REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS, Registrar of the Court.

Vol. 6.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.
1882.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

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

" " Samuel Henry Strong, J.

" " Télésphore Fournier, J.

" " William Alexander Henry, J.

" " Henri Elzéar Taschereau, J.

" " John Wellington Gwynne, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable Sir Alexander Campbell, K.C.M.G., Q.C.

ERRATA.

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

Page 467—in line 15 from bottom, instead of "duty to be cut," read "duty on timber to be cut."

" 516—in line 6 from top, instead of "Day," read "Daly," and note (1), instead of "1 H. L.," read "1 Sch. & L."

" 552—in line 3 from top, instead of "Scurry *v.* Ray," read "Savery *v.* Rex."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

NICHOLAS POWER.....APPELLANT ; 1881

AND *Feb'y.18,19.
*March 3.

THOMAS ELLIS.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Witness—Refusal to answer questions on cross-examination—Privileged communications—Improper ruling—Misdirection.

Plaintiff (respondent), a teller in a bank in *New York*, absconded with funds of the bank, and came to *St. John, N. B.*, where he was arrested by the defendant (appellant), a detective residing in *Halifax, N. S.*, and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank and that her husband was in custody.

In an action for assault and false imprisonment and for money had and received, the defendant pleaded, *inter alia*, that the money had been fraudulently stolen by the plaintiff at the city of *New York*, from the bank, and was not the money of the plaintiff; that defendant as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the question proposed. The learned judge then told the jury that there was no identification of the money, and directed them that, if they

---

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

1881

POWER v. ELLIS.

should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff.

Held (*Henry*, J., dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1), sustaining a verdict given in favor of the respondent, who was plaintiff below.

The following was the case settled for appeal to the Supreme Court:—

DECLARATION.—*Thomas Ellis*, by *Charles W. Weldon*, his attorney, sues *Nicholas Power* for money payable by the defendant to the plaintiff, for money received by the defendant for the use of the plaintiff, and for money payable by the defendant to the plaintiff; for interest upon money due from the defendant to the plaintiff and forborne at interest by the plaintiff to the defendant, and at his request.

And the said plaintiff, by leave of a judge for this purpose first had and obtained, also sues the said defendant for that the said defendant assaulted the said plaintiff and compelled him to go to a police station, and there imprisoned and kept him in prison for a long time, whereby the plaintiff suffered great pain of body and mind, and incurred expense in obtaining his liberation from the said imprisonment; and the said plaintiff claims ten thousand dollars.

PLEAS.—"The defendant, by *S. R. Thomson*, his attorney, as to the first and second counts of the declaration, says that he never was indebted as in these counts alleged.

"And for a second plea, as to the first count of the declaration, the defendant says that he received the money in that count mentioned as the agent of the *National Park Bank* of *New York*, and for the said *National Park Bank* of *New York*, and not otherwise,

(1) 20 New Brunswick Reports 40.

1881

POWER v. ELLIS.

whereof the plaintiff then and there had notice; and that after having so received the said money, and before the commencement of this action, he, the said defendant, paid the same over to the said *National Park Bank* of *New York*, and that ever since such payment, the defendant has had and now has no possession or control of the said money in the said first count of the said declaration mentioned, or of any part thereof.

"And for a third plea, as to the said first count of the declaration, the defendant says that the money in that count mentioned had been feloniously stolen by the plaintiff at the city of *New York* from the *National Park Bank* of *New York*, and in fact was the money of the said bank and not the money of the plaintiff, and thereupon the defendant, as the agent of and acting for the said bank, received the said money to and for the use of the said bank and not otherwise, and afterwards and before the commencement of this action, he, the said defendant, paid the said money over to the said *National Park Bank* of *New York*, and that since such payment the said defendant has never had any possession, use or control of the said money in the said first count mentioned, or of any part thereof.

"And the defendant, as to the third count of the said declaration, says that he is not guilty.

"And for a second plea, to the said third count of the declaration, the defendant says that the plaintiff, before the alleged trespass and imprisonment in that count mentioned, at the city of *New York*, *United States of America*, had feloniously stolen and carried away a certain large sum of money, to-wit, the sum of $30,000 from a certain banking corporation, doing business in the city of *New York* aforesaid, and called the *National Park Bank* of *New York*; and that the plaintiff, after having so feloniously stolen the said money, immediately thereafter fled from the *United States*, and

1881

POWER v. ELLIS.

came with the said identical money so by him feloniously stolen as aforesaid still being in his possession, into the city of *St. John*, in the Dominion of *Canada*, and then actually had in his possession at the city of *St. John* aforesaid, the said money so stolen, or a large part thereof, contrary to the provisions of the Act of the parliament of *Canada* in such case made and provided. Whereupon the defendant, then knowing the premises, and by reason thereof having reasonable and probable cause for suspecting and suspecting that the plaintiff was the person who had so feloniously stolen the said money at the city of *New York* as aforesaid, and that he the said plaintiff, feloniously and contrary to the provisions of the said Act, had then, in the city of *St. John* or elsewhere in *Canada*, the said money so feloniously stolen as aforesaid, or a part thereof, took the plaintiff into custody and brought him to the police station in the said city of *St. John*, and there delivered him into the custody of the police magistrate (who had jurisdiction over the said offence) and of the policemen there, to be dealt with according to law in respect of the premises; and that after having so caused the said plaintiff to be imprisoned in the said station house, he, the said defendant, had nothing more to do with him the said plaintiff; which are the alleged trespasses and imprisonments in the said third count mentioned, and not otherwise."

JOINDER —"The plaintiff joins issue on the defendant's first, second, third, fourth and fifth pleas."

The verdict was for the plaintiff, and damages assessed on the first count $5572, and on the second count $200.

A rule *nisi* for a new trial having been granted was subsequently discharged and the *postea* delivered to the plaintiff. The present appeal was from this decision.

The facts of the case sufficiently appear in the head note, and the judgments hereinafter given.

1881

POWER v. ELLIS.

RITCHIE, C. J.:—

One of the grounds urged for a new trial was that the judge on the trial allowed the plaintiff to refuse to answer certain questions on cross-examination, on the ground that the plaintiff was privileged and not bound to answer the questions put. This is what took place:—

"*Thomas Ellis*—I am the plaintiff. In November, 1876, I gave to my wife $4,500—$100 greenback notes, $300 in Canadian money, in the boarding house at Mrs. *Thompson's*; she had other Canadian money; I got the $4,500 from *James W. Fisher* two or three days before I left *New York*; I got $900; six or seven in forty-nine, $100; the $4,500 I gave to my wife, being part of the $4,900; I requested *Fisher* to purchase $200 in *Canada* money; I gave $300 American money; it was part of what my brother-in-law gave.

"Cross-examined by Mr. *Thomson*—I left *New York* on the evening of 21st October, 1876; all questions outside of this I will answer at the proper time.

"Were you the paying teller of the *National Park Bank* on that day? Obj.

"(Mr. *Palmer* contends that the witness is not bound to answer this question.)

"Witness says—I rely upon my counsel to advise me.

"Were you the paying teller of *National Park Bank*? Obj. On what ground do you decline to answer that question?

"(Judge—I have to allow the witness to exercise his own discretion; if he is of opinion these questions will affect him criminally, or in any way as to the charge set up in these pleas, he is not bound to answer the questions regarding the *National Park Bank*, or any stealing therefrom, as charged in the plea).

"Will you answer? Do you believe that by answering my question that in so doing it would tend to criminate you?

1881

POWER v. ELLIS.

Ritchie, C.J.

"(Judge—The witness need not answer, but if you are of that opinion, it will by answering tend to criminate on the charge, you need not answer, but may decline doing so.)

"(The witness remains silent.)

"I shall follow you step by step until you do answer my questions. Do you apprehend serious consequences if you answer my question? Witness—I respectfully decline answering that question.

"(Judge—I decide the witness if he believes the question if answered by him will tend to criminate him in stealing from the *National Park Bank*, he is not bound to answer.)"

It is not necessary to discuss or decide whether the rule broadly laid down by Lord *Cranworth*, in the case of *The King of the Two Sicilies* v. *Wilcox* (1), that the privilege does not extend to crimes committed in a foreign country for which the witnesses may be liable to be there prosecuted, or the more limited rule as laid down by Lord *Chelmsford* in *U. S.* v. *McRae* (2) should prevail, because in this case the defendant was, without reference to where the crime was committed, entitled to the oath of the party that he objected to answer, because he believed his answering would tend to criminate him, more particularly as the plaintiff, having in his direct examination sworn positively that he got the money from *James W. Fisher* two or three days before he left *New York*, and *Fisher* swearing that the money was the proceeds of a draft drawn by the *First National Bank*, and which money he got from the *First National Bank* in *New York*, and this being the money handed by plaintiff to his wife, if his evidence and contention is true, this could not have been the money stolen from the *National Bank* of *New York*, and there could have been no offence in reference to this money in *New*

(1) 1 Sim. N. S. 301. (2) L. R. 3 Ch. 79.

1881.

POWER v. ELLIS.

Ritchie, C.J.

Brunswick, nor indeed, so far as the evidence goes, in *New York*; and therefore it was all important that the court should have the witness's oath, as it would be impossible for the judge, assuming the witness and *Fisher's* statement to be true, to conclude that any pertinent question relating to this money in controversy could criminate the witness.

I think, therefore, in this case the defendant was entitled to have the oath of the witness that he believed his answer would tend to criminate him. The privilege of protection belongs to the witness, he may in the discretion of the judge be cautioned, but it is for the witness to claim the protection of the court on the ground that the answer would tend to criminate himself, and if there appears reasonable ground to believe that it would do so, or rather if there are no other circumstances in the case to induce the judge to believe that the answer would not have that tendency, he is not compellable to answer.

In *Webb* v. *East* (1) it was held that a party to an action who objects to the production of a document for inspection, on the ground that it may tend to criminate him, must make the objection on oath.

Stephen, J., referred to *Boyle* v. *Wiseman* (2).

Counsel:—"Admitting that the defendant may be called as a witness by the plaintiff, and obliged to state on oath his objection to produce these documents, this is an interlocutory proceeding to which no such rule applies."

Kelly, C. B.:—"I am clearly of opinion that there is no distinction between preliminary proceedings and those before a judge and jury, as to the position of a party to an action who objects either to the production of a document or to any other mode of obtaining evidence, directly or indirectly, on the ground that the

(1) 5 Ex. D. 23. (2) 10 Ex. 647.

1881

POWER v. ELLIS.

Ritchie, C.J.

evidence may tend to criminate him. In every such case the objection must be taken by the party himself, and supported by his oath."

Stephen, J., concurred.

Mr. *Taylor* sums up the law thus (1): "On the whole, as Lord *Hardwicke* once observed, these objections to answering should be held to very strict rules, and in some way or other the court should have the sanction of an oath for the facts on which the objection is founded."

STRONG, FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:—

I am sorry to differ from my colleagues on this question. The pleas to this action set up; [the learned judge read the pleas] (2).

In this case the judge had the evidence before him, he saw whether the notes belonged to the *National Bank* of *New York*, or the plaintiff, and was in a position to know whether the answer to the question might incriminate him. Where the pleas and the opening of counsel make it clear that the question put to the witness is for the purpose of obtaining such an answer as would subject the witness to be incriminated, I do not think he is obliged to answer. I go further, and I maintain that the authorities go this far—that if the answer to the question will incriminate the witness, the judge has a right to interpose and tell him, as the judge did in this case, that if he thinks the answer will incriminate him he need not answer, and the witness was right in not answering. As to the question whether the answer might incriminate him in the *United States* or *New Brunswick*, this cannot alter the position. The defence here was that the plaintiff brought the notes taken from his wife from the *United States*, and that

(1) Sec. 1458. (2) Ser. p.

1882

POWER v. ELLIS.

Henry, J.

they were the identical notes stolen. This, if proved, was an offence indictable in *New Brunswick* under the Dominion Criminal Statutes, and, if on that issue, plaintiff had been found guilty, it would be sufficient for the taking of such steps as would lead to his incarceration. I think, under all these circumstances, it was not necessary for him to answer the questions put to him. It is true, he may be guilty of larceny, but this fact alone is not sufficient to destroy all the rules of evidence in criminal matters, and, in my opinion, it is more important that they should be preserved and let a guilty person escape the punishment he might have otherwise have been subjected to.

GWYNNE, J.:—

I agree that there has been a miscarriage in this case, arising in some measure, as I think, from the fact of two very different causes of action, involving different considerations, having been tried at the same time, without the attention of the jury having been sufficiently drawn to the points involved in each. I agree also that the cross-examination of the plaintiff was prematurely interrupted, and he should have been required to pledge his oath expressly that his reason for declining to answer questions put to him on cross-examination was that he believed that his answers, if given, would tend to convict him of the felony charged. That appears to me to be the rule as established by the recent decisions (1). I am of opinion, however, that independently of this point there has been a miscarriage, by reason of misdirection in the manner in which the case was left to the jury. The learned judge told the jury that there was no evidence whatever of identification of the money, and he directed them that if they should be of opinion that the money was obtained from Mrs.

(1) 10 Ex. 652, 701; L. Rep. 3 Ex. 281; 5 Ex. D. 23; 3 Q. B. D. 658.

1881

POWER v. ELLIS.

Gwynne, J.

Ellis by force or duress they should find for the plaintiff. No distinction is drawn in this charge between the two different species of action. Now, as to the action of assault and false imprisonment, the manner in which the money was gotten from Mrs. *Ellis* had nothing whatever to do, and as to the action for money had and received, as well as to the action for false imprisonment, there was undoubtedly much evidence given on the part of the defence as to identification of the money with money feloniously taken, which should have been left to the jury to express their opinion upon. The circumstances of the case were indeed of such a nature as peculiarly to have called for a submission of the case to the jury in such a manner as to leave them at full liberty to draw their own inferences and to form their own opinion as to the degree of credibility to be attached to the evidence of all the witnesses.

Appeal allowed with costs.

Attorney for appellant: *S. R. Thomson.*
Attorney for respondent: *C. W. Weldon.*

1881

*Feb'y. 24.

*Mar. 3.

LEVI ABRAHAMS.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

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

Indictment—Delegation of authority by Attorney General—32 and 33 Vic., Cap. 29, sec. 28—Obtaining money by false pretences.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury.

Montreal, 6th October, 1880.

"By *J. A. Mousseau*, Q.C. *L. O. Loranger*,
"*C. P. Davidson*, Q.C. Atty.-General."

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

Messrs. *Mousseau* and *Davidson* were the two counsel authorized to represent the Crown in all the criminal proceedings during the term.

A motion supported by affidavit was made to quash the indictment on the ground, *inter alia*, that the preliminary formalities required by sec. 28 of 32 and 33 *Vic.*, c. 29, had not been observed.

The Chief Justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was

Held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 and 33 *Vic.*, c. 29, sec. 28, the Attorney General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), on a case reserved by Sir *A. A. Dorion*, C. J., at the September (1880) term of the said Court (Crown side) sitting at *Montreal*. The following is the reserved case:

"At the last criminal term of the Court of Queen's Bench at *Montreal*, the defendant, *Levi Abrahams*, was indicted for obtaining money by false pretences.

"The indictment contained four distinct counts, as follows:

"The jurors for our lady The Queen upon their oath present that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *Thomas Preddy*, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said *Thomas Preddy*, with intent to defraud;

"And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of

1881

ABRAHAMS v. THE QUEEN.

September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences did obtain from one *James Heaton*, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said *James Heaton*, with intend to defraud.

"And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *Thomas Preddy*, a certain sum of money, to wit: the sum of ten dollars currency, the property of the said *Thomas Preddy*, with intent to defraud;

"And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *James Heaton* a certain sum of money, to wit: the sum of ten dollars currency, the property of the said *James Heaton*, with intent to defraud.

"(Signed) *Schiller & Dansereau*,
"Clerk of the Crown.

"I direct that this indictment be laid before the Grand Jury.

"*Montreal*, 6th October, 1880.

"*L. O. Loranger*,
"Attorney-General.
"By *J. A. Mousseau*, Q.C.
"*C. P. Davidson*, Q.C.

"There was no preliminary examination of the charges before a magistrate, and the indictment was

presented to the grand jury by the only direction which appears on its face, and which is signed:

"*L. O. Loranger*,
"Attorney-General.

"By *J. A. Mousseau*, Q.C.
"*C. P. Davidson*, Q.C.

"The defendant moved to quash the indictment on the following grounds:

"1st. Because the defendant was charged with four distinct offences of obtaining money by false pretences, which could not be joined in the same indictment;

"2nd. Because the indictment had been perferred, without any of the preliminary formalities required by sec. 28 of the Act 32 and 33 *Vic.*, c. 29, respecting procedure in criminal matters having been observed, and namely that it had not been preferred by the direction of the Attorney General or Solicitor General of the province of *Quebec*, or of a judge of this court, or of any judge of the Superior Court for *Lower Canada*, having jurisdiction, and without any preliminary investigation before a magistrate, and without the prosecutor having been bound by recognizance to prosecute the defendant or give evidence against him, and without the defendant having been committed to stand his trial upon the said charge, or detained in custody, or bound over on recognizance to answer the said indictment.

"This motion was supported by affidavit; I rejected it, intimating at the time that as I had some doubts, principally on the second objection urged, I would reserve the case, should the defendant be convicted.

"The defendant was tried on the 26th of October last, and acquitted on the first and second counts, but found guilty on the third and fourth counts, laid in the indictment.

"The evidence adduced at the trial, was that on the 25th of September last, the defendant sold to *Thomas*

1881

ABRAHAMS v. THE QUEEN.

Preddy and *James Heaton*, two persons recently arrived in the country, a pass issued by *The Grand Trunk Railway Company* in favor of *A. Carey*, and one, entitling the said *A. Carey* and another to travel on *The Grand Trunk Railway* from *Montreal* to *Port Huron*, up to the 30th September now last past, and another pass issued by *The Chicago & Grand Trunk Railway Company* in favor of *A. Carey*, and one entitling the said *A. Carey* and another to travel on *The Chicago & Grand Trunk Railway* from *Port Huron* to *Chicago* from date to 27th August, 1880, which last pass was then out of date by effluxion of the time for which it had been issued, he, the defendant, representing to the said *Preddy* and *Heaton*, that these passes were valid and would entitle them to be conveyed from *Montreal* to *Chicago*, by the *Grand Trunk Railway* and by the *Chicago & Grand Trunk Railway* respectively, while it was proved that these passes were of no value to the said *Preddy* and *Heaton*, as the first pass, which was not transferable, could only be used by *A. Carey* and another person travelling with him, and the time for using the second pass had already expired. The price paid for the two passes was twenty dollars, of which ten dollars were of the moneys of *Thomas Preddy*, and ten dollars of the monies of *James Heaton*, the whole amount however being paid through *Preddy*.

"The passes were not shown to *Heaton* and *Preddy* until after they had paid the money, and they were then informed that one of them would have to pass by the name of *A. Carey*, to which no objection was taken; both *Preddy* and *Heaton* swore that they did not understand what this meant, until they read the condition that the passes were not transferable, after leaving defendant's store.

"I reserved the sentence, and the defendant is now on bail to appear before the Court of Queen's Bench, on

the appeal side, and also at the criminal term on the 24th of March next.

"I now beg to submit, for the consideration of the Court of Queen's Bench, the following questions:

"1st. Whether the Attorney-General could delegate his authority, to direct that the indictment in this case be laid before the grand jury, and whether the direction as given on the indictment, was sufficient to authorize the grand jury to enquire into the charges and report a true bill.

"2nd. Whether if the indictment was improperly laid before the grand jury it should have been quashed on the motion made by the defendant.

"3rd. Whether the several counts could properly be included in the indictment.

"4th. Whether the rulings on the above questions are correct, and whether there was sufficient evidence of false pretences to justify a conviction on the third and fourth counts of the indictment.

"*Montreal*, 30th October, 1880.

"*A. A. Dorion*,
"Chief Justice."

The Court of Queen's Bench held that the conviction on the indictment was good, and from this judgment the accused *Levi Abrahams* appealed to the Supreme Court of *Canada*.

Mr. *Doutre*, Q.C., appeared on behalf of the appellant, and Mr. *C. P. Davidson*, Q. C., on behalf of the respondent.

The points and authorities relied on by counsel fully appear in the judgments of the Court of Queen's Bench (1), and in the judgments of the Supreme Court hereinafter given.

RITCHIE, C. J. (after reading the reserved case):—

In acting under this statute the Attorney or Solicitor-

(1) 1 Dorion's Q. B. Rep. 126.

1881

ABRAHAMS v. THE QUEEN.

Ritchie, C.J.

General or Judge, as the case may be, exercises what is in the nature of a judicial function, he is judicially to decide whether the indictment is proper to be presented to or found by the grand jury, so that, while on the one hand the rights of the public are to be guarded, individuals are to be protected from (as *Cockburn*, C. J., in *Queen* v. *Bray* (1) says) "the abuse of the right of prosecution, by proceedings instituted either vexatiously or from corrupt or sinister motives;" and the duty of exercising this judicial discretion, when the prosecutor or other person presenting an indictment has not been bound by recognizance to prosecute or give evidence, or where the person accused has not been committed to or detained in custody, or has not been bound by recognizance to appear to answer an indictment to be preferred against him, is vested in the Attorney-General or Solicitor-General or Judge to be by them personally exercised; "the circumstances," as *Cockburn*, C. J., in the same case, says, "under which the direction shall be given, having been left entirely within the discretion of one or other of these officers; and with the exercise of which the court will not interfere." *The Queen* v. *Heane* (2), shows that where an indictment has been preferred without either of the three conditions mentioned having been performed, the matter may be brought before the court on affidavit after plea pleaded, and the indictment may in the discretion of the court be quashed, or the party on a doubtful case be left to his writ of error.

I think therefore, this being a special statutory power, it must be strictly pursued; the propriety of sending a bill before the grand jury having been confided to the judgment and discretion of the Attorney-General, he cannot extend the provisions of the act and delegate to the judgment and discretion of another the

(1) 3 B. & S. 258. (2) 4 B. & S. 947.

power which the legislature has authorized him personally to exercise, no power of substitution having been conferred. In the present case it is admitted that the Attorney-General gave no directions with reference to this indictment; that the gentlemen who put the indorsement on the indictment did do so merely because they were representing the crown at the criminal term of the Queen's Bench in *Montreal* under a general authority to conduct the crown business at such term, but without any special authority over or any directions from the Attorney General in reference to this particular indictment. Under these circumstances the indictment in this case, having been presented to and found by the grand jury without any compliance with the provisions of the statute, must be quashed.

1881

ABRAHAMS v. THE QUEEN.

Ritchie, C.J.

STRONG, FOURNIER and TASCHEREAU, J. J., concurred.

HENRY, J.:—

The prosecution in this case rests entirely upon a statute, and the legislature have thought it proper to declare that an indictment for obtaining money by false pretences, can only be laid before the grand jury by direction of the Attorney-General or Solicitor-General, or upon the authority of a magistrate after a preliminary investigation, or some other person having a judicial function to perform. It is clear that there is no authority in the statute authorizing the Attorney-General to delegate this power to another. In this case there is no evidence of any directions whatever, except the simple fact that the Attorney-General authorized these gentlemen to represent the Crown in criminal prosecutions during the then following term, and on this they prepared this indictment and submitted it to the grand jury. It has been considered that in a certain number of these cases individuals should not be annoyed by the

1881

ABRAHAMS v. THE QUEEN.

Henry, J.

abuse of the right of prosecution, and for that reason the legislature has thought proper to allow the Attorney-General, Solicitor-General, or Judge, as the case may be, to judicially decide whether the indictment should be laid before the grand jury. The words of the statute are clear, and I concur with the Chief Justice in holding that the conviction should be set aside.

GWYNNE, J.:—

I entertain no doubt that the true construction of the words in the 28th sec. of 32 and 33 *Vic.*, ch. 29, namely: "Or unless the indictment for such offence is preferred by the direction of the Attorney-General or Solicitor-General for the province," is precisely what the words literally express, namely, that the direction shall be in the particular case made by one of those officers of the government and not by another person, who may be appointed to conduct, for the time being, criminal prosecutions upon the part of the Crown. The intention, I am of opinion, was that cases of the description mentioned in the section should be first enquired into before a magistrate, except in cases of emergency, when the discretion of the Attorney-General, or of the Solicitor-General, as officers responsible to the public, might be substituted. One of the offences mentioned is that of conspiracy, which might be to commit a state offence, and which might require the exercise of much discretion and secrecy of investigation to ensure a conviction, and in such case the public interests might require that the responsible law officers of the Crown should be given a discretion as to preferring or not preferring an indictment. But whether the offence charged be one of this nature, or any other of the misdemeanors mentioned in the section, the intention of the legislature, I have no doubt, was that no indictment for any of those offences should be preferred to or entertained

1881

ABRAHAMS v. THE QUEEN.

Gwynne, J.

by a grand jury, unless upon the authority of a magistrate, after a preliminary investigation, or upon the authority and express direction of one of the responsible law officers of the Crown, whose responsibility could not be delegated to another, or upon the authority of a judge of a court having jurisdiction to try the offence.

Now, in this case, a motion was made to quash the indictment upon the ground of its having been found without any of the prescribed authorities (having been presented to the grand jury upon the authority of the Queen's counsel prosecuting at the court on behalf of the Crown). The indictment ought to have been quashed for the cause assigned, and the court having reserved for the consideration of the Court of Queen's Bench, whether it should or not be quashed, that court should have given judgment to quash it, and the appeal therefore must be allowed.

Appeal allowed.

Attorneys for appellant: *Doutre & Joseph.*

Attorney for respondent: *L. O. Loranger.*

1881

*Mar. 9.

*April 11.

ROBERT SUMMERS.....APPELLANT;

AND

THE COMMERCIAL UNION ASSURANCE COMPANY..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance Co.—Interim receipt—Agents, powers of.

This was an action brought on an interim receipt, signed by one *S.*, an agent for the respondent company at *L.* One of the pleas was that *S.* was not respondent's duly authorized agent, as alleged. The general managers of the company for the province of *Ontario* had appointed, by a letter, signed by them both, one

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

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

W., as general agent for the city of *L.* *S.*, the person by whom the interim receipt in the present case was signed, was employed by *W.* to solicit applications, but had no authority from, or correspondence with, the head office of the company.

In his evidence, *S.* said he was authorized by *W.* to sign interim receipts, and the jury found he was so authorized. He also stated that *W't.*, one of the joint general managers was informed that he (*S.*) issued interim receipts, and that the former said he was to be considered as *W.'s* agent. There was no evidence that the other general manager knew what capacity *S.* was acting in.

Held, affirming the judgment of the Court of Appeal for *Ontario*, that *W.* had no power to delegate his functions, and that *S.* had no authority to bind the respondent company.

Per *Strong*, J., That the general agents being joint agents could only bind the respondent company by their joint concurrent acts, the appointment of *S.* as agent by *W't.* without the concurrence of the other general manager would have been insufficient.

APPEAL from the decision of the Court of Appeal for *Ontario*, confirming the judgment of the Court of Common Pleas ordering a non-suit to be entered in an action in that court wherein the now appellant was plaintiff and the respondents were defendants.

The action was brought by the appellant to recover a sum of $1,200, under the terms of an interim receipt purporting to have been issued on behalf of the respondents, and signed by one *David Smith* as agent, and insuring for one year from 22nd June, 1878, unless notice were given that the proposal was declined, $500 on a building of a grist flouring mill, and $700 on fixed and movable machinery therein.

The declaration alleges that the appellant and *Skuse* and *Holmes* owned the mill in question, and that the two latter persons, after the insurance and before the fire, sold their interest to the appellant, and subsequently assigned to him all their rights under the insurance contract.

It also sets out the interim receipt verbatim, and alleges that *David Smith*, who signed it, was the duly

authorized agent of the respondents for that purpose, and that they became liable thereunder, and never declined the said proposal for insurance, and that the property insured was burnt on the 12th July, 1878.

The respondents pleaded seven pleas, but the principal defence rested on the second plea denying *Smith's* agency, and on the third plea, that the interim receipt and insurance contract were procured by the fraud of the appellant and others in collusion with him.

The case was tried before Mr. Justice *Morrison* and a jury at the *London* assizes, and upon the answers of the jury to certain questions submitted to them, a verdict was given for the appellant with $800 damages: leave being reserved to the respondents to move for a non-suit.

The evidence bearing on the subject of agency was as follows: There was a gentleman of the name of *Williams* resident in *London*, who was the general agent of defendants, appointed as such by the general agents of the company for the Province of *Ontario*, Messrs. *Westmacott* and *Wickens*, and *Williams* had authority to receive applications for insurance and to grant interim receipts. *Smith*, the person by whom the interim receipt in the present case was signed, was employed by *Williams* to solicit applications. *Smith* had no authority from, or correspondence with, the head office of the company. He says, in his evidence: "I got liberty from Mr. *Williams* to sign interim receipts. I always informed him I had issued them, and paid over the premiums to him monthly. Mr. *Williams* made reports to the head office; I made none; I was sub-agent for Mr. *Williams*. I could not say whether the head office knew who issued the interim receipts. I had no correspondence with the head office of the company. I told Mr. *Westmacott* (he was one of the head officers of the company in *Toronto*, and is since

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

dead) that I was in the habit of issuing receipts. There was no one present when I told Mr. *Westmacott*; I never told Mr. *Wickens* (the other head officer); I never told Mr. *Williams* that I told Mr. *Westmacott* that I was issuing interim receipts. Mr. *Westmacott* seemed quite agreeable that I should do so, and all my applications could go through Mr. *Williams*. He said I was to be considered as Mr. *Williams*' agent."

On 19th November, 1879, a rule was granted by the Court of Common Pleas to enter a non-suit or for a new trial, and this rule was subsequently made absolute to enter a non-suit.

From this judgment the appellant appealed to the Court of Appeal for *Ontario*, and that court, on 20th September, 1880, dismissed the appeal with costs.

Mr. *H. Cameron*, Q.C., and Mr. *Bartram*, for appellant:

The principal question seems to turn upon the evidence rather than upon the legal principles applicable to the case: whether the evidence shows *David Smith* to have been an authorized agent of the company to issue interim receipts. The forms of application and interim receipts were supplied to *David Smith* by defendants' agent, and such forms gave notice to the plaintiff that he was their agent. There is no notice on said forms qualifying his authority.

The evidence of *Williams*, the general agent of the company for *London* and the county of *Middlesex*, proves that *Smith* was a canvassing agent, or broker, of the defendants, working under said *Williams*, with the knowledge and concurrence of the general agents at *Toronto;* and the defendants are therefore bound by Statutory Condition 21 (1), because *David Smith* was thereby an agent of the defendants. *Leake* Cont. (2).

The jury have found expressly, on a correct charge from the judge, fairly leaving the question to them,

(1) Cap. 153, R. S. Ont. (2) Pp. 517, 524 and 525.

that *David Smith* was duly authorized by the local agent at *London*, with the knowledge of the general agents of the defendants for *Ontario*, to grant interim receipts. *Robertson* v. *Pro. M. & F. Ins. Co.* (1).

The jury saw the witnesses, the way in which they gave their evidence, and we submit that taking *Smith's* evidence by itself, if it is sufficient to sustain the verdict, it ought not to have been disturbed.

The only doubt in the case was whether the agent *Williams* had authority to delegate his authority. But in this case there can be no doubt the general agents at *Toronto* knew that *Smith* was acting as sub-agent, and in this very case he applied for 12 p. c. commission in order that he might get 2 p. c. as sub-agent. Moreover, from the evidence of *David Smith* and *Byron Williams*, *Williams* necessarily carried on his general agency for *London* and the county of *Middlesex*, with the assistance of sub-agents, *David Smith*, *G. G. German* and others, for it would have been impossible for him to conduct his business except by means of sub-agents. *Story* Agen., sec. 14, cited by Mr. Justice *Galt*, and secs. 28, 29, 31 and 58; *Leake* Con., 483; *Campbell* v. *National Ins. Co.* (2); *Clarke* on Ins. (3).

Mr. *Robinson*, Q. C., and Mr. *W. N. Miller*, for respondents:

There can be no doubt *Smith* was never directly appointed by the head office, and that the general agents at *Toronto* never knew that *Smith* had issued interim receipts, unless through what *Smith* told Mr. *Westmacott*. It is equally true that the moment *Williams* knew *Smith* had issued an interim receipt, he ordered the money to be returned. Now it seems to us the question is simply this: had *Smith* authority to sign? It must be by direct

(1) 8 New Brunswick Reports, 379. (2) 24 U. C. C. P. 133.
(3) P. 50.

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

authority from the head office, or by the company not repudiating *Smith's* act. It is beyond all dispute that the company never knew that an interim receipt had been issued.

The business entrusted to *Williams* was of a strictly personal character, requiring the exercise of his own judgment and skill, and could not be delegated. *Evans* Pr. Agent (1); *Story* Agen. (2).

But it is contended *Williams* had authority to appoint sub-agents. Even if the business entrusted to *Williams* was of such a character that it could be delegated in case of necessity, there was no evidence to shew that it was necessary for *Williams* to appoint agents to enable him to transact it.

The appointment of general manager of the respondents was vested in two persons, *Westmacott* and *Wickens*. A letter signed by the two was used in the appointment of *Williams*, and a joint appointment by *Westmacott* and *Wickens*, it is submitted, would be necessary to constitute *Smith* the agent of the respondents (3).

There is no custom that agents appointed by the general agents have authority to appoint sub-agents that bind the company. The learned counsel then argued in reference to the misrepresentations made in the application for insurance, upon which point the court did not express any opinion.

RITCHIE, C. J.:—

This is an action brought on what the plaintiffs claim was an insurance interim receipt issued by *David Smith*, agent of the Commercial Union Insurance Co. The respondent denied *Smith's* agency, and also denied

(1) P. 38, and cases cited.
(2) Sec. 14.
(3) Lewin Trusts, 7th ed., 236; *Lee* v. *Sankey*, L. R. 15 Eq. 204; *Broom* v. *Andrew*, 18 Law J. Q. B. 153.

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

Ritchie, C.J.

that the answers given in the application for insurance to certain questions which the agent *Smith* took from the insured were such as, under the circumstances, the plaintiff was bound to give. I have carefully read the evidence in this case, and I entirely agree with the judgments delivered by Mr. Justice *Galt* in the Court of Common Pleas, and by the judges of the Court of Appeals; and I am of opinion that *Smith*, who was nothing more than a broker, was taking risks for the agent of the company. I have failed to find out any authority whatever from the company to him to authorize him to act as their agent and complete a contract of insurance with any party whatever; and I have failed to find any evidence of any such recognition of his agency or his acts in that character as would clothe him with implied authority from them to take risks.

The appeal should be dismissed.

STRONG, J. :—

I am of opinion that the decision of the Court of Common Pleas, in making absolute the rule to enter a nonsuit, was right, and ought to be affirmed. The execution of the agency entrusted to *Williams* involved the exercise of judgment and discretion in the important matters of accepting or rejecting the risks which were offered to the company, and it is a first principle of the law of agency that, when personal confidence is thus reposed in the agent, he cannot delegate his authority. The interim receipt upon which the action was brought, having been signed by *David Smith*, who alleges he was authorized by *Williams* to take risks and grant receipts, is therefore not binding upon the defendants, unless some prior authority, or subsequent ratification by the company, or their general agent at *Toronto*, is shown. There is no proof of ratification by a subse-

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

Strong, J.

quent recognition of the acts of *David Smith*, but his evidence is relied on to show that he had express authority to act as agent, and in that capacity to sign interim receipts for premiums. This evidence is said to be found in the direct examination of *David Smith*, who was a witness manifestly favorable to the plaintiff, and in what was elicited by the defendants' counsel on cross-examination. It refers to a conversation between the witness and Mr. *Westmacott*, one of the joint agents of the company at *Toronto*, which took place on the occasion of a visit which Mr. *Westmacott* had paid to the office of *Williams*, the company's agent at *London*, when *Smith* was driving *Westmacott* to the railway station, no one else being present. What passed is thus stated by *Smith* :—

> I told *Westmacott* that I was in the habit of issuing receipts; I told him during our drive from *Williams'* office; it was in 1878 sometime; it was before the fire; *Williams* asked me to drive him down; previous to that he had spoken to me; there was no one present when I told *Westmacott;* I had never told it to *Wickens;* I had never told *Williams* that I had told *Westmacott* I was issuing interim receipts; *Westmacott* seemed quite agreeable that I should do so, and all my applications could go through *Williams* he said; I was to be considered as *Williams'* agent. It was then that I spoke about the commission, he said he couldn't come to any understanding about that, he would consult the head office in *Toronto*. I wanted him to appoint me an agent direct, and I said whatever arrangements he could make with *Williams* would be satisfactory to him.

There is nothing in this statement which amounted to evidence of authority to sign receipts proper to be left to the jury.

It is, of course, to be conceded, that if there had been any evidence amounting to even a mere "scintilla," as it has been termed, that should have been left for the consideration of the jury, and the nonsuit would in that case be wrong. But assuming that *Westmacott* had power to confer authority on *Smith* to act directly as agent of the company, there is an en-

tire absence of any proof of his having exercised such a power. *Smith* does not say he told *Westmacott* he was in the habit of signing receipts or accepting risks, but merely that he issued receipts. It is true that in his evidence in chief he said he had told Mr. *Westmacott* he was signing interim receipts, but the cross-examination must be regarded as a correction or qualification of that statement, and the whole evidence being read together, it comes to no more than this, that the witness told *Westmacott* he issued receipts, which, taken in connection with his request to *Westmacott* to be appointed as an independent agent and *Westmacott's* refusal, implied in his answer that he was to be considered *William's* agent, shows that all that was intended to be sanctioned by *Westmacott* was that *Smith* should continue to act as the sub-agent of *Williams*; in other words, that his acts should be subject to the approval and control of *Williams*. This being the fair construction of the evidence, there was nothing to leave to the jury, and the appellant was properly non-suited.

Had *Smith*, however, gone much further, and proved authority derived from *Westmacott* to act as agent independently of *Williams* and to sign and issue receipts binding the company, an authority conferring on him powers co-ordinate with those delegated to *Williams* by the letter of the joint agents, which is in evidence, I should still have been of opinion that the non-suit ought not to be disturbed. The general agents of the company at *Toronto* are Messrs. *Westmacott* and *Wickens*. It does not appear that they were members of a mercantile firm, or in any way associated as partners in any business other than that of the general agency of the respondent's company. It may well be implied that the general agents in this province of an English insurance company have, as part of their general authority, power to appoint local agents with authority to sign interim receipts in

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

Strong, J.

accordance with the usual course of insurance business as carried on in this country. We have, however, no evidence of the actual authority given by the company to Messrs. *Westmacott* and *Wickens*, and with the facts before us that they were joint agents, and in the appointment of *Williams* had acted jointly, one of them, as it appears, having considered on that occasion that he had no authority to act independently of his colleague, we cannot possibly presume that they had a several as well as a joint authority. The irresistible conclusion is therefore that, as in all cases of joint agency, they could only bind their principals by their joint and concurrent acts. Then, it is not even pretended that Mr. *Wickens* concurred in authorising *Smith* to act as an agent, or in recognising his acts as binding on the company; so that even on the assumption that *Westmacott* had conferred such authority, it would be wholly insufficient, for the reason that Mr. *Wickens's* concurrence was wanting. This last ground alone is an incontrovertible reason for sustaining the non-suit.

The learned counsel for the appellant urged that the evidence of a conversation which the witness *William Smith* states he had with *Westmacott* at *Toronto* afforded matter for the consideration of the jury. I am of opinion that this testimony was of no importance, and contained nothing which could properly have been left to the jury, and that for the same reasons already given with reference to the alleged conversation between *Westmacott* and *David Smith*. It contains nothing to show any recognition by *Westmacolt* of *David Smith* in any other character than in that of a sub-agent to *Williams*, and even if it had it could not bind the company, who had entrusted their general business, not to the sole agency of *Westmacott*, but to the conjoint management of *Westmacott* and his colleague *Wickens*.

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

Strong, J.

Taking the view of the case which I have thus briefly stated, I do not feel called upon to enter into a detailed consideration of the other defence—that of misrepresentation—but I think it right to state that on this branch of the case I entirely concur with the Chief Justice of the Court of Appeals, who came to the conclusion that there was a gross misrepresentation, and that in consequence the plaintiff was disentitled to recover. For that reason, had the non-suit on the point of agency not been proper, it would have been incumbent on us to have granted a new trial.

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

FOURNIER, J.:—

For the reasons given in the judgment of the Court of Appeal, I am of opinion that this appeal should be dismissed.

HENRY, J.:—

I concur in the judgments that have been given. I think *Smith* had neither direct authority, nor was his action in signing these receipts sufficiently ratified by the general agents of this company. Without one or other of these two, he could not bind the company. I think, therefore, the receipts given by him, although they were furnished by the local agent to him, did not bind the company. He was virtually soliciting business under the local agent and for him. The parties ran the risk, and they must take the consequences of dealing with a person who is not authorized to bind the company in which they are insured. There is no doubt a great injury is done where parties are induced to take policies in such a way, but as the law is, you cannot bind a company that does not bind itself. They have the right to give certain powers to their

1881

SUMMERS v. THE COMMERCIAL UNION INS. CO.

Henry, J.

agents, and in the appointment of local agents there is no implied authority to them to authorize any other parties to act for them. I think the non-suit is right, and a case is not made out to bind the company; and therefore the judgment of the court below should be affirmed.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Attorney for appellant: *W. H Bartram.*

Attorneys for respondents: *Beatty, Miller, Biggar & Blackstock.*

1881

*May 4.

*June 10.

GEORGE VÉZINA.....APPELLANT;

AND

THE NEW YORK LIFE INSURANCE COMPANY..... } RESPONDENTS.

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

Life Insurance—Insurable Interest—Transfer—Wager Policy—Payment of Premiums.

G. applied to respondents' agent at *Quebec* for an insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at *New York*, a policy was returned to the agent at *Quebec* for delivery. *G.* was unable to pay the premium for some time, but *L.*, at the request of the agent at *Quebec*, who had been entrusted with a blank executed assignment of the policy, paid the premium and took the assignment to himself. Subse-

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

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

quently, *L.* assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to *G.'s* death, the general agent of the company inquired into the circumstances, and authorized the agent at *Quebec* to continue to receive the premiums from the assignee.

Held (*Gwynne*, J., dissenting,)—That at the time the policy was executed for *G.*, he intended to affect a *bonâ fide* insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with *G.* for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) of the 17th September, 1880, confirming a judgment of the Superior Court at *Montreal* of the 30th April, 1878, which dismissed the appellant's action.

The action was brought to recover the amount of a life policy, granted by the respondents on the 5th of November, 1873, for $2,000 on the life of one *Hector Gendron*, who died on the 16th of September, 1875.

The appellant sued as the assignee of one *Langlois*, under a deed of transfer executed on the 3rd of November, 1875, and *Langlois* was alleged in the declaration to have obtained an assignment of the policy from *Gendron* on the 26th of December, 1873.

The company pleaded *inter alia*:

That in the application *Gendron* falsely declared that he was born on the 5th December, 1812, but in fact, as the company had recently discovered, he was born on the 5th December, 1811.

He falsely declared that no proposal to insure his life had ever been declined by any company, whereas the company had recently discovered that his life had been insured with the *Ætna Insurance Company of Hartford*, in June, 1872, by two policies in favor of *Vennor* and *Vallière* respectively, which had been cancelled on

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

the ground of falsehood and fraud, and the absence of an insurable interest.

That *Gendron* merely lent his name without ever having any interest in the policy or paying any premium. That *Langlois* knowing that it would be illegal to take it in his own name, procured *Gendron* to apply for the policy from whom he got an assignment, the whole to defraud the company.

The contract or policy sued upon was initiated in *Quebec*, by application made to the respondents' agent, at that place, on the 27th October, 1873, by *Hector Gendron*, a resident of *Quebec*, on his own life, for the sum of $2,000, for the benefit of his legal representatives and assigns. *Michaud*, the respondents' agent, filled up the printed form of application used by the respondents, with the answers of the applicant, *Gendron*, to the enquiries contained therein; and then forwarded it to the respondents, in *New York*,—where the respondents accepted the application and issued the policy on the 5th November, 1873. The policy contains an acknowledgment that the first premium had been paid by *Gendron;* but the premium was only paid on the delivery of the policy, on the 26th December, 1873, contemporaneously with the assignment made of the policy by *Gendron* to *Langlois*.

The assignment was effected by a document approved of by the respondents' agent, and by the delivery of the policy, on the 26th December, 1873; which assignment was transmitted to the *Montreal* office, and duly acknowledged by the officers at the head office.

A year later *Burke*, the general agent of the Company, went to *Quebec* and cancelled several policies, and in his evidence stated that he tried to see *Langlois* to demand back the policy, and state to him what the consequence would be if he did not do so, but never

succeeded in seeing him,—and in the meantime *Gendron* died.

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Michaud, on the contrary, stated that two years after the assignment, as *Langlois* was his friend, *Burke* being at his office at *Quebec*, annulling some policies, he spoke to him of the policy in question in this cause, and asked him to annul it if the transaction was not correct. *Burke* then asked *Michaud* if *Gendron* was a good risk; *Michaud* told him: "Yes." He then replied: "Let them pay their money." Mr. *Langlois* was informed of that fact.

After the death of *Gendron*, *Langlois* transferred and made over to the appellant his claim and right of action against the respondents.

Mr. *Doutre*, Q. C., for appellant:

The principal ground of defence set up by the company is that neither *Gendron* nor *Langlois*, who assigned for value to appellant, ever had any legal interest in the policy, and that *Langlois* had no insurable interest in the life of *Gendron*; that the insurance was obtained through a fraudulent confederacy between *Gendron* and *Langlois*; and that in effect the insurance was a wager policy, and as such absolutely void and incapable of being enforced in a court of justice.

The question is therefore narrowed down to a question of fact rather than of law, viz.: whether there was any fraud between *Langlois* and *Gendron*, or whether the agent and *Langlois* confederated together to make *Gendron* get a policy for *Langlois*. Now, it is clear that the first time *Langlois* ever knew of this insurance was in December, a long time after *Gendron* had made his application, and when his risk had been accepted no confederacy was proved.

I accept it as an elementary principle of life insurance that every individual, man or woman, has an

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

insurable interest in his or her own life (1). Every man is presumed to possess an insurable interest in his own life, since by insuring it he can protect his estate from that loss of his fortune, gains, or savings, which might be the result of his premature death, and as that cannot be limited, neither can the amount for which he may insure. The insured must have an insurable interest in the life upon which the insurance is effected. The extent of his interest is measured by the contract,—within reason,—that is, at a large or a small sum, as may be agreed upon between the parties interested.

Gendron was possessed of this interest, and having once insured his life it was his own property to dispose of to whomsoever he pleased, and for what consideration he pleased, even by gift, and in doing so he defrauded no one, especially not the company who had agreed with him as to the terms on which his life should be insured.

In *St. John* v. *The American Life Insurance Co.* (2), it was settled by the decision of the court of last resort, in the state of *New York*, that " It is only when a person insures the life of another, that the question of interest in the life can arise." That a policy of insurance effected by a person on his own life is assignable like an ordinary chose in action, and the assignee is entitled on the death of the party whose life is insured to recover the full sum insured, without reference to the consideration paid by him.

Now, when the premium was paid by *Gendron* himself, or paid by *Langlois* for his acquittal to the company, it related back to the time when the policy was issued, and at that time it cannot be said that *Langlois* had conspired to get this insurance. If *Gendron* found he had made a valueless bargain for himself, it was

(1) Bunyon Life Ins. 19, No. 14, ed. 1874.

(2) 13 N. Y. 39.

competent for him to part with it, at cost, or even under cost. I also contend that the company, by accepting the premium from *Langlois* and delivering the policy, acknowledged the validity of the policy and of its assignments, and that the receiving of premiums after the correspondence of *Burke*, in March, 1874, and the willingness of the company to receive premiums, after the disclosures to *Burke*, at *Quebec*, in June or July, 1875, was an insuperable estoppel to raising such objections.

Mr. *Strachan Bethune*, Q.C., for respondents:

In addition to the important question upon which the respondent succeeded in the court below, there are two fatal objections to appellants' action on this policy: 1st, this representation of age; and 2nd, that *Gendron* had represented that no proposal to insure his life had ever been declined by any company, whereas in two instances cited, although he had secured insurance on his life, the policies were very soon after cancelled on the ground of falsehood and fraud. In the original application the date of birth is given first, and immediately after the age next birthday was apparently written 62, and then struck out and written 61, no doubt to make this latter statement accord with the actual fact, as ascertained by the date of alleged birth, which was left as originally made.

There was no evidence whether this change was made before signature by *Gendron* or not, but, as the date of the birth was suffered to remain, and as the copy of the application attached to the policy, and produced by the appellant, states the age next birthday as 61, and is therefore conformable to the amendment on the original, the presumption is very strong that the change must have been made before signature.

As to the second point the question put to the appli-

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

cant was, were you ever refused, and the answer is "no," whereas as a matter of fact it was proved just as we pleaded it, that he had proposed to insure his life, and after being accepted, the risk was cancelled on the ground of falsehood and fraud, in that the said *Hector Gendron* had misrepresented his age and habits, and had merely lent his name to parties who had taken out said policies, as a mere speculation on their part, and without having any insurable interest whatever in the life of said *Hector Gendron*. We contend the warranty extends to this answer.

On the main question raised by the respondent's plea, it was clearly proved that *Gendron*, in applying to have his life insured for $2,000 did not do so for himself and his own benefit (as he falsely alleged in his application), but for the benefit of any third party, who, as a matter of speculation, would pay the premiums on the policy (including the first one), and in the hope that such third party would pay him some trifling sum for thus lending his name for the benefit of such third party. And it would appear from the evidence that he had done the same thing in two former instances with the *Ætna Life Insurance Company*.

As *Gendron* was utterly incapable of paying the premium, the sub-agent at *Quebec* of the respondent's general agent at *Montreal* retained the policy in his hands, and, after a delay of a few weeks, *Langlois* agreed to enter into the desired speculation, paid the required first premium, and obtained delivery of the policy from the sub-agent, and as the policy had been made out in the name of *Gendron*, he took a transfer from him of the policy. There was no evidence that *Langlois* ever paid *Gendron* anything for this transfer.

The transaction as it occurred, therefore, was precisely the same as if *Gendron* had insured his life (on the face of the policy) for the benefit of *Langlois*, who

admits in his evidence that he never had any interest whatever in the life of *Gendron*, and that he paid the premium and took a transfer of the policy as a pure speculation. For, as *Gendron* never had delivery or possession of the policy and had never paid any premium thereunder, he had no legal property in the policy, and the assignment of the policy by him was consequently a mere matter of form, necessitated by the fact that *Gendron* appeared on the face of the policy as the party insured.

The facts being as above stated, it is clear, that *Langlois* could never sue to recover the amount of the policy. Art. 2480 of the Civil Code of *L. C.*, 3rd par.: "Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal." And Art. 2590 of said Civil Code: "The insured must have an insurable interest in the life upon which the insurance is effected."

Mr. Justice *Cross*, who dissented from the other judges of the court of Queen's Bench, remarked: "And it appears that seven or eight months after it (the policy) was effected and transferred to *Langlois*, *Burke*, the general agent of the company, knowing the facts, approved of this and other policies, saying: "*Laisser les payer leur argent*,' (let them pay their money.)"

Now *Michaud*, in the first part of his evidence, says that it was two years after the assignment to *Langlois*, (namely, about the 26th December, 1875), that he explained the transaction to *Burke*, in his (*Michaud's*) office at *Quebec*, and asked him if it was correct, and that *Burke* made the remark "let them pay their money."

The evidence is very unsatisfactory, and on the whole it is quite clear, that if these words were really used by *Burke*, it must have been on the occasion of his visit in June, 1875. And as no premium was paid after that

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

date, *Gendron* having died on the 16th of September, 1875, and the current year's premium having been paid by *Langlois* in November or December, 1874, the respondent cannot be held to have confirmed the transaction with *Langlois*, even if *Burke* had had power thus to bind the respondent.

It will be seen also, by reference to the 5th condition of the policy that "agents of the company are not authorized to make, alter or discharge contracts, or waive forfeitures."

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

RITCHIE, C. J.:—

This was an action brought on a policy of insurance on the life of *Hector Gendron*, of which the plaintiff became the assignee through one *Langlois*, to whom it had been transferred. The policy sets forth that:—

> The *New York Life Insurance Company* in consideration of the statements and representations submitted to its officers of the home office in the city of *New York*, and contained in the written application for this policy, &c., and upon the faith of which statements and representations this policy is issued, and of the sum of eighty-five dollars and twenty-four cents to them in hand paid, and of the sum of one hundred and seventy dollars and forty-eight cents to be paid in like manner, and sums as per margin, in every year during the continuance of this policy, doth insure the life of *Hector Gendron*, &c., in the amount of two thousand dollars for the term of his natural life, commencing on the 5th November, 1873, at noon.

The application was made to the agent at *Quebec*, *P.Q.*, by *Gendron* himself and signed by his own hand. The applicant was personally subjected to a medical examination. The medical examiner's report was presented to the company, and the conditions of the company required the applicant to procure a certificate from a friend. *Gendron* applied to a friend, *Grondin*, who answered the questions proposed to him which were required to be answered by the company. This appli-

cation, these medical documents and certificate of friend having been transmitted to the head office in *New York*, the application of *Gendron* was acceded to, and this policy, which is set out in the declaration, was executed on the day it bears date by the proper officers of the company, as a valid instrument of insurance, whereby *Gendron's* application for insurance was accepted and his life was insured from the date of that policy for one twelve-month, upon payment of a certain premium which was by the policy admitted to have been in hand received, and by the payment annually of a certain other premium as marked in the margin of the policy. This policy was transmitted from the head office to the agent in *Quebec*, to whom the application had originally been made, and who had transmitted the application to the head office in *New York*, to be delivered to *Gendron* on payment of the premium. The policy appears to have remained in the agent's hands for some time. The payment of the premium was made by *Langlois* and the policy delivered to him under and by virtue of an assignment, which *Gendron* had signed in blank. The blank assignment which had been left with the agent was filled up by him and the transfer of the policy was made to *Langlois*, who received the policy and held it as the assignee of the insured. Subsequently Mr. *Langlois* assigned this policy to the plaintiff in this case, *George Vézina*, and the premiums on the policy from that time falling due were paid by the assignee up to the time of the death of *Gendron*, which took place about two years after the date of the policy. The material defence (because I think the other points of the defence were satisfactorily disposed of below) was that this was not an insurance by *Gendron* for *Gendron's* own benefit, but that it was a wager policy obtained by *Langlois*, the original assignee, or by *Vézina* and *Michaud* or *Langlois* and *Vézina* combined, and that there was

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Ritchie, C.J.

no insurable interest under it, and that the policy was therefore void. Now, to ascertain and determine this question, a pure question of fact, we must see what facts there are in the case that are undisputed. I think it cannot be denied that this policy was applied for at the instance of *Gendron*, by him for his own benefit, that from the time the application was made up to the time the policy was executed in *New York* and returned to *Quebec*, and up to the time of the transfer there was no connection whatever between *Gendron* and *Langlois*, or between *Langlois* and *Vézina* in reference to this policy. *Gendron* appears to have been a man in poor circumstances, and he was under the impression that if he could obtain an insurance on his life, he would be able so to deal with that insurance as to realize money therefrom. The evidence upon this point is uncontradicted. The agent of the *Ætna Company*, Mr. *Grondin*, to whom application was first made, says that he knows the parties:—

> Before making the said application the said *Hector Gendron* came to me at my office. * * * He said then that he wished to effect an insurance on his life, so as to get some money, that is to say, on the policy. Then I sent him to Mr. *Michaud*, the defendants' agent, telling him that I thought that this was the only company which would take a risk to be assigned in his case.

Thus in the inception of this transaction there was no combination or confederacy between *Michaud*, the agent of the defendants, and *Gendron* the party desiring to be insured. The former says:—

> I do not know whether or not he had the means of paying his premium, but one day he came to my office to insure himself; he was accompanied by *Joseph Grondin*, agent of the *Ætna*. This was the first time that I saw *Gendron*. I filled in the blanks which were in the application myself after the answers of *Gendron*, and it was on this application that the said policy was issued.

From this it appears that this man made a *bonâ fide* application. Being in poor circumstances and wishing,

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Ritchie, C.J.

for his own benefit, without any connection with any third party whatever, to insure his life, he applies first to the agent of the *Ætna*, which company not being willing to take the risk, its agent introduces him to the agent of defendants, who accedes to his wishes. It cannot be denied that *Gendron* had an insurable interest in his own life, and had a right to effect an insurance thereon, and to use that policy for his own benefit, whether for the purpose of raising a loan through its instrumentality, or by convincing others that the policy upon his life was of value, and so be enabled to transfer it for a consideration. As his application was *bonâ fide* for his own benefit and the company accepted the risk and granted him the policy, he had a right to do with it what he pleased; the transaction between him and the company being a *bonâ fide* insurance of his life for his own benefit, nothing he did subsequently with the policy could make it a wagering policy.

