O. [1887] c. 44). *Held*, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away. *Held*, per Patterson J., that it might be better to leave the decision of the Court of Appeal undisturbed and let the township of S. give notice to repair under sec. 583 of the Municipal Act, and work out its remedy under that section. CORPORATION OF SOMBRA *v.* TOWNSHIP OF CHATHAM — — — 305

4——*Application of—R.S.O.* (1887) *c.* 159—53 *V. c.* 42 *(O.)—Application to company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.*] The provision of the General Road Companies Act of Ontario (R.S.O. [1887] c. 159) as amended by 53 V. c. 42 relating to tolls and repair of roads apply to a company incorporated by special acts and on the report of an engineer as provided by the general act that the road of such company is out of repair it may be restrained from collecting tolls until such repairs have been made. Judgment of the Court of Appeal on motion for entering injunction (19 Ont. App. R. 234) over-ruled and that of the Divisional Court (21 O.R. 507) approved. ATTORNEY-GENERAL OF ONTARIO *v.* THE VAUGHAN ROAD CO. — — — — — — 631

5——*Statute—Application—R.S.O.* (1887) *c.* 124 *ss.* 2 *and* 4—*Chattel mortgage—Preference—Bonâ fide advance—Mortgage void for part of consideration—Effect on whole instrument.*] Section 2 of R.S.O. [1887] c. 124 which makes void a transfer of goods, etc., by an insolvent with intent to, or having the effect of, hindering, delaying or defeating creditors or giving one or more creditors a preference over the others, does not apply to a chattel mortgage given in consideration of an actual *bonâ fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any

STATUTE—*Continued.*

intention on his part to defeat, delay or hinder his creditors.—If part of the consideration for a chattel mortgage is a *bonâ fide* advance and part such as would make the conveyance void as against creditors the mortgage is not void as a whole but may be upheld to the extent of the *bonâ fide* consideration. *Commercial Bank* v. *Wilson* (3 E. & A. Rep. 257) decided under the statute of Elizabeth, is not law under the Ontario statute. Decision of the Court of Appeal following that case over-ruled, but the judgment sustained on the ground that it was proved that no part of the consideration was *bonâ fide*. CAMPBELL *v.* PATTERSON; MADER *v.* MCKINNON — 645

6——*Bill of sale—Affidavit of bona fides—Adherence to form—R.S.N.S. 5th ser. c.* 92 *ss.* 4 *and* 11 — — — — — — 355

See BILL OF SALE.

7——*By-law—Submission to rate-payers—Publication—Compliance with provisions—Imperative or directory* — — — — — 669

See MUNICIPAL CORPORATION 5.

8——*Assessment Act—Statement for assessors—Statutory form—Departure from* — 674, 691

See ASSESSMENT AND TAXES 1, 2.

STATUTES—*B. N. A. Act, s.* 92 *s.s.* 14 — 446

See CONSTITUTIONAL LAW.

2——44 *V. c.* 61 *(D). [Dominion Salvage and Wrecking Company.]* — — — — — 72

See CORPORATION 1.

3——*R. S. C. c.* 5 *s.* 32. [*Electoral Franchise Act.*] — — — — — — — 168

See CONTROVERTED ELECTIONS 1.

4——*R. S. C. c.* 8 *ss.* 30 *(b)*, 31, 33, 41, 54, 58 *and* 65. [*Dominion Elections Act.*] — — 168

See CONTROVERTED ELECTIONS 1.

5——*R. S. C. c.* 9 *s.* 32. [*Controverted Elections Act.*] — — — — — — 28

See CONTROVERTED ELECTIONS 2.
" APPEAL 12.

6——*R. S. C. c.* 135 *ss.* 2, 24 *and* 28. [*Supreme and Exchequer Courts Act.*] — — — 425

See APPEAL 9.

7——*R. S. C. c.* 135 *s.* 29. [*Supreme and Exchequer Courts Act.*] — — — — — 32

See APPEAL 16.

8——*R. S. C. c.* 135 *s.* 29 *(b)*. [*Supreme and Exchequer Courts Act.*] — — 65, 69, 422

See APPEAL 2, 3, 8.

9——*R. S. C. c.* 135 *s.* 46. [*Supreme and Exchequer Courts Act.*] — — — — — 100

See APPEAL 4.

10——*R. S. C. c.* 135 *s.* 52. [*Supreme and Exchequer Courts Act.*] — — — — — 28

See APPEAL 12.
" CONTROVERTED ELECTIONS 2.

STATUTES—*Continued.*

11——51 *V. c.* 47 (*D*). [*Speedy Trials Act.*] — 446
See CONSTITUTIONAL LAW.

12——54 *and* 55 *V. c.* 25 (*D*). [*Supreme and Exchequer Courts Amendment Act.*] — 281,446
See APPEAL 6.
" CONSTITUTIONAL LAW.

13——*R. S. O.* (1887) *c.* 44. [*Judicature Act.*] — — — — — — 103,305
See MUNICIPAL CORPORATION 2, 3.