Then, the policy being in the hands of Mr. *Michaud* to be delivered on payment of the premium, and *Gendron* having left a blank transfer with *Michaud*, he induced Mr. *Langlois* to pay the premium. In doing this *Michaud* states that he did it on behalf of Mr. *Gendron*. Mr. *Grondin*, the friend of Mr. *Gendron*, says that he knew *Michaud* was acting as the plaintiff's agent. Therefore, we have the fact that as the plaintiff's agent he took this policy, and having been entrusted with a blank assignment for the purpose of enabling an assignment to be made in the event of his disposing of the policy on behalf of Mr. *Gendron*, he fills it up in *Langlois'* name and receives the premium as defendant's agent. It is true, the evidence does not show that Mr. *Gendron* received any consideration for that transfer, but the evidence does show that Mr. *Gendron* was dissatisfied that he had not, and wrote to the head office in *New York* complaining of the conduct of Mr. *Michaud*

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Ritchie, C.J.

with reference to that transfer, and that it was in consequence of that letter, as the manager says, that the present difficulty arose with reference to their acknowledging the validity of the policy as a subsisting and binding contract on their part. With this difficulty between *Gendron*, the principal, and *Michaud*, his agent, in the transfer of this policy, the company has nothing to do, and whether *Gendron* received or did not receive the consideration he expected, or was entitled to, is a matter between the principal and agent, and which cannot render the policy, valid in its inception, void by reason of any misconduct on the part of the agent of *Gendron* in disposing of the policy at his instance.

There is also evidence to show that after this the manager was informed of all the circumstances connected with this policy, that he acquiesced in the propriety of what was done, and in the validity of the insurance, directed the money to be taken, and in consequence thereof the company subsequently received the premiums which accrued due until and up to the death of *Gendron*.

It is not disputed that a party insuring upon a life must have an interest in the life insured, in other words, that if this is a wagering policy the plaintiff cannot recover, but it is alleged that the contract was made by the defendants with the party whose life was insured, and that the insurance being thus effected by a person having at the time an interest in the life insured, the contract was valid in its inception, and could not become a wager policy by any subsequent transfers.

When was this policy effected? Was it not, as between the company and the holder, on the day it bears date? and at that time the party effecting the insurance was the party whose life was insured, no other person being in any way interested in or a party to the trans-

action. Can it be said that the evidence conclusively shows that this insurance was not effected by the deceased for his own benefit? To enable the defendants to succeed, I think they must show that this policy was void from the beginning. If *Gendron* had obtained from *Langlois* the money to pay the premium and had not assigned the policy, could it be contended that the company would not be liable to pay the amount insured to *Gendron's* representatives, why then should not *Gendron's* assignee stand in the same position as his personal representatives would have done if no assignment had been made?

No doubt a party cannot procure one, in whose life he has no legal interest, to insure it with his money and for his benefit, still if there is an interest at the time of the policy, it is not a wagering policy, and where a life policy, effected by one who has an interest, is assigned, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration; for it has been decided that he stands on the rights of the party who effected the insurance. The want of interest applies to the original parties to the policy, not to their assignees. When this insurance was effected, it was not at the instance of and for the benefit of the first assignee or the present holder, the plaintiff, nor was there any arrangement between them or any of them that the insurance was to be for the sole benefit of any one other than the assured.

The premium in the second condition of the policy clearly refers to the premium of $170.48 to be paid as per margin in every year during the continuance of this policy, and not to the $85.24, which by the policy the defendants admitted, at any rate for the purposes of the policy, had been "to them in hand paid." Therefore, so soon as the premium was paid and policy delivered, the original contract as contained in the policy

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Ritchie, C.J.

was complete, and it is wholly immaterial whether the premium was paid by and the policy delivered to the assignee of the assured or by the assured himself and delivered to the assignee. The insured had a right to effect an insurance on his life for the benefit of whom he chose, and in this case having applied for this insurance for his own benefit, and his application having been accepted and policy issued, to be delivered on payment of the premium, it was a matter that could not affect the contract where the money came from, so that the premium was paid on the contract and the policy delivered on the contract to the assured or his assignee, or nominee, on which being done a valid contract was effected between the party whose life was insured and the defendants. When the premium was paid it had relation back to the date of the policy, the contract was, as between the parties, on the day of the date of the policy, being the day it was executed and sent from *New York* to *Quebec*, and then only remained in the agent's hand awaiting the payment of the premium for the insurance for a year from the date, which being made the policy took effect as from its date.

If the evidence in this case had shown that the insurance was effected by the party nominally insured at the instance of and for the benefit of *Langlois*, or the present holder, who were to pay the premiums in pursuance of an agreement between them, in which either of the latter secured the sole benefit of the insurance by assignment or otherwise, it would be clear that the interest in the policy was not in the party nominally insured, but really in the third party, at whose instance the insurance was effected, and so the policy would be void; but where the insurance was effected by the party assured at his own instance without the knowledge of or any connection with the party who subsequently paid the premium, I do not think

that the mere circumstance that such other party pays the premium and obtains an assignment of the policy is sufficient evidence to warrant the conclusion that the interest in the policy at its date and when agreed to and executed by the company was not in the assured.

1881
VÉZINA v. THE NEW YORK LIFE INS. CO.
Ritchie, C.J.

STRONG, J.:—

I entirely concur in the reasons and conclusions which have been expressed by the Chief Justice. I shall content myself with expressing a simple concurrence with his judgment, that the appeal should be allowed with costs.

FOURNIER, J.:—

I agree with the views expressed by the learned Chief Justice, and I think that the appeal should be allowed with costs.

HENRY, J.:—

I am of the same opinion. I did not prepare a judgment in writing, but I may just state my views in a few words. The only tangible defence set up is that this is a wager policy. Every lawyer knows what the meaning of a wager policy is. The amount of it is the assertion that *Langlois* was in collusion with *Gendron* to insure the latter's life for his own benefit, and therefore he having no interest, the policy would be void. If the evidence established that position, of course this appeal ought to be dismissed, but in my view the evidence does not sustain any such position. I am of the opinion that the policy was a contract between the original parties. It is not shown that *Langlois* even knew anything about it, and this contract, as far as the policy is concerned, was actually in being a month before the man *Langlois* knew that *Gendron* had made an application. He could not, therefore, have been

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Henry, J.

in collusion with the insured to obtain a policy for his benefit. I concur in the views expressed by the learned Chief Justice in reference to the validity of the policy, and think it a matter of indifference whether the money was already paid by the insured or whether it was paid by some person on his behalf and with his assent. The whole matter was referred to the manager of the company, and with a full knowledge of all the facts, he authorized the agent, *Michaud*, to receive the money and deliver the policy. It is too late, under these circumstances I think, even if it were a wager policy, for the company to set up their defence, because, if they took the risk knowing it was a wager policy, they would be prohibited from setting up such a defence. I think there is not the slightest evidence to show it was a wager policy. The party had a right to insure his life, and we have no right to enquire what his object was, whether it was to sell the policy or make a present of it if he chose. Under the circumstances I agree that the appeal should be allowed with costs.

GWYNNE, J. :—

The question arising in this case is simply as to the proper view to take of the evidence upon matters of fact. In such a case, as I have before taken occasion to observe, a Court of Appeal should not, in my judgment, reverse the judgment of the court of first instance, and *à fortiori* the concurring judgments of two courts, unless under a thorough conviction that in such judgments there is taken a view of the facts which is plainly erroneous. This principle I have never heard questioned, but, on the contrary, have heard approved in this court, although I fear that in this case, the judgment of the Court does not conform to it. I must say that, so far from seeing anything wrong, I entirely concur in the view taken by the courts below, and in the reasons

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Gwynne, J.

given by the Chief Justice of the Court of Queen's Bench, *Montreal*, in appeal.

It appears that one *Gendron*, who was a person of no means, and not able to pay the premium upon an insurance on his life for any amount, was in the habit of raising small sums of money by selling his name to others to use in effecting through him, and in his name, but for their benefit, policies upon his life. Two such policies had been effected with the *Ætna Insurance Co.*, the one for the benefit of one *Vennor*, and the other for the benefit of one *Vallière*, for which *Gendron* had received $20 each. The *Ætna Insurance Co.*, having discovered these facts about 18 months after the execution of the policies, insisted upon their being, and they were accordingly, given up and cancelled. Afterwards *Gendron* being still in embarrassed circumstances applied to one *Grondin*, an insurance agent, with the view of effecting through him, with an insurance company for which he was agent, a policy of insurance under like circumstances and for the like purpose as in the case of *Vennor* and *Vallière*. *Grondin* declined to enter into such a transaction, and informed him that Mr. *Michaud*, who represented the *New York Life Ins. Co.* was the only one through whom *Gendron* could procure an insurance upon such a risk as that proposed by him. *Gendron* accordingly went to *Michaud*,—there an application to the defendant's company was filled up by *Michaud* for *Gendron* to sign, and was signed by *Gendron* and forwarded by *Michaud* to the head office of the defendants at *New York*. The defendants by the form of the applications which it requires to be signed by any applicant, and one which was so signed by *Gendron* (which applications by the form of the policies the defendants incorporate into and make part of the policies), take the precaution, *ex majori cautelâ* of protecting themselves by a provision therein that "under no cir-

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Gwynne, J.

cumstances shall the policy be in force until actual payment to, and acceptance of the premium by, an authorized agent of the company." The defendants, in reply to the application of *Gendron* forwarded by *Michaud*, transmitted to him an instrument or paper writing, dated the 5th November, 1873, with the seal of the company attached thereto purporting to be a policy of insurance for $2,000 upon the life of *Gendron* and in favor of *Gendron*, payable to his legal personal representatives, but which paper writing, by reason of the above provision incorporated with and made part of it, expressly provided that notwithstanding such execution thereof the same should not come into, or have, any existence as a policy of insurance unless nor until the premium thereon, viz., $85.24, should be paid to and accepted by *Michaud*, the defendants' agent in the matter.

Upon the receipt of this document by *Michaud*, *Gendron* continued to be, as he always was, unable to pay the premium, and the document remained an imperfect instrument and the property of the defendants in the hands of *Michaud*, who, it is plain, would lose his commission on the transaction unless he could contrive in some way to obtain payment of the premium, so as to enable him to issue the policy as an instrument to all appearance, at least, binding upon his principals. Accordingly *Michaud*, acting, as he says, as *Gendron's* agent, but while in possession of the imperfect document, as the property of the defendants, looked about to find some person who would pay the premium and take the policy. For this purpose he applied to *Langlois*, who had no interest whatever in *Gendron's* life, and offers the policy to him as a good speculation if he would pay the premium necessary to give it vitality. *Langlois* at first declined, but at length, satisfied, as it would seem, by *Michaud*, that the speculation would be a good one,

consents. Now, at this stage it may be observed that, as the document had not yet acquired the character of an existing policy, *Gendron* had no interest in it and could not therefore authorize *Michaud* to issue it to any one. *Michaud* could issue the policy, that is to say, could only bring it into existence as the agent of the defendants. *Michaud* therefore, while he professes to have been acting as *Gendron's* agent in offering to give the policy to *Langlois*, if he would pay the premium, must be also regarded as the agent of the company, defendants, to give vitality to the document by issuing it, which had not yet been done. To carry out this transaction with *Langlois*, so proposed to him by *Michaud*, acting in the two-fold delicate capacity of agent for *Gendron*, who had as yet acquired no interest in the document, and as agents of the defendants, whose property wholly it still was, and as whose agent only *Michaud* could issue it, he procured *Gendron* to execute in blank a paper endorsed upon or annexed to the still imperfect document, the execution of which by *Gendron* is witnessed by *Michaud*, and the still imperfect policy, with the assignment in blank so signed by *Gendron*, still remains in *Michaud's* hands, and still as the property of the defendants, for, as the premium had not yet been paid, the document executed by the defendants had not as yet acquired vitality or existence, and *Gendron* had no interest, and not having any he had not anything to assign at the time he signed the paper purporting to be the assignment of the policy not yet in existence, nor was there then any person even named in it as assignee; that assignment was therefore invalid, and the paper upon which it was, as well as the document of which it purported to be an assignment, still remained in *Michaud's* hands as the property of the defendants, not having yet acquired any existence as a policy of insurance. While matters are in this condi-

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Gwynne, J.

tion, *Michaud*, having arranged with *Langlois*, inserts in the blank assignment his name, and *Langlois*, at a time when *Gendron* had not, as he never had had, any interest in the document as a policy, pays the premium to *Michaud*, who accepts it, and then for the first time issues it as the act and deed of the defendants, into the hands of *Langlois* for his benefit, although he had no interest whatever in the life of *Gendron*. If this policy ever had existence it came into existence then and for the sole benefit of *Langlois*, and *Gendron*, upon whose life it purports to be effected, never had any interest whatever in it.

It is said, however, that being so issued it enures back to its date, and that the company is estopped from arguing that *Gendron* had not had an interest in it; but that is not so, for it is an express provision of any contract contained in it that none shall be deemed to come into existence until the actual payment of the premium, and surely, if *Gendron* had died after signing the document called an assignment of the policy, and before the payment of the premium by *Langlois*, it cannot be contended that the policy would be enforcable—indeed, the only estoppel in the case is one binding on the plaintiff by which he, as claiming under *Langlois*, is estopped from asserting any existence in the policy until it was issued by *Michaud*, the defendants' agent, to and for the benefit of *Langlois*, and having been, when first issued, issued to *Langlois*, who had no interest in *Gendron's* life, the infirmity attached to the policy in its issue must continue to be attached to it whatever date it may appear to bear.

The above is the position in which the evidence very clearly presents the case to my mind, and to a policy so issued I can attribute no other character than that of one contrived in fraud of the defendants by their own agent, acting also in the character

1881

VÉZINA v. THE NEW YORK LIFE INS. CO.

Gwynne, J.

of agent of *Gendron*, to procure a policy to be effected in the interest of *Langlois* upon *Gendron's* life, in whose life *Langlois* had no interest, and apparently upon behalf of *Gendron*, who, in truth, had never any interest in the policy. In my judgment the allegation in the plea, "that the said *Hector Gendron* never had any legal interest whatever in said policy, and did not pay any portion of the premium on said policy mentioned, and merely lent his name to said *Edouard Langlois* in the matter of the said application and declaration," is sufficiently proved by the evidence which establishes that *Michaud* as *Gendron's* agent, as he says, offered to issue the policy to *Langlois* if he would pay the premium to procure it to be issued. If this proposition was made by *Michaud* as *Gendron's* agent, it is the same as if *Gendron* had said to *Langlois* "there is a document which I can not procure to be issued. I have no means—it on its face purports to be for my benefit, but I cannot give it vitality or obtain its issue—go and pay the premium and procure it to be issued to you and for your benefit, although on my life —you can have it, and I, although having no interest in it, have, to cover appearances, executed an instrument purporting to be an assignment of it to you, so that the Company's agent may give it existence by issuing it to you, and appearances will protect him also." I must say that the transaction appears to my mind so plainly fraudulent that it should not be allowed to prevail in a court of justice.

Appeal allowed with costs.

Solicitors for appellants: *Doutre & Joseph.*

Solicitors for respondents: *Bethune & Bethune.*

1882

*Feb'y. 21.

*April 28.

THE QUEEN.....APPELLANT;

AND

CHRISTIAN A. ROBERTSON.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Fisheries Act, 31 *Vic. ch.* 60 *(D)—British North America Act*, 1867, *secs.* 91, 92 and 109—*Fisheries, regulation and protection of—License to fish in that part of the Miramichi River above Price's Bend—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing.*

On January 1st, 1874, the Minister of Marine and Fisheries of *Canada*, purporting to act under the powers conferred upon him by sec. 2, ch. 60, 31 Vic., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the *South West Miramichi* River in *New Brunswick* for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties:—

"*Price's Bend* is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward, is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of *New Brunswick* having decided adverse'y to his exclusive right to fish in virtue

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

1882

THE QUEEN v. ROBERTSON.

of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred.

By special case certain questions (which are given below) were submitted for the decision of the court, and the Exchequer Court held *inter alia* that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under sec. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" held, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of *Canada* on the main question: whether or not an exclusive right of fishing did so exist.

Held,—(affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the *British North America Act*, 1867, sec. 91, is in the Parliament of *Canada*, but that the license granted by the Minister of Marine and Fisheries of the *locus in quo* was void because said act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the *Miramichi* River flows.

2nd,—That altho' the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in *Canada*, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium filum aquæ*.

3rd. That the rights of fishing in a river, such as is that part of the *Miramichi* from *Price's Bend* to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the *B. N. A. Act*, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th. Per *Ritchie*, C. J., and *Strong*, *Fournier* and *Henry*, J. J.—(reversing the judgment of the Exchequer Court on the 8th

1882

THE QUEEN v. ROBERTSON.

question submitted) that the ungranted lands in the Province of *New Brunswick* being in the Crown for the benefit of the people of *New Brunswick*, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal.

APPEAL from a judgment rendered by Mr. Justice *Gwynne* in the Exchequer Court of *Canada*, in the matter of the petition of right of *Christian A. Robertson*, the above named respondent.

The following special case was agreed to by the parties:

"The *Miramichi* river at *Price's Bend* is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point, upward, is navigable for canoes, small boats, flat bottom scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

"On the 5th November, A. D. 1835, a grant issued to the *Nova Scotia* and *New Brunswick Land Company* of 580,000 acres, which included within its limits that portion of the *Miramichi* river which is in question, and the said grant contained, together with the usual granting clauses, the following clause:—'Excepting also out of the said tract of land, described within the said bounds, all and every lot, piece and parcel of land which have been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate by any grant or conveyance under the Great Seal of the Province of *New Brunswick*, or the Great Seal of the Province of *Nova Scotia* during the period when the said hereby granted tract of land was part and parcel of our said Province of *Nova Scotia*,

together with all privileges, &c., and also further excepting the bed and waters of the *Miramichi* river, and the beds and waters of all the rivers and streams which empty themselves either into the river *St. John* or the river *Nashwaak*, so far up the said rivers or streams respectively as the same respectively pass through, or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted.' (Copy of grant may be referred to.)

"Copies of grants, made prior to the grant to the *Nova Scotia* and *New Brunswick Land Company*, of same lots within and some immediately adjoining and outside of the boundaries of the company's tract, to *Steven Hovey*, *Peter Hayes*, *Thomas Hunter* and *James Young*, and twelve other copies of letters patent are herewith and may be referred to. The other grants to the others within the company's tract are in similar form; copy of map annexed to the grant to the company is also filed herewith; and all are made part of this case.

"On the first day of January, A. D. 1874, the Honorable *Peter Mitchell*, then being the Minister of Marine and Fisheries in and for the Dominion of *Canada*, did, in pursuance of the powers purporting to be vested in him by the Act of the parliament of *Canada*, intituled "An Act for the regulation of fishing and protection of the fisheries," lease to suppliant as follows:—

LEASE OF FISHERY.

"Dominion of *Canada*, to wit:

"Lease between Her Majesty, acting by and through the Minister of Marine and Fisheries for the Dominion of *Canada*, of the one part, and *Christian A. Robertson*, esquire, of the city of *St. John*, *New Brunswick*, of the other part.

1882

THE QUEEN v. ROBERTSON.

"Her Majesty hereby leases, for the purpose of fly fishing for salmon, unto the said *Christian A. Robertson*, hereto present and accepting for himself, his heirs, executors, administrators and assigns, for and during the period hereinafter mentioned, and under the conditions hereinbelow stipulated, a certain fishing station situated on the south-west *Miramichi* river, in the province of *New Brunswick*, and described as follows, that is to say: the fluvial or angling division of the south-west *Miramichi* river from *Price's Bend* to its source.

"The present lease is hereby made for and during the space and term of nine years, to be computed and reckoned from the first day of January, one thousand eight hundred and seventy-four until the thirty-first day of December, which will be in the year of our Lord one thousand eight hundred and eighty-two, and on the following conditions:—

"1st. That the said lessee shall pay to Her Majesty, into the hands of the Minister of Marine and Fisheries for the time being, or such other person or persons duly authorized to receive the same, an annual rent of fifty dollars currency, the said rent payable annually in advance.

"2nd. That the said lessee shall, in the use and occupation of the fishery station and privileges hereby leased, and the working of the same, in every respect conform to all and every the provisions, enactments and requirements of the fishery laws now, or which may hereafter be in force, and comply with all rules and regulations adopted or to be passed by the Governor General in Council relative thereto.

"3rd. That the lessee shall neither concede nor transfer any interest in the present grant, nor sub-let to any one without first duly notifying the Department of Marine and Fisheries, and receiving the written consent of the Minister thereof, or some other person or persons

authorized to that effect. Provided always that actual settlers shall enjoy the privilege of fishing with a rod and line in the manner known as fly surface-fishing in front of their own properties.

"4th. That the said lessee shall not have any right, claim or pretension to any indemnity or abatement of rent by reason of a decrease or failure in the fishery by these presents leased.

"5th. That in default of payment by the said lessee of the rent as hereinbefore stipulated, or by his neglect, default or evasion, failure or refusal to fulfil any of the other clauses and conditions of this lease, the same may, at the option of the lessor, be at any time determined and put an end to upon notice thereof to the said lessee by letter posted to him to the post office nearest to the said premises, or by personal notice through any overseer of fisheries for the province of *New Brunswick*, or other person by the Minister of Marine and Fisheries deputed for the purpose, and the said lease shall become absolutely void and the crown may thereupon enter into possession and enjoyment of the said station and privileges without any indemnification for improvements or recourse to law, and relet the same; the said lessee being moreover held bound and liable for all loss or damage which might accrue or arise to the crown by reason of receiving a lower rent, or being unable to release the premises and privileges appertaining thereto or otherwise.

"6th. That the said lessee binds himself to establish and maintain efficient private guardianship upon the said stream throughout each season, to the satisfaction of the lessor, who reserves the right of four rods.

"This said lease (in duplicate) made and passed on the thirty-first day of October, in the year of Our Lord

1882

THE QUEEN v. ROBERTSON.

one thousand eight hundred and seventy-three in presence of the undersigned witnesses.

P. MITCHELL,
Minister of Marine and Fisheries.

Witness: *S. P. Bauset.*

Countersigned—*W. F. Whitcher*,
Commissioner of Fisheries.

C. A. Robertson.

Witness: *W. H. Venning.*

"It is admitted for the purpose of this case:

"1. That the Government of *Canada* did not own the lands adjoining the said river within the limits of the said lease.

"2. That the said lease includes all that portion of the South-west *Miramichi* River included in the lands of the aforesaid grant to the *Nova Scotia and New Brunswick Land Company*; and also the remainder of the river above the said grant up to its source, which last portion of the river passes through ungranted land, and is of comparatively little value for the purpose of salmon fishing. That the said river for several miles up the stream and above and below the lots and parcels of land previously granted to the said *New Brunswick and Nova Scotia Land Company*, and excepted in the said grant, is within the boundaries of the land described in the said grant. That under the said lease the suppliant entered upon the said fluvial division so leased to him, and paid the annual rent, and fulfilled and performed all the conditions and agreements and provisions in the said lease contained on his part and behalf to be kept fulfilled and performed.

"3. That although the suppliant under the said lease claimed to be in occupation of the said fishery station described in aforesaid lease, and to have the exclusive right of fishing therein, and that subject to the reservations in the said lease he had the right of preventing all

persons from fishing for salmon within the bounds of the said fishery station, *James Steadman* and *Edgar Hanson*, who were not actual settlers, and who did not have or claim to have any lease, license or permission so to do from the Minister of Marine and Fisheries, or from the suppliant, did (with the permission and consent of and under and by virtue of conveyances from the said *Nova Scotia and New Brunswick Land Company* of land, including a portion of the said river above the aforesaid grants so excepted and reserved in said grant to the Company), during the year 1875, and during the season when fly fishing was lawful, enter upon the said portion of the river, being a part of the river so leased as aforesaid, and fished for and caught salmon by fly fishing against the will of suppliant and against his consent.

"4. That in order to maintain his rights and privileges, and the right of fishing purporting to be granted and demised to the suppliant by the said lease, the suppliant prevented the said *James Steadman* and *Edgar Hanson* from fly fishing.

"5. That the said *James Steadman* and *Edgar Hanson*, respectively, brought actions against the suppliant and his servants for and by reason of such prevention from fishing, as above stated, and such proceedings were thereupon had that the said *James Steadman* and *Edgar Hanson* recovered against the suppliant damages and costs, which the suppliant has been obliged to pay, and that the Supreme Court of *New Brunswick* on appeal (see *Steadman* v. *Robertson et al.*, and *Hanson* v. *Robertson et al.* (1), held that the Minister of Marine and Fisheries had no right or power to issue the said fishery lease, and that the same was null and void.

"6. That in and about the defence of the said actions the suppliant also incurred costs and expenses.

(1) 2 Pugs. & Bur. 573.

1882

THE QUEEN v. ROBERTSON.

"7. That also by reason of the premises the suppliant has sustained other loss and damage.

"8. That in establishing and maintaining efficient private guardianship upon the said stream through the season, required by the said lease, the suppliant has also expended money.

"9. That the suppliant therefore prays that her Majesty will be pleased to do what is right and just in the premises, and cause the suppliant to be re-imbursed and compensated for the moneys so expended by him as aforesaid, and for the losses, damages and injuries sustained by him as aforesaid.

"10. It is agreed that the statements above set out are admitted for the purpose of this special case, and are to be used for the purpose of enabling the court to decide the questions of law raised hereby.

"11. It is also agreed that either party may appeal from the judgment to be pronounced in the above case as upon a demurrer.

"The following questions are therefore submitted for the decision of the court:—

"1. Had the Parliament of *Canada* power to pass the 2nd section of the said Act entitled "An Act for the regulation of fishing and the protection of the Fisheries?"

"2 Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

"3. Was the bed of the *S. W. Miramichi* within the limits of grant to the *Nova Scotia* and *New Brunswick* Land Company, and above the grants mentioned and reserved therein, granted to the said company?

"4. If so, did the exclusive right of fishing in said river thereby pass to the said company?

"5. If the bed of the river did not pass, had the company, as riparian proprietor, the right of fishing *ad filum aquæ*; and if so, was that right exclusive?

"6. Have the grantees in grants of lots bounded by srid river, or by any part thereof, and excepted from the said company's grant, any exclusive or other right of fishing in said river opposite their respective grants?

"7. If an exclusive right of fishing in a portion of the *Miramichi* river passed to said company, or to the grantees in the excepted grants, or any of them, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

"8. Where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?

"9. It is understood and agreed, that if upon the final determination of the case it be held that the Government had no power to make the lease in question to Mr. *Robertson*, an order shall be made referring it to the proper officer of the court to take an account of the expenses actually and properly incurred by Mr. *Robertson*, in connection with the suits in the courts of *New Brunswick*, and such other actual expenses as he may have been put to on account of the action of the parties who intercepted the rights claimed by him under the lease; and it is further understood and agreed that the government shall pay to Mr. *Robertson* such of these expenses as the court may think him entitled to, in case the parties to this suit may differ upon the matter."

The case was argued in the Exchequer Court for the Suppliant by Mr. *Haliburton*, Q.C., and for the Crown by Mr. *Lash*, Q.C.

On the 7th October, 1881, the following judgment was delivered by GWYNNE, J.:—

"This special case came before me in the month of February, but upon the argument appearing to be imperfect was withdrawn, and amended, and as so

1882

THE QUEEN v. ROBERTSON.

amended was argued in the month of May. After this argument there appeared to me to be still wanting information as to some facts which should be introduced by way of further amendment. These facts have been supplied during the vacation and are now made part of the case.

"The question is as to the right to the Salmon Fishery in the *Miramichi* River in the Province of *New Brunswick*, and as to the validity of an instrument purporting to be a lease or license under the provisions of the Fisheries Act of 1868, issued by the Minister of Marine and Fisheries, bearing date 31st of October 1873. The questions submitted by the special case which has been agreed upon are as follows:

"1st. Had the Parliament of Canada power to pass the 2nd section of the Act of 1863 entitled, 'An Act for the regulation of Fishing and the Protection of the Fisheries'?

"2nd. Had the Minister of Marine and Fisheries the right to issue the Fishery Lease in question?

"3rd. Was the bed of S. W. *Miramichi* River within the limits of the grant to the *Nova Scotia* and *New Brunswick* Land Company, and above the grants mentioned and reserved therein, granted to the said Company?

"4. If so, did the exclusive right of fishing in said River thereby pass to the said Company?

"5. If the bed of the River did not pass, had the Company as riparian proprietor the right of fishing *ad filum aquæ*, and if so, was that right exclusive?

"6. Have the Grantees in grants of lots bounded by said River or by any part thereof, and excepted from the said Company's grant, any exclusive, or other right of fishing in said River opposite to their respective grants?

"7. If an exclusive right of fishing in a portion of

the *Miramichi* River passed to the said Company or to the grantees in the excepted grants or any of them, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the River?

"8. Where the lands, above tidal water, through which the said River passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a Lease of that a portion of the River?

"It is agreed by the case, that if, upon the final determination of it, it be held that the Government had no power to make the lease in question to the Suppliant, an order shall be made referring it to the proper officer of the Court to take an account of the expenses actually and properly incurred in connection with certain suits in the Courts in *New Brunswick* and such other actual expenses as he may have been put to on account of the action of parties who intercepted the rights claimed by him under the lease, and it was further agreed that the Government should pay to the Suppliant such of those expenses as the Court may think him entitled to, in case the Suppliant and the Government should differ upon the matter.

"The clause of the Act referred to in the first of the above questions is the 2nd section of the Dominion Act 31st Vic., ch. 60, and is as follows:—'The Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue or authorize to be issued Fishery Leases, and licenses for Fisheries and fishing, wherever situate and carried on, but leases or licenses for any term exceeding nine years, shall be issued only under authority of an order of the Governor in Council.'

"The Act in which this section is contained was passed by the Dominion Parliament 'for the regulation of fishing and the protection of Fisheries' and it was passed under the authority of the *British North America*

1882

THE QUEEN v. ROBERTSON.

Act, the 91st section of which places, among other matters, under the exclusive authority of the Parliament of *Canada*, 'Sea Coast and Inland Fisheries.'

"To secure an uniformly consistent construction of this our Constitutional Charter it is necessary that some certain and sufficient canon of construction should be laid down and adopted, by which all Acts passed as well by the Parliament as by the Local Legislatures may be effectually tested upon a question arising as to their being or not being *intra vires* of the legislating body passing them. Such a canon appeared to me to be that formulated by me in the *City of Fredericton* vs. *The Queen* (1), and it still appears to me to be a good and sufficient rule for the required purpose, namely,— 'All subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the *British North America* Act under the exclusive control of the Local Legislatures, and nothing is placed under the exclusive control of the Local Legislatures unless it comes within some or one of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items.' The effect of the closing paragraph of the 91st section, namely: 'and any matter coming within any of the classes of subjects enumerated in the 91st section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces' in my opinion clearly is to exclude from the jurisdiction of the Local Legislatures the several subjects enumerated in the 92nd section, in so far as they relate to or affect any of the matters enumerated in the 91st section.

(1) 3 Can. S. C. R. 505.

"Now, among the items enumerated in section 92 there is nothing which could give to the Local Legislatures any jurisdiction whatever over Sea Coast and Inland Fisheries, unless it be the item 'Property and Civil Rights in the Province,' but inasmuch as 'Sea Coast and Inland Fisheries' are enumerated specially in the 91st section as placed under the exclusive control of Parliament, this enumeration carries with it exclusive jurisdiction over property and civil rights in every province in so far as whatever is comprehended under the term 'Sea Coast and Inland Fisheries' is concerned, and the Local Legislatures have no jurisdiction whatever over this subject; the jurisdiction therefore which is given to the Local Legislatures over 'property and civil rights in the Province' is not an absolute, but only a qualified jurisdiction, and must be held to be limited to the residuum of such jurisdiction not absorbed by the exclusive control given to the Dominion Parliament over every one of the subjects enumerated in the 91st section: while the jurisdiction of Parliament over every subject placed under *its* control is as absolute and supreme as the jurisdiction of the Imperial Parliament over the like subject in the United Kingdom would be; the design of the *British North America* Act being to give to the Dominion of *Canada* a constitution similar in principle to that of the United Kingdom. It is of course, in every case, necessary to form an accurate judgment upon what is the particular subject matter in each case as to which the question arises, for the extent of the control of parliament over the subject-matter, may possibly be limited by the nature of the subject; for example, the first item enumerated in the 91st section as placed under the exclusive control of the Parliament is 'the Public debt and property,' and by section 108 the Provincial Public Works and property are declared to be the property of *Canada*. The

1882

THE QUEEN v. ROBERTSON.

jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of *Canada*, but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the property of individuals, should be no longer subject to the control of the Dominion Parliament any more than any other property of an individual should be; but over most of the subjects enumerated in the 91st section, the right of the Dominion Parliament to legislate is wholly irrespective of there being any property in the several subjects *vested* in the Dominion of *Canada*, and over those subjects the right of legislation continues forever, no matter who may have 'property or civil rights' therein. There is nothing strange in this provision; on the contrary, it is in perfect character with the whole scheme of the Act, that the jurisdiction of the Dominion Parliament should be supreme over all subjects which are of general public interest to the whole Dominion in whomsoever the property in such subject may be vested.

"It cannot be questioned that all the inhabitants of this Dominion, in whatever Province they may reside, have an interest in the regulation and protection of the Fisheries, whether they be Sea Coast or Inland, not only as affording a large supply of food for the inhabitants of the Dominion, but a very extensive traffic also between the several Provinces and with *England* as well as with Foreign States, thus extending the trade and commerce external and internal of the Dominion, and this interest of the public in the Fisheries is not the less because in our Inland waters, consisting of Rivers and Lakes teeming with the finest fish, private persons may have property therein. Now, what is to be comprehended under the term 'Fisheries' as used in

the 12th item of the 91st section of the *British North America* Act? In *Abbot's* Law Dictionary, the term is defined to be, "the right to take fish at a certain place or upon particular waters."

"Chancellor *Kent*, in his commentaries, defines common of Piscary to be 'a liberty or right of fishing in water covering the soil of another or in a river running through another man's lands'—'it is not,' he says, 'an exclusive right, but one enjoyed in common with certain other persons.' Lord *Holt*, in 2 Salk. 637, said that it was to be resembled to the case of other commons.

"In the *Mayor of Carlisle* v. *Graham* (1) 'Common of Fishery' is distinguished from 'Common Fishery,' the former being defined to be a right enjoyed by several persons, but not the whole public, in a particular stream, and the latter, a right enjoyed by all the public as on the sea, or to the ebb and flow of the tide: 'Free Fishery,' is there defined to be a franchise in the hands of a subject existing by grant or prescription distinguished from an ownership in the soil; and 'Several Fishery' to be a private exclusive right of fishing in a navigable river or arm of the sea, but whether it must be accompanied with ownership in the soil, in that the authorities differ.

"Mr. *Hargrave* in his jurisconsult consultations on the distinction of Fisheries differs from *Blackstone*, who was of opinion that the ownership of the soil was essential to a several fishery; after quoting Lord *Coke's* argument, Mr. *Hargrave* says: 'At the utmost, they only prove that a several Piscary is presumed to comprehend the soil until the contrary appears, which is perfectly consistent with Lord *Coke's* position that they may be in different persons, and this indeed appears to be the true doctrine on the subject; and Chancellor *Kent* in his commentaries (2) says: 'The more

(1) L. R. 4 Ex. 361. (2) P. 412.

1882

THE QUEEN v. ROBERTSON.

easy and intelligible arrangement of the subject would seem to be to divide the right of fishing into a right common to all and right vested exclusively in one or more persons.' In fresh water rivers, he says, 'that is, above the ebb and flow of the tide, the owners of the soil on each side had the interest and the right of fishery, and it was an exclusive right extending to the centre of the stream opposite their respective lands unless a special grant or prescription be shown.'

"In Lord *Fitz Walters* case (1), *Hale*, C.J., ruled that in the case of a private river the Lord having the soil, is good evidence to prove he has the right of fishing, and it put the proof on them that claim *liberam Piscariam*, i. e. a right of fishing distinct from ownership of the soil.

"The right of fishing, then, in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

"Now, that the *British North America* Act did not contemplate placing the title or ownership of the beds of fresh water rivers under the control of the Dominion Parliament so as to enable that Parliament to affect the title to the beds of such rivers sufficiently appears, I think, from the 109th section, by which 'all *lands* mines, minerals and royalties belonging to the several Provinces of *Canada*, *Nova Scotia* and *New Brunwick* at the Union' are declared to belong to the several Provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate, and this term '*lands*' in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We

(1) 1 Mod. 105.

must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places 'all Fisheries' both sea, coast and inland under the exclusive Legislative control of the Dominion Parliament. Full effect can be given to the whole Act by construing it (and this appears to me to be its true construction) as placing the fisheries or right of fishing in all rivers running through ungranted lands in the several Provinces, as well as in all rivers running through lands then already granted, *as distinct and severed from the property in, or title to, the soil or beds of these rivers*, under the exclusive Legislative control of the Dominion Parliament. So construing the term 'Fisheries,' the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect the *title or ownership* of the beds of the rivers in which the Fisheries may exist. That title may be and is in the Grantees of the Crown where the title has passed, or may pass hereafter, by grants to be made under the seal of the several Provinces in which the lands may lie, but the exclusive right to control the 'Fisheries,' as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

"So construing the term, it must be held to comprehend the right to control, in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes or in the rivers of the Dominion, and which are valuable for food, within the Dominion, or for exportation for that purpose, or for any other purpose of trade and commerce, and must include as well the right to catch fish as the designation and control of the places where the fish

1882

THE QUEEN v. ROBERTSON.

may be caught and the times and manner of catching; it must also, as it appears to me, be construed to comprehend all such rights of fishing and other matters relating to the 'Fisheries,' *as distinct from ownership of the bed of the streams*, and relating to the protection of the fish, as had been provided by legislation within any of the old Provinces, as the same were constituted before the passing of *British North America* Act. Now, many Acts had been passed by the legislature of the old Province of *New Brunswick* for the regulation and protection of the fisheries in that Province between the 33rd *Geo.* 3rd, ch. 9, and 26 *Vic.* ch. 6, prohibiting, among other things, the use of drift nets, the erection of any hedge, weir, fishgarth, or other incumbrance, or the placing any seine or net across any river, cove or creek in the Province in such manner as to obstruct or injure the natural course of the fish in any river where they usually go—regulating the construction of Mill dams—prohibiting also the fishing for Salmon and other fish at certain periods of the year, and giving to the Justices in General Sessions in each County power to establish such other rules and regulations as to them should seem fit for the better production and preservation of the fish within their respective counties, provided that such regulations should not be contrary to, and should not interfere with, the general regulations and restrictions contained in any Act of Assembly or private right. By chapter 101, of the Revised Statutes, the Governor in Council was authorized to appoint two wardens of Fisheries in any County, who should watch over and protect the fisheries, enforce the provisions of that Act, the rules of the Justices in Sessions, or of municipal authorities, and the regulations of the Governor in Council in relation to such fisheries.

Section 5 authorized the Governor in Council to grant leases or licenses of occupation, for a term not

exceeding five years, for fishing stations on ungranted shores, beaches or islands, which should terminate when such stations should cease to be used for such purpose, and that such leases or licenses should be sold at public auction, but that the right in lands and privileges already granted should not be affected thereby. This provision as to leases or licenses would seem to apply only to fishing in tidal waters, but 26 *Vic.* ch. 6, which was in fact an amendment and consolidation of all previous Acts from ch. 101 of the Revised Statutes, enacted that the Governor in Council might grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belong to the Crown, or the lands are ungranted, that such leases or licenses should be sold by public auction after 30 days notice in the Royal Gazette, the upset price being determined by the Governor in Council, but that the rights of parties in lands and privileges already granted should not be affected thereby, and that the rents and profits arising from such leases or licenses should be paid into the Provincial Treasury to a separate account to be kept, called 'The Fishery protection account.'

"In *Nova Scotia* also there were statutes of a somewhat similar character. Ch. 94 of Title 25 revised Stat. (2nd series) regulated the Sea Coast Fisheries, and ch. 95 the River Fisheries. The first section of this latter Act empowered the Sessions from time to time to make orders for regulating the River Fisheries, and subjected every person who should transgress such orders to a fine not exceeding £10 for each offence, and by section 6 it was enacted that the Sessions should annually appoint such and so many places on the rivers and streams as might be attended with the least inconvenience to the owners of the soil or the rivers as resorts for the purpose of taking fish, but that the

1882

THE QUEEN v. ROBERTSON.

same and the enactments in the Act contained should not extend to any species of fish from the sea, except Salmon, Bass, Shad, Alewives and Gaspereaux.

"The 10th section regulated the Salmon fishing. So likewise in *Canada* an Act was passed, entituled 'An Act respecting fisheries and fishing,' Consolidated Statutes of *Canada*, 22 *Vic.*, ch. 62, containing many like provisions, the first section of which authorized the Governor in Council to grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and to make all and every such regulations as might be found necessary or expedient for the better management and regulation of the Fisheries of the Province. This Act was amended by the 29 *Vic.*, ch. 11, the 3rd section of which (and from which the 2nd section of 31 *Vic.*, ch. 60 would seem to be taken) purported to give the Commissioner of Crown Lands the authority which the latter Act and section purports to give to the Minister of Marine and Fisheries, and is as follows: 'The Commissioner of Crown Lands may, where the exclusive right of fishing does not already exist by law in favor of private persons, issue fishing leases and licenses for fisheries and fishing wheresoever situated or carried on, and grant licenses of occupation for public lands in connection with fisheries, but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor General in Council.'

"At the time of the passing of the *British North America* Act, the above recited Acts were in force in *New Brunswick*, *Nova Scotia* and *Canada* respectively, and by force of the 129th section continued so to be, after the passing of the Act, until the same should be repealed, abolished or altered by Parliament, and the effect was in fact the same as if the *British North America* Act had, for the protection and preservation of

the fisheries, in precise terms, repealed those enactments and declared that the Dominion Executive should have full power to carry them into effect until the Parliament should repeal, abolish or alter those enactments or any of them, or make additional or other provisions in their stead—unlimited power is thus vested in the Parliament, either to maintain the then existing provisions or such of them as it should think fit, or in its wisdom to repeal, abolish or alter those provisions and to make such further and other, or the like provisions and enactments upon the subject, as to it should seem expedient. Now the Act under consideration, viz: 31 *Vic.*, ch. 60, maintains the like scrupulous respect for *private* rights as the old acts which it repealed had done; for by the 2nd section the power given to the Minister of Marine and Fisheries to issue fishery leases and licenses is confined expressly to those places 'where the exclusive right of fishing does not already exist by law,' following the provision of the *Canada* Statute 29 *Vic*, ch. 11, section 3.

"In all matters placed under the control of Parliament, all private interests, whether Provincial or personal, must yield to the public interest and to the public will, in relation to the subject-matter, as expressed in an Act of Parliament. Constituted as the Dominion Parliament is after the pattern of the Imperial Parliament, and consisting as it does of Her Majesty, a Senate and a House of Commons, as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principles of the British Constitution, which forbids that any man should be wantonly deprived of his property under pretence of the public benefit or without due compensation, be always respected.

"It is, however, in Parliament, upon the occasion of

1882

THE QUEEN v. ROBERTSON.

the passing of any Act which may effect injuriously private rights, that those rights are to be asserted, for once an Act is passed by the Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this or any Court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in *England*, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament and the terms of the Act be explicit, so long as it remains in force effect must be given to it in all Courts of the Dominion, however private rights may be affected. There is no evil to be apprehended from giving, in our constitution, full effect to this principle, which is inherent in the British Constitution, nor would the transfer of jurisdiction to the Local Legislatures be any improvement, for experience does not warrant the belief that the interests of private persons in relation to any subject would be more respected, or the Public interest be better protected, if such subject were placed under the control of the Local Legislatures instead of under that of Parliament.

"The Imperial Parliament, having supreme control over the title to, or ownership of, the beds and soil of the inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of *Canada*, *Nova Scotia* and *New Brunswick* as the same were constituted before the passing of the *British North America* Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish as a separate pro-

perty distinct from the ownership of the soil under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term 'Fisheries' as used in the *British North America* Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the Fisheries exist, it seems to me to be free from all doubt, that the jurisdiction of Parliament over all fisheries, whether sea, coast or inland, and whether in Lakes or Rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seised and possessed of the fishing in such waters, either as a right incident to ownership of the beds and soil covered by such waters, or otherwise; and that therefore, the first question in the special case must be answered in the affirmative.

"The special case raises no question as to the terms of the particular instrument which has been used, nor whether it gives to the party named therein, assuming the Minister signing it to have the right to give, an exclusive franchise or privilege of fishing in the waters named during the period named; or only a right in common with others to whom a like privilege might be given as in *Bloomfield* vs. *Johnson* (1), but for the reasons already stated it will be seen that, while by force of the statute, the form of the instrument (although it is not issued under the great seal of the Dominion, under which alone such a franchise could, by the course of the Common Law, be granted) may be sufficient to pass the franchise as distinct from the ownership of the bed or soil of the river, it cannot operate as a demise or transfer of the legal estate in the bed of the river to the donee or Grantee or Licensee

(1) Ir. L. R. 8 C. L. 68.

1882

THE QUEEN v. ROBERTSON.

(which latter term seems to me to be the most appropriate) of the franchise. As to the residue of the questions submitted in the special case, it will be convenient to review the nature, condition and title to the particular property in question, namely:—the right of fishing in the *Miramichi* River prior to and at the time of the passing of the *British North America* Act, and to consider what the law as affecting such property then was.

"The special case states that the portion of the *Miramichi* River which is covered by the Fishery Lease to the Suppliant is above tidal waters and is navigable for canoes and boats and has been used from the earliest settlement of the Country as a highway for the same and for the purpose of floating down timber and log to market. After the *St. John*, the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive Bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the Gulf, and for schooners 20 miles further to the head of the tide, above which for sixty miles it is navigable for tow boats. It has many large tributaries spreading over a great extent of Country.—*Price's Bend* is about 40 or 50 miles above the ebb and flow of the tide. The stream for the greater part from this point upwards is navigable for canoes, small boats, flat bottomed scows, logs and timber; logs are usually driven down the River in highwater in the Spring and Fall. The stream is rapid: during summer, it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

"On the 5th November, 1835, a Grant issued to the *Nova Scotia* and *New Brunswick* Land Comyany of 580,000 acres, which included within its limits that

portion of the *Miramichi* River which is in question, and the said Grant contained with the usual granting clauses the following clause, 'excepting also out of the said tract of land described within the said bounds, all and every lot, piece or parcel of land which have been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate by any grant or conveyance under the Great Seal of the Province of *New Brunswick*, or the Great Seal of the Province of *Nova Scotia*, during the period when the said hereby granted tract of land was part and parcel of our said Province of *Nova Scotia*, together with all privileges, &c., and also further excepting the bed and waters of the *Miramichi* river and the beds and waters of all the rivers and streams which empty themselves into the *St. John* or the river *Nashwaak* so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted.'

"The contention of Mr. *Lash* upon the part of the Crown as representing the Dominion Government is, that the admissions in the case establish the *River Miramichi*, at the *locus in quo*, to be a navigable river, and that, as such, the public at large had a common right of fishing therein, and that therefore there could be no exclusive right of fishing therein, even if the bed of the River had passed by the Grant to the *Nova Scotia* and *New Brunswick* Land Company, a point which however he disputes, contending that the bed of the river *Miramichi* is wholly excepted from the grant; and if the river be, as he contends it is, a public river, he contends that *Magna Charta* prevents any exclusive right of fishing therein. That the *St. Lawrence* and other great rivers of Old *Canada* and the great Lakes formed by them are public waters open to the public at

1882

THE QUEEN v. ROBERTSON.

large, who have the right not only of navigation but of fishing also therein, unless in places which are covered by special grants, is too well established now to admit of a doubt. If the principle upon which *Dixon* vs. *Scnetsinger* (1) was decided be the correct principle, that right is established upon a firm basis in all those waters, wholly irrespective of the Common Law principle that such right is by the Common Law of *England* confined to tidal waters; but the same reasoning as in *Dixon* vs. *Scnetsinger* was applied to the rivers of Old *Canada* will not apply to the rivers of *New Brunswick*, the right of fishing in which must be considered with reference to the Common Law of *England*. I find some difficulty in determining what is precisely meant by the expression in the special case, wherein it is admitted that the portion of the *Miramichi* river which is covered by the fishery lease to the Suppliant, 'has been used from the earliest settlement of the country as a highway for the same and for the purpose of floating down timber and logs to market'—for, by the plan which accompanies the grant to the *Nova Scotia* and *New Brunswick* Land Company, it would seem that for some 20 or 30 miles up the *Miramichi* river, within the limits of the Company's grant and above the highest prior grant of any land upon the river above *Price's Bend*, the country was a dense forest without any settlement whatever, and higher up than the company's grant there is not said to have been any settlement, nor is it said that there had been any licenses to cut timber granted by the Crown in any part of the tract upon the river above the remotest land which had been granted. I find it difficult therefore to understand, if this is what is meant to be admitted, how from the earliest settlement in *New Brunswick* that part of the river which runs through wild ungranted forest

(1) 23 U. C. C. P. 235.

land in which there never had been any settlement whatever, nor, so far as appears by the case stated, any licenses granted to cut timber, could have been used as stated in the case 'as a highway and for the purpose of floating down timber and logs to market.' However, the case sufficiently establishes the character of the river, for it admits that the part in question is above *Price's Bend*, which is situate 40 or 50 miles above the ebb and flow of the tide, and that from this point upwards the river is navigable only for canoes, small boats, flat bottom scows, logs and timber, which latter are driven down the river in high water, in the spring and fall, and that in the months of June, July and August, which is the Salmon fishing season, the water is so low that canoes have to be carried over the bars which are very shallow, and that consequently, during this period of the year, the river is not, at the part in question, navigable for flat bottomed boats, logs or timber. *Lloyd* vs *Jones* (1) is an authority that there is no connection between a right of fishing and a right of passage on a fresh water river—that is, above the ebb and flow of the tide, and that the existence of the latter right does not carry with it the former. *Creswell*, J., at page 81, puts the point thus 'what answer is it to plaintiff's complaint that the defendant unlawfully fished in his stream for the latter to say that he had a right of way over the *locus in quo*?' So from *Ewing* vs. *Colquhoun* (2) it appears that a right of navigation in the public with boats, barges, rafts, &c., &c., on an inland river, involves no right of property in the river or its bed. The public have merely the right to use the river for passing to and fro upon it, in the same manner as they have a right of passage along a public road or foot path through a private estate, but the right of fishing in such a river

1882

THE QUEEN v. ROBERTSON.

(1) 6 C. B. 81. (2) 2 App. Cases 839.

1882

THE QUEEN v. ROBERTSON.

by the riparian proprietors, is a right of property vested in such proprietors, in virtue of their being seized of the *alveus* of the stream *ad medium filum aquae*, which *primâ facie* all proprietors of land adjoining an inland river are; but if the *primâ facie* ownership is rebutted by shewing the *alveus* of the river to be in another, then the right of fishing in that river follows the proprietorship of the *alveus*, until it be shewn that a right to fish has been acquired either by grant or prescription by a person not seised of the *alveus*. 'Riparian proprietors' is a term applied by the civilians to the owners of water courses, and the use of the same significant and convenient term is now fully introduced into the Common Law: the soil of the bed itself and consequently the water may be, and most often is, divided between two opposite riparian owners, that is, the land on one side may be owned by one person and the land on the opposite side by another. When such is the case each proprietor owns to the middle, or, what is called the thread of the river: there is but one difference between a stream running through a man's land, and one which runs by the side of it, in the former case he owns the whole and in the latter but half (1). And in sec. 61 of his work on waters and watercourses *Angell* says 'It will be seen by reference to the first chapter that where a person owns the whole of the soil over which a watercourse runs in its natural course, he alone is entitled to the use and profits of the water, and that where a person owns only the land upon one side of a water course, his interest in the soil and his right to the water extends to the middle of the stream: concomitant with this interest in the soil of the bed of watercourses is an exclusive right of fishing, so that the riparian proprietor, and he alone, is autho-

(1) Ang. Wat. sec. 10

rized to take fish from any part of the stream included within his territorial limits.' And *Hale, Jure maris*, p. 5 of *Hargrave's* tracts, says: 'Fresh water rivers of what kind soever do of common right belong to the owners of the soil adjacent, so that the owners of one side have of common right the *propriety*, that is, the property of the soil, and consequently the right of fishing *usque ad filum aquae*, and the owners of the other side the right of soil or ownership and *fishing* unto the *filum aquae* on their side: and if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.' When we speak then of the riparian proprietor or proprietors having the exclusive right of fishing in the river passing through or by the side of his or their lands, what is meant by the term " riparian proprietor " is the owner of the whole bed of the stream as well as of the land through which the stream passes, *or* the owners of the land on either side and of the bed of the stream, each on his own side *ad medium filum aquae*, which every owner of land upon either side of a stream is presumed to be until the contrary is shewn.

" Chancellor Kent, in his commentaries says: 'It was a settled principle of the Common Law that the owners of lands on the banks of fresh water rivers, above the ebbing and flowing of the tide, had the exclusive right of fishing, as well as the right of property opposite their respective lands, *ad medium filum aquae*, and where the lands on each side of the river belonged to the same person, he had the same exclusive right of fishing in the whole river, so far as his land extended along the same. The right exists in the rivers of that description, though they be of the first magnitude, and navigable for rafts or boats, but they are subjected to the *jus publicum* as a common

1882

THE QUEEN v. ROBERTSON.

highway or easement. In rivers not navigable (and in the Common Law sense of the term, they were only deemed to be navigable as far as the flux and reflux of the tide,) the owners of the soil on each side had the interest and the right of fishery, and it was an exclusive right extending to the centre of the stream opposite their respective lands. This private right of fishing is confined to fresh water rivers, that is to rivers above the ebb and flow of the tide, unless a special grant or prescription be shewn, but the right of fishing in the sea and in the bays and arms of the sea and in navigable tide water rivers belongs to the general public, and any person asserting an exclusive privilege there must shew it strictly by grant or prescription.'—

"In *Murphy* vs. *Ryan* (1) it was held that the public cannot acquire, by immemorial usage, any right of fishing in a river, in which, though it be navigable, in fact the tide does not ebb and flow, and that the term 'Navigable' used in a legal sense, as applied to a river in which the soil *primâ facie* belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows.

"This case is one of great authority, not only for the learning of the learned Judges who decided it, but because it is cited with approbation by the Court of Exchequer in *England*, in the *Mayor of Carlisle* vs. *Graham* (2). In pronouncing the judgment of the Court *O'Hagan*, J, afterwards and now again, Lord Chancellor of *Ireland*, says: 'According to the well established principles of the Common Law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle constituting their legal boundary, and, being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories, though the law

(1) Ir. L. R. 2 C. L. 143. (2) L. R. 4 Ex. 361.

secures to the public the right of navigation upon the surface of that water, as a public highway which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river. But, whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian proprietors is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the Common Law to be *publici juris*, and to belong to all the subjects of the Crown, the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public.'

He proceeds then to demonstrate by reference to authorities that a navigable river, in the sense of the public having a common right to fish in it, must be a tidal river, and that the right to fish therein '*publici juris*,' is confined to the ebb and flow of the tide. 'There are,' (he says) 'two kinds of rivers, navigable and not navigable. Every navigable river, so high as the sea ebbs and flows in it, is a royal river, and the fishing of it is a royal fishery and belongs to the King by his prerogative, but *in every other river* not navigable and in the fishery of such river the terretenants on each side have an interest of common right.' Quoting then *Hale* (1), he says, 'upon a full consideration of all the cases it will, I think, appear, that no river has been ever held navigable, so as to vest in the crown its bed and soil and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation, and that beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *primâ facie* in the riparian owners, and the right of fishing *private*.' —And so he concludes that the public can maintain no claim of right to fish in a river the soil of which is not *publici juris* but private property.

(1) De Jure maris, p. 11.

1882

THE QUEEN v. ROBERTSON.

"In *Bloomfield* vs. *Johnson* (1), where the Crown had granted lands adjoining to *Lough Erne* and islands in the lake, it was held that although the lake was a public navigable highway, yet that being above the flux and reflux of the tide, and although it was held that the ordinary presumption that the bed and soil of a stream opposite their lands belongs to the riparian proprietors, did not extend to a large lake like *Lough Erne*, the public had not any right of fishing therein of common right.

"In *Bristow* vs. *Corcoran* (2) it was held by the House of Lords that *de jure* the Crown had not *primâ facie* a right to the soil or fisheries in a lake like *Lough Neagh*, and that therefore the plaintiff, who claimed a right of fishing in the lake under a grant from *Charles* II, had to prove that the King at the time of such grant had an estate to grant; that it was not to be presumed. Lord *Cairns* there says: 'The lake contains nearly 100,000 acres, but, although it is so large, I am not aware of any rule which could *primâ facie* connect the soil and fisheries with the Crown, or *disconnect them from the private ownership of riparian proprietors or other persons*' and Lord *Blackburn* says: 'It is clearly and uniformly laid down in our books that where the soil is covered by water, forming a river in which the tide does not flow, the soil of *common right* belongs to the adjoining lands, and there is no case or book of authority to shew that the Crown, of common right, is entitled to land covered with water where water is not running water, but still water forming a lake.'

"In *Malcolmson* vs. *O'Dea* (3), *Willes*, J., delivering to the House of Lords the opinion of the Judges says: "The soil of navigable tidal rivers, like the *Shannon*, so far as the tide ebbs and flows, is *primâ facie* in the

(1) Ir. L. R. 8 C. L. 68. (2) 3 App. Cases 641.
(3) 10 H. L. 618.

1882

THE QUEEN v. ROBERTSON.

Crown and the right of fishing *primâ facie* in the public, but for *Magna Charta* the Crown could, by its prerogative, exclude the public from such *primâ facie* right, and grant the exclusive right of fishing to a private individual, either together with or distinct from the soil.'

"*Rolle* v. *Whyte* (1) and *Leconfield* vs. *Lonsdale* (2) decide that the provisions of *Magna Charta* and of the early statutes regulating fisheries, including 17 *Ric.* 2, ch. 9, and 12 *Ed.* 4, ch. 7 apply only to rivers navigable in the Common Law sense of the term, *i.e.* to the flux and reflux of the tide. *Rowe* vs. *Titus* (3) and *Esson* vs. *McMaster* (4) bear wholly upon a question as to the right of the public to the easement of passage along certain rivers in *New Brunswick* with boats, rafts and other property, and the rivers were held not to be navigable, but to be of common right public highways upon which the public had a right of passage, to which right the title of the owners of the soil and of the rivers was subservient. No reference is made in these cases to the right of fishing.

"The great weight of authority in the *United States of America* accords with the decisions of the British Courts. In *Palmer* vs. *Mulligan* (5) it was held in the Supreme Court of the State of *New York*, *Kent* being C.J., in 1805, that the river *Hudson* at Stillwater, which is above the flux and reflux of the tide, was not navigable in the Common Law sense of the term, citing the River *Bar* case (6), *Carter* vs. *Murcot* (7), and *Hale, de Jure Maris* from *Hargrave* (8).

Kent, C.J., says: 'The *Hudson* river is capable of being held and enjoyed as private property, but is notwithstanding to be deemed a public highway for public

(1) L. R. 3 Q. B. 286.
(2) L. R. 5 C. P. 657.
(3) 6 New. Bruns.. R. 332.
(4) 3 New. Bruns. R. 501.
(5) 3 Cai. 318.
(6) Davies 152.
(7) 4 Burr· 2162.
(8) Pp. 5, 8, 9.

1882

THE QUEEN v. ROBERTSON.

uses, such as that of rafting timber, to which purpose it has heretofore been and still is beneficially subservient.'

"In *Carson* vs. *Blazer* (1), it was held in the State of *Pennsylvania* in 1810, that the Patent, under which the proprietors of land abutting on the River *Connecticut* hold under *William Penn*, did not pass to them the bed of the river above tide water, or any right of Fishery therein, and that the river and the fisheries therein, above tide water, belonged to the State; the Court in this case held that the Common Law of *England* rule as to the flux and reflux of the tide determining the character of a navigable river did not apply to a river like the *Connecticut*: however, in *Adams* vs. *Pease* (2) the Supreme Court of the State of *Connecticut*, in 1818, held that the owners of land adjoining the *Connecticut* river, above the flow and ebb of the tide, have an exclusive right of fishing opposite to their land to the middle of the stream, but that the public have an easement in the river as a highway for passing and repassing with any kind of water craft; the Chief Justice pronouncing the judgment of the Court says: 'By the Common Law, in the sea, in navigable rivers and in navigable arms of the sea, the right of fishing is common to all. In rivers not navigable, the adjoining proprietors have the exclusive right. Rivers are considered to be navigable in the Common Law sense as far as the sea flows and reflows, and thus far the common right of fishing extends; above the ebbing and flowing of the tide the fishery belongs exclusively to the adjoining proprietors, and the public have a right or easement in such rivers as common highways for passing and repassing with vessels, boats, or any water craft—a more perfect system of regulations on the subject could not be devised. It secures common rights so far as the public interest requires and furnishes a

(1) 2 Binn. 475. (2) 2 Conn. 481.

proper line of demarcation between them and private rights.'

"In the *People* vs. *Platt* (1), it was held by the Supreme Court of the State of *New York*, in 1818, that the right to take fish in the *Saranac*, a river falling into Lake *Champlain*, could not be a public right, for if the river had been granted, the right to take the fish was a private and individual right, and if it had not been granted, yet the right has not become public so as to authorize the entry of any one who might see fit to enter, for the right would belong to the State; and citing *Hale*, Lord *Fitzwalter's* case, and *Carter* vs. *Murcott* (2) the Court says 'these authorities have never been denied or over-ruled and are of unquestionable authority.' Referring to this case the same Court in 1822, in *Hooker* vs. *Cummings* (3), says: 'In the *People* vs. *Platt* we recognized the principles of the Common Law to be that in the case of a private river (that is where it is a fresh water river in which tide does not ebb or flow, and is not therefore an arm of the sea) he who owns the soil has *primâ facie* the right of fishing, and if the soil on both sides be owned by one individual he has the sole and exclusive right, but if there be different proprietors on each side they own on their respective sides *ad medium filum aquae*. We considered in the case referred to, that it was not inconsistent with this right that the river was liable and subject to the public servitude for the passage of boats. The private rights of the owners of the adjacent soil were not otherwise affected than by the river being subject to public use, this is recognised as having been decided in *Palmer* vs. *Mulligan* (4), and *Adams* vs. *Pease* (5).' And referring to *Carson* vs. *Blazer* (6),

(1) 17 Johns. 211.
(2) 4 Burr. 2162.
(3) 20 Johns. 97.
(4) 3 Cai. 318.
(5) 2 Conn. 481.
(6) 2 Binn. 475.

1882

THE QUEEN v. ROBERTSON.

Spencer, C. J., delivering judgment, says: 'I do not feel myself authorized to reject the principles of the English Common Law by saying that they are not suited to our condition, when I can find no trace of any judicial decision to that effect, nor any legislative declaration or provision leading to such conclusion,' and he adopts the encomium passed upon the Common Law of *England* by the Chief Justice of the Supreme Court of the State of *Connecticut* in *Adams* vs. *Pease*. The principles to be deduced from all these cases seem to be, that in the estimation of the Common Law all rivers are either navigable or not navigable, and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable *in fact*, that is, capable of being navigated with ships, boats, rafts, &c., &c., yet be classed among the rivers not navigable in the Common Law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the Crown being restrained by *Magna Charta* from the exercise of the prerogative of granting a several fishery in that part of any river. Non-navigable rivers, in contrast with navigable or public, are also called private, because although they may be navigable in fact, that is, capable of being traversed with ships, boats, rafts, &c., &c., more or less according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who, in right of ownership of the bed of the river, are exclusive owners of the fisheries therein

1882

THE QUEEN v. ROBERTSON.

opposite their respective lands on either side to the centre line of the river. *Magna Charta* does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or of granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil, and in fact Crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the Grantee of such lands the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if, by exception in the grant of the adjacent lands, the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river, but the property and ownership of the river, its bed and fisheries remain in the Crown, and the bed of the river may be granted by the Crown, and the grant thereof will carry the exclusive right of fishing therein; or the right of fishing, exclusive or partial, may be granted by the Crown to whomsoever it pleases, just as any private person seized of the bed of the river might dispose thereof. This right extends to all large inland Lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely, that a grant of the adjacent lands conveys *primâ facie* the bed of the river, (as was decided in *Bloomfield* vs. *Johnson*) still, the prerogative right of the Crown to grant the bed of rivers above the ebb and flow of the tide, not being affected by the restraints imposed by *Magna Charta*, cannot be questioned, for all title of the subject is derived from the Crown, and so if a bed of a river, or the right of fishing therein, be reserved by the Crown from a grant of adjacent lands,

1882

THE QUEEN v. ROBERTSON.

the right and title so reserved remains in the Crown, in the same manner as it would have vested in the grantee if not reserved, and is not subject to any common right of fishing in the public; for, as was said by Lord *Abinger*, C. J., in *Hull* vs. *Selby Ry. Co.* (1),' as all title of the subject is derived from the Crown, the Crown holds by the same rights and with the same limitations as its grantee.' So in *Bloomfield* vs. *Johnson* above cited, it was held that a grant by the Crown of a free fishery in the waters of *Lough Erne* did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the several fishery remained in the Crown subject to such grants or licenses to fish as it might grant. In old *Canada* the right of the Crown to make such grants of the bed of the great lakes is recognized by Act of Parliament.

"Although the exercise of the prerogative of the Crown to grant a several fishery in waters where the tide ebbs and flows is restrained by *Magna Charta*, still the right of Parliament in its wisdom (in the exercise of its paramount control in the interests of the public, and as the exponent of the voice of the nation as regards all property,) to authorize such grants there, equally as in waters above the ebb and flow of the tide, is undoubted.

"I speak here of the Parliament of the United Kingdom, and the like power, over all subjects placed by the *British North America* Act under the control of the Parliament of *Canada*, is vested in that Parliament.

"As regards then the particular river in question, at the place in question, above *Price's Bend*, notwithstanding that it may be true that it is subject to a servitude to the public for a common right of passage over its waters, as to which I express no opinion, inas-

(1) 5 M. & W. 327.

much as the determination of that point is unnecessary in the case before me, but assuming the river to be subject to such servitude, still, the river there partakes not of a character of a navigable or public, but of non-navigable or private river, in the sense in which these terms are used in law, and the public have no common right of fishing therein.

1882

THE QUEEN v. ROBERTSON.

"The *primâ facie* presumption being that the owners of the adjacent lands are owners of the bed of the river, which presumption may be rebutted, it is necessary now to consider the point, which is urged upon behalf of the Crown as representing the Dominion Government in this case, namely that the presumption is rebutted by matter appearing upon the grant to the *Nova Scotia* and *New Brunswick* Land Company, which is made part of the case and has been produced in evidence, for, if not rebutted, the exclusive right of fishing passed by that grant to the Company, and the Act of Parliament, 31 *Vic*, c. 60, does not affect, or in its 2nd section profess to deal with, any fisheries in which an exclusive right of fishing had been conveyed by the Crown and was vested in any persons at the time of the passing of the Act.

"The clause in the letters patent conveying the land to the land company which is relied upon in support of this contention is the latter part of the exception above extracted, namely: 'And also further excepting the bed and waters of the *Miramichi* River, and the beds and waters of all the rivers and streams which empty themselves either into the River *St. John* or the River *Nashwaak*, so far up the said rivers and streams respectively as the same respectively pass through, or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted.'

"This exception, it is urged, is open to two constructions, the one that insisted upon by Mr. *Lash*, upon

1882

THE QUEEN v. ROBERTSON.

behalf of the Dominion Government, namely: that the bed of the *Miramichi* River is excepted absolutely throughout its whole length, and the beds of the other rivers and streams flowing into the River *St. John* and *Nashwaak* qualifiedly, that is to say, "so far up those rivers and streams respectively, &c., &c.", and the other that insisted on by Mr. *Haliburton*, upon behalf of the Suppliants, namely: that the qualification involved in the words 'So far up the river and streams respectively, &c., &c,' is to be attached to the exception as to the bed of the *Miramichi* River as well as to the beds of the other rivers and streams mentioned in the same sentence.

"Which of these two constructions is the correct one depends upon the determination of the question—what should be held to have been the intention of the Crown in making the grant of the lands mentioned in the letters patent containing the exception? 'It is always' (says Sir *John Coleridge*, delivering the judgment of the Privy Council in *Lord* vs. *City of Sidney* (1) upon a question as to the construction of a Crown grant) 'a question of intention to be collected from the language used with reference to the surrounding circumstances. Words in an instrument of grant, as elsewhere, are to be taken in the sense in which the common usage of mankind has applied to them in reference to the context in which they are found.' And the same construction, I may add, is to be put upon words in a grant of land by the Crown which has been established by the decisions of the Courts to be the proper construction to be put upon the same words in a grant between subject and subject. Now, for the purpose of assisting in arriving at the intention of the Crown as to the use of the above words in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company, as well as for the purposes

(1) 12 Moo. P. C. 473.

of the 6th Question in the special case, namely: '6thly have the grantees in grants of lots bounded by the said rivers or by any part thereof and excepted from the said company's grant any exclusive or other right of fishing in said river opposite their respective grants?' copies of 16 letters patent have been produced, 5 of which grant lands situate upon the *Miramichi*, and 9 lands situate upon the other rivers and streams mentioned in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company running through the tract of land granted to that Company, falling into the rivers *St. John* and *Nashwaak*, and it is admitted that all other grants to others within the lines constituting the boundaries of the tract described in the letters patent to the company are in similar form to those of which the copies have been supplied. Copies also of two letters patent granting large tracts of land amounting to about 25,000 acres, immediately outside of and abutting upon the limits of tract described in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company, have been produced.

"From a perusal of these several letters patent, it appears that, as regards the title to the soil and beds of the said several rivers alike, the language of all the letters patent is the same, the practice of the Crown was uniform throughout. Now, the established rule of law is that *primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, and that a description which extends 'to the water's edge,' or 'to a river' or 'to the river's bank,' or which begins at a stake, tree, or other monument 'by the side of a river' or 'in a river's bank,' and which runs 'up' or 'down the river,' or 'its bank,' or 'by the side of the river,' or 'following its courses,' or to a stake, tree, or monument 'by the side of the river,' or 'on the river's bank,' or the like, carries the

1882

THE QUEEN v. ROBERTSON.

grant to the thread of the stream. In all such cases, the grant covers the bed of the stream, unless there be some expression in the terms of the grant, or something in the terms of the grant taken in connection with the situation and condition of the land granted, which clearly indicates an intention that the grant should stop at the edge or margin of the river, and should exclude the river from its operation. There must be a reservation or restriction, expressed or necessarily implied, to control the general presumption of law and to make the particular grant an exception from the general rule. This is the established doctrine, not only in *England*, but in the Courts of the *United States of America* also, as will sufficiently appear from the cases already cited and from *Wright* vs. *Howard* (1), *Kairns* vs. *Turville* (2), *Tyler* vs. *Wilkinson* (3), *Robertson* vs. *Whyte* (4), *Lowell* vs. *Robinson* (5), *Child* vs. *Starr* (6), *Luce* vs. *Carley* (7), *Howard* vs. *Ingersoll* (8), and Chancellor *Kent's* Comm vol. 3, p. 427.

"Tried acording to the principle laid down in the above cases, it cannot admit of a doubt that the description of boundaries in every one of the letters patent which have been produced and above referred to include and convey to the several grantees of the land therein respectively described the soil and bed, not only of all the streams and rivers which flow into the rivers *St. John* and *Nashwaak*, but also of the river *Miramichi*, and in truth of the *Nashwaak* itself, where the rivers pass through or abut upon the lands described, and as it is part of the admissions in the case, that all other grants of land situate within the outside limits of the tracts described in the letters patent of

(1) 1 Sim. & St. 263.
(2) 32 U. C. Q. B. 17.
(3) 4 Mason 400.
(4) 42 Me. 200.
(5) 4 Shep. 357.
(6) 4 Hill 319.
(7) 24 Wend. 451.
(8) 13 How. 416.

1882

THE QUEEN v. ROBERTSON.

the 5th November 1835, to the *Nova Scotia* and *New Brunswick* Land Company, are in like form with those above recited, it must be concluded as not admitting of a doubt, that every grant which had been made, prior to the 5th November, 1835, of land lying within the limits of the description of the tract described in the letters patent of that date, passed and conveyed to the several grantees of such lands without exception the bed and soil of the river *Miramichi*, as well as the bed and soil of all the rivers and streams flowing into the *St. John* and *Nashwaak*, in accordance with the general presumption and rule of law when the lands granted abutted upon any of the said rivers.

"This being established, it only remains to be considered whether the terms of the grant contained in the letters patent of the 5th November, 1835, are so explicit as to reverse the general presumption of law, and to indicate clearly the intention of the Crown to be to make the grant to the *Nova Scotia* and *New Brunswick* Land Company an exceptional grant and different in this particular from all prior grants made by the Crown in that locality, and which, within the limits mentioned in the letters patent of the 5th November 1835, comprised 206,000 acres of the 795,000 acres constituting the gross contents of the tract, the outside limits of which are given in those letters patent.

"We must reasonably conclude that the object of the grant to the Company was to use the company as an instrument for facilitating the settlement of the Province of *New Brunswick*, in like manner as in the case of a similar grant, which had been made some years previously in *Canada*, to the *Canada* Company. It was necessary to the full enjoyment of the grant and to ensure success to the undertaking of the Company by the settlement of the Country, that the settlers should have the right and power to erect mills and to use the

1882

THE QUEEN v. ROBERTSON.

power of the rivers by dams across them for the purpose of driving the mills; this they could not do in those rivers or streams, if any there were, whose beds and soil were excepted from the grant to the Company.

"No possible reason has been suggested or can be assigned why the Crown should make the grant to this Company an exception from all previous grants made in the same locality, and so obstruct what must have been the object of the grant, namely, the settlement of the Province; or why the River *Miramichi* should be made an exception from all the other rivers and streams; or why the River *Miramichi* itself, where in its course it abutted upon lands granted to the Company, should be excluded from the grant, while the soil and bed of the same river, where it abutted upon land granted to other persons, had been included in those grants and passed to the respective grantees of the adjoining lands; —or, in the language of the Judgment of the Privy Council in *Lord* vs. *the Commissioners of the City of Sidney* (1), 'why the Crown should have reserved what might be directly and immediately useful to the grantees, and could not have been contemplated to be of any use to the Crown, and this too in an infant Colony where it was the manifest and avowed policy to encourage settlement and the cultivation of lands by grant on the easiest and most favorable terms.'

"We must then give to the letters patent of the 5th November, 1835, such a construction as shall be consistent with the previous uniform practice of the Crown and with the general presumption of law, and so as to make the grant valuable in view of the purpose which it must have had in view, and not so as to derogate from that value, unless the terms and expressions in the grant are so peremptory and clear as to place beyond doubt that the intention of the Crown was to exclude

(1) 12 Moo. P. C. 473.

from the grant to the Company the bed of the *Miramichi* River, where it abuts upon lands granted to the Company. The only construction, which, in accordance with the above principles, can, in my judgment, be properly given to the letters patent of the 5th November, 1835 is, that the exception therein affects the *Miramichi* only in the same manner, and to the same extent, as it affects the other rivers and streams therein mentioned, namely: all those falling into the rivers *St. John* and *Nashwaak*, and consequently that the exception is limited to the bed and soil of the *Miramichi* river, as it is to the bed and soil of the said other rivers and streams, namely, opposite to the lands which had previously been granted on the banks of the rivers.

"The form of the description in the letters patent of the 5th November, which the draftsman has made to comprehend within the limit of the tract described 206,000 acres which had already been granted, much of which was situate upon the banks of the said several rivers, made it necessary to except from the grant to the company whatever had been previously granted and the bed and soil of the rivers opposite the lands so granted. This affords a rational cause, and indeed the only apparent rational cause for the exception being inserted at all, and consequently the letters patent must be so construed as to limit the application of the exception to this rational purpose. It was suggested that if the bed and soil of the rivers opposite to the lands previously granted had passed to the grantees of such lands, the exception of those lands, which is also expressed in the letters patent of the 5th November, would have been sufficient to comprehend also the beds of the rivers; but, granting this to be so, it is plain that whether the beds of the rivers had or not passed by the previous grants of lands situate on their banks, the draftsman of the letters patent of the 5th Novembe.

1882

THE QUEEN v. ROBERTSON.

has, *ex majori cautelâ*, inserted an express exception of the beds of the rivers and streams flowing into the *St. John* and *Nashwaak*, where such rivers and streams abutted on lands already granted. This is not disputed, but the contention is, that in the case of the *Miramichi*, the exception is not to be construed as being so limited, but is absolute. But for this distinction, no reason whatever is suggested, and I have shewn that in the previous grants the *Miramichi* river was precisely in the same position as all the other rivers, and that in the case of all alike the beds of rivers abutting on lands granted had been granted and had passed to the grantees of lands.

"The letters patent are capable of the construction, that the exception shall be limited in the case of the *Miramichi*, equally as in the case of the other rivers and streams, and as that construction is most consistent with the uniform practice of the Crown, and with what must have been the object of the company, in acquiring the lands granted, with the general presumption of law, and with reason and common sense, that is the construction which must be given to the letters patent. It follows that the *Miramichi* river, where the lands granted to the *Nova Scotia* and *New Brunswick* Land Company abut upon it, is excluded from the operation of the Fisheries Act 31 *Vic.* c. 60, for there an exclusive right of fishing had passed to the company, their successors and assigns, by the letters patent of the 5th November 1835.

"It was urged, it is true, but scarcely I think seriously, that by force of the 108 sec. of the *British North America* Act, and of the 5th item of the 3rd schedule annexed to the Act, namely: 'Rivers and Lake improvements,' the bed and soil of the *Miramichi*, as well as the beds and soil of every river in the Dominion, is declared to be 'the property of *Canada*.'

The sole ground for this contention is that the word 'Rivers' as printed in the schedule is plural, while the word 'Lake' is singular, and that if it had been intended that the word 'improvements' should be read in connection with the former as with the latter it would have been printed 'River' in the singular as in the word 'Lake.' To this it was replied, that the absence of a comma after the word 'Rivers' afforded as good an argument, that the word 'Improvements' was intended to be read in connection with the word 'Rivers' as with 'Lake,' notwithstanding the affix of a final 'S' to the former. I confess I think both arguments are of about equal weight, and I do not think it profitable to enquire whether the affix of the letter 'S' or the omission of a comma is the act of the printer or of Parliament, for by 108 section of the Act, it is clear that the things which are by that section, made the property of *Canada* are 'the public works and property of each Province' enumerated in the 3rd schedule. Whether, therefore, the word be printed 'River' or 'Rivers' in the 3rd schedule the result is the same, and the word 'Improvements' must be read with it, to indicate the 'Public Work' which having been the property of the Province in which it had been situate is made the property of *Canada*.

"I have thus substantially answered all or most of the questions submitted in this special case, but it may be convenient briefly to give my answers thus:

"The first, third, fourth and sixth questions must be answered in the affirmative, and the second and seventh in the negative.

"To the 5th it is unnecessary to give any special answer, as I am of opinion that the bed of the river did pass to the Company. However, it may be said, that if it had not so passed, the case offers no evidence of any exclusive right of fishing therein having passed

1882

THE QUEEN v. ROBERTSON.

to the Company, which right in such case could only be by grant or prescription. I have in my judment explained at length my views upon the rights of riparian proprietors and of what is meant by that term.

"To the 8th it may be answered, that if what is meant by this question as framed is, whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the River, where it passes through ungranted lands, I am of opinion that he could not, but that the Act does authorize him to issue, and therefore he could lawfully issue, a license to fish, as a franchise apart from the ownership of the soil in that portion of the River.

"The 109 sec. of the *British North America* Act already quoted declares that 'all *lands*, mines, minerals and royalties belonging to the several provinces of *Canada, Nova Scotia* and *New Brunswick* at the Union, shall belong to the several Provinces of *Ontario, Quebec, Nova Scotia* and *New Brunswick* in which the same are situate.' Now, whether this section is to be regarded as sufficient to transfer the *legal estate* in those lands to the several Provinces as corporations, or as a declaration merely that they shall be held by the Crown in trust for, and as part of the public *demesne* of, the respective Provinces, matters not, as it appears to me, in so far as the question under consideration is concerned, for what is declared shall belong to the newly created Provinces is that which at the Union belong to the provinces as formerly constituted, and those lands which had not yet been granted were already subject to a like provision in virtue of Acts of Parliament relating to the Fisheries in existence before the Union, which Acts, the 129 section of the *British North America* Act declares shall continue in existence after the Union until repealed, abolished or altered by Act of the Dominion Parliament. The effect then of the 109th sec-

tion must be to make the lands part of the public Domain of the respective Provinces, subject to the provisions of the several Acts in force relating to the fisheries at the time of the Union, and to such other or the like provisions as the Parliament of *Canada* should enact upon the subject of the Fisheries, treating that term as relating to the incorporeal hereditament or *libera piscaria* as already explained, which subject was placed under the exclusive control of the Parliament, and the expression in the 2nd section of the Dominion Act, 31 *Vic.*, ch. 60, namely, 'where the exclusive right of fishing does not already exist by law' must, I think, be construed to include that part of the public domain in the respective provinces consisting of ungranted lands, over which, not having been converted into private property, no exclusive right of fishing could be legally established by any person.

"Over those ungranted lands the Dominion Parliament had, in my judgment, for the reasons already given above, the undoubted right to legislate in the manner provided by the 2nd section of the 31 *Vic.*, c. 60, and that section does, I think, sufficiently cover those lands which, prior to the passing of 31 *Vic.*, c. 60, were, as I have shewn, subject to a like provision, and the frame of the 2nd section of that Act, when compared with the corresponding sections in the Acts which were in force until repealed by 31 *Vic.*, c. 60, leads to the conclusion that the same lands were referred to in the latter Act as in the like connection were referred to in the former, namely, ungranted public lands.

"I have entered into the subject as fully as I could, in order that I might make my judgment upon all the points as clear as I am capable of doing, for the reason that in the event of an appeal I shall not sit upon the case in appeal. The Court of Exchequer being composed of the same Judges as are the judges of the Supreme

1882

THE QUEEN v. ROBERTSON.

Court, an appeal from the judgment of a single judge of the Court of Exchequer to the Supreme Court is in substance and effect simply an appeal from one of the Judges to the full Court. To avoid the possible anomaly of the full Court being divided, and the judgment nevertheless of one of the Judges of the divided Court remaining of record as a judgment of the Court, it is a point worthy of Parliamentary consideration, whether it may not be expedient to enact that an appeal from a single Judge of the Exchequer Court should be heard only by the other Judges, so that in every case of appeal from the Exchequer Court in order to sustain any judgment, as the judgment of the Court, there should be a *majority* of all the Judges constituting the Court in favor of it.

"The constitution of the Court of Exchequer makes a marked difference between the case of an appeal from that Court, when the Appellate Court is divided, and the case of an appeal from an independent Court consisting of other Judges than those constituting the appellate tribunal when the latter is divided.

"The Judgment of the Court therefore is that a rule shall issue in the terms of the provisions of the special case, referring it to the Registrar to take an account as agreed upon by the concluding paragraph of the case."

The following rule was taken out:

"The special case stated by the parties for the opinion of this court having come on to be heard and debated before this court in the presence of counsel for the suppliant and for her Majesty. Upon debate of the matter and hearing what was alleged by counsel on each side and upon reading the documents and papers filed, this court did order that the said case should stand over for judgment, and the same coming on this day for judgment this court doth order and declare that the first, third, fourth and sixth questions submitted in

said special case should be answered in the affirmative and the second and seventh questions in the negative. This court doth further declare that it is unnecessary to give any special answer to the fifth question as this court is of opinion that the bed of the south west *Miramichi* river within the limits of the grant to the *Nova Scotia* and *New Brunswick* Land Company and above the grants mentioned and reserved therein did pass to the said company.

"This court doth further declare with reference to the eighth question that, if what is meant by this question be whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the river where it passes through ungranted lands, this court is of opinion that the said minister could not lawfully issue such lease, but this court is of opinion that the said minister could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river."

Mr. *Lash*, Q. C,, for the Crown, moved, pursuant to rule No. 231 of the Exchequer Court rules, for an order *nisi* calling upon the suppliant to shew cause why the judgment rendered by the court upon the special case in this matter should not be reviewed and judgment given thereon for the Crown, upon the grounds, that the second question submitted in said special case should have been answered in the affirmative, and that the third, fourth, fifth and sixth questions should have been answered in the negative. This motion was refused.

From this decision the Crown appealed.

Mr. *Lash*, Q. C., for the Crown:

In this appeal the appellant will raise only the main question involved, viz: whether or not an exclusive right of fishing, at the time the fishing lease was granted to the respondent, previously existed by law in the leased

1882

THE QUEEN v. ROBERTSON.

portion of the river. The reason the 8th question was submitted for the decision of the Exchequer Court was that we thought part of the *locus in quo* was through ungranted land, and it has since been ascertained that no part of the *locus in quo* is through ungranted land.

Had the Minister of Marine and Fisheries power to issue the lease in question?

This depends upon there being no exclusive right of fishing, at the time the lease was made, in the leased portion of the river.

An exclusive right of fishing may exist, 1st in a private river, 2nd in a public river.

The first paragraph of the special case shows what the nature of that portion of the *Miramichi* River is: "It is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same and for the purpose of floating down timber and logs to market." My contention is shortly this, that in this country the absence of the ebb and flow of the tide does not make a river a private one,—if the contrary is held, then all the great fresh water rivers in *Canada* are private—and that this river, being admitted to be navigable for the purposes of passage and being used as a highway, is a public river, and no exclusive right of fishing exists in it, as no grant or prescription thereof is shewn.

2 *Broom* & *Hadley's*, Com. (Edition of 1869) page 107; 2 *Stephens* Com. (1874) pages 670-1-2; 2 *Kerr's* Blackstone (1857) page 39; *Warren* vs. *Matthews* (1).

If the *Miramichi* be a private river, it may be admitted that the owner would have the exclusive right of fishing.

Is it a private river? Ebb and flow of the tide is not the proper test: *Lyon* vs. *Fishmongers Co.* (2); *Mayor*,

(1) 6 Mod. 73.

(2) L. R. 1 H. L. 673.

1882

THE QUEEN v. ROBERTSON.

&c. vs. *Brooke* (1); *Carter* vs. *Murcot* (2), confirming *Warren* vs. *Matthews*; *Genesee Chief* vs. *Fitzhugh* (3), confirmed by The *Magnolia* (4), also the reference to *Broom & Hadley & Stephen & Kerr*, above mentioned; *Mayor*, &c. vs. *Turner* (5); *Miles* vs. *Rose* (6).

The navigable capacity need not continue throughout the whole year: *Olson* vs. *Merril* (7).

I do not argue that the bed of the river did not pass, and I can only argue on the assumption that the terms of the special case make the *Miramichi* a highway and a public river, and if so no exclusive right of fishing exists in it: *Thomson's* essay on *Magna Charta* (8); *Mayor*, &c., vs. *Brooke* (9); Duke of *Somerset* vs. *Fogwell* (10); also references to *Broom & Hadley*, *Stephen & Kerr* above mentioned.

In *England* it is well settled that in a navigable river there can be no exclusive right of fishing unless such right existed prior to *Magna Charta*.

But it is contended by respondent that a navigable river is in law navigable only so far as the tide ebbs and flows, and that though navigable in fact above tide water, it is not navigable in law, and that therefore the incidents attaching to a river navigable in law, do not attach to one navigable only in fact.

The appellant denies this contention, but even if such be law in *England* it is not law in *Canada*, as the size and situation of the two countries are so different.

In *New Brunswick* only so much of the law of *England* as was applicable to the circumstances of the Province when it was first created is in force.

In *England*, where navigation was practically confined to the tidal portion of a river—where in fact navigable

(1) 7 Q. B. 373.
(2) 4 Burr. 2163.
(3) 19 Curt. 233.
(4) 20 How. 296.
(5) 1 Cowp. 86.
(6) 5. Taunt. 705.
(7) 42 Wisc. 203.
(8) Page 203.
(9) 7 Q. B. 382.
(10) 5 B. & C. 884.

1882

THE QUEEN v. ROBERTSON.

water and tide water were synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers as contra-distinguished from private ones—it was reasonable enough that the ebb and flow of the tide should have been taken as the test of the navigability of a river, as it was the most convenient test, but such a test was and is inapplicable to this country, and was not imported here as part of the Common Law.

Waters here navigable in fact are so regarded in law, without reference to the ebb and flow of the tide, and if a river be navigable in law all the incidents of navigability attach to it, and one of those incidents is the right of the public to fish therein: see *Atty. Gen.* vs. *Harrison* (1); *Carson* vs. *Blazer* (2); *McManus* vs. *Carmichael* (3).

[THE CHIEF JUSTICE:—Is there any objection in holding that a river may be public for certain purposes and private for all other purposes?]

So far as this river is concerned there is none, and where there is no exclusive right to fish, then Parliament can take away the public right by statute, as was done by the Fisheries Act.

The learned counsel also referred to *Robinson & Joseph's Digest*, (*Ont.*) *Vo.* "Water;" *People* vs. *Canal Appraisers* (4); *Ball* vs. *Herbert* (5); *Dixon* vs. *Scnetsinger* (6).

Mr. *Weldon*, Q. C., for respondent:

It has to be admitted that according to the English cases the decision of Mr. Justice *Gwynne* must be affirmed. This is practically an appeal from the judgment of the Supreme Court of *New Brunswick*, which has held that this was a private river, and that the

(1) 12 Grant 470;
(2) 2 Binn. 475;
(3) 3 Iowa 52.
(4) 33 Tiff. 461.
(5) 3 Taunt. 267.
(6) 23 U. C. C. P. 235.

license issued by the Minister of Marine and Fisheries of the *locus in quo* is void.

Rivers may be divided into three classes:

I. When they are altogether private, such as shallow streams, not capable to be put to any particular use.

II. When they are private property, but capable of, and subject to, the public use. The case of non-tidal waters.

III. Where the use and property are public, where the tide ebbs and flows.

By the 3rd section of 31 *Victoria*, cap. 60, sec. 2, the power to grant leases is given only where the exclusive right does not already exist by law. It is submitted that the exclusive right did exist in the *New Brunswick* and *Nova Scotia* Land Company, under the grant. The river is clearly within its boundaries, and the exception shows the intention of the Crown to include it in the grant, except where already granted.

In non-tidal rivers, the right of the riparian proprietors extends to the middle of the stream, and where both banks are the property of the same owner, the whole right of property in the stream belongs to him: *Beckett* vs. *Morris* (1).

On page 58, Lord *Cranworth* says: "By the Laws of *Scotland*, as by the Law of *England*, when the lands of two continuous properties are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the shores or bed of the river *ad medium filum aquæ*."

In navigable rivers or arms of the sea, fishing is common and public. In private rivers, not navigable, it belongs to the lords of the soil on each side: *Carter* vs. *Murcott* (2); *Malcolmson* vs. *O'Dea* (3); *Marshall* vs. *Ulleswater Steam Navigation Company* (4).

(1) L. R. 1 H. L. Sc. 47.
(2) 4 Burr. 2163.
(3) 10 H. L. 593.
(4) 3 B. & S. 732.

1882

THE QUEEN v. ROBERTSON.

The rights of riparian proprietors are very fully discussed in the case of *Lyons* vs. *Fishmongers* Co. (1) and *Byron* vs. *Stimpson* (2).

The petitioners also rely upon the judgments of the Supreme Court of *New Brunswick* in *Robertson* vs. *Steadman* (3), and the cases therein cited.

As to the construction of sea coast and fisheries, see remarks of Lord *Selborne* in *L'Union St. Jacques de Montreal* vs. *Belisle* (4).

Even assuming that the land in these rivers is vested in the Crown, it is contended that the Crown only held it in trust for the people of *New Brunswick*.

By the *British North America* Act, secs. 109 and 117, the Crown Lands of the Province of *New Brunswick* are the property, so to speak, of the Province, and therefore the incidents of right appurtenant to the property belong to the Province, otherwise this anomaly would exist, that while the lands were ungranted, the Dominion of *Canada* would have the right to dispose or lease the fishery, but so soon as a grant was made under the great seal of the Province of *New Brunswick*, then it would belong to the grantee.

This point is put forcibly by his Honor Mr. Justice *Fisher*, in the case of *Robertson* vs. *Steadman* (5) in his dissenting opinion.

It is submitted, then, that by law, within the limits of the fluvial or angling division described in the lease to the petitioner, the exclusive right of fishing existed and therefore that the Dominion of *Canada* had not, under the Act of Union, nor under the Act of the Parliament of *Canada* 31 *Vict.* cap. 60, power to grant such lease, and therefore the same became null and void, and the petitioner being damnified has a claim upon the Government for the damage sustained.

(1) 1 App. Cases 562.
(2) 17 New Bruns. R. 697.
(3) 18 New Bruns. R. 530.
(4) L. R. 6 P. C. 37.
(5) 18 New. Bruns. R. 621.

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

RITCHIE, C. J. [After reading the statement of the case, proceeded as follows]:

As the lease in question professes to deal only with the right of fishing in that part of the *Miramichi* River described as "the fluvial or angling division of the South-West *Miramichi* River from *Price's Bend* to its source," we are relieved from the necessity of considering in whom the rights of fishing are in the *Miramichi* River from or below *Price's Bend* to its mouth, it being described in the case as being—

After the *St. John* the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels twenty-five miles from the gulf, and for schooners twenty-five miles further to the head of the tide, above which for sixty miles it is navigable for tow-boats. The river has many large tributaries spreading over a great extent of country.

From *Price's Bend* to its source the river is thus described:—

Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point, upward, is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

The questions involved in the case submitted, resolve themselves substantially into these:

What are the rights of fishing in a river or a portion of a river such as is that part of the *Miramichi* from *Price's Bend* to its source? Do the rights of property therein belong to the Provincial Government, or their grantees, or to the Dominion Government, or their licensees, or have the Dominion Government, or the Provincial Government, legislative control over such proprieta-

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

ry rights? And is there any distinction between the rights of the grantees from the Provincial Government before confederation or after, and of the Provincial Government itself? that is, assuming the Dominion Government cannot deal with or take away the rights of the grantees of the crown before confederation, can they do so in respect to the ungranted lands of the provinces granted since confederation? In other words, can the Dominion Parliament authorize the Minister of Marine and Fisheries to issue licenses to parties to fish in rivers such as that described where the lands are ungranted, or where the Provincial Government has before or after confederation granted lands that are bounded on or that extend across such rivers?

It is difficult, if not impossible, satisfactorily to deal with this case and ignore any of these questions, the principles applicable to and governing all being the same, and therefore their determination will consequently answer all the questions submitted and settle this appeal.

The observations I am about to make are designedly confined to rivers such as the *Miramichi* from *Price's Bend* to its source.

In construing the *British North America Act*, I think no hard and fast canon or rule of construction can be laid down and adopted by which all acts passed as well by the Parliament of *Canada* as by the local legislatures upon all and every question that may arise can be effectually tested as to their being or not being *intra vires* of the legislature passing them. The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the *British North America Act*, is what I suggested in the cases of *Valin* v. *Langlois* (1) and *The Citizen's Insurance Co.* v. *Parsons* (2), with respect

(1) 3 Can. Sup. C. R. 15. (2) 4 Can. Sup. C. R.. 242.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada*. And this view I think was clearly in the mind of the Privy Council when in *Cushing* v. *Dupuy* (1), in speaking of the powers of the dominion and provincial legislatures, it is said in the judgment of the Privy Council by Sir *M. E. Smith*:—

> It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*

And this view is, I venture to think, substantially indorsed by the Privy Council in the case of *Parsons* v. *The Citizen's Insurance Co.*, decided in November last. There the Privy Council say as to the provisions of the *British North America Act*, 1867, relating to the distribution of legislative powers between the Parliament of *Canada* and the legislatures of the provinces, that owing to the very general language in which

(1) 5 App. Cases, 415.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

some of these powers are described, the question is one of considerable difficulty; and after referring to the first branch of section 91, the Privy Council say:

> An endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of *Canada* should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sec. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of sec. 92. Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, *it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament.*

And then we find language which I humbly think sanctions to its fullest extent the principle I have heretofore ventured to promulgate as applicable to the interpretation of the *British North America Act* in this admittedly most difficult question:

> With regard to certain classes of subjects, therefore, generally described in sec. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering

more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

And saying they find no sufficient reason in the language itself, nor in the other parts of the act, for giving so narrow an interpretation to the words "civil rights," and that the words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in section 91, they add this important proposition bearing on the case in hand as applicable to "Property and Civil Rights":

> It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited.

After referring to the 14 *Geo.* III, ch. 83, which made provision for the government of the Province of *Quebec*, and by section 8 of which it was enacted, that His Majesty's Canadian subjects within the Province of *Quebec* should enjoy their property, usages and other civil rights as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of *Canada*, and be determined agreeably to the said laws, they say:

> In this statute the words "property" and "civil rights" are plainly used in their largest sense, and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

And after instancing the subject of marriage and divorce in section 91 and observing "it is evident that the solemnization of marriage would have come within this general description yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in section 92," the Privy Council say:—

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

No one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in section 91, but though the description is sufficiently large and general to include direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one.

Let us now refer to the sections of the *British North America* Act bearing on the present case, and guided by considerations such as these, I think the act can be so read as to avoid all conflict and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

By section 91, sub-section 12, is confided to the legislative authority of the Dominion Parliament, "Sea coast and Inland Fisheries;" to the exclusive power of the provincial legislatures by section 92, sub-section 13, "Property and civil rights in the provinces;" and, by sub-section 16, "Generally all matters of a merely local or private nature in the provinces;" and by section 108 certain public works and property specified in schedule 3 are declared to be the property of *Canada*; and by section 109, "All lands, mines, minerals and royalties belonging to the several provinces shall belong to the several provinces in which they are situate, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same;" and by section 92, sub-section 5, the exclusive power of legislation is conferred on the provincial legislatures in relation to "the management and sale of the public lands belonging to the province and of the timber and wood thereon."

I am of opinion that the *Miramichi*, from *Price's Bend* to its source, is not a public river on which the

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

public have a right to fish, and though the public may have an easement or right to float rafts or logs down, and a right of passage up and down in canoes, &c., in times of freshet in the spring and autumn, or whenever the water is sufficiently high to enable the river to be so used, I am equally of opinion that such a right is not in the slighest degree inconsistent with an exclusive right of fishing, or with the rights of the owners of property opposite their respective lands *ad medium filum aquæ*; or, when the lands on each side of the river belong to the same person, the same exclusive right of fishing in the whole river so far as his land extends along the same. There is no connection whatever between a right of passage and a right of fishing. A right of passage is an easement, that is to say, a privilege without profit, as in a common highway. A right to catch fish is a profit *à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others. This right of private property in rivers such as that portion of the *Miramichi* we are dealing with has always been recognized at common law.

In *Hudson vs. MacRae* (1), an information before two justices for unlawfully and wilfully attempting to take fish in water where another person had a right of private fishing, the accused justified under a supposed right on the part of the public to fish in that water.

It was conceded such a right of fishing by the public in a non-navigable river could not exist in law, and that accused, justifying himself under the *bonâ fide*, though mistaken notion, of such a right, did not make such a claim of right as ousted the jurisdiction of the justices.

Blackburn, J., says:—

It appears that the appellant was fishing in a private river with every circumstance necessary to warrant conviction, but he showed

(1) 4 B. & S. 585.

1882

THE QUEEN v. ROBERTSON.

in his defence that for many years the public at large fished there under the notion of a right. The justices have found that he acted under the *bonâ fide* belief in that right, *but then in point of law* such a right could not be obtained in a non-navigable river.

Ritchie, C.J.

If the title to property comes in question, the justices must hold their hands.

Blackburn, J., says:—

But when the claim set up is of a right which could by no possibility exist, it cannot be said that the right of property comes in question; there is then nothing more than this, that the man has got in his head an unfounded notion of a right impossible in law. * * * Here is a non-navigable river where the public could not possibly have a right of fishing.

Race v. *Ward* (1), declaration for breaking and entering plaintiff's close and committing trespass. Defendant justified under an immemorial custom for all inhabitants for the time being of said township to have liberty and privilege to have and take water from certain spring in said close, &c.

Lord *Campbell*, C. J., says:—

In *Wickham* v. *Hawker* (2) the Court of Exchequer held that "a liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish and fowl," is a profit *à prendre* within the prescription Act (3).

* * * * *

We held, last term, that to a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the parish to angle and catch fish in the *locus in quo*, was bad, as this was a profit *à prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied.

Case referred to was *Bland* v. *Lipscombe*, 4 E. & B. 713 note.

Lord *Campbell*, C. J.:—

We must act upon that salutary law which distinguishes between a mere easement and the right to take a profit.

* * * * * *

It is clear to me that the custom claimed in this plea is to angle for, catch, and carry away the fish; but, supposing it were limited,

(1) 4 E. & B. 702. (2) 7 M. & W. 63.
(3) 2 & 3 Wm. 4, 71.

as Mr. *Brown* argues, to a claim to angle for and catch the fish without claiming a right to carry them away, I think it would be equally destructive of the subject-matter, and bad.

Mussett v. *Burch* (1) decides that the right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law.

Cleaseby, B., says:

Now it appears to me that the case in the Irish reports (*Murphy* v. *Ryan*) is decisive on the point before us. It expressly decides that "the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow."

Grove, J.:—

Mr. *Graham* has not shown us any case in which the public have been held to have a right of fishing in a river merely because it is navigable or navigated by boats.

In *Wishart* vs. *Wyllie* (2), the Lord Chancellor laid it down that the law on this subject admitted of no doubt.

If, said his lordship, a stream separates properties A and B, *primâ facie*, the owner of the land A, as to *his* land, on one side, and the owner of the land B, as to *his* land, on the other, are each entitled to the soil of the stream, *usque ad mediam aquæ*, that is *primâ facie* so. It may be rebutted, but, generally speaking, an imaginary line running through the middle of the stream is the boundary; just as if a road separates two properties, the ownership of the road belongs half-way to one and half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption. Then if two properties are divided by a river, the boundary is an imaginary line in the middle of that river; but to say that the whole of the river is a sort of common property, which belongs to no one, is not a correct view of the case.

In *Murphy* vs. *Ryan* (3), *O'Hagan*, C. J, said:—

According to the well established principles of the common law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively, to a supposed line in the middle, constituting their legal boundary; and, being so possessed, have an

(1) 35 L. T. N. S. 486. (2) 1 Macq. H. L. Cas. 389.
(3) Ir. R. 2. C. L. 143.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

exclusive right to the fishery in the water which flows above their respective territories, though the law secures to the community the right of navigation upon the surface of that water as a public highway, which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river, or dealing with the water to the injury of their neighbours.

* * * * * * * * * *

But, whilst the rights of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the crown—the soil of the sea and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public. The exclusive right of fishing in the one case and the public right of fishing in the other depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in the public river respectively.

* * * * * * * * * *

Upon a full consideration of all the cases, it will, I think, appear that no river has been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *primâ facie* in the riparian owners, and the right of fishing private.

* * * * * * * * * *

But no usage can establish a right to take a profit in another's soil, which might involve the destruction of his property; and such a profit would be the taking of fish. The precise point is decided both as to the general law and the particular case of profit by fishing in *Bland* v. *Lipscombe* (1); and the principle of that case, in affirmation of the ancient doctrine, is sustained by the judgments in *Lloyd* v. *Jones* (2); *Race* v. *Ward* (3); *Hudson* v. *MacRea* (4); and other recent decisions. That principle is beyond controversy; and, therefore, the usage relied on in this defence cannot sustain the claim of the right in the public to fish in a river, the soil of which is not *publici juris*, but private property.

In *Lyon* v. *Fishmonger Co.* (5) Lord *Cairns* says:

The late Lord *Wensleydale* observed, in this House, in the case of *Chasemore* v. *Richards* (6) "The subject of right to streams of water

(1) 4 E. & B. 713, note.
(2) 6 C. B. 81.
(3) 4 E. & B. 702.
(4) 4 B. & S. 585.
(5) 1 App. Cases 673.
(6) 7 H. L. C. 382.

flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing."

And he then cites the language of the late Lord *Wensleydale* as quoted by *O'Hagan*.

In *Marshall* v. *Ulleswater Steam Navigation Co.* (1), it was held that "the allegation of a several fishery, *primâ facie*, imports ownership of the soil"; per *Wightman* and *Mellor*, J. J., *Cochrane*, C. J., dissenting, but not holding the court (Q. B.) bound by the authorities to that effect.

Wightman, J., delivering judgment, referring to *Holford* v. *Bailey* (2), says:—

These decisions are in conformity with the rule stated in the late editions of *Blackstone's* Commentaries, vol. 2 p. 39. He that has a several fishery must also be (or at least derive his right from) the owner of the soil.

Cockburn, C. J., says:—

The use of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land, the water and the incidental and accessory right of fishing would necessarily pass with it.

Previous to confederation many enactments were passed by the legislature of *New Brunswick* for the general regulation and protection of the fisheries in that province, but no act, I will undertake with confidence to assert, can be found in the statute books of *New Brunswick*, from the date of the erection of the province to the day of confederation, taking away or interfering with (except as such general regulations might interfere with) the private rights of the individual proprietors of lands through which such rivers run, still less to take from them the enjoyment of their rights of fishing and to authorize the leasing of the same to others to the exclusion of the owner. But the legislature did authorize the Governor-in-Council to

(1) 3 B. & S. 732; affirmed 6 B. & S. 570.

(2) 13 Jur. 278; 13 Q. B. 426; 18 L. J. Q. B. 109.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belonged to the crown or the lands were ungranted, but the provincial legislature, having a just regard for private rights, specially provided that the rights of parties in lands and privileges already granted should not be affected thereby, recognizing the rights of individuals in the fisheries in rivers above tidal waters and the right of the province to the fisheries in rivers through the ungranted lands of the province. The reason why there was any legislation on this matter of leasing (for the executive government might have granted such leases without legislative authority) is to be found on the face of the act, viz., to regulate the sale and provide for the disposal of the proceeds, by enacting that such leases or licenses to be issued by the Governor in Council should be sold by public auction after 30 days' notice in the *Royal Gazette*, an upset price being determined by the Governor in Council, and that the rents and profits accruing from such leases or licenses should be paid into the provincial treasury to a separate account to be kept, called "The Fishery Protection Account."

Such being the state of matters at the time of confederation, I am of opinion that the legislation in regard to "Inland and Sea Fisheries" contemplated by the *British North America Act* was not in reference to "property and civil rights"—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. Nor can I discover the most remote indication of an intent to deprive either the provinces or the individuals of their proprietary rights in their respective properties; or in other words, that it was intended that the lands and their incidents should be separated and the lands continue to belong to the provinces and the crown grantees, and the incidental right of fishing should belong to the Dominion, or be at its disposal.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

I am at a loss to understand how the Dominion, which never owned the land, and therefore never had any right to the fishing as incidental to such ownership, without any grant, statutory or otherwise, without a word in the statute indicating the slightest intention to vest the rights of property or of fishing in the Dominion, without a word qualifying or limiting the right of property of the provinces in the public lands, can now successfully claim to have a beneficial interest in those fisheries, and authority to deal with such rights of fishing as the property of the Dominion, and claim to rent or license the same at large yearly rents and appropriate the proceeds to Dominion purposes. I had formerly occasion to point out that the public works and property of each province which it was intended should be the property of *Canada* were enumerated in the 3rd schedule, and that neither by express words nor by the most forced construction, could the slightest inference be drawn that the public lands of the provinces, or their incidents, were intended to be vested in the Dominion, and that the express words of section 117 as clearly and unequivocally established that the provinces were to retain all their respective public property not otherwise disposed of by the act, and that, as if to place the question beyond a peradventure, section 109 provided that all lands, mines, &c., belonging to the several provinces of &c., and all sums then due and payable for such lands, mines, &c., should belong to the several provinces in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same.

I reiterate what I on a former occasion intimated, that at the time of the union the entire control, management and disposition of the crown lands, and the proceeds of

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

the public domain, were confided to the executive administration of the provincial governments as representing the crown for the benefit of the provinces respectively, and to the legislative actions of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate; and this property, the Imperial Act, by clear unambiguous language, has, as we have seen, declared shall after confederation continue to be the property of the provinces; and I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give to the parliament of *Canada* the right to deprive the province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.

To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

As a necessary consequence of what I have said the Minister of Marine and Fisheries has no authority to issue a lease of the bed of such a river as this where it passes either through ungranted or granted lands, and I have an equally strong opinion that the Dominion parliament has no legislative power or authority to authorize him to issue, as against the owner, a license to fish as a franchise or right apart from the ownership of the soil, whether owned by the province or an individual. I am at a loss to conceive how it is possible for the minister to have that power over lands owned by the province and not have the same power over lands owned by private individuals; the franchise or right is in the private individual by virtue of his property in the bed of the stream, and this he obtains by virtue of the grant from the general government, why then should the province not have the same franchise or right by virtue of its property in the soil, bank and bed of the river?

Unquestionably the right of fishing may be in one person and the property in the bank and soil of a river

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

in another, but can there be a doubt that if a man owning land on the bank of a river, with right to the bed of the river extending to the centre of a stream opposite such land, conveys without reservation or exception the land bounded by the stream, that the right of fishing goes with it? But what is there in the *British North America Act* to give the slightest countenance to the idea that any such separation of the right to lands and to the fishery incidental to the land was contemplated, and that while the public lands were retained to the provinces, rights of fishing connected therewith and incident thereto were to become separate and distinct, the one from the other, and the fishing taken from the provinces and transferred to the Dominion?

Can it be disputed that, under the 109th section, the banks and beds of all such ungranted rivers and streams belong to the several provinces? Where then do we get any language severing the right to the fisheries from the property or title to the soil or bed of these rivers, or altering in any way the title or ownership of the lands, including the banks and beds of rivers passing through them, or any of the rights incident to the same?

I think Mr. Justice *Fisher* in *Steadman* v. *Robertson* (1), took a correct view of the law. I have arrived at like conclusions, viz: that it was not the intention of the *The British North America Act*, 1867, to give the parliament of *Canada* any greater power than had been previously exercised by the separate legislatures of the provinces; that is the general power for the regulation and protection of the fisheries; that the act of the parliament of *Canada*, 31 *Vic.*, c. 60, recognises that view, and while it provides for the regulation and protection of the fisheries, it does not interfere with existing exclusive rights of fishing, whether provincial

(1) 2 Pugs. & Bur. 599.

1882

THE QUEEN v. ROBERTSON.

Ritchie, C.J.

or private, but only authorizes the granting of leases where the property and therefore the right of fishing thereto belongs to the Dominion, or where such rights do not already exist by law; that the exclusive right of fishing in rivers such as the *Miramichi* at *Price's Bend* and from thence to its source, as described in the case, exist by law in the provincial government of *New Brunswick* or its grantees; that any lease granted by the Minister of Marine and Fisheries, to fish in such fresh water non-tidal rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal; that where the exclusive right to fish has been acquired as incident to a grant of the land through which such river flows, there is no authority given by the Canadian act to grant a right to fish, and the Dominion parliament has no right to give such authority; and also that the ungranted lands in the province of *New Brunswick*, being in the crown for the benefit of the people of *New Brunswick*, the exclusive right to fish follows as an incident, and is in the crown as trustee for the benefit of the people of the province, exclusively, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property or private lands is illegal, and consequently the lease or license issued to the suppliant is null and void.

STRONG, J.:—

The fishery license granted to the respondent contains no covenant for title or warranty on the part of the Crown, and, therefore, upon no principle of law which has been suggested, or that I can discover, could the Crown be made liable to indemnify the respondent in the case of eviction. In my opinion the appeal ought to be decided upon this ground, for I do not think the court ought to entertain the special case upon the sub-

1882

THE QUEEN v. ROBERTSON.

Strong, J.

mission of the Attorney General for the Crown to indemnify the respondent, if the Court should be of opinion against the Crown on what, so far as the interest of the respondent is concerned, is a purely speculative question stated for the opinion of the Court. In the case of private suitors, if a special case appears to be framed for the purpose of eliciting an opinion upon a question, the decision of which is not essential to determine the rights of the parties, the court will refuse to entertain it (1), and I see no reason why the same rule should not be applied to a case in which the Crown is a party. As the case is presented to the court it appears that the officers of the Crown have arranged to pay the suppliant, not damages, but a gratuity, in the event of the court being of the opinion that the Crown had no authority to grant the license in question. This is to invoke an advisory not a contentious jurisdiction, and such a jurisdiction ought not to be exercised unless conferred by statute, which has not been done.

As, however, the other members of the court take a different view on this point, I yield to their judgment, and proceed to express the opinion at which I have arrived on the points which have been argued.