14——*R. S. O.* (1887) *c.* 124 *ss.* 2 *and* 4. [*Assignments by Insolvents.*] — — — 645
See STATUTE 5.

15——*R. S. O.* (1887) *c.* 147 *s.* 42. [*Solicitors.*] 267
See SOLICITOR 1.
" APPEAL 5.

16——*R. S. O.* (1887) *c.* 159. [*Joint Stock Companies.*] — — — — — — 631
See STATUTE 4.

17——*R. S. O.* (1887) *c.* 184 *s.* 293, 583. [*Municipal Act.*] — — — — — 103,305,669
See MUNICIPAL CORPORATION 2, 3, 5.

18——53 *V. c.* 42 (*O*). [*Road Companies.*] — 631
See STATUTE 4.

19——36 *V. c.* 81 (*Q*). [*Booms and Piers on Nicolet River.*] — — — — — 415
See PROPRIETARY RIGHTS.

20——44 *and* 45 *V. c.* 90 (*Q*). [*Toll bridge over Chaudière River.*] — — — — 456
See TOLL BRIDGE.

21——*R. S. Q. Art.* 3597. [*Advocates' fees.*[— 419
See SOLICITOR 2.

22——*R. S. Q. Art.* 3871. [*Notaries.*] — 409
See PRACTICE 4.

23——*R. S. N. S.* 5*th Ser.* c. 84 *s.* 21. [*Registry of Deeds.*] — — — — — 33
See REGISTRY LAWS.
" DEBTOR AND CREDITOR 1.

24—— *R. S. N. S.* 5*th Ser. c.* 92 *ss.* 4 *and* 11. [*Bills of Sale.*] — — — — 355
See BILL OF SALE.

25——*R. S. N. S.* 5*th ser. c.* 94 [*Married Women's Property.*] — — — — — 342
See HUSBAND AND WIFE.

26——25 *V. c.* 16 (*N.B.*) [*Highways.*] — — 1
See MUNICIPAL CORPORATION 1.

27——34 *V. c.* 11 (*N.B.*) [*Incorporation Town of Portland.*] — — — — — 1
See MUNICIPAL CORPORATION 1.

28——52 *V. c.* 27 *s.* 125 (*N.B.*) [*Union of St. John and Portland*] — — — — 674, 691
See ASSESSMENT AND TAXES 1, 2.

STATUTES—*Continued.*

29——*C. S. B. C. c.* 25 *s.* 14 [*County Courts Act.*] — — — — — — 446
See CONSTITUTIONAL LAW.

30——53 *V. c.* 8 *s.* 9 (*B. C.*) [*County Courts Amendment Act.*] — — — — — 446
See CONSTITUTIONAL LAW.

STATUTE OF LIMITATIONS—*Sheriff's sale—Judgment against estate for debt of executor—Purchase by executor—Possession—Evidence* — 201
See TITLE TO LAND 2.

SUBSTITUTION — *Will — Construction — Usufruct* — — — — — — 499
See WILL 2.

TIME—*Essence of contract—Extension—Negotiations after expiry—Waiver* — — 390
See CONTRACT 4.

2——*To appeal—Limitation* — — 656
See APPEAL 11.

TITLE TO LAND—*Foreshore of harbour—Grant from local government—Conveyance by grantee—Claim of dower by wife of grantee—Objection to—Estoppel—Act of local legislature—Confirming title—Validity of—Pleading.*] After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot, through the C. B. Coal Co. to the S. & L. Coal Co. S. having died his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government. *Held*, affirming the judgment of the court below, Strong and Gwynne JJ. dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.—Per Strong and Gwynne JJ. dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and an estoppel could not be created by the covenants.—After the conveyance to the defendant company an act was passed by the legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co. *Held*, that if the legislature could by statute affect the title to this property which was vested in the Dominion government it had not done so by this act in which the crown is not expressly named. Moreover the statute should have been pleaded by the defendants. THE SYDNEY AND LOUISBURG COAL AND RAILWAY CO. *v.* SWORD - - - - - - - - - 152

2——*Title to land—Sheriff's sale—Executor—Judgment against estate for debt of—Purchase by executor—Possession—Statute of limitations.*] Judgment was recovered against the executors of an estate on a note made by D. M., one of the executors, and endorsed by the testator for his accommodation. In 1849 land devised by the testator to A. M., another son, was sold under execution issued

TITLE TO LAND—*Continued.*

on said judgment and purchased by D.M., who, in 1853, conveyed it to another brother, W.M. In 1865 it was sold under execution issued on a judgment against W. M. and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof and D. M. brought an action against him for possession. *Held*, affirming the decision of the Court of Appeal, Strong J. dissenting, that the sale in 1849 being for his own debt D. M. did not acquire title to the land for his own benefit thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1865. *Held*, also, that if D. M. was in a position to claim the benefit of the statute of limitations the evidence did not establish the possession necessary to give him a title thereunder. McDONALD *v.* McDONALD - - - 201

3——*Contract—Specific performance — Agreement by person without title—Rescission* — — 390

See CONTRACT 4.