Thus dealing with the case, I think the appeal should be dismissed, but although I arrive at this conclusion, I am not prepared to coincide in all the reasons stated in the judgment delivered in the court below.

I have no difficulty in agreeing in the judgment of Mr. Justice *Gwynne*, so far as it determines that by the true construction of the exception contained in the letters patent of the 5th November, 1835, by which the Crown granted the lands bordering on the river *Miramichi*, including the limits to which the respondents licence extended, that exception did not comprise the

(1) Doe *v.* Duntze, 6 C. B. 100.

1882

THE QUEEN v. ROBERTSON.

Strong, J.

whole bed of the river *Miramichi*, but only so much of it as adjoined lands which the Crown had previously granted, and which lands are also excepted from the operation of the grant.

The exception in question is thus expressed:

> And also further excepting the bed and waters of the *Miramichi* river and the beds and waters of all the rivers and streams which empty themselves into the *St. John* or the river *Nashwaack* so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted.

I cannot conceive what language could have been adopted more plainly expressing an intention to except the portions of the bed adjacent to lands already granted and such portions only. The object of the Crown clearly was to protect the rights of its earlier grantees, an object which would be equally applicable to grantees of lands lying on the *Miramichi*, as to those of lands on the other rivers named. Therefore whilst, on the one hand, neither the words of the instrument itself, nor the plain reason of thus restricting its operation, call for the construction contended for by the Crown, that the whole bed of the *Miramichi* was reserved, on the other hand, there is nothing to give the slightest colour to the argument said to have been advanced in the court below on behalf of the respondent, that the exception itself did not apply to the *Miramichi* but only to the other rivers. Indeed, before this court, neither of the learned counsel who argued the case for the Crown and the respondent urged these contentions.

Then, it does not appear, from the statements of the case, that any portion of the bed of the river comprised in the fishery limits granted by the license, viz.: from *Price's Bend* to its source, had been granted at a date earlier than that of the letters patent to the *Nova Scotia* and *New Brunswick* Land Company. The ques-

1882

THE QUEEN v. ROBERTSON.

Strong, J.

tion next arises what, upon this construction and the state of facts just mentioned, was the effect of the grant upon the property in the bed of the river, did it pass under the grant to the land company, or was it reserved to the Crown?

The river *Miramichi*, between the two points indicated, *Price's Bend* and the source, is, upon the facts admitted in the case, beyond all question not a navigable or public river.

The navigable capacity of this portion of the river is thus described in the case:

That portion of the *Miramichi* river which is covered by fishery lease to suppliant is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same, and for the purpose of floating down timber and logs to market. After the *St. John*, the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the gulf, and for schooners 25 miles further to the head of the tide, above which, for 60 miles, it is navigable for row boats. The river has many large tributaries extending over a great extent of country. *Price's Bend* is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually floated down the river in high water, in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

This description is that of a river non navigable, and consequently what is called a private river as regards that portion of it above *Price's Bend*. Whilst I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in *England*, that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has

1882

THE QUEEN v. ROBERTSON.

Strong, J.

been determined by the Supreme Court of the *United States* and by the courts of most of the States, and whilst I think that with us the sole test of the navigable and public character of such streams is their capacity for such uses, I am still not prepared to accede to the argument of Mr. *Lash* that a river navigable in any part of its course is to be considered in law as navigable from its source. No authority can be produced for such a proposition, and the books are full of instances in which rivers navigable and public in their lower course have been held to be private and non-navigable in the upper part of the stream In the case of *Murphy* v. *Ryan* (1), we have indeed an instance in which this was expressly determined to be the case. Then, the admitted statement contained in the case shews beyond all ground of cavil that in point of fact the portion of the river *Miramichi* in question is not in fact navigable, for, to say that a stream in which the most lightly constructed vessels used upon our waters require to be hauled over shallows and bars is a navigable river, would be a contradiction in terms and calls for no observation.

Then, no principle of law can be better established both in *England* and *America* than the rule which ascribes the ownership of the soil and bed of a non-navigable river *primâ facie* to riparian proprietors of the opposite banks, each to the middle thread of the stream. To cite authorities for this universally recognized principle would be a useless waste of time. It is true that this is but a *primâ facie* presumption, but, this being so, in the present case there is not only nothing to rebut the presumption, but, on the contrary, it is greatly strengthened and made almost conclusive by the exception before adverted to, contained in the letters patent, reserving the soil or bed appurtenant to the lands of

(1) Ir. R. 2. C. L. 143.

riparian owners holding under former grants from the Crown.

It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement, but is strictly a right of property. To sustain these propositions of law authorities without number might be cited, it is sufficient for the present purpose to refer to two or three of the most weighty and apposite. Sir *Matthew Hale* says in the Treatise *de Jure Maris :*

> Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent, so that the owners of one side have of common right the property of the soil, and consequently the right of fishing *usque filum aquæ*, and the owners on the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length; with this agrees common experience.

Chancellor *Kent* in his commentaries (1) states the law as follows :

> But grants of land bounded on rivers or upon the margins of the same, or along the same above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in the case where the river is navigable for boats and rafts, have an easement thereon or a right of passage subject to the *jus publicum* as a common public highway.

I may say in passing that, although Chancellor *Kent* undoubtedly states the law as determined both by the older and more recent authorities applicable to private rivers such as the present, it may be doubted whether his doctrine is equally applicable to large navigable fresh water rivers, above the flow of the tide, not only where such rivers form international boundaries, as in

(1) Vol. 3, p. 427, ed. 12.

1882

THE QUEEN v. ROBERTSON.

Strong, J.

the instance of the *St. Lawrence*, but in cases where their whole course is comprised within the same State or Province. Recent decisions in the learned Chancellor's own State (*New York*) seem to indicate that the beds of such large navigable rivers are, by the common law, vested in the State as a trustee for the public, and are inalienable without legislative authority, and do not therefore pass *ad medium filum aquae* to the riparian owners, and that the right of fishing in such rivers is public, as in the sea and the other large inland lakes of this continent. It is unnecessary for the purpose of the present case to decide this question, and I have only alluded to it to prevent any misapprehension hereafter, should the point itself arise for decision. It is sufficient for the present purpose that the passage from the commentaries applies to non-navigable rivers, and gives us the law governing such streams as those we are now dealing with. To the authorities on this head already quoted, may be added that of Lord *O'Hagan*, lately Lord Chancellor of *Ireland*, who, when a Judge of the Irish Court of Common Pleas, in giving judgment in the case of *Murphy* v. *Ryan*, already referred to, thus distinctly affirms the doctrine of Sir *Matthew Hale* ; he says :

> According to the well established principles of the common law the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle, constituting the legal boundary, and being so possessed have an exclusive right to the fishery in the water which flows along their respective territories.

From a treatise on the law of waters lately published by Messrs. *Coulson & Forbes*, I extract the following passage :

> In all rivers and streams above the flow and re-flow of the tide, whether such rivers are navigable or not, the proprietors of the land abutting on the streams are *primâ facie* the owners of the soil of the alveus or channel *ad medium filum aquæ*, and as such have *primâ*

facie the right of fishing in front of their own lands. This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not strictly speaking a riparian right arising from the right of access to the water, but is a profit of the land over which the water flows, and as such may be transferred or appropriated, either with or without the property in the bed or banks, to another person, whether he has land or not on the borders of or adjacent to the stream (1).

Applying the law as thus stated to the facts stated in the special case submitted for the opinion of the court, we must determine that at the time of the passing of the *British North America Act*, the soil or bed of the river *Miramichi* between *Price's Bend* and its source was vested in the *New Brunswick* and *Nova Scotia* land company, or its grantees, to whom consequently also belonged, and that as a right of property, and not as an easement or franchise, the absolute and exclusive right of fishing within the same limits.

The question next presents itself, did the *British North America Act* either directly affect these vested rights of property, or did it authorize Parliament to interfere with them by legislation? There is no pretence for saying that the Act contains anything in the slightest degree derogating from the rights of fishing belonging to the proprietors of the beds of non-navigable rivers. By the 13th enumeration of the 92nd section the exclusive right to legislate concerning property is conferred upon the Local Legislatures, to whom also by the 16th sub-sec. are granted similar powers concerning matters of a local and private nature. Thse provisions must necessarily exclude the right of the Parliament of the Dominion to legislate to the prejudice of the rights of fishing vested in the proprietors of beds of rivers and streams, unless we can find in section 91, defining the powers of Parliament, some exception to the general effect of the

(1) See also *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Bristow* v. *Cormican*, 3 App. Cases 641.

1882

THE QUEEN v. ROBERTSON.

Strong, J.

word "property" as including such a proprietary right. The only words in the last mentioned section which it can be suggested may have such an operation are those of the 12th enumeration "Sea coast and inland fisheries." It is a sound and well recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication. This principle has within the last few months been applied with much approval by the Privy Council, in the case of the *Western Counties Railway Co.* v. *The Windsor & Annapolis Railway Co*, and is too well fixed as a canon of construction to be open to the least doubt or question. As observed in the judgment of the Privy Council in the case just mentioned, the only difficulty which ever arises respecting it is in its application to particular enactments. I think there is room for applying an analogous principle in the present case. Although the provision in question does not in itself make any disposition of the fisheries mentioned, but is merely facultative, empowering Parliament to make laws respecting the subjects named, we are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial legislature to confer upon parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another legislature. I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression "Inland Fisheries," conferred upon parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word "property," can only be interfered with by the provincial legislatures in exercise of

1882

THE QUEEN v. ROBERTSON.

Strong, J.

the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding, prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries. Again, under this provision parliament may enact laws for regulating and restricting the right of fishing in the waters belonging to the Dominion, such as public harbors, the beds of which have been lately determined by this court to be vested in the Crown in right of the Dominion, and also for regulating the public inland fisheries of the Dominion, such as those of the great lakes and possibly also those of navigable non-tidal rivers. There is therefore no unreasonable restriction of the power of parliament in construing the twelfth sub-section as I do, as not including a power to legislate concerning the right of property in private fisheries.

I am so far of accord with the learned judge whose judgment is the subject of appeal. I am compelled, however, to differ from him when he makes a difference between the rights of private owners which had been acquired by grant from the Crown before Confederation and the rights of the provincial governments in respect of fisheries in non-navigable rivers, the beds of which, not having been granted, were vested in the provinces at that date. I can see no reason for such a distinction. By the *British North America Act*, the Crown Lands are vested in the respective provinces.

1882

THE QUEEN v. ROBERTSON.

Strong, J.

This of course includes the beds of all non-navigable rivers and the consequent right to the fish in such waters, for there can be no doubt that the right of taking fish in rivers of this class, so long as they remain ungranted, is vested in the Provinces as an incident of the ownership of the public domain, just as the timber and all the other profits of the land are so vested. These fisheries, although often in practice not conserved by the Provinces, are certainly not public fisheries open of common right to all who may choose to avail themselves of them, as is the case with regard to the fisheries in tidal waters and the great lakes, but the provincial governments may, without special legislation and in exercise of their right of property, restrict their use in any manner which may seem expedient just as freely as private owners might do. In short, the public have no more right in law to take fish in non-navigable rivers belonging to the provinces than they have to fell and carry away trees growing on the public lands; in the one instance, as in the other, such interferences with provincial rights of property are neither more nor less than illegal acts of trespass.

This being so, it seems very clear to me that no well-founded distinction, as regards the power of legislation by parliament, can be made between fisheries in rivers which, at the date of Confederation, were the property of private owners under grants from the Crown and those which remain the property of the provinces as part of the public domain. In both cases the right of fishing is a profit of the land, an incident of the proprietary right in the soil, and is as much property in the hands of the province as in that of a private owner. Then, if the *British North America Act* contains nothing warranting federal legislative interference with this right of property in the case of a private owner,

how can it be asserted that it does so when the ownership is vested in the province? The Crown lands are expressly assured to the provinces, and these include the beds of all such streams as that now in question. Where it was intended to make an exception to the general terms of the 109th sec. of the Act, as in the case of property reserved to *Canada* by the 108th sec., and the power to assume lands or public property for the purposes of defence, conferred by the 117th sec., we find such exceptions expressed in clear and distinct enactments. How, then, can it be presumed, in view, not only of the 109th sec., but also of the 5th enumeration of sec. 92, giving the provinces exclusive legislative powers respecting the public lands, and that as to property generally in sub-sec. 13 of sec. 92, that the Dominion has the power to legislate respecting these fisheries incidental to the ownership of the provincial lands, or respecting any other dismemberment of the right of property in such lands, if it is not conferred by the clause in sec. 91 respecting sea coast and inland fisheries? Not a single provision of the *British North America Act* can be pointed to as conferring such powers of legislation, except that just mentioned, which, for the reasons already given in considering the case of private owners, must be held inapplicable.

I therefore come to a different conclusion in this respect from that arrived at in the judgment of the Exchequer Court.

There are, of course, fisheries of a very different character from those in non-navigable waters to be found within the limits of all the provinces—public fisheries, such as those in tidal rivers and in the great lakes of the western provinces. A question may arise whether the provisions contained in sec. 91 authorizes parliament to empower the Crown to grant exclusive rights in respect of such fisheries. Upon this point it would not

1882

THE QUEEN v. ROBERTSON.

Strong, J.

be proper now to express any opinion since none has been raised for adjudication. The same may also be said of an important question which may hereafter be presented for decision as to the right to legislate so as to authorize exclusive rights in respect of fisheries in what have been called by Chancellor *Kent*, the "great rivers," meaning large navigable non-tidal rivers, a question the solution of which must depend on whether the beds of such rivers are vested in the Crown in right of the Dominion, not as part of its domain, but as trustees for the public, or in the owners of the adjacent lands, inasmuch as the right of fishing would in the first case be in the public as of common right, but in the second vested in the riparian proprietors.

These are questions the discussion of which would not be appropriate in the present case, and I refer to them only to point out that what I have said, as to rivers of the class to which the portion of the *Miramichi* now in question belongs, has no reference either to navigable fresh water rivers or to the great lakes.

I consider that I shall sufficiently answer the different questions propounded for the decision of this court by stating my opinion that the Crown had no power to grant the license in question, and that the same is absolutely void; and further, that the Crown has no power under the statute of 1868 to grant an exclusive right of fishing in any non-navigable river, whether the bed or soil of such river be vested in the Crown in right of the Province, or in a private owner deriving title under a grant from the Crown made either before or since the passing of the *British North America Act*.

FOURNIER, J.:—

Après les savantes dissertations que l'on vient d'entendre sur l'importante question soumise à la considération de cette cour, il serait inutile pour moi de revenir

1882

THE QUEEN v. ROBERTSON.

Fournier, J.

sur les faits de la cause, et de discuter longuement de nouveau les questions de droit qu'elle présente. Mais comme la question de juridiction, entre le pouvoir local et le pouvoir fédéral, soulève encore ici la question de savoir jusqu'à quel point le pouvoir fédéral exerçant son pouvoir législatif sur un sujet de sa compétence peut affecter les droits particulièrement réservés aux provinces, et plus spécialement les droits civils, je crois devoir réitérer l'expression de mon opinion à ce sujet. Me fondant sur l'opinion des plus hautes autorités judiciaires des *Etats-Unis*, qui ont été appelées à décider des questions analogues, sur la juridiction et les droits respectifs des *Etats* et du gouvernement fédéral de l'Union américaine, j'ai adopté, dès le début, leur opinion qu'il n'était pas possible d'établir une règle uniforme d'interprétation pouvant servir à la décision de toutes les questions de conflit de ce genre. Cette opinion a été aussi exprimée plusieurs fois depuis par le Conseil Privé de Sa Majesté. *Cushing* v. *Dupuy* (1) *Parsons* v. *The Citizen's Ins. Co.* (2) décidée en novembre dernier.

Dans une cause assez récente, j'ai eu occasion de dire, et je le répète, 'que le gouvernement fédéral a, sans doute, le pouvoir de toucher incidemment à des matières qui sont de la juridiction des provinces. Mais dans mon opinion, ce pouvoir ne s'étend pas au-delà de ce qui est raisonnable et nécessaire à une législation ayant uniquement pour but le légitime exercice d'un pouvoir conféré au gouvernement fédéral. Cette règle, pas plus qu'aucune autre, ne peut être d'une application générale. Toutefois, appliquée à la question actuelle, je crois qu'il est facile de concilier les intérêts respectifs des deux gouvernements. La section 91, sous-section 12 de l'Acte de l'*Amérique Britannique du Nord*, en donnant au gouvernement fédéral le pouvoir de légiférer sur les pêcheries, ne lui en attribue pas le droit de propriété.

(1) 5 App. Cas. 415. (2) 45 L. T. N. S. 721.

1882

THE QUEEN v. ROBERTSON.

Fournier, J.

Il ne les enlève pas des propriétaires ou possesseurs d'alors pour se les approprier. Ce n'est pas ainsi non plus que cette section a été interprétée par l'acte 31 Vic., ch. 60, passé très peu de temps après l'acte de confédération. La sec. 2 déclare expressément que le "ministre de la Marine et des Pêcheries pourra, "lorsque le droit exclusif de pêcher n'existe pas déjà en "vertu de la loi, émettre ou autoriser l'émission de baux "ou licences de pêche pour pêcher en tout endroit où "se fait la pêche." Comme on le voit les droits de tous ceux qui avaient un intérêt ou une propriété dans les pêcheries sont respectés. Sous le rapport du droit de propriété l'acte fédéral, ni l'acte des pêcheries n'ont fait de changement à l'état de choses existant avant la confédération. La propriété est demeurée où elle était auparavant. Il n'y a donc sous ce rapport aucun empiètement de la part du pouvoir fédéral. Si l'action du département de la Marine n'a pas été conforme à ce principe, comme dans le cas actuel, cette action est nulle. Tout en respectant le droit de pêche comme propriété le gouvernement fédéral ne peut-il pas y exercer, dans l'intérêt général de la Puissance, un droit de surveillance et de protection? Je crois que oui, et que c'est là précisément le but des pouvoirs législatifs qui lui ont été conférés à ce sujet. Il n'y a, suivant moi, aucune incompatibilité entre l'exercice de ce pouvoir avec l'exercice du droit de pêche, comme droit de propriété en d'autres mains que ceux du gouvernement. Le gouvernement fédéral peut, suivant moi, dire au propriétaire: "Vous ne pêcherez qu'en certaines saisons et qu'avec certains instruments ou engins de pêche autorisés." Cette restriction n'est pas une atteinte, mais bien plutôt une restriction accordée à ce genre de propriété. C'est une réglementation, je dirai, de police et de contrôle sur un genre de propriété qu'il est important de développer et de conserver pour l'avantage général. On

sait ce que deviendrait en peu de temps les pêcheries, s'il était libre aux particuliers de les exploiter comme bon leur semblerait. En peu d'années, leur aveugle avidité aurait bientôt ruiné ces sources de richesses—et nos pêcheries, au lieu de revenir aussi riches et aussi fécondes qu'autrefois, retourneraient bientôt à l'état de dépérissement, sinon de ruine, où elles étaient avant d'avoir été l'objet d'une législation protectrice. Ce pouvoir de réglémentation, de surveillance et de protection a été, avant la Confédération, exercé par chaque province dans l'intérêt public. C'est le même pouvoir qu'exerce aujourd'hui le gouvernement fédéral. Pas plus que les provinces ne l'ont fait, il n'a le pouvoir de toucher au droit de propriété dans les pêcheries, son pouvoir se borne à en régler l'exercice.

A l'endroit particulier auquel s'appliquent le bail et la licence, dont la validité est attaquée, la rivière *Miramichi* n'est pas navigable ; elle n'est que flottable d'après l'admission de faits qui tient lieu de preuve en cette cause. C'est pour cette raison que je m'abstiendrai de faire aucune observation sur plusieurs autres questions importantes, savamment discutées dans le jugement de l'honorable juge *Gwynne*, concernant le droit de pêche dans les eaux navigables. Il me suffit de déclarer, pour les fins de cette cause, que je suis d'avis avec l'honorable juge en chef que le droit de pêche dans les eaux non-navigables est un attribut de la propriété riveraine,—que ce soit une province ou un particulier qui soit propriétaire,—sujet, toutefois, au droit du public de faire usage de ces rivières non navigables comme voies de communication, autant que leur nature le permet. Je suis encore d'opinion avec l'honorable juge en chef, que l'exercice du droit de pêche dans ces mêmes rivières est soumis au pouvoir réglémentaire du gouvernement fédéral au sujet des pêcheries.

1882

THE QUEEN v. ROBERTSON.

HENRY, J.:—

After a full consideration of the issues before us I think the appeal in this case should be dismissed. The *British North America* Act of 1867 conveys to the Dominion no property in the sites of the sea coast or inland fisheries, as I construe it. In section 91, which defines the powers of the Dominion Parliament, we find included "Sea coast and inland fisheries." That provision in the enumeration of the *powers* enables the Parliament of the Dominion to legislate on the subject, as it does in respect to matters such as "Shipping and navigation," "Ferries," "Bills of exchange and promissory notes" and many others, without passing any right of property in the several subject-matters. In fact, in my opinion the power under the Act is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient.

Independently of the Imperial statute the Dominion Parliament has no power to legislate in respect of property or civil rights in the Province, and could not otherwise by enactment affect the tenure of or title to real property. By the common law the owner of the soil has the right of fishery in unnavigable streams and water courses. That right, to be taken away, restrained, or transferred must be by a Parliament having jurisdiction over the subject-matter, and to possess and exercise the power to interfere with and control private property and interests there must have been an express grant of that power in the Imperial Act. I have searched in vain for such, or even anything that would suggest the conclusion that such was intended. I am therefore of the opinion that the leases granted by the several Ministers of Marine and Fisheries, so far as they cover private property or affect private rights, are wholly irregular and void.

1882

THE QUEEN v. ROBERTSON.

Henry, J.

The same principles are applicable where lands are under the control of and owned by the Local Governments in trust for the use of the people of the several Provinces.

I think, therefore, that by force of the agreement under which this case is prosecuted the Respondent is entitled to our judgment. As the learned Chief Justice had prepared a judgment which embraces my views upon the leading points in the case, I have not thought it necessary to put my judgment in writing.

TASCHEREAU, J. :—

I am of opinion to dismiss this appeal on the ground that, as an exclusive right of fishing existed in the part of the *Miramichi* River in question, the Minister of Marine and Fisheries could not legally grant a license to fish for that portion of the said river.

Appeal dismissed with costs.

Attorneys for appellant: *O'Connor & Hogg.*

Attorney for respondent: *R. G. Haliburton.*

JOHN DEWE ..... APPELLANT;

AND

DAVID H. WATERBURY ..... RESPONDENT.

1880

*Oct. 26.

1881

*Feb'y. 11.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Slander—Public Officer—Privileged Communication.

The appellant, *D.*, having been appointed Chief Post Office Inspector for *Canada*, was engaged, under directions from the Postmaster General, in making enquiries into certain irregularities which had been discovered at the *St. John* Post Office. After making

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

1880

DEWE v. WATERBURY.

inquiries, he had a conversation with the respondent, *W.*, alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the assistant-postmaster was called in, and the appellant said: "I have charged Mr. *W.* with abstracting the letters. I have charged Mr. *W.* with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster.

Held, on appeal, 1st. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged.

2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a non-suit should be made absolute.

APPEAL from a judgment of the Supreme Court of *New Brunswick* discharging a rule *nisi* for a non-suit or verdict for appellant, pursuant to leave, reserved or for a new trial.

The action was for slander. The plaintiff (respondent) was a clerk in the post office at *St. John*. The defendant (appellant) was connected with the Post Office Department at *Ottawa* and had been sent to *St. John* to make enquiries about some letters missing at the *St. John* post office. The declaration contained several counts. The first count contained a conversation between the plaintiff and defendant, the latter charging the plaintiff with the missing letters, and the plaintiff strenuously denying it. The other count contains the words: "The defendant addressing Mr. *Woodrow*, the assistant postmaster at *St. John*, said, 'I have charged Mr. *Waterbury* with abstracting the let-

ters.' 'Mr. *Woodrow*, I have charged Mr. *Waterbury* with the abstractions that have occurred from those money letters, and I have concluded to suspend him'."

The defendant pleaded "not guilty" and a special plea setting up that the words used were used by the defendant in the course of his duty as Chief Post Office Inspector, &c.

To this plea the plaintiff demurred and joined issue, the demurrer was first argued, judgment was given and the plea held bad, on the ground that under the Post Office Act the Governor General had no power to appoint a chief inspector, and that the defendant could not therefore legally act as such.

The issues of fact under the plea of "not guilty," were afterwards tried before *Weldon*, J.

The evidence was to the following effect: "After making enquiries, &c., defendant felt satisfied in his own mind that the plaintiff was the guilty party, and on the 19th July, 1875, he called the plaintiff into a room by himself and then charged him with having abstracted the letters, using substantially the words charged in the third count of the declaration. No one was present at the time but the plaintiff and defendant, and the door was shut. The plaintiff denied the charge. The defendant opened the door and called in Mr. *Woodrow*, the assistant-postmaster at *St. John* (the postmaster himself being absent) and spoke to Mr. *Woodrow* the words charged in the first and second counts of the declaration. The door was open and clerks were in the next room, but there was no evidence that any one heard."

It was agreed at the trial that the court should reserve leave to enter a non-suit, or verdict for defendant on any grounds on the whole case subject to this reservation.

The judge charged the jury to find for the plaintiff,

1880

DEWE v. WATERBURY.

and assess the damages, but to answer the following questions :

" 1. Do you find the words charged in the first count of the declaration, spoken in the presence of Mr. *Waterbury*, addressed to Mr. *Woodrow*, heard by any other person ?

" 2. Was the defendant, *Dewe*, actuated by ill-feeling towards Mr. *Waterbury* in making the observations he did to him, and also in the communication he made to the assistant-postmaster, Mr. *Woodrow* ?

" Supposing the words used and charged in the declaration were privileged, did the defendant believe he had reason for using the language to the plaintiff which he did, or did he use the language from a wrong motive and not from a sense of duty ?"

To the first question the jury answered, " That they find no evidence presented that any other person heard the words spoken by Mr. *Dewe* in making the communication to Mr. *Woodrow*, but that Mr. *Dewe* used no precautions to prevent the words being heard by other persons, the door being left open to the general room."

" 2. The jury find the defendant was not actuated by ill feeling towards Mr. *Waterbury* in making the observation to him, but find he was in the communication he made to Mr. *Woodrow*."

The jury gave a verdict for the plaintiff with $6,000 damages.

The defendant during the next term moved for a non-suit or verdict for defendant, or a new trial. (1). Upon the points reserved at the trial. (2). Misdirection of the learned judge : 1. In not directing the jury that the alleged slander was a privileged communication and there was no evidence of malice. 2. Not directing the jury that the alleged slander was a privileged communication made by the defendant in course

1880

DEWE v. WATERBURY.

of his duty, and that even if malice proved, defendant was not liable. (3) Improper admission of evidence. Admission of conversation between plaintiff and defendant. (4.) Verdict against evidence. (5.) Excessive damages.

The rule *nisi* was granted, subsequently argued, and discharged by *Wetmore* and *Fisher*, J. J., *Weldon*, J., dissenting.

This appeal was from the judgment discharging this rule and from the judgment on demurrer to the defendant's special plea.

Mr. *Lash*, Q. C., for appellant:

Appellant's authority to make the investigation and do what is complained of was fully proven. The authority of the Crown to appoint servants exists, I contend, independently of any statute, and the evidence shows that Mr. *Dewe* was appointed as chief inspector by Order in Council, 25th May, 1870. Then, again, it is in evidence that Mr. *Dewe* was acting under the special instructions given him for this particular case, and not even under 31st *Vic.*, c. 10, can this authority be questioned, for by the 15th sec. certain powers are given to the deputy head, which, being ministerial powers, could be delegated to his officers under that act. The point, therefore, to be decided must be, not whether Mr. *Dewe* had authority, nor even a question of the propriety of what he has done, but whether he acted *bonâ fide*: *Tench* v. *Great WesternRwy. Co.* (1).

Now, the jury have found that Mr. *Dewe* did not act with malice when he suspended the respondent. If so, how can it be said he acted with malice by communicating his decision to the assistant postmaster, to whom it was his duty to communicate such decision. The question of privilege is one of law, and not for the jury.

(1) 33 U. C. Q. B. 8.

1880
DEWE
v.
WATERBURY.

See *Dawkins* v. *Lord Paulet* (1). This being the case, the onus was thrown on plaintiff to show there was malice. *McIntyre* v. *McBean et al* (2). There was no publication of the words charged in the second count, they having been addressed to the defendant only with no one else present, and I submit they were privileged communications.

As to the demurrer to the second plea, the judgment of the court below is entirely based upon the ground that there was no power in the statute to appoint post office inspectors to hold inquiry into missing money letters, and that his duties and powers were allegations of law which were not supported. I submit the allegation of duty is a question of fact and not of law at all. If it is admitted that *Dewe's* appointment is valid, then the plea must be held good, but if the court is prepared to say Mr. *Dewe's* appointment is not valid, then the demurrer is good. See also *Clark* v. *Molyneux* (3).

Mr. *Tuck*, Q. C., for respondent:

As to the question of demurrer, it is too late, the judgment has not been entered up, and it seems to me to be quite immaterial.

The first important point is whether Mr. *Dewe* had authority to act. There can be no pretence that he was an officer under the 14th section of 31st *Vic.*, c. 10, for another man held that office at *St. John*. Then there were no instructions according to the Act, no duty shewn for post office inspectors to make charges, or rather to slander; but it is contended that Mr. *Dewe* was an officer of the Post Office Department, with instructions, and that he was acting in accordance with his instructions. Surely the learned counsel cannot

(1) L. R. 5 Q. B. 94, (2) 13 U. C. Q. B. 534.
(3) 3 Q. B. D. 237.

mean the defendant had instructions to enter into the agreement he proposed to make with plaintiff to compound the supposed felony, or to falsely proclaim he had positive proof of the plaintiff's guilt, and that he would prosecute him. Nor can he mean the defendant had instructions to publish of the plaintiff, on any occasion he chose, that the plaintiff had stolen money; if the learned counsel meant that, he is mistaken, for the fact is as the jury have found.

Then as to malice:

1. The defendant did not shew the slighest reasonable evidence of the plaintiff's guilt, and therefore, as a question of law, he failed to show any reasonable or probable cause for his charge, and the want of reasonable and probable cause is always evidence of malice.

2. The statements he made were not only untrue but untrue to his own knowledge; when he stated to *Waterbury* and *McMillan* "that he had positive proof of the plaintiff's guilt, and that if he did not confess he would prosecute," he was stating what he must have known was a deliberate falsehood, and this is sufficient evidence of malice for the jury. Defendant's offer to compound the felony, which offer he had the effrontery to swear on the stand he intended to carry out if the plaintiff confessed, is of itself not only strong evidence of malice, but, if true, is in law a malicious motive.

The law as laid down is, that if a party makes a charge of felony with any other object than the prosecution of the felony, this is malice.

Then there being a case for the jury, was there any misdirection?

In *Stevens* v. *Sampson* (1), Lord *Coleridge* says: "To establish that a communication is privileged two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of *bonâ*

(1) 5 Ex. D. 53.

1881

DEWE v. WATERBURY.

fide and without malice. If either of these are absent the privilege does not attach."

The plaintiff contends in the present case that both these elements are absent, for *bona fides* is wanting and malice exists, and there is no occasion shewn for speaking the words.

Mr. Lash, Q. C., in reply.

RITCHIE, C. J.:—

It is admitted no action can be sustained for the matters alleged in the third count of the declaration, because no one was present at the time in the room when the alleged slanderous words were uttered, and the door was shut, and there was therefore no publication. The first and second counts are as follows:—

(1.) *David B. Waterbury*, by *Acalus L. Palmer*, his Attorney, sues *John Dewe*. For that before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was clerk and employee in the Civil Service of *Canada*, and as such employed in the post office in the city of *Saint John*, and was in receipt of a large salary from his said office; and the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said office and the plaintiff's employment therein, and the doing his duty and conducting himself therein, the words following, that is to say: "I have charged Mr. *Waterbury* (meaning the plaintiff) with abstracting the letters;" meaning thereby that the plaintiff had feloniously abstracted and stolen letters out of the said post office, whereby the plaintiff was injured in his credit and lost his said office, and his character and reputation was injured.

(2.) And also for that the said defendant falsely and maliciously spoke and published of the plaintiff, of and concerning the matters aforesaid, the words following, that is to say: "Mr. *Woodrow*, I have charged Mr. *Waterbury* (meaning the plaintiff) with the abstractions that have occurred from those letters, and I have concluded to suspend him," thereby meaning that the plaintiff had been guilty of abstracting and feloniously stealing money from letters, whereby the plaintiff lost his office and suffered in his character and reputation.

To this declaration defendant pleaded the general issue, and a special plea setting up substantially that

1881

DEWE v. WATER BURY.

Ritchie, C.J.

the words were used by the defendant in the course of his duty as chief post office inspector. To this plea plaintiff demurred and joined issue. The demurrer was argued, and the court held the plea bad.

The issue of fact under the plea of "not guilty," (under which the whole defence was open) was afterwards tried before *Weldon*, J., and a jury, and a verdict found for plaintiff for $6,000. It was agreed at the trial that the court should reserve leave to enter a non-suit or verdict for defendant on any grounds on the whole case subject to this reservation. The defendant moved to enter a non-suit or verdict for defendant. A rule *nisi* was granted and subsequently discharged by Judges *Wetmore* and *Fisher*, *Weldon*, J., dissenting.

The plaintiff was a clerk in the post office in *St. John*, *New Brunswick*. Money had been abstracted from letters passing through *New Brunswick* to *Nova Scotia*. Plaintiff was chief post office inspector for the Dominion, appointed by Order in Council, 25th May, 1870, and in October assumed the duties, and thenceforth continued to act and was acting as such at the time of the trial, and had, he says, general and special duties all over the Dominion, instructions being given him by the deputy postmaster general, and he had instructions from him regarding missing letters, and was directed by him, when he visited *St. John* in the course of his duty, to make inquiries respecting them, having been made aware money had been abstracted from letters passing through the post office in *New Brunswick*. When he visited *St. John* he was recognized by both the postmaster and the inspector, and in fact by plaintiff himself, as the general inspector for the Dominion, and as clothed with authority from the post office department to inquire into all matters connected with these missing letters, and letters from which money had been abstracted. He, together with the inspector for *New*

1881

DEWE v. WATERBURY.

Ritchie, C.J.

Brunswick, made a minute investigation in reference thereto, and the result appears to have been, to lead his mind to the conclusion that the plaintiff was the person implicated in the abstraction, and having arrived at that conclusion, he had an interview with plaintiff alone, in which he appears to have endeavored to extract from him a confession of his guilt.

Defendant gives this account of it:

I was aware money had been abstracted from letters through the post office. What words I used to Mr. *Woodrow* had reference to that fact. I had, in my own mind, positive proof—I don't say legal proof. Whether you thought you had positive proof? I thought I had; but not legal proof. I may have said to Mr. *Waterbury* I had positive proof; I won't be certain. I put it pretty strongly to him. As I told you, I had not legal proof, but I was satisfied in my own mind. I might not be able to prove it. I did believe I had proof, but not legal proof. I told him I should prosecute the matter to the end, and would make every possible exertion as far as possible. I told him if he would confess I would not prosecute, and I intended not to do so. I thought it was better to clear the matter up; I did not want to establish my own reputation. I will take what convinces me.

As to this interview, the jury have found that defendant was not actuated by ill-feeling towards *Waterbury* in making the observations to him at that time. Not obtaining any confession from plaintiff, the assistant postmaster was called in and the defendant addressed to him the words complained of, and directed the deputy postmaster to take charge of the stamps and money in plaintiff's office, and put another clerk in charge of them. The inspector at *St. John* recognized the defendant's authority, and Mr. *Dewe* as his superior officer, and he says:

John McMillan:—I reside in *St. John;* am post office inspector for the district; was so in 1875. My attention was called for abstracting money from letters. I enquired into it. It was dealing with letters passing through *New Brunswick* to *Nova Scotia;* only three cases to *New Brunswick;* these came to my notice in 1874 and 1875; in the registration office, three clerks, *Potter*, *Rankin* and *Water-*

bury; the full enquiry was made by me. The monthly return is made to the department; I sent it very shortly after the end of the month. When Mr. *Dewe* came down here I informed him fully all that had occurred. I consulted with him on this time, and we acted in concert. Mr. *Dewe* and I went over the different cases of registered letters. We went over the ground of every letter had. The three clerks were those I have named. I removed Mr. *Rankin* from the room while this enquiry was going on. We had a conversation, and Mr. *Dewe* was to see Mr. *Waterbury* alone. I can't say he used the words as they were communicated to me. Mr. *Waterbury* was suspended. I knew the suspension took place. I state that Mr. *Dewe* is my superior officer, and I was aware of the supension.

Cross-examined by Mr. *Palmer:*

Question. Did you know that *Waterbury* was suspended at the time he was suspended?

Answer. When he was first suspended I was not there.

Question. Did Mr. *Dewe* do this without reference to you?

Answer. I did not control him, he is my superior officer. I consider him so. Mr. *Dewe* controlled me; I did not control him. I was not present. I was in concert in the investigation and knew he was to have an interview with Mr. *Waterbury.* I did not control him, we consulted together in the matter. I knew Mr. *Dewe* suspended *Waterbury,* and my information was from him. I have no recollection of Mr. *Dewe* communicating to me what he was going to do, or the language he used. I have no recollection of Mr. *Dewe* telling what he would do. Upon the investigation we made up our minds that the plaintiff had abstracted the money. I was there soon after he was suspended.

Re examined:

In all the matters Mr. *Dewe* consulted me. I was at the post office soon after the suspension; the conversation, when I went in, was about the stamps. *Waterbury, Dewe* and *Woodrow* were in Mr. *Howe's* room, and his suspension was done with my approval.

James Woodrow, the assistant postmaster, like *McMillan,* recognized *Dewe's* authority and acted on his orders. He says:—

I was in the post office department in 1875, as assistant postmaster. *John Howe* was postmaster, when absent I had charge. In July, 1875, *Waterbury* was clerk, he was one of the clerks in the registry office department. The records of the post office were burnt. Mr. *Dewe* came in and asked for Mr. *Howe.* I

1881

DEWE v. WATERBURY.

Ritchie, C.J.

told him he was not in. After talking with me he directed me to call Mr. *Waterbury* in. I made arrangements about his department, and told Mr. *Waterbury* he was wanted by Mr. *Dewe*. They went in my room, and I went out and walked about. I heard voices, but could not hear what was said. I was re-called after a while. When I came to the door Mr. *Dewe* said: "I have charged Mr. *Waterbury* with abstracting money from registered letters." This is the man, and said something about suspending; he said: "You will suspend him." I did suspend him and put a person in charge.

Here, then, we have this officer acting, I think, within the scope of the duties of his office as inspector, and under special instructions from the post office department, making inquiries into the matter of the abstraction of money from letters. Can it be possible that the Crown and the department are so utterly helpless that they can employ no person but the Inspector of the district to inquire into matters of this kind? Surely, when a felony has been committed in a particular office, it is the duty of the department to cause investigation to be made; and persons engaged in such investigation, when acting within the scope of the authority with which they are clothed and without malice, are privileged in the communications with post office officials who are subordinate to them and bound to obey their instructions, as the inspector and deputy postmaster did. The suspension in this case, though communicated to the officer who was to see it carried out by the defendant, was with the approval of the local inspectors, and therefore may be considered as much his act as that of the general inspector.

I think the law is very clear on this subject. It is for the judge to rule whether the occasion creates privilege. It is clear that defendant was *de facto*, and I think *de jure*, in the discharge of a public duty, and the words were spoken while in the discharge of that duty and in reference thereto, to a subordinate officer having a corresponding duty, and therefore were privileged;

1881

DEWE v. BURY. WATER- Ritchie, C.J.

that being so, it is equally clear that the burthen of proof was on the plaintiff to shew actual malice.

There was no evidence in this case whatever that the defendant was actuated by motives of personal spite or ill will ; and the occasion and surrounding circumstances repel the presumption of malice. Therefore, I think the evidence in this case clearly establishes that the occasion created the privilege, and that the occasion was used *bonâ fide* and without malice.

The plaintiff having therefore given no evidence of malice, it was the duty of the judge to say that there was no question for the jury, and to direct a non-suit or a verdict for the defendant.

STRONG, J. :—

I have no difficulty in determining that the defendant was a duly authorized officer of the post office department, under section 14 of the Act 31 *Vic.*, c. 10. By that section, it is enacted that

> The Governor may, from time to time, appoint fit and proper persons to be and to be called post office inspectors, and to be stationed at such places, and to exercise their powers and perform their duties and functions within such limits, respectively, as he may, from time to time, appoint.

I find nothing in this provision to interfere with the power of the Governor General to appoint an inspector with authority to act anywhere within the Dominion, that is to say, with powers co-extensive with the limits of the Dominion. There is nothing in the language of this clause making it obligatory to restrict the office to any particular portion of the Dominion ; the language is permissive, not imperative. Therefore, in my opinion, the Order in Council of the 25th May, 1870, constituted a valid appointment of the defendant as chief inspector for the Dominion. By section 15 of the same act provision is made for the appointment of a deputy postmaster general who, it is enacted,

1881

DEWE v. BURY. WATER-

Strong, J.

Shall have the oversight and direction of the other officers, clerks, messengers or servants, and of all persons employed in the postal service, and shall have, under the postmaster general, the general management of the business of the department, and his directions shall be obeyed in like manner as the directions of the postmaster general would be, subject however to the control of the latter in all matters whatsoever.

The defendant acted under express directions from the deputy postmaster general in what he did in reference to the investigation at *St. John*, which resulted in the dismissal of the plaintiff, for the reasons given in the words which are complained of by the plaintiff as defamatory. The deputy postmaster general, a ministerial officer, could legally delegate his functions derived under the large statutory powers conferred by the 15th section of the Act referred to, and, therefore, in this view of the case, irrespective altogether of the 14th section and the appointment under the Order in Council, the defendant was an authorized officer of the department and acted *de jure* in the communication he made to Mr. *Woodrow*, on the occasion of the dismissal of the defendant.

Again the statute 31 *Vic.*, c. 10, organizing the post office department, is not a disabling, but rather an enabling statute. It authorizes the Governor General to appoint officers, and may be considered as implying an undertaking by parliament to provide salaries for officers appointed in accordance with its terms. But it contains nothing taking away from the Governor General the authority which the Crown can always exercise without parliamentary sanction, subject only to a provision for the payment of salaries by parliament, of appointing any officers it may deem necessary for the administrative service of the Dominion, and of defining and regulating their duties. So that at common law, irrespective of and apart from the statute altogether, the defendant was an officer of the Crown,

having authority to act as he did in making the charge complained of and in dismissing the plaintiff from the public service. The consequence is that the communication made by the defendant to Mr. *Woodrow* the deputy postmaster at *St. John*, which is complained of by the defendant as defamatory, was made by a public officer within the scope of whose authority it was to make it to another public officer, to whom it was material the reasons for the dismissal of one of his subordinate officers should be made known, and on a proper occasion, viz.: at the time of the subordinate's suspension from duty, and as the ground for that suspension. We have here, then, all the essentials of a privileged communication.

Then the decided cases, the latest and most authoritative of which is that of *Clark* vs. *Molyneux* (1), clearly establish that it is the duty of the judge at the trial, upon the privileged character of the communication being established, to nonsuit the plaintiff, or to direct a verdict for the defendant, unless the plaintiff gives evidence of actual malice The Chief Justice has already pointed out that in the present case there was an entire absence of evidence of express malice. There was therefore, in my opinion, nothing to leave to the jury, and the learned judge who presided at the trial should have non-suited the plaintiff or directed a verdict for the defendant, as he doubtless would have done had he not been bound to adopt the course which he followed by the previous decision of the court *in banco* on the demurrer.

It is true that the jury have found, in answer to a specific question left to them by the judge, that the defendant did not act *bonâ fide* in making the charge against the defendant. This, however, cannot affect the case, for in the view which *Clark* vs. *Molyneux* requires

(1) 47 L. J. Q. B. 231; S. C., 3 Q. B. D. 237.

1881

DEWE v. WATERBURY.

Strong, J.

us to take that question was erroneously left to the jury. In *Clark* vs. *Molyneux* (1), the privileged character of the defendant and of the occasion on which he had written the letter alleged to be a libel having been established, Baron *Huddleston*, after directing the jury that the occasion was privileged, left this question to them:

> Did the Defendant write the letter and make the statement *bonâ fide*, and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice towards the plaintiff?

The Court of Appeal composed of *Bramwell*, *Brett* and *Cotton*, Lds. J.J., unanimously held that there had been misdirection. They say in effect that it was for the judge to say if the statement complained of was within the scope of the defendant's duty, and whether the person to whom it was made had an interest in having the communication made to him; and these conditions being established, good faith, belief in the truth of the imputed misconduct, and honest motive on the part of the defendant, ought to have been presumed, and the burden of proof rested on the plaintiff to show *mala fides* or express malice, and they held the direction wrong as casting the onus on the plaintiff to establish *bona fides*. That case, which is the latest exposition of the law on this subject, is directly in point, and entirely supports the judgment of Mr. Justice *Weldon* on the argument of the rule to enter a non-suit, which ought, in accordance with the view which that learned judge propounded, to have been made absolute.

As regards the cause of action set up in the third count, which relates to what passed at the private interview between the plaintiff and defendant, there was clearly no publication.

I am of opinion that the judgment of the court below should be reversed and judgment entered for

(1) Vide supra.

the plaintiff on the demurrer, and that the rule *nisi* in the court below should be made absolute to enter a non-suit as regards the issues on the first and second counts.

1881
DEWE
v.
WATERBURY.
Strong, J.

HENRY, J.:—

I do not only concur in the view taken by my learned brothers as to the legality of the appointment of Mr. *Dewe* as post office inspector, but I go further, and say it was not absolutely necessary in this case to prove the appointment.

The action for slander is based on malice. Now, in this case the appellant proved that in making the investigation, he was acting with the authority of the government, and that was sufficient to show he was acting, in the first place, at all events, without malice. Under the instructions he had received, it was his duty to make enquiries as to the missing letters, and it was his duty, also, to suspend any person in the employment of the post office he *bonâ fide* suspected of being the guilty party. The course the post officer pursued in this case, I admit, was harsh, for the respondent, although admitted to have been innocent, has lost his situation, but under the law applicable to slander, I regret it is quite out of the power of this court to give him any redress. The law as laid down by the Chief Justice and my brother *Strong* is very clear. It makes such communications privileged, and if the appellant acted *bonâ fide*, and thought he was doing right, he is protected. Under such circumstances, it was for the plaintiff to show actual malice, and that he did not do.

In the case of *Clark v. Molyneux* (1), the law is laid down in these words:

In an action for libel, where the occasion is privileged, it is for the

(1) 3 Q. B. D. 237.

1881

DEWE
v.
WATERBURY.

Henry, J.

plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with the knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged, and if the defendant made the statements, believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief.

That is the law. I consider it, therefore, insufficient in this case that the evidence raises in our minds a probability of malice. In the absence of evidence of express malice, directly or circumstantially shown, no action will lie.

TASCHEREAU, J., concurred.

GWYNNE J.:—

From the report of the learned judge who tried this case, it is apparent that, in submission to the judgment of the Supreme Court of *New Brunswick* upon the demurrer to the plea, the case was submitted to the jury as one in which it was concluded, as matter of law, that the defendant was not entitled to be regarded as having uttered the words complained of upon a privileged occasion; and having regard to the agreement made at *nisi prius*, and to the circumstances attending the making of that agreement, the rule in the court below should be made absolute for entering a non-suit, if the plaintiff has not proved such a case as entitles him to retain the verdict which has been rendered in his favor, assuming the case to be one in which the defendant was entitled to the benefit of the defence which was relied upon, namely, that the words complained of were uttered only upon a privileged occasion.

The learned judge says:

I told the jury that, as the court held the Post Office Act did not authorize the appointment of a chief inspector, I must make my charge conform to that judgment, and the defendant was acting without authority. Had he been chief inspector, he would have

been privileged, and as the plaintiff had consented that a non-suit should be entered if he had not made out a case, I should direct them to find a verdict for the plaintiff, and ask them to answer certain questions.

When at the close of the plaintiff's case, the learned counsel for the defendant moved a non-suit upon the ground, among others, that the only evidence of the slander which was offered related to a privileged occasion, it appears by the learned judge's notes that the plaintiff's counsel objected that no such attempt to set aside the judgment of the court upon the demurrer to the plea should be entertained, and thereupon the agreement was made that the defendant should have the privilege of entering a non-suit upon all grounds moved or any other, and the case was left to the jury as above. Now, the grounds of non-suit urged were firstly, that there was no sufficient evidence of any publication of the words complained of; secondly, that if there was, the occasion was privileged; and thirdly, that there was no evidence of malice.

The question arises upon the first and second counts of the declaration, for, as to the third count, it is admitted that no action lies in respect of the matters alleged in that count, for that what is there set out took place wholly in a private interview between the plaintiff and the defendant. To the charges in the first and second counts, which are substantially the same, and as follows: that the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his office as a clerk in the post office department, these words: "I have charged Mr. *Waterbury* with the abstractions which have occurred from those letters, and I have concluded to suspend him," thereby meaning &c., &c., the defendant pleaded, firstly, the general issue of not guilty, and, secondly, a plea, the gist and substance of which is that the words complained of were spoken on

1881

DEWE v. WATERBURY.

Gwynne, J.

a privileged occasion in the *bonâ fide* belief by the defendant that he was acting in the discharge of a public duty—it is to be observed that the matter alleged in this plea was matter which was equally available to the defendant under the plea of not guilty, so that there was no necessity for raising the defence specially by a formal plea. The plaintiff, besides replying to this plea that "the words were spoken not in discharge of any duty, but of actual malice, and with full knowledge that the words so spoken were false," matter which he could give in evidence upon a joinder in issue to the plea of not guilty to displace the defence of privileged communication, also demurred. Upon this demurrer the court held the plea to be bad, for the reason that, in the judgment of the court,

The Post Office Act 31 *Vic.*, ch. 10 did not mention such an office as "Chief Inspector of the Post Office Department," andthat therefore the plea did not state facts necessary to enable the court to say that the defendant spoke the words complained of, in discharge of his duty, but that, on the contrary, the plea showed that the defendant was not the officer whose duty it was, under instructions from the Postmaster General, to make the enquiry mentioned in the plea.

In support of this judgment, the court relied upon the judgment in *Brown v. Mallet* (1), which decides that where a declaration states certain facts, and alleges that *thereupon* it became the duty of the defendant to do certain acts, such allegation is to be taken merely as an averment that the duty resulted from the facts previously alleged, and not as an averment of the existence of the duty as a matter of fact, irrespective of the facts previously alleged. In applying that case as the governing case upon the demurrer, the court, as it seems to me, misconceived the gist and substance of the plea, which does not profess to set up any duty as

(1) 5 C. B. 599.

resulting in law from previously alleged facts, but which alleges as matter of fact, that the defendant was acting as an officer of the post office department (whether the name given to his office, of "chief inspector," was or not the proper name to be attached to it was wholly immaterial), and that, upon the occasion of speaking the words complained of, he was, as matter of fact, acting and used the words in the *bonâ fide* discharge of what was, or what he believed to be, his duty—all this was matter of fact averred, not matter of law to be adjudicated upon as such by the court—although, as it seems to me, it was irrelevant whether the name attributed by the defendant in his plea, to his office, namely "chief inspector," was or not a proper name to be attributed to the defendant's employment in the department of the post office, still, I confess I cannot see any objection to His Excellency the Governor General, under the 14th section of the Act 31 *Vic.*, c. 10, attributing duties to one of the post office inspectors named in that section which would place him above all other inspectors, as chief inspector, or to the postmaster general assigning to any post office inspector the duty of making the enquiries which the defendant in his plea alleges he was making as to the loss of valuable letters upon the occasion of his using the language complained of. The judgment of the court therefore, upon the demurrer to the plea, was, in my judgment, erroneous; but as the same defence and reply thereto was open under the joinder in issue upon the plea of not guilty, as was involved in the special plea and in the issue joined upon the replication in fact thereto, the question of privilege remained as open upon the trial of the general issue as if there had been no special plea or judgment upon the demurrer thereto. The judge at the trial acted in deference to the judgment of the court upon the demurrer contrary to his own opinion.

1881

DEWE v. WATERBURY.

Gwynne, J.

The agreement, however, made at *nisi prius* enabled the Supreme Court of *New Brunswick*, in term, to render the judgment which, under the circumstances appearing at the trial, ought to have been rendered there, and the like course is open to this court upon this appeal. Upon the question of privileged occasion, I have nothing to add to the judgment of Mr. Justice *Weldon*, which appears to me to be sufficiently exhaustive upon that point, and where the occasion is privileged the established rule is that the onus lies upon the plaintiff to prove that the defendant, in doing what is complained of, was actuated by an improper motive; that he acted, not from a sense of duty, but under the influence of malicious feelings, that in fact he cloaked his malice under the pretence of acting under a sense of duty; and if there be no such evidence there is nothing to submit to a jury. I can see nothing in the evidence to warrant the submission to the jury in this case, of any question as to the absence of a *bonâ fide* belief by the defendant that he was acting in the discharge of a public duty, or which would justify a finding of actual malice concealed under the cover of a pretence of duty. The jury, in answer to one of the questions submitted to them by the learned judge, have found that the defendant was not actuated by any ill-feeling towards the plaintiff in what passed between them in the private interview, of which evidence was given by the plaintiff himself, although it was in the course of that conversation that the proposition was made, which was relied upon as indicating actual malice under the cover of a pretence of duty, namely, the proposition that, if the plaintiff would admit the truth of the charge, there should be no further action taken in the matter. If there was no ill feeling towards the plaintiff in what passed at this interview, the communicating the result at which the defendant had arrived to the superior

officer of the plaintiff in the office in which the plaintiff was employed, which was clearly a privileged communication, and indeed a duty, could not give a cause of action. In the presence of the finding of the jury, to the effect that in what passed at the interview in the course of which that proposition was made, the defendant was not actuated by ill feeling towards the plaintiff, the sole ostensible ground upon which the action could be attempted to be sustained is removed; and as the agreement at the trial was to the effect that, if the plaintiff was not entitled to retain his verdict upon the evidence given, a non-suit might be entered, the rule should be made absolute in the court below for a non-suit in accordance with that agreement, and a rule also should be issued, for judgment for the defendant on the demurrer to the plea.

1881
DEWE
v.
WATERBURY.
Gwynne, J.

Appeal allowed with costs.

Attorneys for appellant: *Harrison & Burbidge.*

Attorney for respondent: *C. A. Palmer.*

PATRICK COSGRAVE, JOHN COSGRAVE AND LAWRENCE JOSEPH COSGRAVE ..... APPELLANTS;

AND

DAVID BOYLE EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES STEWART DECEASED ..... RESPONDENT.

1881
*March 8.
*April 11.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Death of endorser—Notice of dishonor—33 Vic., c. 47, sec. 1 D.

The appellants discounted a note made by *P.* and endorsed by *S.* in the Bank of Commerce. *S.* died, leaving the respondent his

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

1881

COSGRAVE v. BOYLE.

executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of *S.*, addressed notice of protest to *S.* at *Toronto*, where the note was dated, under 37 *Vic. c.* 47, sec. 1 (D) (1). The appellants, who knew of *S's* death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonor given by the bank, sued the defendant.

Held, reversing the judgment of the Court of Appeal for *Ontario*, that the holders of the note sued upon when it matured, not knowing of *S's* death, and having sent him a notice in pursuance of sec. 1, c. 47, 37 *Vic.*, gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants.

APPEAL from the Court of Appeal for *Ontario*. The action was commenced by the appellants against the respondent on the 10th of April, 1879, to recover the sum of $500, due by the respondent as the executor of *James Stewart*, endorser of a promissory note, made by one *Margaret Purdy* to the appellants.

There was but one count in the appellants' declaration, viz.: The statutory count against the endorsers.

The respondent pleaded among other pleas, that there had not been due notice of the dishonor of the note.

The case was tried at *Toronto* by Mr. Justice *Cameron*, without a jury, and a verdict entered for the defendant on this plea. This verdict was sustained by the majority of the Court of Queen's Bench.

On appeal to the Court of Appeal for *Ontario*, the judges were equally divided for and against the ap-

(1) 37 *Vic.*, c. 47, sec. 1: Notice of the protest or dishonor of any bill of exchange or promissory note payable in *Canada*, shall be sufficiently given, if addressed, in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature, on such bill or note, designated another place, when such notice shall be sufficiently given, if addressed to him, in due time, at such other place; and such notices, so addressed, shall be sufficient, although the place of residence of such party be other than either of such before mentioned places.

pellants, and so the judgment of the majority of the Court of Queen's Bench was allowed to stand.

The note was made and dated at *Toronto*, November 5th, 1878, payable four months after date, and was therefore due on the 8th of March, 1879. On this latter date it was protested for non-payment by the notary of the Canadian Bank of Commerce, *Toronto*, and notices duly mailed to Mrs. *Margaret Purdy* (the maker), *Toronto*; Mr. *James Stewart* (endorser), *Toronto*; Messrs. *Cosgrave & Sons* (appellants), *Toronto*.

James Stewart died on the 5th of December, 1878, one month after the note was made, and three months before it fell due, and the respondent is the executor of *James Stewart*.

Stewart did not designate under his signature on the note his Post Office address, which appears to have been *Lansing*, a village near *Toronto*.

Neither the Bank of Commerce nor their notary knew of the death of *Stewart* when the note matured, and the notice of protest was on the 8th of March, 1879, addressed to *Stewart* at *Toronto*, pursuant to 37 *Vic.* c. 47, sec. 1.

Mr. *O'Sullivan* for appellants:

The sole contention in this case is in reference to the third plea: had the respondent due notice of dishonor of the note in question? It is admitted that neither the bank, who were the holders of the note for value, nor the notary, knew that the indorser was dead when the note fell due on the 8th of March, 1879. They gave a sufficient notice to bind the indorser and his representatives, and such notice enures for the benefit of all parties (1).

The appellants purchased the note for value from the bank, and they are entitled to all the remedies which

(1) 37 *Vic.* c. 47, sec. 1., and Cons. Stats. C. c. 5, sec. 6, sub-sec. 8 and Cons. Stats. U. C. c. 2. sec. 12.

1881

COSGRAVE v. BOYLE.

the bank could claim. The American case relied on by the court below of *Beale* v. *Parrish* (1), I think, is quite distinguishable from this case. The plaintiffs in that case misled the owners of the note. Of course, if the bank had inquired from the appellants and they had misled them, it would be a different case. But this was not the case, and I submit no authority can be found which will show that it was the duty of appellants to go and inform the bank that the endorser was dead.

The learned counsel relied on *Bigelow* on Bills (2): *Ex parte Baker in re Bellman* (3); *Merchants' Bank* v. *Birch* (4); *Beals* v. *Peck* (5).

By the Civil Code of *Lower Canada*, art. 2328, notice of protest sent to the residence, or usual place of business of a deceased endorser, is good, and this taken in conjunction with the provisions of 37 *Vic.*, c. 47, sec. 1, would render the notice sent in the present case good, wherever the code is in force. In the absence of direct English or Upper Canadian authority, this is an argument in favour of their contention.

Dr. *McMichael*, Q.C., respondent:

The question for the consideration of the court is, whether the notice addressed to Mr. *James Stewart*, *Toronto*, after the death of *James Stewart* (*Toronto* never having been his place of residence and not being his last place of abode, and not being the post-office nearest to his last place of abode), was sufficient to charge his executor. Previous to the Act of 1874, cap. 47, sec. 1, it would not have been sufficient. That statute altered the law in this respect.

Had *Stewart* been alive at the time the notice was sent, the notice would have been sufficient by virtue

(1) 20 N. Y. 408.
(2) P. 282.
(3) 4 Ch. D. 795.
(4) 17 Johns. 25.
(5) 12 Barb. 251.

1881

COSGRAVE v. BOYLE.

of the statute, because it would have been addressed to the party to the note entitled to the notice, to the place where the note was dated. But it cannot be said that a deceased man was the man entitled to such notice, and there being at the time such notice was given an executor, he was the party entitled to the notice and it should have been addressed to him. If the statute was not complied with, then the usual principles as to notice must prevail.

The appellants had knowledge of the death of the party, and it was their duty to let the bank know or send notice themselves and not rely on the statute, which could not avail them. The appellants, who were subsequent endorsers, had knowledge, and not giving it to the holder, they cannot avail themselves of a notice given by the bank. For when the bank was paid, the contract with the bank was at an end, and the whole thing is transferred to the other endorser, who must rely on his rights; and the common law provides that notice must be sent to the executor unless the party is ignorant of his death.

The argument may be summed up thus:

The statute does not repeal or displace the rules of the common law. It declares that the taking certain steps shall be regarded as compliance with it. These steps have not been taken, and therefore the plaintiffs' rights and liabilities are under the common law. When notified of the dishonour of the note the burden was cast upon them, if they wished to hold the next endorser liable, to do what the law required to make him liable. No one was bound to do it for them. If they chose to rely upon another, and he neglected, they must take the consequence.

They could have complied with the law, but neither they, nor any one for them, have done so.

1881

COSGRAVE v. BOYLE.

Chapman v. *Keane* (1); *Harrison* v. *Ruscoe* (2); *Willis* v. *Bank of England* (3); and *Parsons* on Notes and Bills (4).

Mr. *O'Sullivan* in reply.

RITCHIE, C. J.:—

[After stating the facts of the case and reading the 1st sect. of c. 47, 37 *Vic.*, D., proceeded as follows]:—

I think the holder, the *Canadian Bank of Commerce*, fulfilled its duty when it sent notice to the place at which the note was dated, being the place which the law has fixed as the place at which the indorser, or whoever should be a party to the note, was to be found for the pnrpose of receiving notice. The law may be said to have domiciled the bill there so as to entitle the holder to treat that as the place to which a notice of dishonor should or might be sent to whomsoever should be or become a party to the note, whether such party should be an indorser or a representative of an indorser, who, by reason of the death of the indorser, became, as his representative, a party to the note. The statute was passed, in my opinion, to relieve holders from the difficulties and risks so likely to arise from the necessity of observing the very strict technical rules in regard to notices of dishonor, and instead of requiring such notices to be sent to the residence or place of business of drawers or indorsers of negotiable instruments, and imposing on holders the burthen of discovering the proper addresses to which notices should be sent, substituted, in lieu of the implied contract in respect thereto, a statutory contract by which the holder was relieved from all difficulty and risk, by enacting that all notices should be sufficient, if addressed in due time to the party upon whom liability was to be fixed, at the place at which the note was dated,

(1) 3 Ad. & El. 193.
(2) 15 M. & W. 231.
(3) 4 Ad. & El. 21.
(4) p. 627.

unless another place is designated. This provision, wholly irrespective of previously existing requirements as to notice, arbitrarily fixed as by agreement between the parties that notice sent to the place of the date of the instrument should be sufficient.

The fallacy in this case, I humbly think, was in supposing that there was *omission* on the part of the holders, the bank, or that they were entitled to recover by reason of their ability to show a sufficient excuse for such omission, that is want of knowledge of the indorser's death, and that the present plaintiffs, not having that excuse, are endeavoring to avail themselves of the *excuse* of the bank; but such is not, in my opinion, the case.

The bank, in my opinion, gave *due notice*, and might have declared against defendant, alleging that the defendant had had due notice of presentment and dishonor, without alleging an omission to give due notice and matter of excuse for such omission; and the evidence of the notice here given would, in my opinion, have sustained such an allegation of due notice, and a liability, so regularly established, I think enured to the benefit of the other indorsers.

When the plaintiffs paid this note to the bank, and the bank transferred the note by delivery to the plaintiffs, they transferred their complete title and substituted the holders to their rights as against all parties so duly notified in strict accordance, in fact in literal compliance, with the provisions of the statute.

The right of the testator was to receive a notice of dishonor at the place of date, the right of the holder was to fix a liability by a notice addressed there. On the death of the testator, his representative had, I think, the same right his testator had, no other and no greater. If the testator could not insist on the holder addressing the notice elsewhere than to the place where

1881

COSGRAVE v. BOYLE.

Ritchie, C.J.

the note was dated, I do not think his representative can impose a larger or more extended obligation on the holder. The indorser might have designated another place, it was optional with him, or he might, as is often done, have waived notice altogether; in either of which cases I fail to see how his representative can claim to occupy any other or better position than the original contractor. I am, therefore, not prepared to say that if the bank had known of the death of *Boyle*, a notice addressed as this was would not have been sufficient, but, as they did not know, the notice, in my opinion, was clearly good, and plaintiffs, now standing in the shoes of the bank, are clothed with all the rights the bank had against indorsers prior to the one so taking up the note.

I think this conclusion is not only in the interest of trade and commerce, as simplifying the dealings with and the duty cast on holders of bills or notes, but is giving effect and carrying out the policy of the Dominion statute, in reference to which, I think, it may be said, that no lawyer who has enjoyed a large mercantile practice but must have witnessed manifold failures of justice arising from non-observance of, or difficulties in connection with, the strict technical rules relating to notices of dishonor, and must appreciate the expediency and wisdom of an enactment such as this, and, therefore, I think it is our duty to give this legislation full force and effect, certainly not to hamper or unnecessarily limit its operation.

STRONG, J.:—

By the statute of the Dominion, 37 *Vic.*, c. 47, sec. 1, it is enacted that:

Notice of the protest or dishonor of any bill of exchange or promissory note, payable in *Canada*, shall be sufficiently given, if addressed in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature on such bill or note, desig-

nated another place, when such notice shall be sufficiently given if addressed to him in due time at such other place; and such notices so addressed shall be sufficient, although the place of residence of such party be other than either of such before-mentioned places.

There was no designation in the promissory note upon which this action is brought of any other place than that at which the note was dated as the residence of the endorser, the testator of the present defendant.

I regard this enactment as creating a statutory presumption, not to be controverted, that the place of residence of an endorser is, in the absence of any designation of another place being written under the endorsement, at the place at which the bill or note is dated. This note was dated at *Toronto*, and we are therefore to presume that the residence of the indorser was at *Toronto*.

In the absence of any decisions upon the point in our own courts as well as in *England*, we may have recourse to American authorities to ascertain what constitutes sufficient notice in case of the death of an indorser at the maturity of a note, and we find it established by high authority that if the holder is, without negligence on his part, ignorant of the death of the indorser, a notice addressed to the indorser and sent to his last place of residence is sufficient

In *Daniel* on negotiable instruments (1) the law is thus stated:

> It is likewise sufficient, if notice be addressed to the deceased, when, without negligence, the holder is not aware of his death;

and the cases of *Barnes* v. *Reynolds* (2), and *Maspero* v. *Pedexlaux* (3), *Merchants Bank* v. *Birch* (4), and *Planters' Bank* v. *White* (5), are decisions to that effect.

(1) 2nd Ed. sec 1001.
(2) 4 How. (Miss.) 114.
(3) 22 La. 227.
(4) 17 Johns. 25.
(5) 2 Humph. 112.

1881

COSGRAVE v. BOYLE.

Strong, J.

In *Parsons* on notes and bills (1) we find the same doctrine enunciated. He says:

> If the death is not known, and nothing appears to show that the sender ought to have known this fact, notice addressed to the deceased endorser will be sufficient.

In the present case the notice was sent through the post, addressed to the deceased endorser at *Toronto*, where the note was dated, and it is not even suggested, nor could it have been suggested, that there was any negligence on the part of the bank in not discovering the fact of death and the proof of the will. Therefore, according to these American authorities the bank did all that was requisite to charge the executor, so far as to make him liable to them.

The only English authority which in any way touches the question is the case of *Ex parte Baker in re Bellman* (2), in which it was held that notice of dishonor sent to a bankrupt after the bankruptcy was sufficient to charge the assignee, and to entitle the holder to prove against the endorser's estate for the amount of the bill. *James* L. J., in this case says:—

> It does not appear to me that any good reason can be suggested why the holder of a bill should give notice of dishonor to any one but the persons whose names he finds upon the bill.

This I regard as an authority strongly in the appellants favor, inasmuch as it shows that in this, as in all questions of commercial law, the courts will, in the absence of direct authority, be influenced by considerations of mercantile convenience. Now, in the present case, were we to say that the law requires the holders of negotiable instruments, at their peril, to ascertain the fact of an endorser's death, and the appointment of his personal representatives, we should be manifestly laying down a rule which it would be impossible for bankers and other large holders of commercial paper to

(5) Vol. 1, p. 501. (2) 4 Ch. D. 795.

1881

COSGRAVE v. BOYLE.

Strong, J.

comply with, and the interference of the legislature would be indispensable to make such an alteration in the law as would enable them to carry on their business with safety. I think, therefore, we may well adopt the rule of the American courts already stated, and determine that the notice given by the Bank of Commerce was sufficient to make the defendant liable to the bank.

Next arises the question, are the plaintiff's entitled to avail themselves of the notice given by the bank? There are numerous general dicta that a notice sufficient to entitle the actual holder at the time of maturity to recover enures to the benefit of a subsequent party who may take up the paper. In *Beale* v. *Parish* (1), which is relied on in the judgment of some of the learned judges in the court below, it was said that there can be no subrogation to a right arising out of an excuse for omitting to give notice founded on an honest ignorance of the holder of the fact of death. But it may be remarked that when notice is given, under the circumstances of the present case, the liability is not put on the ground that the holder has excused himself from giving notice, but the notice is treated as sufficient. If then, where the excuse of notice is a personal privilege of the holder, the right of a subsequent indorser to be substituted does not apply; that doctrine can have no application to the present case.

But it appears plain on principle that if the right of action is once fixed and absolute in the holder a subsequent indorser taking up the paper is subrogated to his rights.

It has been shown, under the first head, that the right of action is vested in the holder so soon as he does all that the law requires him with his means of knowledge to do. Then no matter how the right of action which the holder has acquired against the prior indorser has

(1) 20 N. Y. 408.

1881

COSGRAVE v. BOYLE.

Strong, J.

arisen, on payment by the subsequent indorser he ought to be subrogated. The principle of subrogation always applies in favor of a surety. A party liable in that character, paying, is entitled to all securities and rights of action held by and vested in the creditor (1). Then, every indorser is a surety for those liable before him. Next, the holder's right of action against the first indorser is distinct from that which is satisfied and extinguished by the payment made by the second indorser. The second indorser paying only satisfies the several and distinct right of action of the holder against himself, and if the holder retains the note in his possession he may, after payment by the second, sue the first indorser and recover the full amount of the note. This is established by the elaborate judgment of Lord *Truro* in *Jones* v. *Broadhurst* (2).

The holder recovering under such conditions will, however, be held to be a trustee for the second indorser, who has paid, and the latter may recover from him as for money had and received. If, however, instead of retaining the instrument he hands it over to the second indorser, the distinct right of action which the holder retained against the first indorser, so long as he held the paper, will, if the note is endorsed in blank, pass with it.

Formerly, at common law, a title gained by subrogation could not be worked out in the case of transfers of rights of action not arising on negotiable instruments, and the aid of equity was indispensable, but where the liability was attached to a negotiable instrument, the title to which passed by delivery or endorsement, the intervention of equity was not required.

(1) See *Duncan Fox & Co.* v. *North and South Wales Bank*, 11 Ch. D. 88.

(2) 9 C. B. 173. It is said in *Cook et al* v. *Lister;* 13 C. B. N. S. 586; that although this judgment was delivered by *Cresswell*, J., it was written by Lord *Truro*.

From these considerations, therefore, I deduce the conclusion that the bank, after payment by the plaintiffs, still retained a right of action against the defendant, by means of which they might have enforced payment of the full amount of the note, and that this right of action passed with the note on its delivery to the plaintiffs.

Further, this doctrine of subrogation is now recognized by statute, and the indorser paying could insist upon all rights of action against parties liable before himself being expressly transferred, if they did not pass by the mere delivery of the note endorsed in blank. And under the procedure in the province of *Ontario*, established by the Administration of Justice Act, the plaintiffs are entitled to avail themselves in this action of all their equitable rights.

We are also to consider that the plaintiffs, by suing in the name of the bank as their trustee, could have recovered on the strength of the bank's title. To me there is nothing either illogical or inconvenient in holding that they became substituted to this same right of action when they retired the note. I am of opinion that the appeal should be allowed, and that judgment should be entered in the Court of Queen's Bench in favor of the plaintiffs for the amount of the note and interest, and that the respondent must be ordered to pay the costs in this court, as well as in the Court of Appeal.

FOURNIER, J., concurred.

HENRY, J.:—

I entirely concur in the views that have been expressed in this case by the learned Chief Justice and my brother *Strong*. It is the holder of a note which becomes dishonored who is always expected to give all

1881

COSGRAVE v. BOYLE.

Henry, J.

the requisite notices. When a note is dishonored it is protested, and the duty of the party protesting, or of the party for whom the protest is made out, is to give the notice to all the parties that are liable. An intermediate or immediate endorser has the right to assume that the holder of the note has given all the notices that are required. The indorser of the note has the right to conclude that that being done the law has been complied with, and all that is necessary was done for the bank to recover, and therefore when he is called upon subsequently by the bank for payment, he has, according to the views which are laid down here and which are applicable to this case a right to sue for this note by subrogation when he pays the note to the bank. I have no doubt that is the law, and that such a judgment will further the commerce and trade of the country, and that a contrary judgment would have a contrary effect. I am glad to find that the law will enable this court to come to a conclusion so favorable to the trade of the country, and at the same time sufficient to protect the rights of all the parties to such bills and notes. I think the notice posted by the Bank quite sufficient in this case.

GWYNNE J.:—

The right of the plaintiffs to recover in this action depends upon the right which the Bank of Commerce, who were the holders of the promissory note declared on when it matured, would have had, if they had been the plaintiffs, to recover against the defendant upon issue joined to a plea traversing an averment in the declaration that the defendant had due notice of dishonor of the note by the maker. There is no express authority in the English courts upon the subject, neither is there in *England* an act of parliament of the nature of the act in force here—viz.: 37 *Vic.*, c. 47, s. 1. The object of that act plainly was, as it appears to me, to

compel the parties to bills of exchange and promissory notes, payable in *Canada*, to designate under their hands, upon such bills and notes, their domicile, for the purpose of receiving notice of dishonor thereof, by making the place where such bill or note upon its face purported to be drawn or made to be the domicile for such purpose of all the parties thereto not so designating their domicile for that purpose; and the effect of the act, as it appears to me, is to make a notice of dishonor, mailed by the holder in due time to any party to such note, at the place designated, if any be designated or mailed to the address of such party at the place where the bill or note purports to have been drawn or made, if none be designated, equivalent to the delivery of such notice at the actual domicile or residence of such party. If, therefore, delivery by the Bank of Commerce of notice of dishonor in due time after maturity at the last actual domicile or place of residence of a deceased payee would have been a good notice, entitling them to recover against his personal representatives under the circumstances appearing in evidence, it will be equally good although only mailed and addressed to the payee by name at *Toronto* where the note purports to have been made. Now, in the absence of authority in *England*, we find that in *Stewart's Exors vs. Eden* (1), it was held in 1804 by the Supreme Court of the state of *New York*, that notice directed to and inserted in the key-hole of the last dwelling house which was shut up of a deceased endorser was good notice and well served, the holders having been ignorant of his death. This doctrine was re-affirmed in the same court in 1819, in the *Merchants Bank* vs. *Birch* (2), and again in 1843, in *Willis* vs. *Green* (3), and by the Supreme Court of the

(1) 2 Caines 121.
(2) 17 John. 25.
(3) 5 Hill 243.

1881

COSGRAVE v. BOYLE.

Gwynne, J.

state of *Pennsylvania* it was held, upon the authority of the above cases in *Lendermen's Executors* vs. *Guldenchal*, in appeal (1), that in the case of the death of an endorser of a promissory note before its maturity, if his decease be unknown to the holder, it is sufficient, in order to charge his estate, to direct notice of non-payment to the deceased endorser, by name, at the post office nearest his last place of residence; and these cases proceed upon the ground, that notice so given is, under the circumstances, good notice, not that the circumstances constitute a legal excuse for the omission to give good notice.

Upon the authority of the above cases and upon the true construction of the statute, in the absence of any express authority in *England* to the contrary, it must, I think, be held that if the *Bank of Commerce* had been plaintiffs, the evidence of the mailing of the notice of dishonor to the address of the deceased payee, at *Toronto*, where the note upon its face purports to have been made, was a good and sufficient notice, entitling the bank to have recovered on the issue traversing the averment in the declaration of notice of dishonor; in this view, the case of *Beale* vs. *Parish* (2) has no application, and the notice having been a good and sufficient notice, given by the holders at maturity to the payee, inures to the benefit of the plaintiff, notwithstanding that he was aware of the decease of the payee; a contrary decision would defeat what I cannot but take to have been the object of the statute, namely: To relieve holders of over-due notes and bills from all anxiety and difficulty arising by reason of their being ignorant of the actual place of residence of the parties on the note or bill, or of the fact appearing here, namely, the decease of the party to whom the notice was addressed.

(1) 34 Penn. 55. (2) 20 N. Y. 408.

1881

COSGRAVE v. BOYLE.

Gwynne, J.

The appeal must, therefore, be allowed with costs, and the rule in the court below be made absolute with costs for the entry of a verdict for the plaintiffs, pursuant to the leave reserved, for $409.28, with subsequent interest.

Appeal allowed with costs.

Attorneys for appellants: *O'Sullivan* and *Perdue.*

Attorneys for respondent: *McMichael, Hoskin & Ogden.*

1881

*Feb'y. 23.

*Mar. 3.

WILLIAM S. SHAW.....APPELLANT;

AND

KENNETH McKENZIE *et al*.... .....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

Capias—Affidavit—Art. 798 *C. C. P.—Want of reasonable and probable cause—Damages.*

S., a debtor resident in *Ontario*, being on the eve of departure for a trip to *Europe*, passed through the city of *Montreal*, and while there refused to make a settlement of an overdue debt with his creditors, *McK. et al*, who had instituted legal proceedings in *Ontario* to recover their debt, which proceedings were still pending. *McK. et al* thereupon caused him to be arrested, and *S.* paid the debt. Subsequently *S.* claimed damages from *McK. et al* for the malicious issue and execution of the writ of *capias*.

McK. et al, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent *McK.*, one of the defendants,

---

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

1881

SHAW
v.
MCKENZIE.

for his belief that the appellant was about to leave the Province of *Canada* were as follows:—"That Mr. *P.*, the deponent's partner, was informed last night in *Toronto* by one *H*, a broker, that the said *W. J. S.* was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and deponent was himself informed, this day, by *J. R*, broker, of the said *W. J. S's* departure for *Europe* and other places." The appellant *S.* was carrying on business as wholesale grocer at *Toronto*, and was leaving with his son for the *Paris* Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by *McK.*, that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that *S.* would not pay him, that he might get his money the best way he could."

Held: that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side), affirming the judgment of the Superior Court, by which the plaintiff's action was dismissed.

The facts and pleadings of the case sufficiently appear in the head note, and the judgment of Mr. Justice *Taschereau* hereinafter given.

Mr. *McLaren* for appellant:

The facts of the case are, that a dispute having arisen between the parties as to the date from which the four months for the payment of the teas purchased by appellant from the respondents should run, the latter took a suit in *Ontario*, which was contested as premature. When appellant was about to take the steamer on his way to visit the *Paris* exhibition, he was arrested at

1881

SHAW v. MCKENZIE.

Montreal on a writ of *capias*, issued under article 798 C. C. P. Now, this affidavit is plainly insufficient to justify the issuing of a *capias*, and all the judges have admitted that it was insufficient, and that the *capias* could have been quashed on the ground that *Mackenzie* should have specially stated in his affidavit his reasons for believing that *Shaw's* leaving *Canada* was "with intent to defraud his creditors in general and the plaintiff in particular." The only reason given was that the appellant was about leaving the province.

It is well established in the urisprudence of *Quebec* that leaving the province is not of itself a presumption of an intent to defraud, but that the affidavit must contain reasons sufficient to satisfy the court that the debtor is actually about to leave with a fraudulent intent (1). We contend that the affidavit clearly establishes that the deponent did not state at the time any probable or reasonable cause, as he was bound to do, for issuing a *capias*, and that when the trial took place, respondents showed conclusively that they had no other reason for arresting appellant but the one they had stated in their affidavit, and, therefore, they were liable in damages for the wrongful issue and execution of the *capias*.

There was some evidence of what took place between *Shaw* and *Mackenzie* after the issue of the *capias*, but that evidence cannot be received for two reasons: first, it took place after the *capias*, and therefore cannot be a justification; and, secondly, such evidence is inadmissible, as, by the law of *Quebec*, a party to a suit cannot make evidence for himself (2), and any statement made by him in his own favor goes for nothing.

There was nothing secret or suspicious about *Sha*

(1) See *Hurtubise* v. *Bourret*, 23 L. C. Jur. 130; *Henderson* v. *Duggan*, 5 Q. L. R. 364; *Laroque* v. *Clarke*, 4 L. C. R. 402; *Renaud* v. *Vandusen*, 21 L. C. J 44.

(2) C. C. P. Art. 251.

1881

SHAW v. MCKENZIE.

departure. He was making a usual trip to *Europe*, and the high standing of *Shaw's* firm in *Toronto*, as proved by several witnesses, was evidently well known to respondents, who gave them four months credit for over $2,400 without question on this the first transaction they had with them; and it was surely incumbent on them to have obtained some definite and reliable information as to some fraudulent, or, at least, suspicious act of appellant, before taking such an extraordinary step as the arrest complained of. The arrest was public, and appellant suffered very serious damage, and appellant respectfully submits that under the circumstances and proof of record he is entitled to substantial damages, and confidently asks the allowance of his present appeal.

Mr. *Rose* followed on behalf of the appellant and relied on the following authorities:

1. As to the construction of the words "leave *Canada*." *Larchin* v. *Willan* (1), decided under 1 and 2 *Vic.*, c. 110, sec. 3, determines these words not to include a temporary absence.

2. As to the "intent":—See remarks of *James*, L. J.; and *Jessel*, M. R., *Ex parte*, *Gutierrez* (2); *Butler* v. *Rosenfelt* (3); *Freer* v. *Ferguson* (4); *Bowers* v. *Flower* (5), in which case intent to defraud was not drawn from a similar expression, as to "getting the money, if the creditor could"; *Damer* v. *Bushby* (6), is the leading practice case in *Ontario*, in *capias* actions.

As to "reasonable and probable cause:"—See *Hagarty* v. *G. T. R.* (7), citing *Broad* v. *Ham* (8); *Johnston* v. *Sutton* (9); *Daniels* v. *Fielding* (10); *Lyons* v. *Kelly* (11);

(1) 4 M. & W. 351.
(2) 11 Ch. D. 301.
(3) 8 U. C. P. R. 176.
(4) 2 C. L. Ch. Rep. (Ont.) 144.
(5) 3 U. C. P. R. 66.
(6) 5 U. C. P. R. 356.
(7) 4 U. C. Q. B, 321.
(8) 5 Bing. N. C. 725.
(9) 1 Term Rep. 544.
(10) 16 M. &. W. 199
(11) 6 U. C. Q. B. 279.

1881

SHAW v. MCKENZIE.

Ruttan v. *Pringle* (1); *Thorne* v. *Mason* (2); *Torrance* v. *Jarvis* (3).

As to its not being necessary to set aside the writ :— See *Eakins* v. *Christopher* (4); *Bishop* v. *Martin* (5); *Griffith* v. *Hall* (6).

As to subsequent knowledge not availing to support allegation of reasonable and probable cause:—See *Crandell* v. *Crandell* (7).

Mr. *Doutre*, Q. C., for respondents :

The learned counsel stated there was a disputed debt between the parties; the fact is there was an overdue debt, and after the conversation which took place before the arrest, it cannot be said that the respondents, who were going to lose $2,000 had no reasonable and probable cause to cause the arrest. What guarantee had the respondents of the early, or even remote, return of the appellant? He was taking his son with him; his wife could have followed him at any time; what more was needed to justify the issue of the *capias*? It was for the appellant, and he has completely failed, to show the absence of probable cause for the issue of the *capias*. The respondents, on the other hand, proved that the credit of the appellant was at that time very much shaken; that he was obliged to buy for cash, and that but a few days before the issue of the *capias*, an assignee had been instructed to collect an account from him for debt contracted in *Montreal*.

Then I submit also that appellant in paying the amount, virtually assented and acquiesced in the proceeding of the respondents, to secure payment of their debt. In giving security he would have reserved the

(1) 1 U. C. C. P. 249.
(2) 8 U. C. Q. B. 239.
(3) 13 U. C. Q. B. 122-124.
(4) 18 U. C. C. P. 536.
(5) 14 U. C. Q. B. 418.
(6) 26 U. C. Q. B. 97.
(7) 30 U. C. Q. B. 513.

1881

SHAW v. MCKENZIE.

right of contesting the *capias*, whilst he renounced the right by the payment without reserve. The learned counsel cited *Lapierre* v. *Gagnon* (1); *Baker* v. *Jones* (2); *McIntosh* v. *Stevens* (3); *Lajeunesse* v. *O'Brien* (4); *Prentice* v. *Harrison* (5); *Huard* v. *Dunn* (6).

Mr. *McLaren* in reply.

The judgment of the court was delivered by

TASCHEREAU, J.:—

This is an appeal from a judgment of the Court of Queen's Bench for the province of *Quebec*, affirming the judgment of the Superior Court, by which the plaintiff's action was dismissed.

The plaintiff, present appellant, claims damages from the respondents for the malicious issue and execution of a *capias* against him, the plaintiff, at *Montreal*, in July, 1878.

The defendant's first plea to this action is that the plaintiff having, when arrested, and without protest, paid the sum demanded from him, he has thereby acquiesced in the arrest and waived all his rights to the present action. All the judges in the two courts below have dismissed this plea, and I cannot see that their decision on this point can be controverted. A payment under duress can never be construed into an acquiescence or operate as a waiver. In the case of *Dennis* vs. *Glass* (7), a plea of this nature was put in by the defendant, but the Court of Appeal mulcted him in damages without even noticing this contention on his part. The case of *Lapierre* vs. *Gagnon* (8) is totally different from the present case, and cannot help the respondents.

(1) 8 Rev. Lég. 727.
(2) 17 U. C. C. P. 365.
(3) 9 U. C. Q. B .235.
(4) 5 Rev. Lég. 24.
(5) 7 Jur. 580.
(6) 3 Rev. Lég. 28.
(7) 17 L. C. R. 473.
(8) 8 Rev. Lég. 727.

The defendants' other pleas amount to the general issue and to a plea of justification, alleging that when they arrested the appellant they acted with reasonable and probable cause.

Of course, it was incumbent upon the appellant to prove the allegations of his declaration, and to give *primâ facie* evidence of a negative character to a certain extent; that is, that the respondents had had no probable cause to arrest him. In my opinion, this he has done to an extent seldom possible in such actions, and in the proof of a negative nature. I think, moreover, that the respondents, in the evidence they have adduced in support of their plea, far from establishing their contentions, have, on the contrary, added largely, in my opinion, to the strength of the appellant's case. In fact, not only in this case, but also in their original case against the appellant, and by the very terms of their own affidavit, upon which they arrested the appellant, it is clear and apparent that the respondents were and are under the impression that the fact alone of the departure of their debtor from the country was a sufficient ground to arrest him. Now, that is not the law.

Under article 798, C. C. P., the affidavit required to obtain a writ of capias must show "that the defendant has reason to believe, and verily believes, *for reasons specially stated in the affidavit*, that the defendant is about immediately to leave the Province of *Canada with intent to defraud* his creditors in general or the plaintiff in particular."

McKenzie's affidavit, under which the capias in question here was issued, is as follows:—

That deponent has reason to believe, and verily believes, that the said *William J. Shaw*, one of the defendants, who is presently in the said city of *Montreal*, is about to leave immediately the province of *Canada*, and Dominion of *Canada*, with intent to defraud his creditors in general and the plaintiffs in particular, and

1881

SHAW v. MCKENZIE.

Taschereau, J.

that such departure will deprive plaintiffs of their recourse against the said *William J. Shaw*; that the reasons of the said deponent for stating his belief as above, are: that Mr. *Powis*, the deponent's partner, was informed last night in *Toronto*, by one *Howard*, a broker, that the said *W. J. Shaw* was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and deponent was himself informed, this day, by *James Reid*, broker, of the said *W. J. Shaw's* departure for *Europe* and other places; and further deponent saith not,

Now, where are, in this affidavit, the reasons why the deponent construes *Shaw's* departure for *Europe* as done or projected with an intent to defraud? The deponent does not even attempt to give any. The existence of the debt and the departure from the country are, for him, sufficient to constitute an intent to defraud. This affidavit shows it clearly: the evidence in the present case corroborates it. *Howard* and *Reid*, the two persons who told *McKenzie* that *Shaw* was going to *Europe*, and whose names he relies upon in his affidavit, both swear positively that they never said anything to *McKenzie* which could lead him to believe that *Shaw* was leaving for good, or with any attempt to defraud any one. Here is what *Reid* says on the subject:

Question. Did you see either of the partners.

Answer. I saw Mr. *Mackenzie* and I think Mr. *Powis* also.

Question. Did you have any conversation about Mr. *Shaw*?

Answer. Yes.

Question. Will you please state what was said between you and them about Mr. *Shaw* on that occasion?

Answer. I think I mentioned to Mr. *Mackenzie* that I had heard Mr. *Shaw* was on his way to *Europe*, that he was expected to-day, that I had a letter from *Toronto* to that effect, that he was passing through the city on his way to the old country.

Question. Your information had come in a letter from *Toronto*?

Answer. Yes.

Question. Was your information to the effect that he was leaving the country for good, or only going on a trip?

Answer. Nothing to that effect.

Question. Nothing to the effect that he was leaving for good?

Answer. No; O certainly not.

1881

SHAW v. MCKENZIE.

Taschereau, J.

Question. Your information then was that he was taking a summer trip to *Europe?*

Answer. Exactly, on business or pleasure, I do not know which.

Question. Did you say anything to *Mackenzie, Powis* & Co., that would lead them to believe, or give them reason to believe, that Mr. *Shaw* was leaving the country for good?

Answer. I think not.

Question. Do you think any reasonable man could have inferred that from what you stated?

Answer. No; I think not.

Howard does not even remember to have told to *Powis* that *Shaw* was leaving for *England*, but is positive that if he did he said nothing that could induce *Powis* to believe that anything was wrong, or could be suspected, in this trip to *Europe*.

Shaw, at the time of the arrest, was on his way to *Europe* to attend the *Paris* exhibition with his son. He was carrying on a large wholesale grocery business in *Toronto*, where he had left his partner in charge of the business. His wife and another child he had also left in *Toronto*. He was in the habit of crossing the ocean almost every year. Far from trying to leave the country on this occasion furtively or secretly, it is in evidence that he was entertained by a number of the business men of *Toronto* at the club in that city before leaving; that his bankers and his business friends all knew of his intended trip; that for a month or two he had been unwell, and had been advised by his friends to leave his business for some time and recruit; that he was leaving for a couple of months for his health and recreation. Moreover, it is well known that any one in *Toronto* wishing to leave the country to defraud his *Montreal* creditors could do so without coming to *Montreal*, stopping over there for whole day, with his name publicly registered in one of the leading hotels of the city, and informing every one whom he meets of his leaving, as the appellant did on the occasion referred to.

1881

SHAW v. MCKENZIE.

Taschereau, J.

Of course, the present case is not concluded by *Shaw* proving that he was not leaving with the intent to defraud. Had the respondents reasonable and probable cause to believe him to be so leaving with such intent? is the question here.

The respondents themselves, examined as witnesses in this case, admit, as clearly as possible, that the fact by itself of *Shaw's* departure was for them a departure with intent to defraud. There is not a word of evidence that any one ever informed them of any such intent in *Shaw's* departure. *Powis*, one of them, was in *Toronto*, the day before. He was informed that *Shaw* intended to leave that evening. He is asked, on his examination as a witness in this case:

Question. Did you have any knowledge of any of the circumstances of his going to *England?*

Answer. I did not.

Question. Did you take any pains to inquire about whether he was going for good, or going on a trip, or to get information?

Answer. I took this much pains, that I was standing nearly all the forenoon around the *St. Lawrence* Hall, trying to find him, until about six o'clock in the evening.

Question. Had you any idea that Mr. *Shaw* was going to remain in *England*, to live there?

Answer. I did not know where he was going.

Question. Did you take any means to find out?

Answer. Nothing special.

Question. When you were in *Toronto*, on the 18th, and heard that he was coming down on the train that night on his way to *England*, did you take any means to find out whether he was leaving his business, breaking up his establishment, and going to *England* with a view to remaining there?

Answer. I did not.

And *McKenzie*, who made the affidavit, being examined, answers as follows:

Question. Did you ask your partner whether Mr. *Shaw* was going there on a trip or not?

Answer. No, sir.

Question. What was your idea, that Mr. *Shaw* was going there to live or going there on a trip?

Answer. I don't know that I formed any idea of that nature at all.

That is admitting clearly that they never took the trouble to enquire at all about it. If *Powis* had, every one in *Toronto* would have told him that *Shaw* was going to *Europe* for his health and on a pleasure trip, and that he intended to return within two or three months. Now, as laid down by the Court of Exchequer Chamber in *Perryman v. Lister* (1), where there is a ready and obvious mode of ascertaining the truth, and the opportunity of doing so is neglected in such an action as the present, the absence of enquiry is an element in determining the question of the presence or absence of reasonable and probable cause. This case, it is true, was reversed in the House of Lords, *Lister v. Perryman* (2), but on the ground that the plaintiff in the case, having acted upon the information of a trustworthy informant, he was not obliged to make any other enquiry about it before acting on the information he had received. Here, there is nothing of the kind. The respondents had never received any information of *Shaw's* intention to defraud his creditors by leaving the country to settle abroad. They have not attempted to prove any. The evidence adduced by them tends to prove that *Shaw* & Co. in some instances, some eight or nine years before, had not promptly met their engagements, or had been refused credit. These facts have but little bearing on the case. For some of them, it is not even proved that the respondents were ware of them when they issued the capias against *Shaw*. It requires no authority to demonstrate that subsequent knowledge cannot support an allegation of reasonable and probable cause, that one cannot excuse, for instance, or explain, an act done in July, by facts which came to his knowledge only in August.

(1) L. R. 3 Exch. 197. (2) L. R. 4 H. L. 521.

1881

SHAW v. MCKENZIE.

Taschereau, J.

The respondents seem to say in this case: "Well, it may be that the reasons we gave in our affidavit to arrest *Shaw* were insufficient, but we had other and better reasons, which we now give in defence to his action." Now, they must be presumed not to have given these reasons in their affidavit, either because they were not then aware of them, or because they themselves believed these reasons not sufficient to arrest *Shaw*. If they were not then aware of them, they cannot now mention them as their excuse for arresting *Shaw*; and if they were aware of them, but did not think them sufficient to form the basis of their affidavit of intent to defraud against *Shaw*, they cannot expect us to consider them now sufficient to establish that they acted with reasonable and probable cause.

On the whole, I agree with the Chief Justice of the Court of Queen's Bench and Mr. Justice *Cross*, who dissented from the majority of the court appealed from, that *Shaw's* arrest was entirely unjustifiable, and that it is clearly established in the present case that the respondents had no reasonable or probable cause for issuing the writ of capias in question. Mr. Justice *Cross*, in the court below, would have awarded $500 as damages. We think it a fair and reasonable amount, and have agreed to this sum.

Appeal allowed with costs.

Solicitors for appellant: *McLaren & Leet.*

Solicitors for respondents: *Doutre & Joseph.*

F. X. COTÉ.....APPELLANT; 1881

AND *Mar. 9.
*Nov. 15.

THE STADACONA INSURANCE CO..RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

Company—Action for calls—Misrepresentation—Contract—Repudiation—Acquiescence by receipt of dividend.

The Stadacona Insurance Company incorporated in 1874 employed local agents to obtain subscriptions for stock in the district of *Quebec*, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, *F. X. C.*, intending to subscribe for five paid-up shares, paid $500 and signed his name to the subscription book, the columns for the amount of the subscription and the numbers of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without *F. X. C's* consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to *Quebec* and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé*,) and the plaintiff received a check for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and notwithstanding *F. X. C's* repeated endeavors to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of $100 each alleged to have been subscribed by *F. X. C.* in the capital stock of the company.

Held, (Sir *W. J. Ritchie*, C. J., *dubitante*) reversing the judgment of the court below, that the evidence shewed the appellant never entered into a contract to take 50 shares, that the receipt given

*PRESENT.—Sir W. J. Ritchie, Kinght, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

1881

COTÉ
v.
STADACONA
INS. CO.

for a dividend of ten per cent. on the amount actually paid (*montant versé,*) was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side), affirming a judgment of the Superior Court for the District of *Quebec*, by which the appellant was condemned to pay the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of one hundred dollars each, alleged to have been subscribed by the appellant in the capital stock of the respondent company.

This action was instituted by the plaintiffs (respondents) against the defendant (appellant) to recover four several calls of 5 per cent. each upon fifty shares, of one hundred dollars each, amounting to five thousand dollars of the capital stock of the company, of which fifty shares it is alleged in the declaration that the defendant is the holder, and that he is indebted to the plaintiff in the sum of one thousand dollars for the said four calls, which sum still remains due and unpaid by the defendant to the plaintiffs. The defendant, in bar of this alleged cause of action, pleaded:

First, that he never was a holder of more than five shares in the capital stock of the said company, which he paid for in full when he subscribed for them, and that with the exception of those five shares he never took, or subscribed for, or became the holder of, any other share of such capital stock; and

Secondly, that the plaintiffs' agents, when canvassing the defendant for his subscription for the shares aforesaid, represented to him and assured him that his subscription was for five shares only, and that upon the payment of five hundred dollars, then made by the defendant, he should be completely discharged from any

further obligation, and could not be called upon to pay any further sum; and that upon these assurances and representations the defendant consented to sign a paper which plaintiffs' said agents then presented to him and which he only signed upon the said assurances that his said signature only pledged the defendant to the amount aforesaid, and the sum aforesaid; that the defendant so gave his signature upon the assurance of the said agents, without examining the contents of the said paper, and in the belief that he only subscribed for the said five shares, which he then paid in full; that after the departure of the said agents the defendant examined divers "*circulaires et livrets*," which the said agents left with him, and by these appeared the manner in which ordinary subscriptions were invited by the company, and that only one or two payments were required in ready money, but eight others would become payable at future periods; that suspecting the good faith of the said agents he immediately made complaint and protestation to the chief officers of the plaintiffs, and represented to them as above stated upon different occasions; and that the said chief officers, to this purpose authorized, acknowledged that there was a mistake in the matter, and that the defendant was only bound for the shares as verbally agreed to be subscribed for by him and which he had the intention of taking, and that they sent him away saying that he need not be uneasy; that the matter was arranged, and that he would not have to pay any further sum.

That in all the above the defendant has been cheated —that there has been on the part of the plaintiffs fraud and bad faith, and that the plaintiffs, under the pretence of procuring a subscription for the said five shares, have endeavoured to hold the defendant bound to the payment of fifty, although they will knew that the defendant had no means to meet such amount, and that if

1881

COTÉ v. STADACONA INS. CO.

such a subscription had been made by him, it could only be the result of error or of false representations of the said agents of the plaintiffs. Wherefore the defendant prayed that it should be declared that the signature of the defendant was obtained by error and by the false and fraudulent representations of the plaintiffs' said agents, and that the defendant never intended to subscribe, and never did in fact subscribe for more than five shares, which he paid for in cash, and that the plaintiffs' action be dismissed with costs.

There are two actions precisely similar as the suit of the plaintiffs, against two brothers of the defendant, the pleadings in which, and the circumstances of which are similar, but only that in one of them, namely against *Joseph Coté*, the amount claimed is $2,000 as four calls upon $10,000 in the capital stock of the company, alleged to be held by him, whereas his plea alleges that he subscribed only for $1000 or ten shares, which he paid in full at the time of subscription; and in the other, namely, against *Amédé Cotée* the claim of the plaintiffs is for $1,200, as for four calls upon $6,000 in the capital stock of the company alleged to be held by him, whereas his plea alleges that he subscribed only for $600 which he paid in full at the time of the subscription.

The oral as well as the documentary evidence is reviewed in the judgments hereinafter given.

Mr. *Languedoc* for appellant:

[The learned counsel reviewed the evidence and contended that it had been clearly proved "when the defendant subscribed for the shares mentioned in the pleadings in this cause, he did not know the nature or extent of the responsibilities he assumed."]

This has been admitted by the judgment of the Superior Court and that of the Court of Appeals, and

yet we are condemned to carry out a contract to which it is admitted we never were parties.

1st. Because we were paid and took a dividend.

2nd. Because we allowed two years to elapse without "taking legal measures to have the contract set aside."

We respectfully submit their conclusion is erroneous on both the points on which they rest.

1st. Payment to defendants of a dividend.

It is quite true they received ten per cent. on the money they handed to the local agents, but it is equally true that to use this as an argument against them, it must first be shown that it was their holding a greater number of shares than they claim, that entitled them to get the money. Now, the three brothers when they subscribed paid cash down $1,000, $600 and $500 respectively, being the full and entire sums they meant to invest in the enterprise. The company declaring a dividend of ten per cent. on the paid-up capital, entitled them to receive ten per cent. on the sums which they had actually paid. When they had received this money they simply carried out the contract as they had from the first understood it to be, and their conduct and their declarations are thoroughly consistent throughout.

It is upon the sum paid, not the sum subscribed, that the dividend was declared, and it always is so, and therefore it is impossible to say that the defendants must be held to have subscribed $21,000, because they took that to which they were entitled by the fact of having paid $2,100, as the full price of twenty-one shares.

The defendants having allowed two years to lapse, without taking legal measures to have the contract set aside, are held to have acquiesced in a contract to which they constantly and persistently declare they never became parties. With all possible respect, we submit

1881

COTÉ v. STADACONA INS. CO.

this results from a confusion of ideas which we will endeavor to clear. Contracts are either null or voidable. When they are tainted with causes of nullity they exist none the less, till such causes of nullity are revealed and made to operate rescission. In such cases, the laches of the parties may estop them from setting up such nullities, nay more, the doctrine that a party to a voidable contract is bound to take active steps to rescind it with reasonable diligence, after he becomes aware of the causes of nullity, is well established. But the very foundation of the doctrine is the existence of a contract.

The main feature which distinguishes the present case is that the contract alleged by the company never existed at all. The doctrine of acquiescence resulting from lapse of time or laches on the part of the defendants can therefore have no application.

But supposing for a moment the contract to have existed, and all the essential elements to be found in it, and that it was merely voidable, has there been on the part of the defendants such conduct as to justify the assumption that they ratified it?

It is in evidence that immediately upon discovering that the agents had deceived them, the defendants, through *Joseph* one of them, came expressly to *Quebec*, saw the head agent, the secretary of the company; tried to see the president; did what they could to have the matter cleared up, and subsequently called on several different occasions on Mr. *Belleau* for the same purpose.

Now what is the law on this subject. We find it in abundance of authority, for it is the same in *France* and *England*, and of so elementary a character as to leave no room for controversy: see *Dalloz'* Répertoire de Jurisprudence (1); *Swan* v. *The North British*

(1) Vo. Acquiescement No. 307.

1881

COTÉ v. STADACONA INS. CO.

Australasian Company, limited (1); *in re Russian* (*Vyksounsky*) *Iron Works Company, Kincaid's case* (2); *Taite's case* (3); *Oakes* v. *Turquand* (4); *The Bank of Hindustan, &c.*, v. *Alison* (5); *Carr* v. *The London and North-Western Railway* (6); *Sharpley* v. *The Louth and East Coast Company* (7); *Ashbury Railway, Carriage and Iron Company* v. *Riché* (8); *ex parte Adamson, in re Collie* (9); *Ætna Insurance Co. in re Shiels* (10); *The Brolch-y-Plwm Lead Mining Company* v. *Baynes* (11).

Mr. *Bédard* for respondents:

[The learned counsel commented at length on the evidence to show that the contract alleged by plaintiffs was satisfactorily established.]

Besides, it must be remembered that the contract in this cause is in writing, and that by law no parol evidence can be adduced to contradict or vary the terms of a written document. *See* Civil Code of L. C. art. 1234; *Abbot's* Digest, On Corporations (12). The appellant has ratified his contract after having found out his error; and his plea cannot be admitted, because it comes too late, and because the parties are no longer in the same position.

To have a contract annulled on account of an error, it is not sufficient that a party should allege or prove an error, whatever it may be.

Error, says *Larombière* (13) must be certain: *In dubio nocet error erranti.* If the error is a gross one, no one will believe it. *Solere succurri non stultis, sed errantibus.*

The error set forth by the appellant, if proved, does

(1) 7 H. & N. 603.
(2) L. R. 2 Ch. App. 412.
(3) L. R. 3 Eq. 795.
(4) L. R. 2 H. L. 325.
(5) L. R. 6 C. P. 54 & 222.
(6) L. R. 10 C. P. 307.
(7) 2 Ch. D. 663.
(8) L. R. 7 H. L. 653.
(9) 8 Ch. D. 807.
(10) 7 Ir. R. Eq. 264.
(11) L. R. 2 Ex. 324.
(12) Page 796, Nos. 113 and 114.
(13) Obligations, vol. 1, p. 47.

1881

COTÉ v. STADACONA INS. CO.

not prevent the existence of the contract, which subsists till annulled.

The last reason of the appellant is to the effect that he understood that his contract was but for five shares, and he says that, for the amount beyond that, the contract is null, has in fact no existence, and was therefore never susceptible of ratification.

The law enacts that the contract will be the one implied by the terms which express the agreement, and not that which either of the parties might have understood it to be. No matter what they may have had in their minds when contracting, they will have to abide by the terms they employed, because there is no other means to know their respective intentions at the time. In a word, the law of convention is made to rule not the acts of will, but, using the words of *Savigny*, the manifestations of will (1).

There is no article of the code to declare that consent is necessary to the existence of a contract, because contract implies consent, and it would be, to say the least, useless to enact that where there is no consent, there is no contract. The law declares only that the convention is valid when the consent is legally expressed. It looks not to the consent, but to its manifestation; from the latter it implies the existence of the consent and determines its effect.

Art. 991 enacts that error, violence and fraud are causes of nullity in contracts. Art. 992 declares that error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the contract, or in the substance of the thing which is the object of the contract. And lastly, art. 1000 goes on to say that error, fraud and violence are not causes of absolute nullity in contracts, and only give a right of action or exception to annul or rescind them.

Mr. *Languedoc* in reply.

(1) See article 984 C. C. L. C.

1881

COTÉ v. STADACONA INS. CO.

RITCHIE, C. J.:—

I am not sorry that my learned brethren have been enabled to arrive on this evidence at the conclusion which is so satisfactory to their own minds, because I think a judgment in opposition to the conclusions which they have expressed would operate with extreme hardship on these unfortunate men. I am not prepared to differ from the conclusions at which they have arrived, and I do not intend to dissent from the judgment which they have given; but I must confess that the inclination of my mind has been, in the consideration of this case, that those parties were aware of the number of shares that they signed for. But I also think that they did not fully appreciate the large liability they thereby incurred, and they were influenced in subscribing for this number of shares by the influence and representations of an agent whose interest it was to induce these unfortunate men to take these large amounts of shares, as it has been shown that they went abroad to get subscriptions to this stock, and for every share they were able to get subscribed they were to receive a certain amount of money. Therefore, it was their interest, in dealing with these ignorant people, to induce them to put down their names for as many shares as they could, and they represented, I am inclined to think from the evidence, much more strongly than they should have done, that no larger amount than they had paid at the time of subscription would be required by the company; and that the subscribers only realized the extent of the obligation they had entered into and the risk they were running, on a careful examination of the prospectus and charter of the company and on consultation with their friends on the evening on which the subscription was made. I think there was very considerable force in the

1881

COTÉ v. STADACONA INS. CO.

Ritchie, C.J.

observation made by Mr. Justice *Ramsay* on this point, in which he says the proof that *Coté* knew the figures were $10,000 for 100 shares appears clearly from this: that he found out the difficulty and the extent of his liability without reference to the share list, simply in conversation with his friends and from the statute. Also, I was very much impressed with the fact that the appellant and his brothers, after they discovered the extent to which they would be liable, appear to have consulted counsel, and they appear to have called upon the directors, and the directors seem to have repudiated any idea of the correctness of what they then put forward, and they remained quiescent, except the writing of the letters, taking no steps whatever to have the matter set right. I think they were aware of the fact that the company held them for the fifty shares. That was clearly brought home to them. They must have been aware that they were held for the fifty shares, and that the company absolutely refused to permit them to stand as shareholders for five paid up shares; and it would have been at variance with the prospectus and with the act, with which it is evident these parties made themselves acquainted, by their own statement, to have stood as shareholders fully paid up for five shares alone, and knowing they were registered by the company as the holders of 100 shares. Here, I must say, I cannot agree with my learned brother, who says it was necessary that there should be an allotment of shares, or that there was no proof of allotment in this case. I think, under this statute, there was no necessity for an allotment.

When the company sent out their books for subscriptions, and the parties subscribed for fifty shares, they became shareholders of the company, not by any subsequent allotment, but by operation of law under the statute. Therefore, when they sub-

scribed, and when they paid their five per cent. down upon that subscription, they became, by force of this act, and without any act done by the company or by the parties themselves, shareholders and subscribers, and liable under this act to all the obligations the statute imposed upon them. When a dividend was declared, they must have known, from the knowledge they had of the act, that the dividend was not declared upon paid-up shares, because section three does not recognize that the whole amount is to be called in at once, but can only be called in and accepted by the company in a certain way, 5 per cent. in the first instance, a further call of 5 per cent., and so on. Therefore, when he received the dividend, I find it difficult to believe that the appellant did not know it had been delivered by the company on the fifty shares he held and subscribed for. Having received his share of the earnings, I also find it difficult to see that he is not a shareholder, and that he did not accept his position as shareholder, as he stood on the books of the company, and therefore would not be liable; because it must be borne in mind that while he remained and continued a shareholder for these two years the company was doing a prosperous business. It had paid a 10 per cent. dividend; and it must be borne in mind also that conflagrations more extensive almost than ever known before—exceptional conflagrations—took place in the city of *St. John* and in other portions of *Quebec*, by which this company, from a very prosperous state of business, was reduced to insolvency. Had this company had a number of years of prosperity and yearly declared large dividends, I do not see my way very clearly to the conclusion that this man could, from time to time, have been allowed to receive these dividends, and when ultimately the company may have experienced any losses, he could then repudiate

1881

COTÉ v. STADACONA INS. CO.

Ritchie, C.J.

and claim not to be a shareholder, and accept the gains and refuse to bear his share of the liabilities. In other words, to use an expression which is to be found in the books with reference to cases of this kind, that he should not be allowed to play fast and loose, that having received the benefits he should be liable to the loss he sustained.

However, as I said before, as the judgment of my learned brothers on the facts of this case differs from the conclusions on the facts that I have stated now, and as there is a conflict of evidence in the case, I do not intend to set up my judgment on the facts against theirs, and differ from the conclusions they have arrived at on the case, and which conclusions I am very gratified, on account of these people being poor, they have been enabled to arrive at with satisfaction to themselves. At the same time, having these doubts on my mind, I thought it proper to give expression to them, because if it had not been for the very strong and forcible judgment delivered by my brethren, if I had been left alone I should have come to a different conclusion, but I am happy to say that on the whole I shall not dissent from their judgment.

STRONG, J.:—

The first question to be determined is one of fact. What was the contract which the appellant intended to make with the agents of the company who came to him to solicit his subscription for shares? Did he intend to take fifty shares and to pay ten per cent. on the amount of those shares, or did he intend to become a subscriber for five shares only, paid up in full?

It appears to me that the evidence of *Genest*, who is the only witness called by the respondents to prove what took place at the time of the subscription, is sufficiently contradicted by the evidence of the witnesses for the

defendant, his brothers, the circumstances attending the transaction, and the probabilities. All depends on the testimony of witnesses,—oral evidence; the writing itself does not assist us in solving this question. When the appellant signed his name to the subscription book, the columns for the amount of the subscription and the number of shares were left in blank. These columns were afterwards filled in with the number of shares (fifty shares) and the amount of the subscription by *Genest* himself, in the presence of the appellant, or at least of his brother *Joseph*. This is a fact of considerable importance in my view of the case, for had the number of shares and the amount of subscription been written by the appellant himself, or filled up before the signature, the legal consequences might have been different. As it is, according to *Genest's* own evidence, it must be taken to have been done by him acting as the mandatory or agent of the appellant, and it follows therefore that, if the appellant only intended to subscribe for five shares and not for fifty, *Genest* had no authority to make the entry he did, and his unauthorized act can therefore in no way bind the appellant, who did not assent to it. It is therefore assuming in favor of the company the very question in dispute, to say that the appellant signed his name to a subscription for fifty shares.

Then, I think, *Genest's* evidence is extremely vague and unsatisfactory; in answer to very important questions in cross-examination, he says he is unable to remember what passed. Next, the conduct of the three brothers is altogether inconsistent with the supposition that they understood they were contracting for shares to a greater amount than the sums they actually paid in cash. They appear to have discovered their true position the same evening, and the elder of them went to *Quebec* the next morn-

1881

COTÉ
v.
STADACONA INS. CO.