4——*Purchaser at tax sale—Cloud upon title—Purchase money—Distribution—Trustee.*] DRAPER *v.* RADENHURST — — — — - - 714

TOLL BRIDGE—44 *&* 45 *Vic. ch.* 90 (*P.Q.*)—*Toll bridge—Franchise of—Free bridge—Interference by —Injunction.*] By 44 & 45 Vic. (P.Q.) ch. 90 sec. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River in the parish of St. George, it is enacted that "so soon as the bridge shall be open to the use of the public as aforesaid during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles or cattle for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll bridge or toll bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river for the conveyance of persons, vehicles or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present act, for the persons, cattle or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall, at any time, for lucre or gain, convey across the river any person or persons, cattle or vehicles within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal or vehicle which shall have thus passed the said river; provided always, that nothing contained in the present act shall be of a nature to prevent any persons, cattle, vehicles or loads from crossing such river within the said limits by a ford or in a canoe or other vessel without charge." After the bridge had been used for several years the appellant municipality passed a by-law to erect a free bridge across the Chaudière River in close proximity to the toll bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality

TOLL BRIDGE—*Continued.*

be restrained from proceeding to the erection of a free bridge. *Held*, affirming the judgment of the court below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll bridge, and the injunction should be granted. CORPORATION OF AUBERT-GALLION *v.* ROY — — — — 456

TOLLS—*Collection of—Road Co.—Special charter —Application of general act—R. S. O.* (1887) *c.* 159 53 *V. c.* 42 (*O.*) — — — — 631

See STATUTE 4.

TRESPASS—*Action against sheriff—Execution —Seizure of goods—Justification* - - — 342

See HUSBAND AND WIFE.

" MARRIED WOMAN'S PROPERTY.

TROVER—*Action against sheriff—Justification— Execution—Seizure of goods—Proof of judgment* — — — — — — 342

See HUSBAND AND WIFE.

" MARRIED WOMAN'S PROPERTY.

2——*Application for insurance—Agreement to forward policy—Conversion—Escrow* - - — 371

See CONTRACT 3.

TRUSTEE—*Title to land—Sheriff's sale—Executor —Judgment against estate for debt of—Purchase by executor — Possession — Statute of limitations.*] Judgment was recovered against executors in an action on a note made by one of them and endorsed by the testator for his accommodation. Property devised to a son of testator was sold under execution issued on said judgment and purchased by the executor who had made the note and conveyed by him to another son of the testator. The property was again sold under execution against the last mentioned grantee and again purchased by the said executor. The original devisee having taken forcible possession of the property the executor brought an action to recover it. *Held*, Strong J. dissenting, that the first sale being for his own debt the executor on purchasing did not acquire title for his own benefit but became a trustee for the devisee, and the trust continued when he purchased the second time. McDONALD *v.* McDONALD. — — 201

2——*Mortgage—Railway bonds—Security for advances—Second mortgagee—Purchase by* — 536

See MORTGAGE 3.

USUFRUCT—*Will—Construction—Substitution* — — — — — — — 499

See WILL 2.

WAIVER—*Contract—Specific performance—Time for completion—Negotiations after expiry* — 390

See CONTRACT 4.

WARRANTY—*Policy of insurance—Ownership of property—Declaration of—Materiality to risk* — — — — — — — 288

See INSURANCE, FIRE.

WILL—*Legacy—Words "property" and "estate" —Charge on realty.*] Either of the words "property" or "estate" is sufficient to pass realty under a will. CAMERON *v.* HARPER — 273

2——*Construction of — Substitution— Usufruct — Sheriff's sale—Effect of—Art.* 711, *C. C. P.*] The will of the late J. McG. contained the following provisions:—Fifthly, I give, devise and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use and enjoyment during all her natural lifetime, of the rest and residue of my property, movable or immovable * * * in which I may have any right, interest or share at the time of my death, without any exception or reserve. To have and to hold, use and enjoy the said usufruct, use and enjoyment of the said property unto my said wife, the said Helen Mahers, as and for her own property from and after my decease and during all her natural lifetime. Sixthly, I give, devise and bequeath in full property unto my son James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind, movable, real or personal of which the usufruct, use and enjoyment during her natural lifetime is hereinbefore left to my said wife the said Helen Mahers but subject to the said usufruct, use and enjoyment of his mother the said Helen Mahers during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever; should, however, my said son, the said James McGregor, die before his said mother, my said wife, the said Helen

WILL—*Continued.*

Mahers, then and in that case I give, devise and bequeath the said property so hereby bequeathed to him, to the said Helen Mahers, in full property to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever. To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property for ever, and in the event of his pre-deceasing his said mother, the said Helen Mahers, her heirs and assigns as and for her and their own property for ever. *Held*, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the will of J. McG. did not create a substitution but a simple bequest of usufruct to his wife and of ownership to his son. *Held*, also, that a sheriff's sale (*decret*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711, C. C. P. *Patton v. Morin* (16 L. C. R. 267) approved. MCGREGOR *v.* CANADA INVESTMENT & AGENCY CO. — 499

3——*Monthly allowance by—Action against executor for—Appeal—Amount in controversy* — 69

See APPEAL 3.