Strong, J.

ing, and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. On the whole, all the surrounding circumstances are confirmatory of the evidence of the three brothers, and I agree with Mr. Justice *Tessier* in the Court of Queen's Bench, in holding that the appellant never entered into the contract to take the fifty shares in respect of which he is sued on this action.

Had the courts below taken a different view of the facts, it might have been a reason why this court should have hesitated before acting on a different view of the evidence. It does not appear, however, that the judges of the court below did come to a different conclusion in this respect. The Chief Justice of the Queen's Bench, in his notes of judgment, expresses himself very decidedly to the effect that there was no contract, and from the first "*considerant*" of the judgment of the court of first instance, I am led to the conclusion that that was also the view taken by the Chief Justice of the Superior Court.

Both the learned Chief Justices, however, attached much importance to the subsequent receipt by the appellant and his brothers of the dividend declared upon the paid-up capital. I was much impressed with this view at the hearing of the appeal, but subsequent consideration has convinced me it ought not to affect our judgment. According to the view I have taken of the evidence, the appellant never entered into any contract to take fifty shares, such a contract never existed, there was therefore never anything susceptible of ratification. Again, even if there had been a contract, but one voidable for error, the receipt of the 10 per cent. dividend on the amounts which the appellant and his brothers had actually paid in cash to the company would not have been such an unequivocal act of recognition and confirmation as

would have been requisite to ratify a contract which might have been set aside in an action brought to establish its nullity. It was quite consistent with what they had always contended, viz: that they were holders of shares for an amount equivalent to the cash they had paid, but for no more, that they should have received the 10 per cent. declared on shares actually paid up in cash. I cannot, therefore, see that their receipt was any admission of their liability, or a renunciation of the right they had always claimed to have their shares limited to the amount they had paid.

On both these grounds I think the company's contention, that there was a ratification, fails.

I think the appeal should be allowed, with costs to the appellant in this court and in both the courts below.

FOURNIER, J.:

L'appelant, *F. X. Coté*, est poursuivi en cette cause pour mille piastres ($1000) montant de quatre versements dus sur cinquante actions qu'il aurait souscrites dans le fonds social de la compagnie d'assurance, intimée en cette cause. Sa réponse à cette demande est qu'il n'a souscrit que cinq parts et qu'il les a payées comptant, que si son nom est inscrit au livre de stock pour cinquante actions, il l'a été ainsi par les agents de la compagnie frauduleusement et sans son consentement.

Après son incorporation, en 1874, par acte du Parlement du *Canada*, la compagnie intimée nomma comme un de ses agents pour solliciter des souscriptions à son fonds social, M. *J. N. Belleau*, de *Québec*. Celui-ci à son tour délégua ses pouvoirs à deux sous-agents, *Genest* et *Delisle*, pour recueillir des souscriptions dans l'*Isle d'Orléans* qui faisait partie de la circonscription dans laquelle l'agent principal, *Belleau*, était autorisé à agir pour la compagnie.

1881

COTÉ
v.
STADACONA INS. CO.

Fournier, J.

Le 29 octobre de la même année, *Genest* et *Delisle* se présentèrent au moulin de *Joseph Coté*, à *St. Pierre, Isle d'Orléans*, pour remplir leur mission. L'entrevue qu'ils eurent avec l'appelant et ses frères, qui sont comme lui poursuivis pour quartre versements sur le montant des parts qu'ils auraient ainsi souscrites dans cette circonstance, est racontée comme suit par *Joseph Coté :*

Dans la nuit du vingt-neuf octobre, mil huit cent soixante-quatorze, les deux agents que je viens de mentionner, sont venus au moulin me trouver, accompagnés de deux de mes frères, *Amédée* et *François-Xavier*, les deux autres défendeurs.

Ils m'ont demandé de souscrire au fonds social de la compagnie *Stadacona*, et demandant dix pour cent.

J'ai refusé, ne voulant pas souscrire les dix pour cent ; et j'ai passé dans un autre appartement ; alors ils sont venus me trouver là et m'ont dit.....

Objecté à cette preuve.

Objection réservée.

Eh bien ! souscrivez mille piastres, votre frère *Amédée* six cents piastres, et votre frère *François-Xavier* cinq cents piastres, et cela sera tout ce que vous aurez à payer et vous aurez dix pour cent de dividende sur ces montants-là.

Amédée Coté, l'un des frères présents dans cette occasion, donne la version suivante de ce qui s'y est passé :

R.—Ils sont arrivés à la maison chez moi et m'ont fait des propositions très-avantageuses à propos de la souscription à la *Stadacona* ; ils m'ont demandé de prendre des parts, que c'était un grand avantage. Là dessus je n'ai rien voulu faire sans voir mes frères qui étaient au moulin à farine.

R. Là ils ont raconté à mes frères la même histoire qu'ils m'avaient contée à moi-même ; ils l'ont contée devant moi et mes frères qu'on a trouvés là au moulin, disant que c'était très avantageux de prendre des parts.

Q. Votre frère *Joseph* a-t-il dit quelque chose ?—R. Il dit que tant que pour payer dix pour cent il comprenait que ça ne pouvait se faire, qu'il préférait prendre un montant qui ne donnerait aucun trouble, aucune responsabilité par la suite.

Q. Votre frère *Joseph* a-t-il consenti à souscrire dix pour cent ?—R. Eh ! non, quand ils nous ont parlé de dix pour cent, il (*Joseph*) nous a laissé, disant qu'il ne voulait pas de ça. Les agents ne nous

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

ont pas laissés et nous les avons conduits dans le bateau où mon frère *Joseph* était, et là ils ont dit à mon frère qu'il pouvait prendre un montant comme ça, puisqu'il ne voulait pas souscrire dix pour cent seulement, qu'ils feraient comme ça puisqu'il ne voulait pas souscrire autrement.

Q. Les agents ont-ils dit qu'ils prendraient les souscriptions de vos frères et la vôtre dans les mêmes conditions?—R. Oui.

Q. Ensuite?—R. Là-dessus on a mis le montant qu'on voulait souscrire.

Q. Combien votre frère *Joseph* a-t-il mis?—R. Mille piastres ($1000).

Q. Votre frère *François Xavier*?—R. Cinq cents piastres ($500) et moi-même six cents piastres ($600).

Q. Ces montants-là vous les avez payés?—R. Aux agents; on est retourné à la maison et on a signé des chèques pour payer ces montants-là?

Q. Vos frères à eux deux combien?—R. Quinze cents piastres.

Q. Etes-vous positif là-dessus?—R. Oui, mon frère *Joseph* mille piastres ($1000) et mon frère *François Xavier*, cinq cents piastres ($500).

Les trois frères mirent leur signature sur le livre de stock, sans spécifier ni le nombre d'actions qu'ils souscrivaient, ni le total auquel se montait leur souscription, croyant, comme ils le disent, ne souscrire que pour les montants qu'ils avaient payés comptant. Les entrées du nombre de parts et de leur total ont été faites par les agents eux-mêmes, hors la présence des *Côté*, d'après la version de ceux-ci, et sans qu'on leur eût déclaré que les montants ainsi entrés étaient différents de ceux payés. Cette version est contredite par *Genest*, qui déclare avoir obtenu cette souscription de la manière ordinaire, comme il avait fait avec *tous ceux qui* avaient déjà souscrit. Il dit qu'il a donné toutes les explications nécessaires qu'il avait coutume de donner en pareil cas. Il ajoute qu'il avait pour s'aider un prospectus de la compagnie, qu'il leur a expliqué,—qu'il leur a dit qu'il n'était pas probable que tout le montant serait appelé, que ce n'était pas l'intention de la compagnie de demander plus qu'ils ne payaient; mais que cepen-

1881
COTÉ
v.
STADACONA INS. Co.
Fournier, J.

dant, ils étaient responsables pour tout le montant de parts qu'ils souscriraient, et qu'il ne leur a pas dit cela rien qu'une fois. Il dit aussi avoir mentionné le nombre de parts, le montant souscrit et le montant payé pour le premier et le deuxième versements. Ce témoignage avec la production du livre de stock constitue la preuve sur laquelle la compagnie se fonde pour demander l'exécution du contrat qu'elle prétend avoir été fait par l'appelant. Ainsi qu'on le voit, il y a deux versions diamètralement opposées. Si celle de *Genest* est la véritable, il est évident que l'appelant doit succomber. Il doit au contraire réussir, si celle donnée par ses deux frères, *Joseph* et *Amédée*, est acceptée. Il s'agit donc en grande partie d'une appréciation de témoignages.

Il faut d'abord remarquer que la déposition de *Genest* n'est aucunement corroborée. Il était au pouvoir de la compagnie de le faire puisqu'elle avait un autre agent présent à cette entrevue, le nommé *Delisle*. Pourquoi n'a-t-il pas été examiné ? Est-ce que l'on a redouté son témoignage, est-ce que par hasard les quelques mots qu'il a dits auraient été une confirmation du récit des *Coté*? Quoi qu'il en soit, on ne peut pas tirer de l'absence de *Delisle* d'autre conclusion contre la compagnie que celle qu'elle n'a pu corroborer le témoignage de *Genest*. Ainsi, on se trouve d'une part, en présence d'un version donnée par un seul témoin, et de l'autre, celle donnée par deux témoins. Il est vrai que l'on peut dire que ceux-ci sont intéressés, puisqu'ils ont un procès semblable, reposant sur les mêmes preuves ; mais à part cela rien ne fait voir que leur témoignage ne soit pas digne de foi. *Genest* lui-même est aussi intéressé, car il avait une assez forte commission sur le nombre de parts qu'il faisait souscrire. Il était payé tant par part ; il était intéressé à en rapporter le plus grand nombre possible. Si l'intérêt se contrebalance, la version des deux *Coté* devrait être reçue. Il y a de plus dans la déposi-

tion de *Genest*, l'affirmation d'un fait important sur lequel il est contredit par des témoins étrangers et désintéressés. Cette circonstance est de nature à affecter considérablement son témoignage. Il dit: "J'ai donné toutes les explications nécessaires *et que j'avais coutume* de donner en pareil cas,"—plus loin: "J'ai voulu les mettre en état de connaître la chose aussi clairement qu'il y avait moyen, non-seulement avec eux, *mais avec toutes les personnes* que j'ai fait souscrire"; "J'ai donné les mêmes explications *à tout le monde.*" Cette assertion positive est répétée encore sous d'autres formes. Sur ce point cependant il est formellement contredit par trois témoins tout-à-fait désintéressés.

Basile Marquis raconte ainsi sa rencontre avec les sous-agents *Genest* et *Delisle:*

> Ils m'ont demandé de prendre des actions pour au moins $10.00; que si je souscrivais une part ça ne serait que $10.00, les actions étant de dix piastres chacune, que je ne m'engageais pas pour plus que cela. Je leur dis que je n'avais que $5.00, sur quoi ils me répondirent qu'ils accepteraient ces cinq piastres-là et me donneraient deux ou trois mois pour payer la balance. Sous ces circonstances, j'ai pris une part que je croyais de dix piastres, ayant seulement souscrit pour cette somme. Ce n'est que dans l'après-midi du même jour ou le lendemain que je me suis aperçu que les parts étaient de cent piastres et non pas dix piastres.

Il est admis par les parties que les deux témoins *Phydime Ferland* et *Léon Aubin* prouveraient les mêmes faits. Comment après cela ajouter foi à la déclaration de *Genest* qu'il a donné à l'appelant les mêmes explications qu'il a données à tout le monde? N'est-il pas évident qu'il *n'a pas dit la vérité sur* ce sujet, et ne peut-on pas raisonnablement en conclure qu'il a employé pour obtenir la souscription des *Coté* le stratagème qui lui avait réussi avec d'autres. En acceptant les montants payés par les *Coté*, il a sans doute fait avec eux ce qu'il avait fait avec *Marquis*—il a réparti les sommes payées par eux pour les premier et

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

deuxième versements sur les parts qu'il leur attribue sans leur en avoir déclaré le montant, au lieu d'entrer leurs actions comme payées en plein. Cette conclusion est d'autant mieux fondée qu'il est en preuve que les *Coté* ont payé tout ce qu'ils avaient d'argent; que l'un d'eux a même été obligé d'emprunter $50.00 pour parfaire son montant. Est-il à présumer que ces trois individus qui paraissent des gens honnêtes et respectables, mais dont la fortune totale s'élève à peine à $3,000 auraient engagé leur responsabilité pour le montant de $21,000 ? Je crois au contraire que la seule mention de ce chiffre les eût tellement effrayés qu'ils auraient absolument refusé de n'avoir rien à faire avec la compagnie et qu'ils se seraient ainsi épargnés les procès qu'ils ont à soutenir.

D'après l'exposé ci-dessus, il paraît certain que dans ses démarches auprès de *Côté*, *Genest* voulait leur faire prendre un montant plus considérable de parts que ceux-ci n'étaient disposés à le faire ; il prétend avoir fait souscrire à l'appelant 50 parts. Celui-ci au contraire déclare n'en avoir souscrit que cinq qu'il a payées en plein. Il est évident d'après le témoignage, que chacune des deux parties voulait une chose différente que leur consentement n'a pas porté sur une même chose, faisant l'objet du contrat dont il est question. Le concours de volontés, condition essentielle de l'existence du contrat, n'a donc pas eu lieu,— conséquemment il n'y a pas eu de contrat, faute d'accord entre les parties. C'est le point de vue que j'adopte. Cette appréciation ne m'éloigne guère des opinions exprimées à ce sujet par les deux honorables juges en chef de la cour supérieure et du Banc de la Reine. L'honorable juge en chef *Meredith* dit dans son jugement :

When the Defendant subscribed for the shares mentioned in the pleadings in this cause, he did not know the nature or extent of the responsibilities he assumed.

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

Sir *A. A. Dorion* donne ainsi son appréciation du même fait :

Il n'y a aucun doute que l'appelant a été induit à souscrire des actions dans la compagnie d'assurance *Stadacona*, sans trop comprendre la responsabilité qu'il assumait.

Et plus loin il ajoute :

Je conclus donc d'après cette preuve, que le contrat allégué par la compagnie n'est pas prouvé.

Aussi, l'appelant sans l'acceptation qu'il a faite d'un dividende, et le délai qu'il a laissé écouler sans prendre des mesures judiciaires pour faire rescinder cette souscription, aurait-il eu gain de cause auprès des deux honorables juges en chef. Ces deux circonstances constituent dans l'opinion des deux honorables juges une ratification ou confirmation du contrat allégué, laquelle a l'effet, suivant eux, de le rendre responsable.

En effet, il est établi que l'appelant a reçu un dividende de 10 pour cent qui lui a été payé par un chèque dans la forme suivante :

Compagnie d'Assurance Stadacona contre le Feu et sur la Vie.—Premier Dividende.—Québec, 25 janvier 1876.—Au caissier de la Banque d'Union du Bas-Canada ; payez à.....ou ordre .....piastres, étant pour dividende sur capital versé au trente et un décembre 1875.

Mais ce dividende avait-il été calculé sur cinquante actions, dont dix pour cent avaient été payées, ou bien sur cinq actions payées en entier ? Rien ne le fait voir. Le chèque ne fait mention ni du nombre de parts ni de leur total ; il y est seulement fait mention que le dividende est réparti sur le montant versé. On ne peut donc de ce fait tirer aucune conclusion contre la prétention de l'appelant qu'il n'a souscrit que cinq parts payées en plein. Il n'a, dans ce cas, touché que ce qu'il devait recevoir conformément à ce chèque. Si, au contraire, il avait souscrit, comme le prétend la compagnie, cinquantes parts sur lesquelles

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

dix pour cent seulement aurait été payé, il est vrai qu'il n'aurait encore touché que le même montant. De sorte que si, d'un côté la compagnie peut dire que l'appelant a accepté le nombre de parts qu'elle lui a attribué, en acceptant ce dividende; de l'autre, celui-ci peut répondre que la compagnie a au contraire acquiescé à sa prétention qu'il n'avait souscrit que cinq actions entièrement payées en lui payant, comme le comporte le chèque, un dividende sur le montant par lui versé. Ce fait pouvant être, avec autant de raison, invoqué par chacune des parties à l'appui de ses prétentions, ne peut en conséquence servir ni l'une ni l'autre, ni affecter en aucune manière leurs positions. Mais si le chèque, au lieu d'être conçu comme il l'est, avait comporté que le dividende payé et reçu était sur cinquante actions dont dix pour cent avait été payé, c'eût été indubitablement une confirmation du contrat allégué, et la nullité dont il était était entaché aurait été couverte. C'eût été alors donner valablement, quoique tacitement, le consentement nécessaire à la formation du contrat; et de ce moment-là seulement le contrat eût existé. Puisqu'avant l'acceptation du dividende il n'y avait pas de contrat, il faut que le fait opposé à l'appelant soit suffisant pour en former un, et certes, l'acceptation de ce dividende auquel il avait droit suivant ses prétentions ne constitue pas un consentement d'accepter les 50 parts qu'il avait déjà répudiées.

Si le juge ne doit, comme le dit l'autorité de *Dalloz* citée par l'hon. juge *Tessier*, "prononcer qu'avec la plus "grande réserve et ne déclarer qu'il y a acquiesement "que lorsque les faits ou actes démontrent l'intention "formelle de la partie de se soumettre," il est évident que l'acceptation du dividende dans les circonstances où elle a été faite n'implique aucunement l'intention de la part de l'appelant de se départir de sa prétention qu'il n'avait souscrit que cinq parts. Cette acceptation n'est nulle-

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

ment en contradiction avec sa prétention ; elle en est plutôt une confirmation si elle a quelque signification, et ne peut par conséquent lui être opposée.

D'ailleurs le prétendu contrat invoqué par la compagnie n'ayant jamais existé, faute de consentement, n'était pas susceptible de confirmation. Il en pourrait être autrement s'il y avait eu un consentement, quoique vicié par le dol, l'erreur ou par quelque autre cause.

Laurent (1) s'exprime ainsi au sujet de la confirmation des actes :

Confirmer une obligation c'est renoncer au droit que l'on a d'en demander la nullité à raison du vice dont elle est atteinte. La confirmation a pour but et pour effet d'effacer ce vice, de sorte que l'obligation quoique nulle dans son principe est considérée comme n'ayant jamais été viciée.

Le même auteur, au No. 531, faisant la distinction entre les obligations annulables et les obligations inexistantes, dit :

Il ne faut pas confondre les obligations annulables avec les obligations inexistantes. Nous avons établi ailleurs la différence qui existe entre les actes nuls, c'est-à-dire annulables, et les actes que la doctrine appelle inexistants, parce qu'ils n'ont pas d'existence aux yeux de la loi, en ce sens que la loi ne leur reconnaît aucun effet. Les actes nuls donnent seuls lieu à une action en nullité. Quant aux actes inexistants, on ne peut logiquement en demander l'annulation, car on ne demande pas la nullité du néant. Si l'on m'oppose un contrat auquel je n'ai pas consenti, j'ai sans doute le droit de le repousser, mais je ne demande pas au juge de l'annuler, car ce contrat n'existe pas puisqu'il n'y a pas de contrat sans consentement. Je demanderai que le juge déclare qu'il n'y a jamais eu de contrat Je puis prendre l'initiative en agissant en justice pour qu'il soit décidé que le contrat, que l'on pourrait un jour m'opposer à moi, ou à mes héritiers, n'a pas d'existence légale. Le jugement ne l'annulera pas, il déclarera qu'il manque de l'une des conditions requises pour son existence et que par suite il ne peut produire aucun effet."

Le deuxième motif du jugement attaqué, consistant à dire que l'appelant ne peut plus opposer les vices

(1) T. 18, au No. 559.

1881

COTÉ
v.
STADACONA INS. CO.

Fournier, J.

dont on admet que son contrat est entaché, parce qu'il a laissé écouler un délai de près de deux ans, sans prendre aucune mesure judiciaire pour faire rescinder sa souscription, ne me paraît pas fondé en loi. Pour lui opposer ce moyen avec succès, il faudrait établir par quelque texte de droit qu'il était obligé d'agir dans le délai de deux ans. Je n'en connais pas. Si l'on adopte l'opinion qu'il n'y a pas eu contrat, faute de consentement, dans ce cas l'appelant avait trente ans pour agir s'il le jugeait à propos. Il aurait pu, comme le dit l'autorité citée ci-dessous, prendre l'initiative, mais ce n'est qu'une faculté qu'il était libre d'exercer ou non, à son gré. Le défaut de le faire ne pouvait pas le priver de son droit d'invoquer pendant trente ans l'inexistence du contrat quand il lui serait opposé. Dans le cas où l'on considérerait qu'il y a eu contrat, mais que le consentement à ce contrat a été vicié par le dol ou l'erreur, le contrat étant annulable seulement, l'appelant avait encore en vertu de l'art. 2258 C.C. de *Québec*, dix ans pour prendre son action en nullité. Ces deux propositions sont clairement établies par l'autorité suivante (1) :

> La différence est grande entre la nullité prononcée par le juge ou le jugement par lequel il déclare qu'il n'y a pas eu de contrat. Dans le premier cas la partie doit agir dans les dix ans, sinon le contrat est valide par son silence en vertu d'une confirmation tacite, et elle ne pourra même plus, dans notre opinion, opposer l'exception de nullité. Tandis que, s'il n'y a point de contrat, le prétendu débiteur pourra toujours demander par voie d'action ou d'exception, que le juge le délie du lien apparent d'une obligation qui ne'xiste point ; aucune confirmation, ni expresse, ni tacite, ne peut être opposé, car on ne confirme pas le néant.

Voir encore le même auteur aux Nos. 559 et 560.

La doctrine contenue dans les citations ci-dessus est confirmée par les nombreuses autorités citées dans le factum de l'appelant.

(1) Laurent T. 15, p, 536, No. 465.

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

Si, comme je le pense, il n'y a pas eu contrat, l'appelant avait trente ans pour agir, et dans le cas où le contrat ne serait qu'annulable à cause du consentement vicié, l'appelant avait dix ans pour en demander ou opposer la nullité. Ainsi l'on ne peut lui opposer son défaut d'action judiciaire pendant deux ans comme une preuve qu'il a acquiescé au contrat, puisque dans un cas, il avait trente ans et dans l'autre dix ans pour agir.

Cependant l'appelant, quoiqu'il ne fut pas obligé, pour se maintenir dans ses droits, de prendre l'initiative d'aucunes démarches, s'est empressé, après la découverte de l'erreur dont il se plaint, d'en donner information à la compagnie. En effet, aussitôt que les trois frères *Coté* se sont aperçus qu'ils pouvaient être inscrits comme actionnaires pour de plus forts montants que ceux qu'ils avaient payés, ils ont envoyé leur frère *Joseph* pour informer la compagnie des faits tels qu'ils s'étaient passés. *Joseph Coté* s'adressa à M. *Lindsay*, le secrétaire de la compagnie, et à M. *Belleau*, l'agent principal pour les souscriptions du stock. M. *Lindsay* comprit la justice des représentations faites par *Joseph Coté*, mais M. *Belleau* refusa d'intervenir pour faire rectifier la souscription. *Coté* fit aussi des démarches pour rencontrer M. *J. B. Renaud*, le président de la compagnie, mais n'ayant pu réussir à le voir, il retourna chez lui découragé et à peu près convaincu qu'il n'y avait pas moyen d'obtenir justice, mais sans avoir fait aucun acte, ni prononcé une parole que l'on puisse considérer comme un acquiescement à la souscription qu'on voulait lui imposer. L'appelant et ses frères s'en tinrent là, jusqu'à la réception du dividende dont il a été parlé plus haut. Etaient-ils obligés de faire plus ? Certainement non, d'après les autorités ci-haut citées. Mais la compagnie elle-même, informée comme elle dût l'être par son secrétaire et par l'agent *Belleau*, n'était-elle pas obligée d'intervenir immédiatement et de régler le diffé-

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

rend. On oppose de la négligence à l'appelant qui, en loi, n'était pas obligé d'agir, et l'on perd de vue que d'après son prétendu contrat, l'initiative était obligatoire pour la compagnie. Quel est en effet le prétendu contrat dont il s'agit ? En voici la teneur, telle qu'on la trouve dans les papiers qui ont été, à la demande de la cour, transmis par les parties, depuis l'audition de la cause :

> The undersigned do hereby agree to take, and they hereby do take and subscribe to the number of shares in the said company set opposite to their respective signature, or any portion thereof 'as may be allotted' by the provincial board of directors, the whole subject to such conditions contained in the Act incorporating the said company.

Le contrat entre les actionnaires et la compagnie est conditionnel, comme on le voit par le fait que celle-ci se réserve d'accorder le nombre ou seulement une partie du nombre des parts souscrites, tel que son bureau de direction pourra en faire la répartition. Cette répartition a-t-elle été faite ? On n'en sait rien, le fait n'est pas prouvé. Avis en a-t-il été donné à l'appelant ? On ne le sait pas davantage. Cependant il est clair qu'il était du devoir de la compagnie de se conformer à la condition qu'elle a jugé à propos d'introduire dans son contrat. Elle eut pu se dispenser de l'y insérer comme on le verra par la 2me section de son acte d'incorporation, 37 Vic, ch. 94, sec. 2 :

> Books of subscription shall be opened in the City of Quebec and elsewhere at the discretion of the directors, and shall remain open so long as and in the manner that they shall deem it proper, after giving due public notice thereof, which said shares shall be and are *hereby vested* in the several persons, firm or corporations who shall subscribe for the same, their legal representatives and assigns subject to the provisions of this Act.

D'après cette section la seule souscription au livre de stock eut été suffisante pour former un contrat parfait. Mais exerçant les pouvoirs que leur donne la sec.

24, les directeurs ont sagement pensé qu'il devait se réserver le droit de contrôler la souscription, et pour cela ils se sont réservés le droit d'en faire la répartition comme bon leur semblerait. Après avoir été informés de la manière dont la souscription des *Coté* avait été obtenue, et surtout, connaissant que cette souscription était tout-à-fait hors de proportion avec leurs moyens, n'était-t-il pas du devoir des directeurs de ne leur accorder qu'un montant de parts en rapport avec leur fortune? En ne le faisant pas, ils ont manqué d'accomplir une condition de leur contrat et commis une injustice envers leurs assurés, en laissant sur leur livre de stock des actions qui ne valaient rien. Si la répartition eût été faite et qu'avis en eût été donné à l'appelant, la réception du dividende après cela, eût pu, sans doute leur être opposée. D'après ce qui précède je crois que c'était à l'Intimé à prendre l'initiative en faisant la répartition du stock et non pas à l'appelant, comme je crois l'avoir démontré par les autorités citées plus haut.

Pour ces considérations je suis d'avis que l'appel devrait être alloué avec dépens.

HENRY, J.:—

The respondent company claims in this action that the appellant is a stockholder in it to the extent of fifty shares, while he alleges himself as such only to the extent of five shares. The right of the respondents to recover depends on their showing him to be a stockholder beyond the number of five shares. The appellant, whose statement is sustained by other witnesses, alleges that he only agreed with the canvassing agent to take five shares, and that for them he paid the whole amount, and was entitled to have received a certificate for them as fully paid up. The agent (*Genest*) who dealt with him alleges he agreed to take, and with full knowlege of what he was doing, signed the stock

1881

COTÉ v. STADACONA INS. CO.

Henry, J.

list for, the fifty shares. His testimony is not corroborated, although it appears another agent of the company was present at the transaction, and might have been called for that purpose, if he would have done so. The stock book, when produced, corroborates *Genest's* statement, but the appellant swears that he did not know it had been filled up for more than the five shares, and that his signature was fraudulently obtained. He is a comparatively uneducated farmer, and one shown to have been in no circumstances to have taken so large an amount of stock. The learned judge who tried the cause found in favor of the appellant's evidence, and, after carefully considering it, I feel bound to say that, so far from differing with his conclusions, were I in his place I would have decided as he did. This view of the result of the evidence seems to have been subsequently adopted in the two courts below. How, then, does the case stand? The appellant agreed to take five shares, but was fraudulently got to put his name to a stock list for fifty. Did the respondents case rest here it would be a plain one against them. The fraud would render the contract, not necessarily void, but voidable by the appellant. Under the evidence, however, I consider it was a good contract for five shares. Taking the testimony of the appellant and his witnesses there was a verbal agreement for five shares, and the money for them paid in full. The fraud or mistake in inserting fifty in the stock list could have been corrected, and the agreement for the five enforced. But, although it was not so corrected, it does not therefore follow either that there was no contract, or that there was one for fifty shares. Immediately on the discovery of it he appealed to the manager of the company, with whom he had several interviews, informed him of the circumstances in evidence, and repudiated the contract beyond five shares. Amongst other things, he was told by the

manager to keep himself quiet, that the sum paid was all he would have to pay. It appears that this satisfied the appellant and his two brothers, who were similarly situated, and they became quiet as desired, no doubt, in my mind, thinking the error would be corrected, and the contracts they had really made carried out. We should construe the acts and dealings of those illiterate men very differently from those of persons of legal or technical acquirements, and from a totally different standpoint. I make this remark in view of another question affecting the decision of the case I intend hereafter to refer to.

There was, then, no binding contract on the appellant for more than five shares. Has he by his subsequent conduct adopted the contract for the fifty? It is alleged that he has done so by the acceptance of a cheque for a 10 per cent. dividend the following year. A counterpart of the cheque (with a blank for the name of the payee and the amount) is in evidence, and it states the payment to have been for a dividend upon paid up capital to the 31st December, 1875. The amount in the cheque was the dividend on the sum he had actually paid. It might have been intended by the manager or officer of the company who sent it as a dividend on the paid up capital on the fifty shares, for the amount would be the same in either case, but there is no evidence to show how it was intended. There is no reference in the cheque to the number of shares for which it was sent, nor was there anything to bring to the mind or notice of the appellant that it was for a dividend on the fifty shares, nor does it show whether it was *intended* as a dividend on the fifty shares or on the five. The amount was calculated on the capital *paid up*, and in the absence of any proof, why are we to assume that it was intended for the one any more than the other; and still further, how can we be called

1881

COTÉ v. STADACONA INS. CO.

Henry, J.

upon to assume that the appellant so received or understood it. The cheque told him that it was a dividend on paid-up capital. He had paid in an amount sufficient to entitle him to a dividend, and had no reason to presume it was intended to have reference at all to fifty shares. Whether he was to be held for fifty or five shares was not a subject then necessarily brought to his mind by the words of the cheque. Besides, neither the rate of the dividend nor the time for which it was made up was stated, so that he was in no position to make any calculations as to the amount sent him, or the purpose for which it was sent. The receipt by him of the cheque is, however, relied on to prove that he acquiesced in his remaining as a subscriber of fifty shares. I cannot so receive it. To amount to an estoppel, the language or conduct of the acting party sought to be affected must be pointed and unequivocal, and must leave no reasonable doubt. Here, I think, no such evidence is furnished by the cheque or otherwise. The doctrine of estoppel is necessarily applicable in cases like the present, and if with full knowledge a party accepts a position tendered by another, he is estopped from taking one inconsistent with it. If the appellant was shown with his eyes open to have accepted the cheque on fifty shares, he would not be permitted afterwards to repudiate it, but the evidence before us falls far short of establishing that position. If the filling up the fifty shares was a fraud, the appellant, of course, could have repudiated the whole transaction, and obliged the company to repay the money paid them. He, in that case, should not, however, have received any dividend, but ought to receive back his money. His receipt of the dividend for the money he paid in does not, however, estop him from contending that his contract was but for five shares. When he applied to the manager shortly

1881

COTÉ
v.
STADACONA INS. CO.

Henry, J.

after subscribing for the stock, he was lulled into security, and when he subsequently received the cheque, he might very properly conclude that if the company intended to hold him for fifty shares, no dividend would be paid him until the dispute was adjusted, he having so forcibly protested against holding any stock beyond five shares, and informed the manager the signature for more was a fraud. I think the company with greater propriety, by sending him the cheque on his paid-up capital, might, under the circumstances, be held estopped from claiming him to have been a holder beyond the five shares. I don't agree with the proposition that there was no contract existing, for, if it had been *ab initio* void for fraud, there must have been a new one entered into between the parties, before an action could have been maintained at all. It was, in my opinion, binding on the company, and the appellant might have adopted it had he so elected to do, but instead of that he repudiated any thing beyond five shares, and for those five shares I think there was an enforcible contract. It seems to have been admitted throughout, that but for the receipt of the dividend by the appellant, the respondents would have no claim to recover. I am decidedly of the opinion that the receipt of the dividend by the cheque, under the circumstances, is *per se* no evidence of acquiescence in, or ratification of, the contract sued on. It is objected that the appellant should have within two years, taken action to set aside the agreement, as it appears by the stock list. Article 2,258, C.C. however, provides, that in cases of fraud, there is a prescription of ten years from the time it is discovered.

I am of opinion that the appeal should be allowed, the judgments below reversed, and judgment given for the appellant, with costs.

1881

COTÉ v. STADACONA INS. CO.

GWYNNE, J.:—

This action is by the company to enforce a contract alleged to have been entered into by the defendant, whereby, as is alleged, he became the holder of fifty shares, amounting to $5,000 in the capital stock of the company; we have no occasion therefore to refer to the numerous cases decided under the Companies' Clauses Act in *England*, which lay down the broad distinction which exists between the rights of the creditors of a company against a subscriber for shares in the company and the rights of the company against such a person disputing his liability to the company upon the ground of the fraud and misrepresentations of the agents of the company by which his subscription was obtained. In *Oakes* v. *Turquand* (1), the Lord Chancellor, Lord *Chelmsford*, alluding to this distinction, says:

> If this had been a case between *Oakes* and the company in which he sought to be relieved from his contract, as in the *Venezuela Railway Company* v. *Kisch* (2), or the company had been suing him for calls as in *Bwlch-y-plwm Lead Mining Company* v. *Baynes* (3), he would have succeeded in the one case and the company would have failed in the other, on the ground which I venture to think was correctly laid down in the recent case of the *Western Bank of Scotland* v. *Addie* (4), in this House that when a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations, and I would add by a fraudulent concealment of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent.

The equitable rights of creditors against shareholders have nothing whatever to do with the present action, which rests upon the allegations of contract contained in the declaration, and must be determined by the ordinary principles of common law as applied

(1) L. R. 2 H. L. 325.
(2) L. R. 2 H. L. 99.
(3) L. R. 2 Ex. 324.
(4) L. Rep. 1 Sc. Ap. 145.

1881

COTÉ
v.
STADACONA INS. CO.

Gwynne, J.

to matters of contract. As was said by *Bramwell*, B., in the *Bwlch-y-plwm Lead Mining Company* v. *Baynes* (1), if the defendant is liable "it is because he has undertaken to fulfil the duties of a shareholder in consideration of the plaintiffs giving him the benefits of one." The action rests upon the allegation that the defendant is the holder of fifty shares in the capital stock of the company, upon which certain calls have been made which are due and unpaid by the defendant; the defendant by his plea denies that he ever became the holder of more than five shares in such capital stock, which he alleges he paid up in full at the time of taking them. To entitle the plaintiffs to maintain this action, they must clearly establish it to be true that the defendant is the holder of the fifty shares, as alleged in the declaration, or at least that the defendant is the holder of more shares in the capital stock of the company than the five which the defendant alleges he paid up in full. That the defendant paid to the plaintiff a sum of money equal to the full amount of five shares, which is equal to 10 per cent. upon fifty shares is not disputed, but the question raised is, as in the *Bank of Hindustan* vs. *Alison* (2), is the defendant in point of fact the holder of the fifty shares as alleged by the plaintiffs, or of any greater number than the five paid up in full as denied by the defendant, *or* has he estopped himself from saying that he is not?

Now, if the evidence of the defendant's brothers is to be taken as representing truly what passed between the defendant and the company's agent (the brothers each give evidence for the others in the three several actions), there can be no doubt that they were all grossly deceived and entrapped into the appearance of having signed what they never contemplated signing,

(1) L. R. 2 Ex. 376.

(2) L. R. 6 C.P. 54 and 222.

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

and what in point of fact they never did sign or agree to. They say most distinctly that when applied to by Mr. *Genest* as agent of the company to take shares in the company, and to pay 10 per cent. thereon, they absolutely refused to do so, saying that for what they should take, if they should take any shares, they would pay in full once and for all, and that the agent of the company, finding them resolved upon this point, at length said to Joseph (the eldest of the brothers, who spoke for the others), in presence of the others:

Eh bien, souscrivez mille piastres, votre frère *Amédée* six cents piastres et votre frère *François Xavier* cinq cents piastres, et cela sera tout ce que vous aurez à payer et vous aurez dix par cent de dividende sur ces montants là.

That this was eventually agreed upon, and thereupon they each signed their respective names in a book presented to them by the agent and paid the above several sums as in full for all the amounts they respectively desired to take in the capital stock of the company. They say, also, that they never wrote in this book the matter which now appears in it set opposite to their respective names, namely:

Opposite the name *Joseph Coté*, "*St. Piere Isle d'Orleans*, $10,000; 100 shares—167."

Opposite the name of *Amédée Coté*, "*St. Pierre Ile d'Orleans*, $6,000; 60 shares—168."

Opposite the name of *F. X. Coté*, "*St. Piere Ile d'Orleans*, $5,000; 50 shares—168."

That these must have been all written by the agent of the defendant afterwards, and without their authority, knowledge or consent.

Mr. *Genest*, agent of the plaintiffs, while admitting that this additional matter is in his handwriting, written after the parties had signed their names, says that it was done by him in their presence; and to carry out what he says he clearly understood to be the intention of the parties to whom, as he says, he fully

explained the amounts and numbers of shares so written down, and although he admits that he told them it was not the intention of the company to call in more than they had paid, he says he explained to them that they would nevertheless be responsible to the above amounts.

Against the interest which it is urged the brothers have to support the contention of each other, as affecting the weight of their evidence, is to be set the interest which Mr. *Genest* admits he had in getting subscriptions for as many shares as possible in the books in his hands, for that he was paid 25 cents per share upon all the shares so appearing in such book, and the further interest that he has to free himself from the charge of fraud imputed to him by the brothers *Coté*. It sufficiently appears by evidence, which is not attempted to be impeached by any contradictory evidence, that the total amounts above set opposite the names of the brothers *Coté* is six or seven times in excess of the united property of all three combined; and that the now defendant *F. X. Coté*, when he paid the $500 paid by him, paid more than the whole of what he was worth, and that he had to borrow $50 from his brother *Joseph* to make up the amount. We start therefore with a strong presumption, in support of the assertion of these poor farmers, that they never contemplated taking, and absolutely refused to take, any greater amount in the capital stock of the plaintiff's company than they paid for in full at the time. The learned Chief Justice *Meredith*, before whom the case was tried in the court of first instance, was satisfied by the evidence, that however much Mr. *Genest* may have thought he had explained to the defendant the nature of the transaction to which he had set his name, he wholly failed to make the defendant understand it, for in the judgment of the learned Chief Justice when the de-

1881

COTÉ
v.
STADACONA
INS. CO.

Gwynne, J.

fendant and his brothers signed their names in the book presented to them by *Genest*, they did not know the nature or intent of what they had signed, nor the nature, amount, or extent, of the responsibility which, by so doing, they were assuming, that in fact the matter was not fairly put before the defendant nor understood by him. The Court of Queen's Bench, in appeal, was of opinion that without any doubt the defendant, the now appellant, had been induced to sign his name for the shares as appearing in the book produced in evidence without understanding the responsibility which, by so doing, he was assuming; and the court concludes that the contract alleged by the company in the declaration is not proved, and that in this point of view (if that in the judgment of the court were sufficient to decide the action) the action should be dismissed.

I must say that with this view so expressed by two courts, the presiding judge in one of which himself heard the witnesses, I should not, sitting as a judge in appeal, feel myself justified in differing, even though the evidence should not present itself to my mind precisely in the same light; but the true result of the evidence, as it appears to my mind also, clearly is that the defendant never contemplated taking any greater interest in, or any greater amount of, the capital stock of the company than what was covered by the $500, which he paid at the time as, and intending it to be, in full of all his interest in the company, that is to say, in full of five shares, and that he did not comprehend, if he had at the time heard, what the company's agent set opposite to his name, consequently there never was that concurrence of minds which is essential to the making of a contract *inter partes*, and that, therefore, the first branch of the question which we have to decide, if the evidence relating thereto be received, must be answered

in favor of the defendant, namely: That, *in point of fact*, he never was the holder of fifty shares in the capital stock of the company, as alleged by the plaintiff, nor of any shares, unless the plaintiff should be willing to accept, and should accept, his $500 paid to them as payment in full for five shares.

It only, therefore, remains to be considered whether the defendant is estopped from saying that he is not the holder of the fifty shares as alleged by the plaintiffs in their declaration? In considering this question, it becomes important to enquire, and we are justified (in a case of this nature having regard to the humble condition and want of experience in business of the defendant) in criticising minutely what was the true legal nature, purport and effect of the document which the defendant, without understanding what he was doing, did in fact sign. The attention of the courts below was not, as it appears to me, drawn to the true nature of that document, the book itself having been withdrawn and only a partial extract, and that of the least important part, taken from it, nor has the character or effect of the defendant's prompt repudiation of that document, as soon as he suspected what it did purport to represent, been sufficiently appreciated.

The page in the book where the defendant's signature appears had not, nor had any page in it, except the first, any heading to indicate what it was the parties signing their names in the book set their names unto. The evidence on the part of the defendant is that he did not see the heading or know that there was one. The evidence of Mr. *Genest* is, that he read and fully explained to the defendant what appears at the head of the first page. Now, what is it that is there and that he so explained, if indeed he did so? It is in French and English, and in English is as follows:—

1881

COTÉ
v.
STADACONA INS. CO.

Gwynne, J.

The undersigned hereby agree to take and they do hereby take and subscribe to the number of shares in the said company set opposite to their respective signatures, *or any portion thereof as may be allotted by the Provisional Board of Directors*, the whole subject to such conditions contained in the Act incorporating the said company.

Now, leaving out of consideration for the present the fact that, when the defendant signed his name in the book, there were no shares or amounts set opposite to his name, and that the words and figures now appearing there were added afterwards by Mr. *Genest* without the knowledge or consent of the defendant (as the defendant's evidence says, although, as Mr. *Genest* alleges, with his knowledge), and assuming these words and figures to have been added with defendant's knowledge and consent, what is the legal effect and purport of this document, and what is the explanation of it which should have been given by Mr. *Genest*, if it be true, as he says, that he read it and explained it to the defendant.

This document differs from what appeared to me to be expressed in the document of a like nature which was before us in *Nasmyth* v. *Manning* (1), lately decided in this court, in which case, although the language of the document there was not so strong as the language of that now before us in support of the conclusion at which a majority of the court arrived, the court held that no liability arose until some subsequent act in the nature of an allotment of shares by the provisional directors should take place and be communicated to the party subscribing the document. The judgment of this court in that case, until reversed, I must consider as binding upon me, and upon the point now under consideration I must regard it as a conclusive authority.

The document, then, now before us involved no obligation upon the part of the provisional board of directors

(1) 5 Can. S. C. R. 417.

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

to allot to the defendant any portion of the shares set opposite to his name. Mr. *Genest* did not and could not represent the provisional board for that purpose. The document as appearing now signed in the book produced, the nature of which, *as it is found*, was not fully explained to or understood by the defendant, is simply a proposition upon his part, with an undertaking, as yet unilateral, to take and pay for such portion of the shares set opposite to his name, if any, as the provisional board of directors should allot to him. Until this board should exercise their judgment upon that proposition and signify to the defendant in some manner what they had resolved upon doing and had done in the matter, there was not, and, *by the terms of the document so signed by the defendant*, there does not profess to be any, contract perfected between him and the plaintiffs, and the defendant was not and did not become, by his mere signature in the book, the holder of any number of shares in the capital stock of the company.

Now, before the provisional board of directors ever assumed to act in the discharge of the function and duty devolved upon them by the defendant's proposition, and which could be discharged by that board only, the defendant became aware that, or had reason to suspect that, the fraud and misrepresentation which he now sets up as his defence to this action had been committed, whereby he was induced to sign a document purporting to represent his intentions and design to be totally different from what he intended and understood it to represent, and thereupon without delay, and before any action is taken by the provisional board of directors upon the document, he wholly repudiates the matter as erroneously represented in the book by the plaintiffs' agent, and informs the company, through their secretary, that all the defendant intended or proposed to do was to take shares to the amount of $500 paid up in full;

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

that it was for this purpose he had given his cheque for $500. There was no legal necessity that such information should be communicated in writing; oral communication was as good as in writing. Now, the effect of this notice and repudiation by the defendant of what the book represented was clearly, as it appears to me, to give to the plaintiffs ample notice to require them, in the discharge of the duty which they owed alike to him as to the company, which latter was to allot shares only to solvent persons, having regard to the amount allotted, that unless they should be willing to accept the defendant as the holder merely of shares to the amount of $500 all paid up, he would have no shares. If they should not be willing so to accept him, their duty was to erase his name from the book in which it was and to refund him his money, which, to say the least, they had so become possessed of by manifest error, of which, after such notice and information given to them, they must be taken to be aware.

The board, it appears now, never did allot to the defendant any shares, but they retained his money of which they had so become possessed, with full notice from the defendant that he had only paid it as, and that under the circumstances communicated to the plaintiff by the defendant, they could only justify their retention of it by accepting it, for the purpose for which it was given by the defendant, as payment in full of so many shares fully paid up in the capital stock of the company as $500 represented. The defendant, then, as it appears to me, effectually withdrew from the provisional board of directors all right to regard him as a subscriber for, or as assenting to become a subscriber for, any greater number than five shares, and those as fully paid up; the Board, however, never did, in fact, communicate to the defendant their acceptance of him as the holder of five fully paid up shares, under

the notice given by him in repudiation of the proposition as appearing in the book. They simply retained his money, with the knowledge communicated to them by the defendant that he had paid the $500 as and for payment in full of shares to that amount, viz., five shares; there having been no completed contract at this time, there was no necessity for the defendant to take any proceedings in any court to annul a contract not entered into.

While things still remained in this condition, the plaintiffs having had sufficient notice that what the book signed by the defendant represented was utterly erroneous, and that the defendant was not an applicant for any shares in the capital stock of the company, unless it should be for five shares, for which, as payment in full, he had given his cheque for $500 to the company, the plaintiffs in the year 1876 sent to the defendant a cheque in the following terms:

Compagnie d'Assurance *Stadacona* contre le feu et sur la vie.
Premier dividende—*Québec* 25 janvier 1876.
Au caissier de la banque d'Union du *Bas-Canada*.
Payez à *F. X. Coté* ou ordre cent piastres étant pour dividende sur capital versé au trente et un décembre 1875.

The money made payable by this cheque was received by the defendant. Now, can the acceptance of this money operate as estopping the defendant from now alleging that he never was the holder of more than five shares in the capital stock of the company, and these as fully paid up? Clearly not, as it appears to me, for, firstly, the amount so paid was calculated upon the paid-up capital, that is to say, in so far as the defendant is concerned upon his $500, whether that $500 was payment in full of five shares, or as 10 per cent. upon fifty shares, and, secondly, because, after the notice given by the defendant to the plaintiffs in repudiation of what appeared in the book signed by him, and inform-

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

ing the plaintiffs that he had only paid $500 as and for payment of that amount of fully paid up shares, the board of directors had no right to allot, and in point of fact did not allot, to the defendant any shares under the proposition as appearing in such book. They had, in fact, no right to hold him liable for any shares, unless they were willing to accept his version of the erroneous character of what appeared in the book, and of his purpose and intention in paying the $500, and to accept him as the holder of five shares paid up in full.

When, then, the directors sent to the defendant the above cheque he would have been rather, as it seems to me, justified in regarding it as evidence of the adoption by the plaintiffs of the defendant's statement, as communicated to them through their secretary in repudiation of the proposition as appearing in the book which the defendant was ignorantly, if not fraudulently, induced to sign, and of his version of the purpose for which he paid his $500.

If there be any estoppel arising out of this cheque it is not against the defendant that it should operate, but against the plaintiffs, who, under the above circumstances, and affected with knowledge of the defendant's contention, and of his intention in paying the $500 being as payment in full of five shares, issued the cheque. As to the defendant, *his acceptance* of the money made payable by the cheque cannot in reason be regarded as acquiescence in anything further than that he is a holder of five fully paid up shares, which is what he has always contended was the utmost he ever contemplated being the holder of.

The doctrine of estoppel can only operate to prevent the defendant from showing the truth, if, by any act or declaration acquiesced in by him, the plaintiffs were misled to their prejudice to believe the defendant to be the holder of fifty shares in the capital stock of the

company. A party is only estopped from showing the truth when he has by some act or declaration acquiesced in an assumed state of things, *and by such acquiescence* the situation *of the other party* has been altered to his prejudice. *Bank of Hindustan* vs. *Alison* (1).

Now the terms of the document bearing the defendant's signature, already commented upon, could not have had that effect, for that document was not only not acquiesced in by the defendant, but was immediately, and before having been acted upon, repudiated by the defendant, to the knowledge of the plaintiffs. The plaintiffs, therefore, could not, by reason of the defendant's signature appearing in that document, have been prejudiced or have believed the defendant to be in truth the holder of the fifty shares for which they now seek to make him liable. The act of the defendant in receiving the money made payable by the cheque for dividend cannot, as I have already stated my opinion to be, be construed to be an acquiescence in anything more than that the defendant admitted (as he had contended and as he does now, was the true state of the case,) that he had paid his $500, intending it to be and as payment in full of five paid-up shares.

It appears that *Joseph Coté*, having learned in 1877 that the plaintiffs still contemplated holding him and his brothers for the amounts wrongly entered by the plaintiffs' agent in the plaintiffs' book, again remonstrated to Mr. *Lemoine*, one of the directors, who suggested to him to write a letter to the board of directors which he would lay before them. *Joseph* thereupon, or I should say from the mistakes apparent in the letter, somebody for him, wrote a letter in French, of the 28th February, 1877, to the directors of the company, of which the following is a translation :

(1) L. R. 6 C. P. 227.

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

The object of this is to make you understand my actual position towards your company. I am still full of confidence as to the administration of the affairs of the company, and I hope we shall not have reason to regret having placed there all the money we possessed. I address you in the name of four brothers who are in the same position as myself. The amount of our subscription has been $2,600, or 260 shares.

Here are the reasons for our having taken so great a number of shares. The agents sent to make known to us the rules of the company, and the conditions of subscription concealed from us almost altogether the risks and responsibilities which we should incur by such subscription. Observe, if you please, Messieurs, that not being able to obtain anything in the Parish of *St. Pierre*, the agents struggled to show to us the advantages which the company offered without suggesting, save in a vague manner, the dangers that we should run. We yielded to a confidence which we regret to this day. The influence which we have in our locality has been the cause that our mistake has procured many more subscriptions than there would have been without us. If we had had an extract from the act of incorporation, as that which was left with Mr. *François Fortin*, we should have understood as he did that we should not with our means risk so much. He only paid $125. Your secretary even expressed his astonishment, and admitted how irrational it was in our position (one of my brothers having borrowed $50 to make his payment), to have paid so large a sum. Upon this subject one of your agents at the office, and in the presence of Mr. *Lindsay*, said that we had made our payment and that we should not be troubled any more about it. By reason of his reassuring words we surrendered *ourselves to your good faith*. For these reasons we take occasion to ask to sell our shares without confiscation, so that after this year we may have still the sum of $2,600 in the same manner as if we had paid this sum in three instalments instead of two.

Your humble servant,

JOSEPH COTE.

And on the 4th of August, 1877, *Joseph* and his brother *Amédée* and the above defendant, all three signed a letter of that date, addressed to the the directors, in French, of which the following is a translation:

4th August, 1877.

TO THE DIRECTORS, &c.,

GENTLEMEN,—From the different notices, circulars, &c., which you have sent us we see that you have not paid any attention to our

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

observations and demands. This is very unfortunate, for we ventured to hope different treatment on the part of persons so agreeable and intelligent as you appear to be. We repeat, then, the observations which we addressed to you in writing last winter, in the hope that you will pay attention to it. Three brothers, *Joseph*, *Amédée* and *François Xavier Coté*, deposited in your office $2,100 as shareholders, upon the express condition, and well explained, that they understood that they paid thereby the full amount of their shares. Then your agents wrote that they paid only two instalments of 5 per cent. which constituted a responsibility of $21,000. Can we, gentlemen, in the name of common sense, believe that you will exact that which your agents have written, our whole properties are not worth the sixth part of that amount. You would thus deprive us of all means of subsistence, and you would still be at a great loss. At present is it true that we have undertaken to pay all the amount of our shares? Well, we have paid almost every farthing we possess, and *François Xavier* had to borrow even a part of his to make his payment. Moreover, we have witnesses, if it be necessary, that your agents are mistaken. That our deposit is spent we suspect is true, but as to paying anew we will not, for we are unable to do so. We beg of you, therefore, once for all, to arrange with your agents, that we have taken twenty-one shares instead of 210.

We respectfully solicit an answer.

Your three humble servants,

JOSEPH COTÉ,
AMEDEE COTE,
FRANCOIS X. COTE.

Now that this last letter cannot operate as estopping the defendant from showing the truth is clear, for it is a reassertion of the repudiation of what the plaintiffs' agent had written in the book, involved in the remonstrance and complaint made by the defendant immediately after he first had reason to believe or suspect that it falsely represented him to have taken $5,000 instead of $500 paid up in full.

Then, as to the other letter, its contents show how slow we should be to give the effect of an estoppel to anything over the signature of this poor ignorant man. The letter speaks of his having four brothers, whereas there were only two, and of the amount of their sub-

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

scriptions being $2,600 or 260 shares, when we know that even in the plaintiff's book they were put down for $21,000 and 210 shares. Then the last sentence in the letter is utterly insensible and unintelligible. It was written at the suggestion of one of the directors to whom *Joseph Coté* was repeating his original complaint. From what we now know of the nature of that complaint, the letter must be read as having reference to that old complaint, and to the position which, by the alleged wrongful conduct of plaintiffs' agent, *Joseph* was given to understand that he and his brothers occupied on the books of the company, although it presses other considerations for the board yielding to his demands.

Now, it is to be observed that no obligation is pretended to have been incurred by the company since the writing of that letter, or upon the faith of any admission contained in it; but there is a further and an insuperable reason why that letter should not operate to estop the defendant from showing the truth in this action.

The general doctrine laid down in *Heane* vs. *Rogers* (1), approved and followed in *Newton* vs. *Belcher* and *Newton* vs. *Liddiard* (2), that a party is at liberty to prove that his admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless the opposite party has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability, as well as in respect of fact. In all cases, therefore, of this nature, a jury, or judges acting as jurors, with the view of estimating the effect due to an admission, are justified in considering the circumstances under which it is made, and if it should appear to have been made under an erroneous notion of legal

(1) 9 B. & C. 577. (2) 12 Q. B. 921-927.

liability, they may qualify its effect accordingly (1). Acting, then, as a juror in this case, and assuming the defendant to be affected by the contents of this letter, and that it is the one referred to in the letter of August, signed by the three brothers as having been addressed by them last winter to the directors, of which, however, there was no evidence, and which it would seem not to be from a passage in the letter of August, viz : "We repeat, then, the observations which we addressed to you in writing last winter," I cannot read it as an abandonment by the defendant of the position taken and asserted by him as involved in his original remonstrance and repudiation of what the plaintiffs' agent, contrary to the truth as the defendant alleged, entered in the book opposite to his name, and which contention is repeated in the letter of August, 1877. But now that we see what the nature of the document which the defendant so signed was, the circumstance under which his signature was procured, the fraud or error committed in setting opposite to his signature the amount and number of shares now appearing there, and when we consider that it was the duty of the plaintiffs, upon the first remonstrance and repudiation of its contents made by the defendant, either to have erased his name altogether and to have refunded him his money or to have adopted his version of the purpose he had in paying them his $500, we see that they never were justified in incurring any obligation based upon the faith of the defendant being the holder of shares to the amount of $5,000 ; and when we see that the letter under consideration was written under a mistaken idea entertained by the defendant of what he had in fact signed, as well as of his legal liability and rights in

(1) Taylor on evidence, 743.

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

respect thereof, the plaintiffs cannot be heard to say that the defendant is estopped from showing the truth. He was led by the plaintiffs to believe that he had by a perfected contract become the holder of shares to the amount of $5000.00 in the capital stock of the company which he was legally bound to pay, whereas it now appears that as matter of fact the paper which he signed did not contain such a contract, and that his signature to what was in the book did not subject him to the legal obligation which was insisted upon.

The fact that the defendant, immediately after setting his name to the book produced, communicated to the plaintiffs the true state of the case, before the plaintiffs had taken any action upon the faith of the defendant's signature having been obtained, and that, in fact, at a time when, as now appears, no completed contract between the defendant and the plaintiffs had been entered into, distinguishes this case from that class of cases which was relied upon by the courts below.

For the above reasons, I am of opinion that nothing has taken place which can, in law, estop the defendant from showing the truth in this action in relation to the matter which the plaintiffs make the foundation of their claim, and that the truth being shown establishes that the defendant never was in fact the holder of fifty shares, nor of any number of shares, in the capital stock of the company, unless he be holder of five shares fully paid up

The appeal, in my judgment, should be allowed with costs, and judgment should be entered for the defendant in the court below, with costs.

Appeal allowed with costs.

Attorneys for appellant: *Bossé & Languedoc.*

Attorneys for respondents: *Pelletier, Bédard, Rouleau & Lemoine.*

JOHN WALKER AND WILLIAM SPEARS ..... } APPELLANTS;

AND

JAMES McMILLAN ..... RESPONDENT.

1881
*Nov. 2, 3.
1882
*May 3.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

41 *Vic., chs.* 6 *&* 7 (*N. B.*)—*By-law of city of St. John.—Building erected in violation of.—Negligence of contractor.—Liability of employer—Several defendants appearing by same attorney.—Separate counsel at trial—Cross-appeal—Rent, loss of.—Damages.*

On the 26th September, 1877, *S.* contracted to erect a proper and legal building for *W.* on his (*W.'s*) land, in the city of *St. John* Two days after, a by-law of the city of *St. John*, under the act of the legislature, 41 *Vic.*, c. 6, "The *St. John* Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, *W.* reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, &c., &c. By the contract it was also declared that *W.* had engaged *B.* as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and issue certificate. While *W.'s* building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to *W.* and *McM.*, his neighbour. On an action by *McM.* against *W.* and *S.* to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, $3,952, and $1,375 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable. On motion to the Supreme Court of *New Brunswick* for a non-suit or new trial, the verdict was allowed to stand for $3,952, the amount of the general damages found by the jury. On appeal to the Supreme Court

*PRESENT—Sir William J. Ritchie, Knight, C. J., and Fournier Henry, Taschereau and Gwynne, J. J.

1881

WALKER v. MCMILLAN.

and cross-appeal by respondent to have verdict stand for the full amount awarded by the jury—

Held, (*Gwynne*, J., dissenting), 1. That at the time of the injury complained of, the contract for the erection of *W.'s* building being in contravention of the provisions of a valid by-law of the city of *St. John*, the defendant *W.* his contractors and his agent (*S.*) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to *McM.* charged in the declaration.

2. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded.

Per *Gwynne*, J., dissenting, That *W.* was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it.

The defendants appeared, by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness.

Held (affirming the ruling of the judge at the trial), that the judge was right in allowing only one counsel to cross-examine the witness.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) discharging a rule *nisi* for a non-suit or a new trial.

The facts of the case are, shortly, these: The respondent and the appellant *Walker* are owners of lots adjoining each other situate on the east side of *Prince William Street* in the city of *St. John*, the buildings on these having been swept away in the great fire of June, 1877. The respondent commenced to erect a building on his lot, one *Spears* being the contractor, and shortly afterwards the appellant *Walker* entered into a contract with *Spears* to erect the mason work of a block of stores to be erected on his lot, the stores to be

(1) 21 New Brunswick Rep., 31.

1881

WALKER v. McMILLAN.

brick. *Miller* and *Nice* had a contract to build, finish and complete the carpentering, painting and plumbing of the buildings,—this being an entirely independent contract from that of *Spears*; it is dated the same day. Under these contracts, *Spears*, *Miller* and *Nice* went on with the building of appellant's building, and the walls were up to the top and ready for roofing; the floors were laid three stories. Under Act of Assembly 41 *Vic.* chs. 6 and 7, the mayor, aldermen and commonalty, on the 26th Sept. A.D., 1877, had passed a by-law relating to the construction of buildings. The walls to be built according to the contract contravened the provisions of the by-law. On the 6th Dec., 1877, a heavy rain storm took place, and in the afternoon the centre wall of *Walker's* building gave way, bringing down the other walls, tearing away the party wall between the building and respondent's building, and doing considerable damage to respondent's building. The foundation, it would appear, was defective and improperly built, but had been approved by the architect. For this damage the respondent commenced an action in the Supreme Court, to which the appellants pleaded several special pleas; in these pleas the principal allegation is that the buildings so being erected were not in possession of or under the control of the appellants, or either of them, but in the possession and under the control of *Spears*.

The case was tried before Mr. Justice *Weldon* and a special jury at the *St. John* circuit, November, 1879, when the jury, under the charge of the learned judge, found a verdict for the plaintiff for $5,327.32, including $1,375 for loss of rent.

The motion for a new trial was made on a variety of grounds, and the first ground was the refusal of the judge to permit the counsel of each defendant to cross-

1881
WALKER
v.
McMILLAN.

examine the plaintiff's witnesses and to address the jury for the defendant.

The defendants appeared by one attorney and united in their defence, which was substantially the same; but on the trial they appeared by different counsel, but during the progress of the trial no different defence was set up by either defendant. The other grounds were: improper reception of evidence; improper rejection of evidence; the refusal of the judge to order a non-suit; misdirection.

After argument for a new trial the court refused the rule, the verdict being reduced by the amount of the rent. The appellants thereupon appealed to the Supreme Court of *Canada*, and the respondent, by way of cross-appeal, claimed that the verdict should stand for the full amount awarded by the jury, $3,952 for general damages, and $1,375 for rent.

Mr. *Kaye*, Q.C, and Dr. *Tuck*, Q.C., for appellants, and Mr. *Weldon*, Q.C., and Dr. *Barker*, Q.C., for respondent.

The principle arguments urged and authorities cited are reviewed at length in the judgments of the Chief Justice and of Mr. Justice *Gwynne*. See also report of the case in *New Brunswick* reports (1).

RITCHIE, C. J.:—

[After having stated the pleadings, proceeded as follows:]

All the pleas are by defendants, by *S. R. Thomson*, their attorney, and are signed by Mr. *Kaye* as counsel for defendants.

At the trial it is said in the case:

Mr. *Weldon* and Mr. *Barker* for the plaintiff.
Mr. *Thomson* for *Walker*.
Mr. *Kaye* for *Spears*.
Mr. *Thomson* cross-examines the first witness. Mr. *Kaye* pro-

(1) 21 New Brunswick Rep. 31.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

poses to cross-examine witness as his counsel Mr. *Spears*. This being objected to by plaintiff's counsel.

Judge:—I rule, as the defendants have not severed in their pleadings there is no right that the defendants' counsel can be heard to cross-examine the witness, the plea is for both, one attorney and one counsel.

The witness appears then to have been further cross-examined by Mr. *Thomson*. Plaintiff's second witness was cross-examined by Mr. *Kaye*, when, at the close of his cross-examination, Mr. *Thomson* claimed the right, as counsel for Mr. *Walker*, to cross-examine the witness, Mr. *Kaye* being counsel for *Spears*.

The learned judge stated that, in accordance with his previous ruling, only one counsel could cross-examine the witness.

As the defendants appeared by the same attorney, pleaded jointly by the same attorney, and the pleas were all signed by the same counsel, and the same attorney and counsel appeared on the trial, and the defence, being in no material sense different and distinct, but on the contrary the defence of both being in substance precisely the same, under the circumstances I think the judge was right in refusing to allow the defendants to be represented separately at the trial. This was a matter relating to the conduct of the suit, and was in his discretion, and in my opinion no fault can be found in the way he exercised that discretion.

As to the merits:

On the 5th September, 1877, 41 *Vic.*, c 6, "An Act to amend the law for the better prevention of conflagrations in the city of *St. John*," and 41 *Vic.*, c. 7 were passed.

Sec. 7 of 41 *Vic.*, c. 7 is as follows:

7. The inspector shall have full power to decide upon any questions arising under the provisions of this Act, and of the by-laws passed under the authority of this Act, relative to the manner of construction or materials to be used in the construction, alteration

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

or repair of any building in the city of *St. John*, and he may require that plans of the proposed erection, alteration or repairs shall be submitted for inspection before issuing his permit; *provided, however*, that should any question arise between the inspector and the owner or architect of any building, or should the owner or architect object to any order or decision of the said inspector, the matter shall be referred to the arbitrament of three persons (who shall be either architects or master builders), one to be chosen by the inspector, one by the owner or other person interested, and these two shall choose a third, and the decision of these referees, or any two of them, submitted in writing, shall be final and conclusive on the matter referred.

8. The inspector shall examine all buildings in the course of erection, alteration or repair throughout the city, as often as practicable, and make a record of all violations of any provision of this act, or of the by-laws made under the authority of this act, together with the street and number where such violations are found, the names of the owners, lessee, occupants, architect and master mechanics, and all other matters relative thereto.

27. No building shall be erected hereafter in any part of the city of *St. John*, without a permit being first obtained from the inspector of buildings, and no addition or alteration to any building, subject to the regulations of this act, shall be made without a permit from the said inspector.

30. The Mayor, Aldermen and Commonalty of the city of *St. John*, in Common Council, are hereby authorized and empowered from time to time to make, ordain, amend and rescind by-laws and ordinances regulating the mode of constructing buildings in the city of *St. John*, and any part thereof, with a view to ensuring the sufficient, safe and proper construction thereof, and the security of life and limb, and protection against fire.

31. Whosoever shall commit or make any act or default contrary to the provisions of this act, or contrary to any of the provisions of any by-law or ordinance made under the authority of this Act, shall be liable to a penalty of not less than twenty dollars nor more than one hundred dollars for every such act or default, to be recovered by proceedings to be taken in the name of the inspector of buildings, before the police magistrate of the city of *St. John*, or other magistrate sitting at the police office in the said city; and in default of payment, the person convicted shall be committed to the common gaol of the city and county of *St. John* for a period of not more than two calendar months, in the discretion of the committing magistrate.

32. Whosoever, having been convicted as last aforesaid, shall permit the continuance of any matter or thing contrary to the provisions of this act, or contrary to any of the provisions of any by-law or ordinance made as aforesaid, shall, for each day's continuance after such conviction, be liable to a further penalty of not less than ten dollars nor more than fifty dollars, to be recovered before the police magistrate of the city of *St. John*, or sitting magistrate at the Police Office in said city, in the same manner and with the like effect as hereinbefore mentioned in the last preceding section provided.

On the 24th September, 1877, defendant entered into a contract with *J. & W. C. Spears* for the erection of a building on his lot adjoining that of plaintiffs, and signed the following:—

This agreement, made this twenty-fourth day of September A.D., 1877, between *J. & W C Spears*, parties of the first part, and *James Walker*, party of the second part, witnesseth, the said party of the first part, for and in consideration of the payments to be made by them by the said second party as hereinafter provided, do hereby contract and agree to furnish all the material, labor, tools, machinery, etc., and to build, finish and complete for the said second party all the masons' and other trades of the block of stores to be erected on *Prince William* Street, east side, between *Princess* and *King* Streets, to be described as in the foregoing specifications, and according to the plans and drawings therein especially referred to; which plans and drawings are declared to be a part of this agreement.

And the second party, for and in consideration of the said first party fully and faithfully executing the aforesaid work, and furnishing all the materials therefor, as specified, so as to fully carry out the design according to its true spirit, meaning and intent, and in the manner and by and at the times set forth in the foregoing specification, and to the full and complete satisfaction of *John C. Babcock*, superintendent as aforesaid, doth hereby agree to pay to the said first party as the work progresses, and as the same shall be certified to by the said superintendent, the sum of ten thousand four hundred and forty-one ($10,441) dollars, to be paid in the following manner: On demand, as the work progresses, in payments amounting to seventy-five per cent. of the amount as set forth and specified above, and as the same shall be certified by the superintendent, and the balance of twenty-five per cent. as shall be found due as hereinafter provided.

It is further agreed by the parties that the twenty-five per cent.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

aforesaid agreed to be reserved by second party from the value of work executed, shall be held by second party until the full completion of the work to the satisfaction of the superintendent aforesaid, as security for the proper execution of the contract by first party, and as indemnity, as far as the same is sufficient, to be applied on the liquidation of any damages arising under this contract.

It is further agreed by the parties hereto that all the foregoing conditions and stipulations shall be mutually binding upon executors and administrators.

In witness whereof, the parties hereto have set their hands the day and year first above written.

JAMES WALKER,
J. & W. C. SPEARS.

JOHN C. BABCOCK.

And in the specifications referred to we find:

"§ V. The proprietor has engaged *John C. Babcock* as superintendent of the erection and completion of said building; his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information required to properly illustrate the design given; also to make estimates for the contractor of the amounts due to him on the contract, in no case estimating any materials or work which are objectionable, or have not become permanent parts of the work; and when the building is completed, to issue a certificate to the contractor, which certificate, if unconditional, shall be an acceptance of the contract, and shall release him from all further responsibility on account of the work.

§ VI. It is to be understood by the contractors that the building or work is entirely at their risk until the same is accepted, and they will be held liable for its safety to the amount of money paid by the proprietor on account of the same.

§ VII. In case of any unusual or unnecessary delay, or inability, by the contractor in providing and delivering the necessary materials, and performing the necessary labor at the time the same is required, so as to insure the completion and delivery of the building or work at the time hereinafter set forth and contracted; then, and in such case, the proprietor, within three days after having notified the contractor of his intention so to do, shall have the right to enter upon the work and procure such necessary materials or labor to be furnished or performed, as the case may require; and remove from the same all defective materials or workmanship as in the judgment of the superintendent may be found necessary, and carry on the work to completion in such way as shall be proper and right, charg-

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

ing the cost thereof to the contractor, and deducting such charges from the amount of the contract price.

§ VIII. The proprietor reserves the right by conferring with the superintending architect, to alter and modify the plans and this specification in particular, and the architect shall be at liberty to make any deviation in the construction, detail, or execution, without in either case invalidating or rendering void the contract. And in case such alteration or deviation shall increase or diminish the cost of doing the work, the amount to be allowed to the contractor or proprietor shall be such as may be equitable and just.

On the 26th September, 1877, by-laws were passed by the mayor, &c., of the city of *St. John*, in common council, under the authority of the 30th sec. of 41 *Vic.*, ch. 7, regulating the mode of constructing buildings in the city of *St. John*. In the latter part of September the building was commenced, the centre wall of the building having been misplaced was taken down and rebuilt; it is admitted on all hands that this wall was not built in compliance with the acts or by-laws and was not properly built. On the 6th December, this wall gave way, fell, and with it brought down the wall of plaintiff's building. The defendants contend that having contracted with a competent person they were not liable for the damage done plaintiff's building by the falling of this wall.

There was evidence to show that a large quantity of sand for building purposes had been put in the building for the convenience and use of the contractors, and that a somewhat continuous rain having come on, and the building not being roofed, the weight of the water and the sand contributed to the fall of the wall, though Mr. *Causey*, an experienced builder called by the defendants, and who rebuilt the wall, says:

I went to rebuild in the trench. The original was twelve inches astray. I saw indications on the clay. He said if the wall had been built in its present position as laid out on the plan it must have been on the clay. Half of it in the front part. It had not gone down to the rock in the right place. I re-built as laid down in the plan. I

1882

WALKER v. McMILLAN.

Ritchie, C.J.

got down to the rock. I got the rock for it from the cellar floor. The wall had got to the solid rock in front. Other part on clay. I should say it was not a proper job. I think *Spears* could not have known from the character I have heard of him. If so badly built it is a wonder to me it held until it got to the top.

The work was superintended by Mr. *Babcock*, defendants' architect, and *Spears* his agent. For the work done on the building the architect, under sec. 5 of the specifications, gave certificates as follows:—

St John, November 2nd, 1877.

This certifies that Messrs. *J. & W. C. Spears* are entitled to the payment of three thousand dollars ($3,000.00) for labour and material supplied to building of *James Walker*, Esq., east side of *Prince William* Street, between *King* and *Princess* Streets, *St. John*, according to contract.

"$3,000.00.

JOHN C. BABCOCK.

Received the above amount,
J. & W. C. SPEARS.

St. John, November 24th, 1877.

"This is to certify that Messrs. *J. & W. C. Spears* are entitled to a payment of twenty three hundred dollars ($2,300.00) for labour and material furnished to building of Dr. *Jno. Walker*, on the east side of *Prince William* Street, between *King* and *Princess* Streets, *Saint John, N. B.*, according to contract.

"$2,300.00.

JOHN C. BABCOCK.
Architect and Superintendent.

J. & W. C. SPEARS.

I think it is clearly established that injury was occasioned by the centre wall of the *Walker* building giving way, and there was conclusive evidence that this wall was improperly built on an improper foundation, was too weak, and was contrary to the statute and the by-laws.

Simeon Jones, in his evidence, says:

I know the buildings and recollect the occasion. I was on *Prince William* street near *King*. I heard a noise and saw the *Walker* building apparently settle down in the middle and fall, and I think the side of *McMillan* building fell out. Settled down in the middle and fell down. I could not see the rear of the building.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

Michael W. Maher:

I reside in *St. John.* Am Inspector of buildings since September, 1877. I knew the properties of *McMillan* and *Walker* before they fell. They are east of the street *Prince William.* I am practical builder for 40 years. I have been architect and practical builder.

* * * I saw the *Walker* building a story above the street. I went to visit it. I think they were putting on the beams. I went there; I saw Mr. *Spears* and enquired who had charge of the building. I hunted up Mr. *Spears* and told him that the walls were not according to the law, and the vibration in the walls. Mr. *Spears* said he thought it good enough. I saw *Spears* near *Yeats'* iron store. I saw him at the building the next day or soon after, and met *Spears,* I think it was by appointment. I told him what I required. *Spears, Babcock* and *John McMillan.* I think Mr. *Spears* asked if I would not allow to get the building covered in when he would do it. I would not for or against. I wanted several courses of the— Mr. *Spears* spoke of spikes and ordinary concrete would do better. I spoke to Mr. *Spears.* He said he was the inspector of the building. I did not say anything; I was rather taken aback. The character of the building for storage and warehouse buildings. I stated what the law required me to have done, and then Mr. *Spears* said he—"

The sentence breaks off here, but I presume it has reference to what he said a moment before. *Spears* had said that he was the inspector of the building.

Joseph Pritchard says:

I reside in *St. John.* I know the *Walker* building. I have had conversation with Mr. *Spears.* He asked me what I thought of the building. I told him they looked very well, a few days before they fell, as far as they were. I said if the building was mine I would not have those shores in front. I said I would not trust them. He said that they were going to put iron pillars there. I said in the meantime the posts would have to support the whole of the building above. He asked to go and see it, and said it is stronger than you think it is. I told him I would not like to trust them myself to be under. The shore was under the front floor. There was no wall in front. The shore looked like a piece of scantling or deal. I was on the opposite side of the street.

The evidence of *Spears,* the contractor, is as follows:

I arranged for the building on the *Walker* lot. I spoke of *John C. Babcock;* he was here before I came. I entered into a written

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

contract with Dr. *Walker* for the building on the lot adjoining *McMillan's*. (Called for and produced by defendants). This is the contract. Only one signed. This is my signature of the firm and Dr. *Walker*, signed in presence of *Babcock* (the architect).

No. 2 contract.

Babcock same person I spoke of. I went on to construct this building. *Miller & Nice* had the contract for the carpenter work; it went on as I progressd with my contract. I began latter part of September to build; I went on. *Babcock* furnished me with plans —this is one. (One produced. No. 3.) * * * * * * * * This plan was given to me by *Babcock* as the working plan. The building is 65 feet high, 26 feet from the face of the *McMillan* wall to the face of the centre wall, and 26 feet to the face of the south wall. I worked under that plan from the commencement. I commenced the foundation, and I had to excavate extra to the rock in front, and ran to the rear. I built the stone wall and was ready for the first tier of beams. *Walker* and *Spears* were both there occasionally. I should judge a small space. There was a mistake in the plan. I went to the *Babcock* office as he was away. There was a foot of a mistake; it was a foot too near the *McMillan* building. *Babcock* suggested me to build another wall alongside this. I told him it would be, my judgment would be, against the doing this, as it would be on two separate foundations—better way to take down and re-build it; and it was done. I was directed, but can't state the language he used. I had previously built according to the plan. I took it down and re-built it. I then went on with the building. Mr. *Spears* was there while the building was in progress. Dr. *Walker* was there occasionally. Mr. *Spears* every day, some times several times a day. * * * Mr. *Maher* was in there one day and Mr. *Spears* and *Babcock* were there. We were in the front. *Maher* said the space was wider than the law provided, and the centre wall was not strong enough, that was his opinion. Mr. *Spears* had some words, and said he would make himself superintendent of the building, and Mr. *Maher* went away. Afterwards *Maher* came and told Mr. *Spears* that the wall, cellar wall, must be increased in thickness. This was the second time, *Spears* came and he wanted *Maher* to allow him to enclose the building, and he would increase the wall. *Maher* did not allow this to be done. I was asked for my opinion, was by driving a spike three inches into the wall and bricks four inches, and by that way add four inches to the wall. *Maher* or *Spears* asked me if I could build a wall, in the way I stated, to be as strong as if 16 inch. I declined an opinion. The centre

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

wall was left 16 inches as it originally was. Some weeks—three or four—the building fell. When *Maher* first came it was one story; the second time I think a second story was up. I notified Mr. *Babcock* to have the roof put on to protect the building, but it was not done. Mr. *Spears* came there—was annoyed at my not having more men as the work was not progressing. I told him it was going up faster than it ought to in my judgment. He said it was necessary to get the top on before the winter set in. I said in my judgment I would not put them along as fast as they were going. I told there was a great mass of green material and it was put up too fast in my judgment. I had not been in *New Brunswick* before; I had only built in *New York* and *Brooklyn*. *McMillan's* building fell 6th December about four o'clock, * * * Before the rain storm came on the building was allright. I received from Mr. *Spears* on the contract $5,300. I had certificates from Mr. *Babcock* which I gave to Mr. *Spears* when I got these payments. (These certificates called for). I never got the certificates back again.

No. 3. November 2, 1877, *John C. Babcock* certificate for $3,000.

No. 4. November 24, 1877, *John C Babcock* certificate for $2,300.

These amounts paid by Mr. *Spears* to me. Mr. *Spears* paid me before on the *Walker* estate, all paid by him to me. The building was nearly all up as before described. I think the upper story was up, the rear and side walls and the centre wall when I got the $3,000; that is all I received. The certificates was given after the conversation between *Walker*, *Spears*, *Babcock* and myself. It would have taken $1,500 to complete my contract with *Walker*. I built the *McMillan* party wall; it was well built. The witness makes a plan, shews the jury.

I spoke of Mr. *Maher* having said such wall was too slight.

Maher spoke to me, I spoke to Mr. *Spears*.

Spears was hurrying previous to walls being up.

John McMillan another witness:

My father and myself are the firm. Dr. *Walker* in possession of adjoining lot to the lot occupied by my father. I was present when our building was the second story. *Walker* at first story, adjoining the party wall. Mr. *Spears*, Mr. *Babcock* and Mr. *Maher* called my attention to the centre wall. Mr. *Spears* said *Maher* had called his attention to the centre wall and would have it wider, which he thought was absurd. He said he knew as much as Mr. *Maher*, and he would have himself made inspector. I soon left, and *Maher* went with me. I did not know *Spears* until he came here. We had a temporary place on *Canterbury* street. The building was nearly

1882

WALKER v. McMILLAN.

Ritchie, C.J.

completed. The outside wholly completed. Preparing the internal fittings. Finally got in about 1st January. What rent were you to pay?

Objected. (I am of opinion it is somewhat doubtful whether the question is allowable, as the damages on this ground would be too remote; but I think by allowing it and the damages are agreed rent, the question may be put; no injury can be done in such view of it.) Mr. *Thomson* objects to this.

The firm of *J. & A. McMillan* had agreed to rent the building from the plaintiff. The rent was to be 10 per cent. on the outlay, $3,000 a year. 1st January, 1878, to the time we got into it after its being repaired would be $1,250. The latter part of June we got into it. * * * * * * *

Cross-examined:

I am quite sure of the conversation I had with *Spears* in *Maher's* presence was in the *Walker* building.

James McMillan, plaintiff, says:

This building I had put up to be occupied by the firm.

The defendant's case.

William Miller:

I am a carpenter. I did the *Walker* building carpenter work. There was with me *George Nice* as co-contractor. *Spears* did the mason work. Sand was put in the *Walker* building, next to *McMillan*. Sand was brought in and dumped against the wall. I spoke to Mr. *Spears* and told him it would spring the floor. He said it would not do so, and he spoke to Mr. *Babcock*. He put the shores within 3 feet of the centre wall.

George Nice, in his cross-examination, says:

Weight close up to the wall. *Babcock* told him to spread it over the floor about eighteen inches. The weight would be on the end of the beams. The shores would take the weight off the walls. *Spears* had been there two or three weeks, it had been screened over a fortnight. * * * Contract was made by Mr. *Babcock's* directions. He was there every day, and Mr. *Spears* there every day, and Mr. *Walker* not so often. I got my money from Mr. *Spears*.

Re-examined by Mr. *Thomson:*

I was there at the laying of each floor. They were not against the wall nor allowed to do so. They were rough boards and would come down as it fell. No. After sand was in made. *Babcock* said spread over the floor. Beams 3 x 15.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

John C. Babcock:

I am an architect. Principally engaged in *New York* City on my own responsibility. I profess to be a skilled man. Built a great many under my superintendence. I am a witness to the contract. I saw *Walker* sign and *W. C. Spears*. I am the architect who prepared the plan; all prepared by me—contract by the contractor. When my plan was made no work done on *McMillan's*. My plan was made with reference to a particular wall. I had nothing to do with a partition wall. I think it would be a suitable building according to my plan. I have no doubt if my plans were followed. This plan shews the dimensions. This central space constructed. It was to be carried to the rock. I was at the ground when the wall in the centre was commenced. The excavation made. The plan shews here the cellar wall was to be placed from the *Wiggins* side fifty-five feet. This was to the centre of *Wiggins* wall to *McMillan* wall centre fifty-five feet. I did not measure the distance when the trench was dug. Commenced from the centre of *Wiggins* twenty-four inches. Twenty-four inches on *Walker* lot. Width of north cellar, 25.6. To *McMillan* wall twenty-four inches. Cellar wall not located by these figures. I did not know the trench dug was in centre line of my plan. It had gone to the rock. The rock was about four feet from the centre line of the building and came to a foot in rear. The wall was carried up to the street level. I think I was the first to discern it was wrong. The *McMillan* wall carried up some distance, cannot say how far. When I discerned I had to see how the mistake occurred. I put it right in the rear, but not in the front. Wall to rear of *McMillan* building at the front. I pointed this out. We concluded to take it down and build it right. I saw Mr. *Spears* about it. It may be first or second day of May. It was done very quickly. I saw some portions taken down, not all. When I next saw it, it was nearly re-built. I had not seen it between those two periods. It would be necessary to excavate the trench for the alteration. I did not see it done. I suppose it had been done; I did not know it was done. I did not tell *Spears'* foreman I had discovered a mistake.

(Mr. *Kaye* reads from his notes of evidence what Mr. *Spears* said in his evidence, and he asks the witness if that is true. This being objected to by Mr. *Barker*, I express my opinion that it is not regular, but the witness is to state what took place between him and Mr. *Spears* and not what is read by Mr. *Kaye* and taken down by him. The witness may give his version of the conversation).

There was some measurement made as to see how much it was out of line, and some suggestions made as to whether the error could not be redressed in the first story by moving over the wall. I could not

1882

WALKER v. McMILLAN.

Ritchie, C.J.

agree to that, and I ordered the wall to be taken down. I did not suggest to Mr. *Spears* to build any other wall alongside of it. It would not be practicable. When you sent for *Spears* a general conversation took place, but I can't recollect exactly what was said. I regretted the error had been made in locating the wall. I did not tell *Spears* it was my mistake. The wall was not built in the first instance according to the plan. Some time after the accident I did discover the new wall had not been built on the rock, or some of it. After the accident I discovered a part had not been built up from the foundation (trench, rock). The beams were sixteen inch from centre in second, third and fourth floors, to twelve inch to centre of beam in first floor. The beams bore five inches in the under. The beams are bevelled below to save the walls in case of fire. The flooring was laid across the beams. Ordinary rough spruce boards. Rough stuff the 1¼. On the floor. The beams are cut to allow a deflection. The boards were laid on the beams; nailed, but open so water would pass through. Not roofed; all the rain that I ever saw in that building passed through the floor. I don't think the rain would pass over the floor to the side at the walls. I heard *Miller* and *Nice's* statements. Can you, from the work done in that building by *Miller* and *Nice*, speak as to their capacity as carpenters?

(Objected to): I only judge from that work. The carpenters, in my opinion, were competent to do the work they contracted for.

I saw sand on the building, in the north side, from front to rear, fifteen or twenty feet from the front. It was placed adjoining to the central wall the highest and sloped to *McMillan's* wall. It went to the vault, about fifty feet in length. When first put in half the distance in the width, but afterwards spread out. Between *McMillan* and the centre the cart passed through. A considerable quantity in when I first saw it. It was added to. I gave directions to Mr. *Spears* regarding it a week or ten days before the accident. I could not say exactly the quantity. And to spread over the surface to a depth of more than eighteen inches. I first ordered it to be taken away, and therefore allowed it to remain if spread over the building. Sand laid on a four inch ledge. A large portion of the sand was levelled off as I directed. I directed on several occasions. I said I thought it dangerous to place so much sand, it might injure the walls. I am not aware of any assent being given before the sand was brought in. What would be the effect of a body of sand? It would affect the wall. I thought there was sand enough for the building or more. A cubic yard of wet sand 1½ ton. I should think between seventy-five and one hundred tons there of sand. After the accident I found a part of the front portion of the wall had not been carried to the rock. The base of the wall was a little wider than

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

the wall, and the ground widened the bearing on the wall. If there had been no sand, the rain in my opinion would not carry down the wall. It had received injury from the sand before the rain. The wall had been effected by the sand before the rain came. I generally visited the building every morning, most generally twice a day. I did not actually see everything done. The rain would strike the wall and run down it. I heard Captain *Pritchard* give his testimony. I said there was no wooden shore in front. Iron columns was in before the accident, not less than a week. No boards on the roof of the *Walker* building. The fire walls not complete. Side and rear complete. I think no unnecessary delay in putting on the roof. I have recollection of *McMillan's* roof; rain fell through it. I can't say about the fire wall being carried out. Board could be put on before the parapet were put. I allowed a girder to run fore and aft in the cellar, resting on brick piers in lieu of the timber in the specification, which it was impossible to get. I saw *McMillan's* wall and party wall. 8.4.8 beams rested practically on an eight inch wall. Not so strong as a sixteen inch solid wall. This stopped at second story. Vaulted up two stories and then carried up fifteen inch solid. The sixteen inch would balance on the side of the 8.4.8. The upper part of the wall would be stronger than below, in my opinion. A large portion of the *McMillan* fell out by the withe anchor of ours, and one wall giving way. The sixteen inch wall or stronger than the hollow wall of 2.8. I think the party wall was defective in this respect. 26th September, the date of the contract; plan made before, I think. *Spears'* men worked in the buildings of *McMillan* and *Walker*. I knew Mr. *Spears* before he built here. He had erected, etc.

I observed a shore on *McMillan's* building, in front of the iron column. I saw nothing the matter with it.

Cross-examined by Mr. *Weldon*:

I came to *St. John* in July, after the fire. The *Spears* were builders, and had given satisfaction to the work done. I recommended them to come. My plans were made before the contract. The figures and details are on the plans to work by. I gave them measurements. They are bound by them and the figures on the plan. The contractor will not err when it is followed. I gave one to *Spears* from the centre wall to the centre of the wall or from face to face 27.6. Right through from face to face 25.6. Explain the measure 13.9 altered. I don't think the alteration was made after the mistake was discovered. Either plan would. I can't tell the alteration when made. Altered from 25.6 to 26.6. No mistake in

1882

WALKER v. McMILLAN.

Ritchie, C.J.

the figures. The alterations in the plan were made in my office. I can't say whether the alteration was made before or after. I think the alteration was made after the commencement of the wall. He had no right to take from that side. I think 25.6. On 24.6. There is a discrepancy. I don't think I was wrong. 2.24.6. 26.6.2. 13.3 to locate the pier after first wall was built. There is an alteration, 13.3 to 39. The wall ready for beams. The trench was to the wall. I discovered a break in the wall, and the error would diminish one foot to nothing in the distance of sixty feet of the height to a sharp pointed wedge. It had to go ten inches beyond the trench. I had to give certificates, and the work was done to my satisfaction. I knew I employed a competent man to do it, and I expected it was done. I think I found out the error first. I relied on my plan in my office. Mr. *Watson* was my assistant. Did you tell *Spears* I had taken a wrong point? I did not. I do not think the error is the original. The other working plan is corrected by it.

I gave the certificate up to 24th November. 2nd November. There was a permit got. The party wall was, I think, up. I think the wall of *McMillan* was up. I made some objection. I had solid done when I wanted. It was rear. There was, I think, over three feet. The joist did not always strike the withes. More beams put up stairs. Below twelve inches apart. Would the milky water indicate water running down the wall? There must be milk. It would indicate lime. Would it percolate the foundation? It would not, I think, the brick, it might the stone. Not many alterations made. *Spears* was the agent, he paid for *Walker*. I obeyed Mr. *Spears'* directions. Did Mr. *Maher* call your attention to the wall? He did. He did not tell me it was an unsafe wall. I did not hear the conversation between Mr. *Maher* and *Spears*. *Maher* did not tell me the wall would not do. We were to do. It was to be done. No terms were fixed between *Wiggins* and us. There was an old wall twenty-four inches. We had nineteen inches as a party wall in *Walker's*. It is, I think, the dividing line at the centre of the wall. It was intended as a sixteen inch, but large brick made it an eighteen inch wall.

I think *Maher* was there twice. A second time he insisted his direction were to be carried out. He kept increasing it. I never told *Spears* to put up the shores. I did not know it until after the accident. I did not tell *Spears*. I found under wall on the sand side was gone. Perfectly sound on other side. The sand was. The centre wall gave way and the building fell. Sand levelled before the accident. I think engaged in taking. Fifty cubic yards, 1½, 75 tons. Dry sand much less. I think *McMillan's* roof was not tight. I think

it was three inch deal in front of *McMillan*. Thirty feet width of *McMillan*. A stick eighteen and twenty-four would not carry it without deflection. A brick tier and iron column. I don't know how the weight was distributed. The beam and anchor well in the wall. It brought down the whole by the withes. We do not use hollow party walls in the States. I have seen them. The withes are not equal to the solid wall. 13.9 is my figure.

Re-examined by Mr. *Thomson:*

These figures are the original in my office. The plan may have been in the office. One cellar is a foot wider than the other if the wall was located from that line. I discovered the deflection. The building would be a foot narrowér in the front or rear He had it partly up. It was his duty and he thought so. I found it after the building fell. I believe the effect of the sand. No danger of dry sand in a proper place. I gave a certificate after as percentage to make good if any irregulation. All party walls are carried up solid. The solid wall would increase the weight. No such indication as a milky wall. I examined the wall after the accident. I am satisfied they were close. was such they as my saying I had made a mistake. It made no matter who made the mistake, it would have to be altered. Soft crust ought to go to the rock. I saw a shore in front. The

By a Juror—Is it customary to cover that wall with boards?

I can't say it was, I don't know.

TUESDAY, 25th November.

What did you mean by I obeyed Mr. *Spears'* directions? I obeyed meant such directions as one would give to his architect. I had received directions to prepare plans and specifications, and, secondly, to receive tenders; also, what tender to accept, and prepare agreement with that party to arrange for commencement of work and order of payment. That is the usual directions. After the contract was made he did not interfere with me in any particular. Mr. *Spears* was away a good deal of the time.

Cross-examined by Mr. *Barker:*

I did not tell him a mistake had been made; he must have known it. He was in *Halifax* a part of the time. *Spears* was often there. I think he complained of the work not going on as fast as he could. I spoke to *Spears:* It was not necessary, in consequence of what Mr. *Spears* said. It was partly, not to a very great extent, by his influence. I can't tell you. I won't say it was not. I spoke before the beginning of the building. Was not *Spears* there constantly? He was there about the building. I thought I had no conversation about the wall, I won't swear I had not. It was my own judgment

1882

WALKER v. McMILLAN.

Ritchie, C.J.

about the wall. After work had progressed I got the permit. (Mr. *Thomson*—It was in writing. You have already said so, have'nt you?) Re-examined:

This wall was ordered down by my directions. He, *Spears*, gave no order, neither directly or indirectly:

William Causey:

I am a mason. In *St. John* forty to fifty years. I have looked at the contract. I don't presume to be much of a judge of the carpenter work. The foundation was built and what the contract describes. All foundation walls to bed in solid rock, which will be levelled off and shaped off as directed or required, laying all footings on large flat stone, bedded in cement when rock may not show sound or fit to be removed, and concrete substituted. Would such a foundation, if made, would it be proper and sufficient? (Objected to by Mr. *Barker*). It would be proper for such a building and fit and sufficient.

stone wall ready for coutract. The work would be quite sufficient.

The usual way of doing it as described in contract. Head of granite pier sufficient. The usual way. Freestone. The general way. Specification.

The brick wall would be sufficient if properly built. A 16 inch wall would be sufficient for offices and stores anchored as required. The contract is such if carried out would, in my opinion, be sufficient. Walls secured by anchor would be sufficient. I have done walls as thus described. I am of opinion it is sufficient. A building so constructed would, in my opinion, be sufficient. I had to examine after the building fell next morning. I could not for the *debris*. I went to re-build in the trench. The original was twelve inches astray. I saw indications on the clay. He said if the wall had been built in its present position as laid out on the plan it must have been on the clay. Half of it in the front part. It had not gone down to the rock in the right place. I re-built as laid down in the plan. I got down to the rock. I got the rock for it from the cellar floor. The wall had got to the solid rock in front. Other part on clay. I should say it was not a proper job. I think *Spears* could not have known from the character I have heard of him. If so badly built it is a wonder to me it held until it got to the top. * * *

Cross-examined by Mr. *Barker:*

I found a trench down to the solid rock sufficient for a two foot base, which was brick. I found it half in the clay; the one part on rock, one on clay. I re-built by a plan according to the dimensions of this plan. My centre wall was a two foot wall. This plan is a sixteen inch. The space would be less. No such

vibration on a building used for offices or for iron. This is for storage of heavy goods. Supports would be underneath. Sixteen inch for offices would be sufficient. A wall might dry in a month. Built according to the specification it would take some time in the flat near the ground.

James Walker:

I am a defendant. I had to trust to my architect. I am neither a builder nor contractor. I trusted to my contractor. I believe if Mr. *Babcock's* specification had been followed there would have been no trouble. I did not interfere more than giving advice to take every precaution to prevent accidents.

Cross-examined by Mr. *Weldon:*

Babcock is my architect, and *William M. Spears* looked after it and attended to it much more than I did. I live five miles from town. I went to the building as it was going along, saw the cellar walls after they re-built them.

Cross-examined:

Spears made no complaint to me, nor Mr. *Maher*. *Spears* endeavoured to allay any suspicious in my mind about the building. Very particular in wanting stone and cement. I once remarked I wanted stronger mortar. He said he understood his business. It was my suggestion, I had to be satisfied. Did not interfere.

Re-examined:

There was talk about the wall. I told *Babcock* there was a new law, and *Babcock* had some conversation with Mr. *Maher*, and he had made it all right. I did not understand what it was.

Re-examined by Mr. *Thomson:*

This was about the building, and to get a permit, and he told me he had done, and I was told.

William M. Spears:

I am one of the defendants. I was acting for him as his agent. After the contract was made. I did not interfere directly or indirectly. I think I saw the building going up from day to day with the contractors. I have too much respect for Captain *Pritchard* to say I did not say what he said I did, but I have no recollection of it.

No. 7. 22nd September, *J. Harris* & Co., contract for iron work.

I have no recollection in stating of what Mr. *Maher* said; if so, it was only in a joke. I have no knowledge of mason work.

No idea of taking charge or interfering. I was away two or three weeks every month while the building was progressing. I was executor of the late *John Walker*, and had to go to *Halifax*. I did

1882

WALKER v. McMILLAN.

Ritchie, C.J.

not observe the building. I saw the sand there. Was knowing *Spears'* men going from one building to another. I had no fear of it, neither of the weight, height or depth of the sand. I cannot remember the quantity there. I merely saw sand what was usually hauled from a wood-boat.

The only recollection I have is the taking of the wall down. I saw them altering. Neither consulted or directed anything about it. I did not know the cause for what I had seen until after the accident.

Cross-examined:

While I was in *St. John* I was there every fine day, sometimes half a dozen times a day, looking after it for Dr. *Walker;* he spoke to me to do so. I was in *Halifax* in November probably not less than a fortnight. I was in *Halifax* half-a-dozen times. I was in *Halifax* two or three times after the contract was signed, 27th September. I was not there in October. I am not prepared to say that I was more than once in *Halifax.*

There every fine day and several times on some days. I did not know anything about the wall being shifted until after the accident. Building on the *Potter* property. I don't remember when the conversation when *Babcock* spoke of. I remember *Maher* asked what the building was designed for. I went and got a permit from Mr. *Maher.* I was not present when the I was present when Mr. *Maher* asked what the building was designed for. He considered a 16 inch wall would be insufficient if converted into warehouse or stores, but if for offices it would be sufficient. Did not Mr. *Maher* speak of it being contrary to law? I don't remember he did. I will swear that at no time I was doing I suppose *Maher* was speaking about the regulations. I think this was after we got the permit.

* * * * * * * * * *

I think the matter was referred to more than once. I do not ask Mr. *Maher* to allow me to complete. The centre wall would be made heavier afterwards. There was no arrangement with Mr. *Maher* or *Babcock* that I was to strengthen the centre wall. Is it not new to you that Mr. *Maher* stated to you that the centre wall was not according to law? He did say it was not sufficient for a warehouse. I don't remember, but I won't swear he did or did not.

I suppose *Maher* only came as city inspector. He had nothing that I knew of.

If *Maher,* as city inspector, required you to make alteration? I did not refuse nor did I assent. He inquired if the building was to be used for other purposes than offices. I was to do certain things. It was intended for offices as much as for other purposes.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

Was it intended for offices?

Intended for both offices and warehouse purposes.

Then Mr. *Maher's* opinion was that if it was for warehouse purposes it was not sufficient? That was a part of the contract for warehouse purposes. It is for warehouse purposes, I never heard otherwise. It was built for wholesale purposes. I did not know it was for that purpose when I had the conversation with Mr. *Maher*. I did give Mr. *Babcock* instructions for the building. They were prepared under my directions. I did not know the contract was for wholesale business. I thought it was to be strong enough. So far as my recollection goes I said it was intended to be used for offices, and, if so, it was sufficient. The central wall was not then completed. There was no position demanded to carry it out. I really do not remember what impression was made in my mind. I said I might have said so, but I was not serious in saying I had control.

I did not take any steps to alter it from what Mr. *Maher* said. I heard nothing from Mr. *Spears*. I do not remember speaking to Mr. *Babcock* after what *Maher* said. I had a conversation with Mr. *Babcock* before or after *Maher* was at the building. I had not much opinion about it and I made no change. I do not remember *Babcock* made any change in the timber on the girder. I do not know sufficient about the specifications to make, nor of any alteration made. I made no objections. The season was getting late and I was anxious the building to proceed, and I may have spoken to *Spears*. I did not talk to the parties about the work. I do not recollect speaking to *Spears* more than once.

Assuming the work to have been lawful if done in a proper way, and that defendant had entered into a contract with a third person for the performance of the work, and that, therefore, he would not, under certain circumstances, be liable for any negligence on the part of the person with whom he had contracted in the performance of the work, it is very obvious in this case that the work was done under the immediate superintendence of *Babcock*, the defendant's architect, and defendant's agent, Mr. *W. M. Spears*, who, plaintiff says, "looked after it, and attended to it much more than I did." The work done on, and materials in, the wall which fell were estimated and certified for under the contract as being properly done by the architect, the

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

contract expressly providing that "in no case was he to estimate any materials or work which are objectionable," and were paid for by the agent. The evidence clearly shows that, independent of the statutes and by-laws, the work was so improperly done as to create a nuisance which caused the damage to the adjoining proprietor. There can be no doubt, the wall fell from being improperly constructed, and this the jury must be taken to have found, as the judge in his charge said:

> If you are of opinion that the centre wall was improperly built, and the accident occurred by the falling down by reason of its weakness, or that a sufficient foundation had not been provided to bear the weight necessary for a warehouse, I am of opinion the plaintiff is entitled to recover and the defendants are liable. If the foundation was not on the solid rock or not a sufficient foundation after the inspector pointed it out, the plaintiff is entitled to recover.

On this ground it would be difficult for defendants to escape liability, but there is another ground on which I prefer to rest my judgment, viz., that the erection of the centre wall which fell and did the damage was an illegal erection, and that all engaged in its erection are liable; *Walker*, who caused it to be erected; *Sears*, who superintended its erection, and the party who actually erected it.

I think it was within the competency of the local legislature to pass these acts.

The prohibition imposed was for a public purpose, for the better prevention of conflagrations in the city of *St. John*, and to regulate the construction of buildings in the city of *St. John*, and to provide for the due inspection thereof—41 *Vic.*, c. 6, being "An Act to amend the law for the better prevention of conflagrations in the city of *St. John*," and 41 *Vic*, c 7, being "An Act to regulate the construction of buildings in the city of *St. John*, and to provide for the due inspection thereof."

These acts were passed for a public purpose, their policy was purely restrictive for the purpose of guard-

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

ing against fire, and to secure the erection of proper buildings in a city such as *St. John*. Any erections contrary to the regulations therein imposed being clearly unlawful, beyond all question it was unlawful to contract to do that which it was unlawful to do, and any contract which, though lawful in its inception, by a change in the law became unlawful to fulfil, is necessarily at an end.

There can be no doubt that this building was a direct violation of the law and in defiance of the inspector, and was consequently an unlawful erection, and the contract entered into for the erection of such a building was put an end to by the law prohibiting its being carried out, and though a person employing a contractor to do a lawful act may not be responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong, as was held in *Ellis* v. *The Sheffield Gas Co.* (1). For, can it be doubted that if one person commits an unlawful act or misfeasance under the direction of another both are equally liable to the injured party?

There was a statutory duty imposed on owners of property in that part of the city of *St. John* as to the character of the buildings to be erected and the mode of erection, and the non-compliance with such statutory duty and the erection of a building in contravention of the statutes and by-laws and in defiance of the inspector of buildings, clearly rendered the building a nuisance, had there been no section in the act declaring such erection a nuisance.

Such being the case the owner of the land, *Walker*, and his agent, *Spears*, and the contractors, *Spears &*

(1) 2 El. & B. 767.

1882

WALKER v. McMILLAN.

Ritchie, C.J.

Co., were all, in defiance of an express law and regulation to the contrary, engaged in the erection of a building, the centre wall of which fell and caused the injury complained of, and permitting and causing such wall to be erected, all parties engaged in such unlawful erection were liable for the damage occasioned to the neighboring property by the falling of the wall so erected, such damage being the result of work unlawfully done. Therefore the owner, for whom and at whose instance the work was done, the owner's agent, who superintended and directed and paid for the work, and as he says :

When I was in *St. John* I was there every fine day, sometimes, half-a-dozen times a day, looking after it for Mr. *Walker*, he spoke to me to do so;

and as *Walker* says :—

Mr. *Wm. M: Spears* looked after it and attended to it much more than I did,

together with the parties who were employed to do the work, are equally responsible for the consequences of the improper building of the dangerous and illegal wall which caused the injury to plaintiff charged in the declaration.

This case seems to me to come clearly within the principle established in *Bower* v. *Peate* (1), and *Angus* v. *Dalton* (2) :

That where a defendant has employed a contractor to do the work which in its nature is dangerous to a neighbouring property, and damage is the result of the work done, the employer is liable though he has employed a competent contractor and given him directions to take precautions in executing the works.

Here all the parties were engaged in an illegal act, for when a statute prohibits a particular work being done, a party cannot procure the work to be done and avoid responsibility by contracting with another to do that work.

(1) 1 Q. B. D. 421. (2) 4 Q. B. D. 187.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

The erection of, or causing to be erected, this wall contrary to law by *Walker* on his property, being the creation of a nuisance and contrary to the statutory duty imposed on owners of property in respect to erections on their properties in the city of St. *John*, and mischief having resulted therefrom, it is no answer that the mischievous results arose by reason of the manner in which the owner's contractor performed his work in connection with the erection of the illegal structure. In *Stevens* v. *Gourlay* (1) it was held that "a contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act 18 and 19 *Vic.*, c. 122, cannot be enforced." *Erle*, C. J., in that case said:

> The contract was for the erection of a building known to the plaintiff to be, or whether known or not, at all events it was in violation of the Metropolitan Building Act 18 and 19 Vic., c. 122.

And, after discussing whether the structure was a building within the meaning of that statute he says:

> Upon the whole, I think this case a contract for the erection of a fabric or structure in violation of tl e statute, and that the parties being *in pari delicto potior est conditio defendentis.*

Williams, J., says:

> Assuming then that this shop was a "building" within the statute, the rest of the case is clear. There has been a plain infringement of the act, and the plaintiff is disentitled to recover upon the principle laid down in the case of *Foster* v. *Taylor* (2) where it was held that the vendor of butter in a firkin that was not branded as required by 36 *Geo.* 3, c. 86, could not recover the price of it. That case is a distinct authority to show that the plaintiff cannot be allowed to enforce in a court of justice a contract which has been entered into in violation of the provisions of an Act of Parliament.

Crowder, J.:

> I am also of opinion that this rule must be made absolute on the ground that the contract declared on was entered into and carried into effect in express violation of the Metropolitan Building Act.

(1) 7 C. B. N. S. 99. (2) 5 B. & Ad. 887.

1882

WALKER v. MCMILLAN.

Ritchie,C.J.

In *Broom's* Legal Maxims (1):

If an exercise of public authority render impossible the further performance of a contract which has been in part performed, the contract is *ipso facto* dissolved.

And also (2):

Again, we find it laid down where *H.* covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if *H.* covenant to do a thing which is lawful and an act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, such act of Parliament does not repeal the covenant.

In the Bank of *U. S.* v. *Orr* (3) the Court said:

But when the restrictive policy of a law alone is in contemplation we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do.

In a case in the *Massachusetts* Supreme Judicial Court, *Sturgess* v. *Society of Theological Education* (4):

Defendant having occasion to construct a sewer from the cellar of its building to the common sewer, employed a contractor to do the work. In constructing this sewer it was necessary to cut through a plank barrier which had been constructed beneath the surface of the street to prevent the tide flowing into cellars in that locality. The contractor so negligently performed this part of his work that the tide-water came through the opening made by him and flowed into the cellar of a building owned by plaintiff, adjoining that of defendant. It was held that defendant was liable for the injury done by the tide-water to plaintiff's premises. The owner of a building, who has used due care in the employment of an independent contractor, is not responsible to third persons for the negligence of the latter occurring in his own work in the performance of the contract, such as the handling of tools or materials or providing temporary safeguards while doing the work. *Hilliard* v. *Richardson* (5). *Connon* v. *Hennessy* (6). As to such matters, pertaining to the mode in which he does the work, he is not the servant of the owner. But where the thing contracted to be done from its nature creates a nuisance, or when

(1) P. 229.
(2) P. 224.
(3) 2 Peters 527.
(4) Albany Law Journal, Vol. xxiv. p. 76.
(5) 3 Gray 349.
(6) 12 Mass. 96

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable for it. *Gorham* v. *Gross* (1) and cases cited. In the case at bar the defendant had a right to make an opening through the barrier for the purpose of laying a drain, but it was his duty to close it securely so that the cellars should be protected from the tide. Having employed an independent contractor, it is not responsible for his negligent acts while doing the work, because in respect of such acts he is not its servant; but if the work, after it was done, created a nuisance and caused injury to the plaintiff, it is responsible. *Sturges* v. *Society of Theological Education.* Opinion by *Morton*, J.

And in the case of *King* v. *Davenport* (2):

The delegation of legislative power to a city to prohibit the erection, placing or repairing of wooden buildings within limits prescribed by ordinance without permission, and to direct and prescribe that all buildings within the limits prescribed shall be made or constructed of fire proof materials, and generally to define and declare what shall be nuisances, and to authorize and direct the summary abatement thereof, etc., is within the competency of legislative power, and authorizes the passage of an ordinance prohibiting the erection or repairing of any building within the fire limits with combustible materials, and providing for the summary abatement or removal of the same. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may be prohibited in the midst of dense masses of population, on the general principle that every person ought so to use his property as not to injure his neighbour, and that private rights must be subservient to the general interests of the community. An ordinance of a city passed in pursuance of legislative authority, establishing fire limits and declaring that a wooden roof put on a building thereafter within the fire limits to be a nuisance, and requiring the city marshal, under an order from the mayor, to remove the same, is reasonable exercise of the police power of the state, and has the force and effect of a statute when set up in justification by the marshal in removing such a roof.

As to the rent:

The loss of the use of the building during the time the damage was being repaired, was the direct and immediate result of defendant's act, and though damages

(1) 125 Mass. 232

(2) Albany Law Journal, vol. xxiv, p. 135.

1882

WALKER v. MCMILLAN.

Ritchie, C.J.

may not be recoverable as rent, or rent as rent recoverable as damages, I know no better way of establishing the exact amount of the damage sustained, than by shewing the actual amount that the plaintiff (but for the defendant's wrongful act) would have received from the occupation of the building during the time reasonably required to repair the injury (in this case the actual time it took to repair was shewn), and as defendant offered no evidence on this point to shew that the amount claimed and found by the jury was unreasonable or in excess of the actual loss, and did not raise any question for the jury in relation thereto, though the judge offered to submit to them any question on which counsel might desire to take their opinion, I can see no reason why the jury should not, in the absence of any evidence to the contrary, adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained as the legal and natural consequence of defendant's wrongful act, and to enable plaintiff to recover for such loss as was proved to be the direct result of the wrong to be redressed.

The appeal will therefore be dismissed, but inasmuch as the damages claimed in the declaration amount only to $5,000, and as the amount found by the jury was in excess of that sum, and as the declaration has not been amended, the verdict can only be entered for $5,000.

FOURNIER, HENRY and TASCHEREAU, J. J., concurred.

GWYNNE, J. :—

This action was brought originally against the defendant *Walker* and one *Spears*, and judgment in the court below was against them both, and both appealed. Upon the argument before us it appeared to us that there was really nothing to support the judgment as

1882

WALKER v. MCMILLAN.

Gwynne, J.

against *Spears*, and this being admitted by the learned counsel for the respective parties, it was agreed that a *nolle prosequi* as to *Spears* should be entered in the court below, and that the case should be treated here as the appeal of *Walker* against a judgment rendered against himself alone.

The point arising for adjudication, without setting out the lengthy pleadings spread upon the record, may be stated thus :—*A* and *B*, being owners of contiguous lots of land, purposing to erect houses on their respective lots, agree with each other that there shall be erected on the line between their lots a party wall common to both buildings, the erection of which *A* assumes ; and they respectively enter into written contracts with *C* for the completion of the mason's work of their respective buildings. By the contract between *B* and *C* the latter agreed to furnish all the materials, labor, tools, machinery, &c., and to build, finish, and complete for *B* a building as described in certain specifications set out in the contract, according to plans and drawings in the specifications referred to, which plans, drawings and specifications were declared to be part of the contract.

By the 4th article, it was provided that the contractor should in all cases be his own judge as to the amount of diligence and care required for the proper execution of the various constructions.

By the 5th, it was declared that *B* had engaged *John C. Babcock* (an architect) as superintendent of the erection and completion of the said buildings ; his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information to properly illustrate the design given ; also to make estimate for the contractor of the amounts due to him on the contract, in no case estimating any materials or work which are objectionable, or have not become

1882

WALKER v. MCMILLAN.

Gwynne, J.

permanent parts of the work, and when the building is completed to issue a certificate to the contractor, which certificate, if unconditional, shall be an acceptance of the contract, and shall release him from all further responsibility on account of the work.

By the 6th, it was declared that the building or work should be entirely at the risk of the contractor until the same should be accepted, and that the contractor should be held liable for its safety to the amount of the money paid by *B* on account of the same.

By the 7th, it was provided that in case of any unusual or unnecessary delay or inability by the contractor in providing and delivering the necessary materials, and performing the necessary labor at the time the same is required, so as to insure the completion and delivery of the building or work at the time hereinafter set forth and contracted; then and in such case the proprietor, within three days after having notified the contractor of his intention so to do, shall have the right to enter upon the work and procure such necessary materials or labor to be furnished or performed as the case may require, and remove from the same all defective materials or workmanship, as in the judgment of the superintendent may be found necessary, and carry on the work to completion in such way as shall be proper and right, charging the cost thereof to the contractor and deducting such charges from the amount of the contract price.

8th. The proprietor reserves the right, by conferring with the superintending architect, to alter and modify the plans, and this specification in particular; and the architect shall be at liberty to make any deviation in the construction, detail or execution, without in either case invalidating or rendering void the contract, and in case such alteration or deviation shall increase or diminish the cost of doing the work the amount to be

allowed to the contractor or proprietor shall be such as may be equitable and just.

9th. The contractor is to co-operate with the contractors for the other parts of the work, so that, as a whole, the job shall be a finished and complete one of its kind, and he is to arrange and carry on his work in such a manner that any of the co-operating contractors shall not be hindered or delayed at any time; and when his part of the work is finished, he shall remove from the premises all tools, machinery, *debris*, &c., and so far as he is concerned, leave the job clear and free from all obstructions or hindrances.

While both buildings were still in course of erection by *C*, a centre wall of *B's* house fell, either by reason of the persons employed by *C* not having built that wall upon rock foundation as was required by the plans and specifications—a fact which did not become known to *B.* or his architect until after the wall fell—or by reason of sand to be used on the building having been brought by persons employed by *C* on to the floor of *B's* building so in course of erection, and having become saturated with rain and too heavy for the floor to bear, and the falling wall taking with it the floor upon which the sand was so deposited, brought with it the party wall erected by *C* under his contract with *A*, in which *A* and *B* were mutually interested, thereby damaging also the front wall of *A*'s building erected for him by *C* under his contract. In such a case will an action lie at the suit of *A* against *B* for the damage so done to the party wall in which *A* and *B.* are so mutually interested, and to the front wall of *A's* building so in course of erection? And can *A* recover from *B* monies paid by *A* to *C* for re-erecting and restoring the party wall and other wall so damaged? or other damages alleged to have accrued to *A* by reason of his not having had his building completed ready for occu-

1882

WALKER v. MCMILLAN.

Gwynne, J.

pation at the time at which it might have been completed if *B.'s* wall so erected by *C* had not fallen, and, in falling, done the damage aforesaid? At the trial there was much evidence given attributing the falling of the centre wall of *B's* building to the weight of the sand piled upon the floor of the building, and other evidence, which attributed the fall to the fact of the wall not having been built, as required by the plans and specifications, upon rock foundation. At the close of the case, the learned counsel for the defendant moved for a non-suit upon the ground that the action did not lie against *B*—that he was not responsible for the neglect, default or misconduct of the persons employed by *C*, the contractor, such persons not being servants of *B*.

The learned judge before whom the case was tried refused to nonsuit the plaintiff upon the ground that, as he held, articles 5 and 8 of the contract, quoted above, had the effect in law of making the defendant responsible, as retaining control by his architect to receive or reject what was proper or what improper work, and that therefore it became a duty imposed upon the defendant to take care that the work was properly executed according to the specifications—that it was the duty of the architect, acting for the proprietor of the building and engaged by him, to take care that the work was properly done, and that if the work was improperly done, the defendant, having taken control over the contractor, rendered himself liable in law as a party to the act and injury sustained by the plaintiff; and he so charged the jury; and he added that if they should think that the wall fell from not having been built upon the rock, as required by the contract, they *must* find for the plaintiff. The jury found for the plaintiff.

In the following term a motion was made upon

behalf of the defendant for a nonsuit, or for a new trial, upon several grounds stated, and among others, for misdirection in the learned judge having directed the jury as above, and a rule *nisi* was granted, which, after argument, was discharged.

1882

WALKER v. MCMILLAN.

Gwynne, J.

It is against the rule discharging the rule *nisi* that this appeal is taken, and I am of opinion that the appeal must be allowed, and that the rule in the court below must be made absolute for a new trial.

The ruling of the learned judge before whom the case was tried, on the motion for a nonsuit and his charge to the jury cannot, in my opinion, be upheld consistently with a sound application of the principle which is recognized in modern times as governing the case, both in the decisions of the English courts and in those of the courts of the *United States*.

In *Bush* v. *Steinman* (1799) (1), where *A*, having a house by the roadside, contracted with *B* to repair it for a stipulated sum, and *B* contracted with *C* to do the work, and *C* with *D* to furnish the materials, and the servant of *D* brought a quantity of lime to the house and placed it on the road, by which the plaintiff's carriage was overturned, it was held that *A* was answerable to the plaintiff for the damage sustained. C. J. *Eyre*, before whom the case was tried, was of opinion at the trial that the action was not maintainable; and although after argument he yielded to the opinion of his brothers in holding that the action was maintainable, he confesses his inability to state upon what precise principle it can be supported. *Heath*, J., founded his judgment upon the single ground that all the sub-contracting parties were in the employ of the defendant, and he illustrates the case by an *obiter dictum* which he lays down, namely, that:

> Where a person hires a coach upon a job, and a job coachman is

(1) 1 Bos. & P. 404.

1882

WALKER v. MCMILLAN.

Gwynne, J.

sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, although he is not his servant.

And *Rooke*, J., rests his judgment upon the position taken by him, namely: that he who has work going on for his own benefit, on his own premises, must be civilly answerable for the acts of those whom he employs. The case, then, comes not recommended by any concurrence of opinion of the learned judges by whom it was decided in the principle upon which their judgment can be supported.

In *Laugher* v. *Pointer* (1826) (1), where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff, the latter, having brought an action for such injury against the owner of the carriage, was non-suited by *Abbott*, C. J., and upon argument, the court being divided, the non-suit was maintained. In that case, *Littledale*, J., who concurred with the C. J., that the action did not lie, and the C. J. both repudiate the *obiter dictum* pronounced by *Heath*, J. in *Bush* v. *Steinman*; while *Holroyd* and *Bailey*, J. J., who maintained that the action did lie, did so upon the ground that, as they held, the driver of the horses while engaged in driving the defendant was the servant of the defendant, and that so the maxim *respondeat superior* applied. And *Littledale*, J., for the purpose of showing that *Bush* v. *Steinman* had no application to *Laugher* v. *Pointer*, points out the fact which had been relied upon by *Rooke*, J., as the ground of his judgment, that in *Bush* v. *Steinman* the injury was done upon or near, and in respect of the property of the defendant, of which he was in possession at the time, and granting that the rule of law may be that in all cases where a man is in

(1) 5 B. & Cr. 547.

possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors and their servants, that had no application to *Laugher* v. *Pointer*. He does not express his opinion to be that there is any such rule of law, but assuming there to be such a rule, the judgment in *Bush* v. *Steinman* was not a binding authority in *Laugher* v. *Pointer*, and as to that judgment he points out its weakness by reference to the doubt expressed by *Eyre*, C. J., as to what principle could be urged in its support, and he proceeds to show that *Bush* v. *Steinman* was mainly grounded upon *Littledale* v. *Lord Lonsdale* (1), which was a clear case of master and servant, and *Leslie* v. *Pounds* (2), in which the defendant's liability was put upon the ground of his having personally interfered in the superintendence of the repairs which were being done to his house by his tenant, in whose occupation the house was, and at whose cost and charges the repairs were being made, in the progress of which the plaintiff received injury. Whatever, then, may be the ground upon which *Bush* v. *Steinman* may be sought to be supported, the judgment in that case acquires no confirmation from *Laugher* v. *Pointer*.

In *Randleson* v. *Murray* (1838) (3), where a warehouseman employed a master porter to remove a barrel from his warehouse, the master porter employed his own men and tackle, and through negligence of the men the tackle failed, and the barrel fell and injured the plaintiff, it was held that the warehouseman was liable in case for the injury. It is to be observed that in this case the learned counsel for the defendant admitted that *Bush* v. *Steinman* had been questioned, and contended

(1) 2 H. Bl. 268. (2) 4 Taunt. 649.
(3) 8 Ad. & El. 109.

1882

WALKER v. MCMILLAN.

Gwynne, J.

only that the defendant would be liable, if the master porter and his men could be considered as the servants of the defendant] and the case was decided upon the ground that they clearly were so under the circumstances of that case. Lord *Denman*, C. J., says:—

> Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative.

That case then proceeded upon the principle that the master is responsible for the tort of his servant, wholly irrespective of the fact that the premises upon which the tort was committed was the property of the defendant.

In *Quarman* v. *Burnett* (1840) (1), the very point which was raised in *Laugher* v. *Pointer* was decided in accordance with the opinions of *Littledale*, J., and *Abbott*, C. J., as given in that case, notwithstanding that, as pointed out by *Littledale*, J., in his judgment in *Laugher* v. *Pointer*, there might be a rule of law that where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors with them or their servants; but the court does not lay down that there is any such rule of law so that the dictum of *Rooke*, J., in *Bush* v. *Steinman*, that there is such a rule, has acquired no confirmation or force from the judgment in *Quarman* v. *Burnett*.

In *Milligan* v. *Wedge* (1840) (2), the Court of Queen's Bench, approving and following the judgment of the Court of Exchequer, in *Quarman* v. *Burnett*, held, where the buyer of a bullock employed a licensed drover to drive it from *Smithfield*, and the drover employed a boy to drive it to the owner's slaughterhouse, and mischief was occasioned by the bullock through the careless

(1) 6 M. & W. 499. (2) 12 Ad. & El. 737.

1882

WALKER v. MCMILLAN.

Gwynne, J.

driving of the boy, that the owner of the bullock was not liable for the injury, for the reason that the boy was not in point of law his servant. Lord *Denman*, C. J., in this case takes the opportunity of casting a doubt upon that portion of *Quarman* v. *Burnett* referring to the judgment of *Littledale*, J., as to the distinction in cases of fixed property which *Rooke*, J., had relied upon as the foundation of his judgment in *Bush* v. *Steinman*. He says:

I think we are bound by the late decision in *Quarman* v. *Burnett* which was pronounced after full consideration. It may be another question whether I should agree in all the remarks delivered from the bench in that case. If I felt any doubt it would be whether the distinction as to the law in the cases of fixed and of movable property can be relied upon.

Williams, J., then says the difficulty always is to say whose servant the person is that does the injury; when you decide that, the question is solved. To say that that party is liable from whom the act ultimately originates is indeed a rule of great generality, and one which will solve the greater number of questions, but its applicability fails in one case.; For *where the person who does the injury exercises an independent employment the party employiug him is clearly not liable.* And *Coleridge*, J., says, the true test is to ascertain the relation between the party charged and the party actually doing the injury; unless the relation of master and servant exists between them the act of the one creates no liability in the other. This case did not raise for judicial decision the question whether the injury being done on property which was the fixed real property of the defendant, would make the owner liable irrespective of the existence of the relation of master and servant between him and the person who is directly the cause of the injury; but the principle upon which an action of this nature is maintainable against a person not directly the cause of the injury is so clearly placed

1882

WALKER v. McMILLAN.

Gwynne, J.

upon the existence of the relation of master and servant as plainly to cast a doubt upon the correctness of the principle as to the injury occurring upon fixed property of the defendant, which *Rooke*, J., relied upon in *Bush* v. *Steinman* as the foundation of his judgment.

In *Rapson* v. *Cubitt* (1842) (1), the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fixing of gas fittings. He made a sub-contract with *B*, a gas-fitter, to execute this part of the work. In the course of doing it, through *B*'s negligence, the gas exploded and injured the plaintiff, and it was held that the defendant was not liable, upon the ground that the person whose negligence had directly caused the injury did not stand in the relation of a servant to the defendant, but was a sub-contractor. Lord *Abinger*, C. B., says:

> I think the true principle of law, consistent with common sense, was laid down in the case of *Quarman* v. *Burnett*, in which all previous cases on this subject were cited and considered, and some distinguished and some overuled.

It is true that *Parke*, B, in that case distinguishes it from *Bush* v. *Steinman* in the language used by *Littledale*, J., in *Laugher* v. *Pointer*. In *Burgess* v. *Gray* (1845) (1), *B*, the owner and occupier of premises adjoining a highway, employed *C* to make a drain therefrom to communicate with the common sewer. In the performance of the work the workman employed by C placed gravel on the highway, in consequence of which *A*, in driving along the road, sustained personal injury. Before the accident the dangerous portion of the heap was pointed out to *B*, who promised to remove it, and *B* was held liable to *A*. *Bush* v. *Steinman* was relied upon by the plaintiff's counsel, as also were the observations in relation to it made by *Littledale*, J , and *Parke*,

(1) 9 M. & W. 710. (2) 1 C. B. 578.

B., in the above cases. *Sergeant Byles*, on the contrary, for the defendant, insisted that *Bush* v. *Steinman* was not law, and that the sole test of liability was to enquire whether the relation of master and servant existed. The court in pronouncing judgment seem to take special care to avoid resting their judgment upon *Bush* v. *Steinman*. *Tindal*, C. J., says:

> The only question in this case is, whether there was any evidence to leave to the jury? The matter left for the consideration of the jury on this declaration was whether or *not the defendant* wrongfully put and placed *or caused to be put and placed* in a large heap or mound great quantities of earth, gravel, &c., upon a certain highway, *and so* caused the accident of which the plaintiff complained.

and he adds:

> I think there was evidence to leave to the jury in support of that charge. *If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor,* and not by the individual for whom the work was done.

He then goes through the evidence showing the evidence from which the jury were justified in concluding that the defendant had actually interfered in causing the dirt to be heaped where it was, and that it was, in fact, placed there with the defendant's consent, if not by his express direction, and *Cresswell*, J., going through the evidence in like manner, comes to the conclusion that there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road, and *that therefore* he was responsible for its consequences. Now, this case is a clear enunciation of the opinion of the Court of Common Pleas, that if an owner of fixed property enters into a contract with an independent contractor for work to be done upon the property, the proprietor is not liable

1882

WALKER v. MCMILLAN.

Gwynne, J.

because of his being owner of the property, to a third person, for injury arising to him from an act or default of a person employed by the contractor, nor unless there be evidence of the proprietor having himself personally interfered by authorizing or sanctioning the very act or default which was the cause of the injury. It is therefore in antagonism with the principle enunciated by *Rooke*, J., as the foundation upon which he rested his judgment in *Bush* v. *Steinman*. In *Allen* v. *Hayward* (1845) (1) the Court of Queen's Bench, referring to the above quoted cases, say:

> It seems perfectly clear that in an ordinary case the contractor to do work of this description is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them. We find here none of the reasons which have prevailed in cases where one person has been held liable for the acts of another as his servant. The doubt is raised by the contract which expressly requires that all such parts of the said work to be done by *Butten* (the contractor) as are not in particular manner specified and described in the contract, or the plans and specifications, shall be executed in such manner as the surveyor of the said works for the time being shall direct, and in a good and workmanlike manner. * * * This passage of the agreement would appear to take power from the contractor and keep it in the hands of the commissioners or their surveyor; but whatever may be its proper construction or effect, it has no application to the present case, for the bank which failed is part of the works so specified and described, and for which, therefore, if ill done, the contractor is liable, and not the commissioners.

In *Reedie* v. *London & North Western Railway. Co.* and *Hobbitt* v. the same (1849) (2), where the company, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contrac-

(1) 7 Q. B. 975. (2) 4 Exch. 244.

tor's workmen for incompetence, it was held that the company were not responsible to the administrator of a person passing along a highway who had been killed by the negligence of a workman employed in constructing a bridge over the highway for the company under the contract, and that the terms of the contract made no difference.

Rolfe, B., pronouncing the judgment of the court, referring particularly to the distinction drawn between fixed property and moveable chattels, and pointing out that the circumstances of *Laugher* v. *Pointer* or of *Quarman* v. *Burnett* were not such as to make it necessary to overrule *Bush* v. *Steinman*, says:

> On full consideration, we have come to the conclusion that there is no such distinction unless perhaps in cases where the act complained of is such as to amount to a nuisance, and, in fact, that according to the modern decisions *Bush* v. *Steinman* must be taken not to be law.

and he proceeds to say that, if the owner of real property be responsible in any cases for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him or part of his family, the liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others, but such principle could not apply to the wrongful act which caused the injury in the case before the court, which could in no possible sense be treated as a nuisance, for that it was a single act of negligence, and that in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property, and referring to the observations of *Littledale*, J., in *Laugher* v. *Pointer*, that the law does not recognize a several liability in two principals who are unconnected,

1882

WALKER v. MCMILLAN.

Gwynne, J.

if they are jointly liable; you may sue either, but you cannot have two separately liable, he says:

> This doctrine is one of general application irrespective of the nature of the employment, and applying the principle to the present case it would be impossible to hold the present defendants liable without at the same time deciding that the contractors are not liable, which it would be impossible to be contended.

This last observation seems to be the logical conclusion necessarily deducible from the liability in cases like the present being made to depend upon the relation of the master and servant and the maxim *respondeat superior*, for it is plain that a workman employed by, and the servant of, an independent contractor can no more be said to be the servant of the contractor and his employer jointly than he can be the servant of the employer alone, there could, therefore, be no joint liability of the contractor and the employer. If there was, the defendants in the above case might have been sued alone. Then as to the terms of the contract, *Rolfe*, B., says:

> Our attention was directed during the argument to the provisions of the contract whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal, but this power of removal does not appear to us to vary the case; the workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskillful, did not make him their servant.

Hence it follows that the control, which, being retained by an employer of work done upon his premises, over the work, which would make him liable as the superior, upon the principle which governs in cases of this kind, must be such a control as to make the person actually causing the injury the servant of the person sought to be charged; the supervision of an architect in the ordinary discharge of the duties of his profession to see justice done by the contractor to their joint princi-

pal can never make that principal liable for the negligence of the person standing in relation of servant to the contractor alone.

In *Knight* v. *Fox* (1850) (1), where a railway company had entered into a contract with *A* to construct a portion of their line, and *A* contracted with *B* to erect a bridge on the line, and *B* entered into a contract with *C* (who acted as the surveyor and manager of *B*'s business in *London* at an annual salary), by which *C* agreed to erect for £40 a scaffold which was necessary for the building of the bridge, the scaffold was erected upon the footway by *C*'s workmen and a portion of it improperly projected, by reason of which *D* fell and was injured. It was held that *B* was not liable to *D*, for that the act of *C* was not done by him in the character of servant of *B*. There *Alderson*, B., says:

> The real question and the only one, is whether the negligent act by which the injury was occasioned to the plaintiff, was the act of *C* as the defendant's servant; but the evidence shows that when the negligent act was occasioned by *C* he was acting in the character of a sub-contractor, and that he did the work on his own individual account. The plaintiff's remedy is against *C*.

In *Overton* v. *Freeman* (1851) (2), *A* had contracted with parish officers to pave a certain district, and entered into a sub-contract with *B*, under which the latter was to lay down the paving of a street, the materials being furnished by *A* and brought to the spot in his carts; preparatory to the paving, the stones were laid by laborers employed by *B* on the pathway and there left unguarded at night in such a manner as to obstruct the same, and *C* fell over them and broke his leg, and it was held that *B*, and not *A*, was responsible to *C*.

In giving judgment, *Cresswell*, J., there says:

> It seems to me that the modern cases of *Rapson* v. *Cubitt*; *Reedie* v. *The London & N. W. Rwy. Co.* and *Knight* v. *Fox* are conclusive.

(1) 5 Ex. 721. (2) 11 C. B. 867.

1882

WALKER v. McMILLAN.

Gwynne, J.

In *Reedie* v. *The London & N. W. Railway Company, Rolfe* B. delivering the judgment of the court says: The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*; the party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or care of the person employed, but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.

And *Williams*, J., says:

This is not the case of master and servant, but of contractor and sub-contractor, The plaintiff's counsel has rested his argument upon a broad and intelligent ground, viz: that the act complained of is a public nuisance. Some of the cases, it is true, would seem to justify the distinction, but it seems to me we cannot give any weight to it without overruling *Knight* v. *Fox*.

And upon this point *Cresswell*, J., added that

If indeed the act contracted to be done would itself have been a public nuisance of course the defendant would have been responsible.

In *Peachey* v. *Rowland et al* (1853) (1), *A* employed *B* to construct a drain from certain houses of *A's* across a public highway. *B* employed *C* to fill in the earth over the brickwork and to carry away the surplus, *C*, in performing this work, left the earth raised so much above the level of the road that *D*, driving in the dark, was thereby upset and sustained injury, and it was held that *A* was not responsible to *D* for the negligence of *C*. *Maule*, J., in giving the judgment of the court, says:

It would be extremely inconvenient if this case could be successfully distinguished from *Overton* v. *Freeman*, which proceeded upon the decision of the Court of Exchequer in *Knight* v. *Fox*; the true result of the evidence here was that the defendants had nothing whatever to do with the wrongful act complained of; they employed somebody to do something which might be done, either in a proper or an im-

(1) 13 C. B. 182.

proper manner, and he did it in a negligent and improper manner, and injury resulted to the plaintiff. I am of opinion that if the jury had, upon this evidence, found that the defendants did the wrong complained of, their verdict would have been set aside as not warranted by the evidence; there was, in truth, no evidence for the practical purpose in hand.

He adds:

The rule is very well stated by *Rolfe*, B., in *Reedie* v. *L. & N. W. Ry. Co.* (1)

In *Ellis* v. *Sheffield Gas Co.* (1853) (2), it was held that the Gas Company who had no right to open the streets of *Sheffield*, and the opening of which was a public nuisance, could not shield themselves from responsibility to a person receiving injury from the nuisance by shewing that the nuisance was committed under a contract entered into by the company with contractors for that purpose. Lord *Campbell*, C. J., there says:

I am clearly of opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself, affirming the principle stated by *Cresswell*, J., in *Overton* v. *Freeman*.

And *Erle*, J., says:

The cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract, and that, in my opinion, makes the distinction between the present case and those cited in which the cause of the accident was the neglgence of those doing the thing, not the thing itself.

And in *Sadler* v. *Henlock* (1855) (3), where the defendant was held liable, upon the ground that the person who caused the injury there complained of, by digging through a public highway, was the servant of the defendant, Lord *Campbell* points out that *Ellis* v. *Sheffield Gas Co.*, which was relied upon by the plaintiff, had no application, for it proceeded on the ground that the act done there could not be done at all without committing

(1) 4 Exch. 244.

(2) 2 El. B. 767.

(3) 4 El & B. 571.

1882

WALKER v. MCMILLAN.

Gwynne, J.

a public nuisance, which the person committing it was employed by the defendants to commit, whereas in *Sadler* v. *Henlock* the drain which was being cleansed might have been cleansed without the committing of any nuisance; and he, therefore, puts the case then before him upon its true principle, namely, the relation of master and servant, and *Wightman*, J., says:

> The question is whether *Pearson* (the laborer who did the work) is to be considered as the defendant's servant or as a contractor exercising an independent employment; the whole evidence is that the former is the correct view.

In *Steel* v. *The South Eastern Railway Co.* (1855) (1), it was held that where work is done for a railway company under a contract, parol or otherwise, the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.

Cresswell, J., there says there was no evidence that could properly be left to a jury to show that the defendants or their servants had been guilty of any such negligence as to make them responsible. He says:

> If it could have been shown that that plaintiff's land was flooded in consequence of something done by the orders of the company's surveyor it might have been said that was the same as if the surveyor had done it with his own hands, and then the company would have been responsible.

And *Crowder*, J., says:

> The only persons responsible for the acts complained of are *Furness* or *Eaves*, the circumstance of the work being done by *Furness* under a contract negatives his being a servant of the company. The evidence of *Eaves* showed that he was acting quite independently of the company, though receiving orders from their surveyor; there clearly was no evidence to fix the defendants.

In *Hole* v. *Siltingbourne and Sheerness Railway Co.* (1861) (2), where a railway company were autho-

(1) 16 C.B. 550. (2) 6 H. & N. 489.

rized by their Act of Parliament to construct a railway bridge across a navigable river, and the Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals, or passengers ready to traverse, to cross the bridge and for opening it to admit such vessel, the defendants employed a contractor to construct the bridge in conformity with the provisions of the Act of Parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river; it was held that the railway company was responsible for the damage thereby caused to the plaintiff, upon the authority of *Ellis* v. *Sheffield Gas Co*, because the very thing which was contracted to be done for the company, namely, the erection of the bridge, was the thing which caused the obstruction and nuisance of which the plaintiff complained as obstructing his right to navigate the river, contrary to the express terms of the Act of Parliament, in virtue of which alone the railway company had any right to erect the bridge.

Pollock, C. B., says:

> There is a wide difference between a liability arising from the relation of master and servant, and that which exists in the present case. The defendants are authorized by Act of Parliament to construct certain works, and they cannot transfer that authority to another person without being responsible for the proper execution of them. This is a case in which the maxim *qui facit per alium facit per se* applies.

And he adds:

> Where a person is authorized by act of Parliament or bound by contract to do a particular work, he cannot avoid responsibility by contracting with another person to do the work.

Then quoting what was said by Lord *Campbell* in *Ellis* v. *The Gas Co.*, that where the contractor does the thing which he is employed to do, the employer is res-

1882

WALKER v. McMILLAN.

Gwynne, J.

ponsible for that thing as if he had done it himself, he says:

> Here the contractor was employed to make a bridge, and he did make a bridge which obstructed the navigation, so causing the injury complained of;

and he proceeds to draw the distinction between the thing itself contracted to be done causing the injury, and injury caused by an act arising incidentally in the course of the performance of the work contracted for, that is to say, between the thing itself contracted for, causing the mischief, and mischief arising only from the manner in which a thing in itself innocuous, if properly constructed, is constructed. He says:

> Where the act complained of is purely collateral and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act, the remedy is against the person who did it; that, however, generally affords but a poor compensation to the party injured, for the wrong doer is usually a common workman. Then comes the enquiry, who is the master?—the contractor. In such case the employer is not responsible; but when the contractor is employed to do a particular act the doing of which produces mischief, another doctrine applies. Here the legislature empowered the company to build the bridge; in building that bridge the contractor erected an obstruction to the navigation, and for that the company are liable.

That the principle applied to the determination of this case has no application to the case now before us appears from the judgment of the same court in *Butler* v. *Hunter* (1862) (1), which was decided by the same judges as had decided *Hole* v. *Sittingbourne and S. Ry Co.*

The plaintiff and defendant being owners of adjoining ancient houses, it became necessary for the defendant, in consequence of a fire, to repair his house, and he employed an architect to superintend the making the repairs. The architect having considered it necessary to pull down and rebuild the front wall, agreed with a

(1) 7 H. & N. 826.

contractor to do the work for an estimated price, and the workmen of the contractor, in pulling down the wall, removed a brest-summer which was inserted in the party wall between the defendant's and plaintiff's house without taking any precautions by shoring or otherwise, in consequence of which the front wall of plaintiff's house fell, and it was held that the contractor and not the defendant was the person responsible to the plaintiff for that injury.

Martin, B., says:

The contractor's negligence in removing the brest-summer caused the plaintiff's wall to fall. When a person employs a builder to do certain work and he does it negligently, the employer is not liable unless he personally interferes.

And again,

The relation of master and servant must exist before any other person can be made responsible than the person who did the act which caused the mischief.

Pollock, C. B., says:

The argument of Mr. *Denman* amounts to this: That where a person employs a tradesman to do work which may be dangerous to another, he is bound to show that he directed all care to be taken and specifically pointed out in what way the danger was to be guarded against; or, at all events, to show that he did enough to exempt himself from responsibility. No doubt where the act is in itself a nuisance. And this term nuisance is to be read in the sense declared by *Parke*, B., in *Knight* v. *Fox*, to be attributed to the same term in *Reddie L. & N. W. Ry. Co.*, namely, a private nuisance as connected with a man's house or fixed property. The party who employs another to do it is responsible for all the consequences, for there the maxim *qui facit per alium facit per se* applies, but where the mischief arises not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists.

And *Wilde*, B., says:

It seems to me the case is very plain. *Hole* v. *S. S. Ry. Co.* is distinguishable. There it is said that where the act itself has caused the injury, the person who ordered it is responsible, but where the

1882

WALKER v. McMILLAN.

Gwynne, J.

injury happened from something collateral in the course of carrying out the order, he is not responsible.

And, again, as to the fact of the defendant having employed an architect, he says:

In the case of almost every house that is built the owner employs an architect; the architect employs a builder, and the builder employs workmen, but the owner of the house is not responsible for the negligence of the workmen.

Pickard v. *Smith* (1861) (1) proceeds upon the same principle as that which was involved in *Ellis* v. *Gas Co.* and *Hole* v. *S. & S. Ry. Co.* *Williams*, J., pronouncing the judgment of the court, puts the case thus:

If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not responsible. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; and by parity of reasoning to cases in which the contractor is entrusted with a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned, which was the case before the court.

In *Bower* v. *Peate* (1876) (2), where plaintiff and defendant were respective owners of two adjoining houses, and plaintiff's house was entitled to the support of defendant's soil, and the defendant employed a contractor to pull down his house, excavate the foundations close to plaintiff's wall and rebuild defendant's house, it was held that the defendant was liable to the plaintiff for injury occasioned to his wall by reason of the means taken by the contractor to prevent the injury having been insufficient, upon the principle, as stated by *Cockburn*, C.J., delivering the judgment of the court—that

A man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve him-

(1) 10 C. B. N. S. 470. (2) 1 Q. B. D. 321.

self from responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

In that case injury to the plaintiff was, in the natural course of things, to be expected to follow from the excavation ordered to be made by defendant for his house unless the plaintiff's house should be properly shored up during the progress of the excavation for and the building of defendant's house; the defendant, under these circumstances, owed the duty to the plaintiff involved in the maxim *Sic utere tuo ut alienum non lædas*, and so apparent was the danger to plaintiff's property that the defendant took a covenant of indemnity from the contractor.

Between such a case and the case now before us there is a manifest distinction, as was pointed out by *Cockburn*, C. J., in pronouncing judgment against the defendant in the above case, at p. 326, where he says:

> There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures a adopted, while it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injur caused by an act certain to be attended with injurious conseque ces if such consequences are not in fact prevented, no matter t l rough whose default the omission to take the necessary measures s uch prevention may a e.

Butler v. *Hunter* was not cited, not because the learned counsel who argued *Bower* v. *Peate* may be assumed to have been ignorant of it, but because, as I think, it had no application to the question arising in *Bower* v. *Peate*, which was rested upon a wholly different principle than that governing *Butler* v. *Hunter*, namely, on the principle involved in *Ellis* v. *The Gas Co.*, *Hole* v. *S. & S. Rwy. Co.*, *Pickard* v. *Smith*, and

1882

WALKER v. MCMILLAN.

Gwynne, J.

Grey v. *Rullen*, while *Butler* v. *Hunter* comes within that class of cases which is contrasted by *Cockburn*, C.J., in principle with the principle governing *Bower* v. *Peate*. The defendant in *Butler* v. *Hunter*, so far as appeared in evidence, was in the position of a man who had simply authorized and contracted for the execution of a work from which, if executed with due care and in a proper manner, no injury was or could reasonably have been anticipated, and who, therefore, was not responsible, because of injury having arisen in the progress of the work from the negligence of the contractor or his servants; whereas, in *Bower* v. *Peate* the injury which did happen was naturally to be expected to happen as the direct and immediate consequence of the work ordered by the defendant to be done unless special care should be taken to prevent its happening; and the probability of the occurrence of the injury was so apparent that the defendant required the contractor to indemnify the defendant in case it should happen. This view is confirmed, as it appears to me, by what fell from the learned judges in the Court of Appeal, and in the House of Lords upon this point in the recent case of *Angus* v. *Dalton* (1). That case was identical in its circumstances with *Bower* v. *Peate*, and was determined wholly, so far as this point is concerned, upon the authority of *Bower* v. *Peate*.

Lord Justice *Thesiger*, in *Angus* v. *Dalton* (2), says:

> It is properly admitted by the defendant's counsel that the case of *Bower* v. *Peate* is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the court is correctly stated and placed upon proper principles, and that the defendants in the present case who have ordered work to be executed from which in the natural course of things injurious consequences to the plaintiff's factory might be expected to arise unless means to prevent them were adopted, are, if the plaintiffs are entitled to recover at all,

(1) 5 Q. B. D. 184. (2) 4 Q. B. D. 184.

responsible for the damage which has in fact arisen owing to the means adopted having proved to be insufficient.

And Lord Justice *Cotton*, at p. 188, says:

I agree with the decision in *Bower* v. *Peate*, that where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighboring property and damage is the result of the work done, the employer is liable, though he has employed a competent contractor and given him directions to take precautions in executing the work.

And in the House of Lords (1), Lord *Blackburn* says:

Ever since *Quarman* v. *Burnett*, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them, so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

And at p. 831, Lord *Watson* says:

The operations of the commissioners were obviously attended with danger to the building in question. * * * When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor, but in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions.

The courts in the *United States* have adopted the law upon the subject as expounded by the English courts. In *Blake* v. *Ferris* (1851), the Court of Appeals of the state of *New York* (2), reviewing all the English cases up to that time, came to the conclusion that *Bush* v. *Steinman* was not law in *England*, or in the State of *New York*, and they held that persons who, having a license from the proper authorities of the city of *New York* to construct at their own expense a sewer from their house into the public street, engaged a contractor

(1) 6 App. Cases. 829. (2) 1 Selden 48.

1882

WALKER v. MCMILLAN.

Gwynne, J.

to construct it at a stipulated price for the whole work, were not liable to third persons for any injury resulting from the negligent manner in which the sewer was left at night by the workmen employed by the contractor, upon the ground that the contractor or his servants were not servants of the defendants. In *Barry* v. *The city of St. Louis* (1852) (1), the Court of Appeals of the State of *Missouri*, after a like review of all the English cases, came to a like conclusion as to *Bush* v. *Steinman*, and held that the defendants, who had entered into a contract with a contractor for the construction of a sewer, whereby the contractor covenanted for a consideration agreed upon to furnish all materials and do all the work, were not responsible to a third person for the negligence of the contractor in not properly guarding the excavation at night, upon the ground that the contractor was not the servant of the defendants, and it was held further that the contract having contained a provision that the work was to be done under the inspection of the city Engineer made no difference. In *Pack* v. *The Mayor, &c., of the city of New York* in (1853) (2), the Court of Appeals of the State of *New York*, following *Blake* v. *Ferris*, held the city corporation was not liable for injury to third persons occasioned by negligence of workmen engaged in grading a street under a person who had entered into a contract with the corporation to furnish all the materials, and perform the work in conformity with certain specifications mentioned and described in the contract, and further to conform the work to such further directions as should be given by the Street Commissioner and one of the city Surveyors, and it was further held that this last clause made no difference as it did not change the relation between the parties and constitute the contractor or his servants the servants of

(1) 17 Missp. 121. (2) 4 Selden 222.

1882

WALKER v. MCMILLAN.

Gwynne, J.

the corporation. In *Hilliard* v. *Richardson* (1855) (1), the Supreme Court of the State of *Massachusetts*, reviewing all the English cases to that time, came to the same conclusion as to *Bush* v. *Steinman* as the Court of Appeals of the State of *New York* had in *Blake* v. *Ferris*, and held that the owner of land who employs a carpenter for a specific price, to alter and repair a building thereon, and to furnish all the materials for the purpose, is not liable for damages resulting to a third person, from boards deposited on the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in the repair of the building.

In *Gilbert* v. *Beach* (1858) the Court of Appeal of the State of *New York* (2) say the question whether an owner can be held responsible for damages occasioned by the unauthorized act of builder or contractor could not arise in the case until the question of fact, whether the act was or was not authorized by the owner, should be first disposed of and settled, and a new trial was ordered. On the case coming up again (3) the court, following *Blake* v. *Ferris*, held that the owner of a lot of ground who has contracted with masons, carpenters and other mechanics of competent skill for the erection of a building thereon in a safe and proper manner, is not responsible to an owner of adjoining property for injury occasioned by water from the defendant's property flooding the plaintiff's cellar, occasioned by the negligence of the servants of the contractor engaged in the prosecution of the work contracted for. *Clark*, J., in delivering the judgment of the court, referring to *Blake* v. *Ferris*, and the principle thereby adopted, says :

I cannot conceive that it makes any difference when the injury happens to have been committed on the premises of a person sought

(1) 3 Gray (Mass.) 349. (2) 16 N. Y. Rep. 608.
(3) 5 Bosw. 455.

1881

WALKER v. MCMILLAN.

Gwynne, J.

to be charged, if he had no direct agency in the commission of it, or has not sanctioned it in any way. If the person doing the injury is not his servant but the servant of another, there is no better reason why the latter should be relieved from responsibility than if the injury was committed in the street.

In *Blackwell* v. *Wiswall* (1) the Supreme Court of the State of *New York* held the only principle upon which one man can be made liable for the wrongful acts of another to be that—

> Such a relation exists between them that the former is bound to control the conduct of the latter. The party sought to be charged must stand in the relation of superior to the person whose wrongful act is the ground of complaint.

In *Storrs* v. *The City of Utica* (1858) (2) the Court of Appeals of the State of *New York* draws the distinction which exists between injury arising from the work itself authorized to be done, and that which arises from negligence only in the manner of performing the work; and proceeding upon the same principle as the courts in *England* proceeded in *Ellis* v. *The Gas Co.*, *Hole* v. *S. and S. Ry. Co.*, *Bower* v. *Peate*, and *Angus* v. *Dalton*, held that a municipal corporation, by reason of its owing a duty to the public to keep its streets in a safe conditon for travel, were liable to persons receiving injury from neglect to keep proper lights and guards round an excavation which it had caused to be made in the street, although that excavation was made under a contract entered into with a competent contractor, and that the corporation could not escape responsibility for putting a public street in a dangerous condition for travel at night, by interposing the contract by which they had authorized the very thing which created the danger. Says the court:

> The danger arises from the very nature of the improvement, and yet can be avoided only by special precautions, such as placing

(1) 24 Barb. 355. (2) 17 N. Y. 104.

guards or lighting the street. The corporation which has authorized the work is plainly bound to take those precautions.

This is the precise principle laid down in *Bower* v. *Peate*, and *Angus* v. *Dalton*.

In *Potter* v. *Seymour* (1859) (1), where an owner being about to erect a building on his lot entered into a contract with one *Adair*, whose business was to put up marble fronts to buildings, to furnish and set the marble for the front thereof agreeably to certain specifications, and the plaintiff passing along the street sustained injury in consequence of the fall of a derrick erected on the top of the building by persons employed by *Adair* for the purpose of raising the marble, and counsel for the defendant required the learned judge who tried the case to direct the jury

That if they should find that a contract had been made with *Adair* to put up the marble front, and that he was exercising an independent employment under such contract, and the accident was the result of his negligence or that of his servants, the defendant in law was not liable, or that if the negligence of *Adair's* servants had caused the accident, and the defendant had not the right to choose said servants, the defendant was not liable in law;

And the learned judge refused to give such direction; it was held that by so refusing he had erred, and that he should either have treated the contract with *Adair* as a defense, or should have left some such question as he was requested by counsel for the defendant to do as above, and a new trial was ordered.

In *Benedict* v. *Martin* (1862) (2), in an action brought by plaintiff to recover damages for injury done to his property by reason of the falling of a wall which the defendant the owner of the adjoining lot was having built for him under a contract entered into with a competent contractor, the Supreme Court of the State of *New York* held that the learned judge before whom the

(1) 4 Bosw. 140. (2) 36 Barb. 288.

1882

WALKER v. MCMILLAN.

Gwynne, J.

case was tried erred in leaving the case to the jury, and in overruling the contention of defendant's counsel that the defendant was not liable, and that plaintiff should be nonsuited, as the persons actually engaged in erecting the wall were servants of the contractor, and not of the defendant, and the court, holding that, as there was no conflict of testimony as to the relation between the defendant and the contractor, there was nothing to leave to the jury, ordered a new trial.

In *Hunt* v. *Pennsylvania Railroad Co.* (1866) (1), the Supreme Court of *Pennsylvania* held, that where a railroad company had contracted with a builder to do the work of a building in a substantial and workmanlike manner, and in accordance with plans, specifications and instructions furnished by the company, the latter were not liable to a third person for injury arising from the negligence of a person employed on the building by the contractor, for that notwithstanding the above provision that the work was to be done in accordance with instructions furnished by the company, the contractor was left to his own skill and judgment as to the mode of accomplishing the work, and he was bound to bring to its execution the degree of skill and care necessary to perform his contract; and the persons to be employed on the work were necessarily to be hired by the contractor, and so were his servants, and not the servants of the company.

As to the case of *Gorham* v. *Gross* (2), which contains expressions of the court which appear to be in antagonism with the above cases, it is not necessary to express an opinion whether it was well or ill decided, for that case appears to be distinguishable in this that there the masons had completed the wall, and it had been accepted by the defendant as completed in accordance

(1) 51 Penn. Rep. 475. (2) 125 Mass. 236.

1882

WALKER v. MCMILLAN.

Gwynne, J.

with the contract, from which circumstance it seems to have been considered that there became a duty imposed upon the defendant to maintain it in such a state of efficiency that it should not fall and do damage to neighbouring property. Unless thus distinguishable it appears to be in antagonism with all the above decisions as well of the American as of the English courts.

Now, in the case before us it appears to me to be clear that the 8th article of the specifications (relied upon by the learned judge who tried this case as subjecting the defendant to liability), whereby the defendant reserved the right by conferring with his architect to be at liberty to make any deviation in the construction, detail or execution without invalidating or rendering void the contract, cannot be construed as having invalidated the contract so far as to make the defendant responsible for the negligence of the contractor's servants, and for which the defendant would not be responsible if the 8th article had not been introduced; that article, (even if what is there contemplated had been done) could not relieve the contractor from the obligation assumed by him of furnishing all materials and labor, of executing the work to be contracted for with due care and skill, and in a perfect manner, and of incurring all risk until completed as was provided in other articles, nor could it be construed to have the effect of altering the relation existing between the defendant and his contractor, or of making the persons employed by the latter to be the servants of the former, but inasmuch as what was contemplated by the 8th article is not claimed to have been ever done, that article can have no bearing whatever upon the question as to the liability of the defendant under the circumstances appearing in evidence.

Then, as to the 5th article, also relied upon by the learned judge, whereby *Babcock* is declared to be the

1882

WALKER v. McMILLAN.

Gwynne, J.

defendant's architect for the performance of duties and services usually devolving upon an architect, (duties and services which, as pointed out by *Wilde*, B., in *Butler* v. *Hunter* are called into action in the case of almost every house which is built without making the owner of the house responsible for the negligence of the contractor or his workmen) the appointment of the architect cannot have the effect attributed to it by the learned judge without introducing a wholly new principle governing the liability of one person for injuries caused by the actual negligence of another, not sanctioned by any of the cases in either the English or American courts; and which is expressly repudiated in some of them, notably in *Reedie* v. *L. & N. W. Ry. Co.* and *Steel* v. *S. E. Ry. Co.*, in the English courts, and in *Barry* v. *City of St Louis*, *Pack* v. *New York*, and *Hunt* v. *Pennsylvania Ry. Co.* in the *United States* courts, and not only is the proposition contended for, not sanctioned by authority, but it cannot, as it appears to me, be reconciled with any principle that a person who, if departing from the universal practice of employing an architect to superintend the erection of a house being built for him under contract with an independent contractor would not be liable for injuries caused by the negligence of the contractor or his servants, would become liable for such injuries by the mere fact of his adopting the universal practice of employing an architect. If there were any such liability no doubt it would have been established by express authority long ago, and would have been alluded to in some of the above cases in which the ground upon which one person can be made liable for the negligence of another is so clearly put upon the relation of master and servant, except in the cases where the thing itself, authorised by a defendant to be done constitutes a nuisance to the property of a neighbour, or where, from

1882

WALKER v. MCMILLAN.

Gwynne, J.

the nature of the thing authorised, it is obvious that in the nature of things injury is likely to happen from the execution of the work to the person or property of another, unless special precautions are taken to prevent the injury, in which case a duty becomes imposed upon the person authorizing the work to take all necessary precautions to prevent the injury arising; and this duty is wholly irrespective of all consideration by whom the injury was caused, and whether from the negligence of a contractor or his servants, or whether an architect or superintendent be or be not employed to take measures to prevent the happening of injury from the work authorized. The learned judge then, as it appears to me, erred in ruling that the legal effect of the contract in this case, by reason of its providing for the appointment of an architect to superintend the contractor's work, made the defendant liable to the plaintiff for injury arising from the contractor and his servants being guilty of negligence in the performance of the work and not executing it according to the plans and specifications furnished by the architect, and there must, therefore, be a new trial.

It is admitted that the accident would not have happened if the contractor had excavated, as he was bound by his contract, down to rock excavation; but assuming that if the centre wall had been built upon the rock foundation, the floor upon which the sand was piled would have been sufficient to bear the weight of the sand, it may, nevertheless, be that although the centre wall was not carried down to rock foundation, still the accident might not have happened but for the great weight of the sand become saturated by the rain, and this act of placing the sand upon the floor comes clearly, as it appears to me, upon the authority of all the cases within the description of a collateral act for the consequences resulting from which the contractor, and not the defendant, would plainly be responsible.

1882

WALKER v. MCMILLAN.

Gwynne, J.

In fine, I can see no principle upon which this case can be taken out of that class of cases which is governed by the principle involved in the relation of master and servant, unless a jury should first find as a fact, upon the authority of *Bower* v. *Peate* and *Angus* v. *Dalton*, that the accident was in the natural cause of things to be apprehended as likely to occur from the erection of defendant's building, that the risk was obvious as necessarily attendant upon the erection of the building; but I cannot well see how upon the evidence a jury could come to such a conclusion, nor, if they should, how it could be upheld by the courts without practically reversing nearly all the cases which have been decided upon the principle involved in the relation of master and servant and nullifying that principle.

To hold that the plaintiff can recover from the defendant damages occasioned to the former by reason of his contractor not having completed his contract with plaintiff within the time limited in their contract or within a reasonable time; or moneys paid by the plaintiff to his contractor for rebuilding a wall damaged by the tort of that contractor, upon the ground that such tort was occasioned by the act of the contractor in the course of his executing work for the defendant upon an adjoining lot, by which act the defendant was damnified equally with the plaintiff; that in fact the plaintiff can recover from the defendant money paid by the plaintiff to his own contractor for work which the latter, as well by reason of his own tort, as by his covenant with the plaintiff to complete his building for him, was bound to execute without payment, would, as it seems to me, be a decision novel in its character, wholly without precedent, and which with great deference for the opinions of those with whom it is my misfortune to differ in this case, appears to me to be irreconcilable with any principle of law.

1882

WALKER v. McMILLAN.

Gwynne, J.

In the argument before us it was contended that the building as designed by the defendant's contract departed in some particulars from certain regulations prescribed by a by-law of the corporation of the city of *St. John*, (in which city the building was being erected) passed after the contractors entered into their contract, but before the building was commenced, and that for this reason and for the reason that by an act of the provincial legislature, 41st *Vict.*, ch. 6, sec. 6, it was enacted that all buildings hereafter erected in the city should be constructed in accordance with any law for the time being in force in the city regulating the construction of buildings, and by sec. 9, that any building which should be erected after the passing of the Act contrary to any of the provisions of the Act, should be and was thereby declared to be a public and common nuisance; and by section 10, that in addition to any indictment which might be found or any action which might be brought for such nuisance, the person erecting or causing to be erected, or who might attempt to erect or cause to be erected such building, should be liable to a penalty not exceeding $20, and to a further penalty of not less than $10 for each and every day on and during which such nuisance might be maintained and continued, to be recovered before the police magistrate of the city upon the information or complaint of the inspector of buildings or of any ratepayer, and to be paid to the Chamberlain of the city to the credit of the city, and it was contended, therefore, that this present action lay at the suit of the plaintiff againt the defendant.

It is unnecessary to determine a question raised in connection with this point, viz., whether it was competent for the provincial legislature so to extend the area of the criminal law, for even if the point were raised by the pleadings, which it does not seem to be, it could not give to the plaintiff any right to recover in

1882

WALKER v. MCMILLAN.

Gwynne, J.

this action, if independently of this point he had no right; for it is admitted that the particulars in which the defendant's building departed from the regulations prescribed by the by-law did not cause, and had no connection with the occurrence of, the accident which caused injury to the plaintiff, and it is obvious that the defendant's disobedience of the city regulations, in a matter having no connection with the occurrence of the thing which caused injury to the plaintiff, cannot entitle the plaintiff to recover damages from the defendant for an injury asserted by the plaintiff himself to be attributable to a totally different cause. The question of the defendant's liability in this action must be determined by his responsibility or non-responsility by reason of some duty which he owed to the plantiff in connection with the thing which caused the plaintiff injury, and not by his responsibility or non-responsility to other persons for a thing which had no connection with the causing the injury sustained by the plaintiff.

The act or by-law, or both combined, cannot make the servants of the contractor to be servants of the defendants, so as to make the latter responsible for the acts of the servants of the contractor upon the principle of *respondeat superior*, neither do they create any new duty from the defendant to the plaintiff, which, irrespective of the act and by-law would not arise at common law from the nature and character of the act done which caused the injury, so that the question of defendant's liability to the plaintiff as for a breach of duty owed by the former to the latter must be determined irrespective of any consideration whether or not the defendant had complied with the provisions of the statute or the by-law. Indeed, it seems to me to be contrary to reason and common sense to hold the defendant liable to the plaintiff by

reason of non-compliance with the provisions of the by-law for an injury which the jury has found, and is upon all sides admitted, to be attributable, not to non-compliance with the provisions of the by-law, but to a cause wholly independent of, and in no way connected with, these provisions. But as the case at the trial did not proceed upon any such point, nor is any such point raised by the pleadings, and as the verdict moved against must be regarded as given under the influence of a direction of the learned judge to the jury, which direction was not warranted by law, the only mode of redressing the wrong arising from this misdirection in the charge of the learned judge who tried the cause, is by granting a new trial, so that the liability of the defendant, if he be at all liable, may be presented to the jury upon some acknowledged principle of law applicable to the case. I am, however, of opinion that the present action cannot be maintained, and that the plaintiff's sole remedy is against his contractor, who alone is responsible to the plaintiff for the damage he has sustained. The order should, I think, be that the plaintiff undertaking by his counsel to enter a *nolle prosequi* as to the defendant *Sears*; it is ordered that such *nolle prosequi* be entered in the court below, and that the rule *nisi*, in the court below, be made absolute, with costs for a new trial, as between the plaintiff and the defendant *Walker*.

Appeal dismissed with costs, and cross appeal allowed.

Solicitor for Appellants: *E. G. Kaye.*

Solicitor for Respondent: *C. W. Weldon.*

1881

JAMES H. RAY *et al*.....APPELLANTS;

*Feb'y. 18.

AND

*April 11.

THE ANNUAL CONFERENCE OF NEW BRUNSWICK AND PRINCE EDWARD ISLAND IN CONNECTION WITH THE METHODIST CHURCH OF CANADA *et al*..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Will—Construction of—Surplus—Whether residuary personal estate of the testator passed.

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here, the sum of £1,250, to be paid out of the moneys due me by *Robert Chestnut*, of *Fredericton*. I bequeath to the Bible Society £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." Then follow other and numerous bequests. The last clause of the will is:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

Held, affirming the judgment of the Supreme Court of *New Brunswick*, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in *New Brunswick*.

[*Fournier* and *Henry*, J. J., dissenting.]

---

*PRESENT.—Sir Wm. J. Ritchie, Knight, C.J.; and Strong, Fournier, Henry and Gwynne, J.J.

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

THIS was an appeal from a judgment of the Supreme Court of *New Brunswick*, by which it was declared that by the proper construction of the will of *Gilbert T. Ray*, the respondents, "*The Annual Conference of New Brunswick* and *Prince Edward Island*, in connection with the *Methodist Church of Canada*," and the "*New Brunswick Auxiliary Bible Society*," were entitled to the whole residuary personal estate of the said *Ray*.

This was a bill filed in the Supreme Court in Equity of the province of *New Brunswick*, by the plaintiff, as surviving executor of the last will and testament of *Gilbert T. Ray*, for a decree declaring the persons entitled to a fund of some $40,000 in the executors' hands. The question arose in reference to the last clause in the will. Under it the *Methodist Conference of New Brunswick and Prince Edward Island*, and the *New Brunswick Bible Society* (respondents), claim all the residuary, real and personal estate, while the remaining defendants (appellants), who are the testator's heirs, claim that, as to this residuary estate, there is an intestacy, and that they are entitled.

Gilbert T. Ray died on the 23rd October, 1858, without leaving any issue. By his will he appointed the plaintiff and *Aaron Eaton* and *John Fraser*, executors; and after giving to his wife an annuity of £300 per annum and the use of his house and furniture on *Carmarthen* street for life; and an annuity of £200 per annum to his sister, *Rachael Hallett*, for life; and from and after her death an annuity of £100 per annum for eight years to her daughters, he bequeathed—

"To the worn-out Preachers and Widows' Fund in connection with the Wesleyan Conference here the sum of £1,250, to be paid out of the monies due me by *Robert Chestnut*, of *Fredericton*; to the Bible Society £150; to the Wesleyan Missionary Society in connection with the Conference here, £1,500."

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK &c.

He then gave a number of other legacies, of unequal amounts, to some of his next of kin and others, amounting in the aggregate to $31,360. In addition to a pecuniary legacy of £1,000 to one of his next of kin, he gave him "All his marsh lands in the County of *Annapolis*."

To another, Mrs. *Fraser*, he gave his house and land on *Carmarthen* street; and the will then concluded as follows:

"I hold by deed 540 acres of land in *Sussex*, which I leave to be disposed of, by my executors, at a time when they shall deem it most advantageous."

"Should there be any surplus or deficiency a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz.:—

"Worn-out Preachers and Widows' Fund. Wesleyan Missionary Society. Bible Society."

The defendants, "*The Annual Conference of New Brunswick* and *Prince Edward Island*, in connection with the *Methodist Church of Canada*," represent the bequests to the Worn-out Preachers and Widows' Fund, and to the Wesleyan Missionary Society; the defendants, "*The New Brunswick Auxiliary Bible Society*" represent that to the Bible Society; and amongst the other defendants are all the next of kin of the testator.

All the legacies mentioned in the will were paid except one of £400 to *Charles Prichard*, which, with an annuity of £100 per annum for eight years to *Elizabeth C Hallett*, *Fanny Hallett* and *Margaretta Ray Hallett*, unmarried daughters of *Rachael Hallett*, are now the only charges on the estate.

In addition to the lands at *Annapolis*, the lands devised to Mrs. *Fraser* and the lands at *Sussex* mentioned in the will, the testator died seized of a lot of land and house (No. 643) fronting on Princess street, in the city

of *St. John*; two lots fronting on Orange street (No. 691 and 692); and another lot fronting on Orange street (No. 730) which were appraised as of the value of £1,300.

Exclusive of these lands, the plaintiff, as surviving executor, has in his hands personal property and assets belonging to the estate amounting to $39,462.12.

The matter was heard before Mr. Justice *Duff*, who made a decree declaring that the two defendants first named were entitled to the fund in question representing the real and personal estate under the last clause in the will. On appeal to the Court in Term this decree was varied, and a majority of the Court held that, as to the real estate (except the land in *Sussex*), there was an intestacy, and it went to the heirs; but they sustained the decree as to the personal estate, agreeing with Mr. Justice *Duff* that it passed to the first two named defendants under the will in the proportions of the legacies given them.

From this judgment of the Supreme Court of *New Brunswick*, affirming Mr. Justice *Duff*'s judgment, except as to the four lots of land in the city of *Saint John*, the present appeal was taken.

Dr. *Barker*, Q. C., for appellants:—

The testator after giving to his relations certain legacies, and bequeathing to the respondents' small legacies, comparatively to the residue of the estate, closes his will by a very short, but which would be a very comprehensive clause if the decision of the court below was sustained. It is upon this clause that the controversy arises.

It is a well understood rule that merely negative words are not sufficient to exclude the title of the next of kin; there must be an actual gift to some other definite object. *Johnson* v. *Johnson* (1), *Fitch* v. *Weber* (2).

(1) 4 Beav. 318. (2) 6 Hare 145.

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

It is an equally well understood rule of construction as to wills that the heir is not to be excluded without an express devise or necessary implication. *Wilkinson* v. *Adam* (1), *Dashwood* v. *Peyton* (2).

It is submitted that a clause so ambiguous and general as that in this will amounts neither expressly nor by necessary implication to such a gift as would exclude the heir.

Admitting, however, for argument's sake, that the words amount to a sufficient devise to defeat the claim of the heir, what passes under the clause?

It seems obvious that the real estate would not pass under it. There is no devise of the real estate to any one. The word *bequeath* used in the will is inapplicable to real estate. In whom did the title vest? Certainly not in the executors, for it is not given to them. The title could not be in a *fund*; neither could it be in two unincorporated voluntary societies; much less could it be in the three as tenants in common. Besides this, they were only to take in case of a surplus. It therefore follows that the title to the real estate, except that which the executors were empowered to sell, must have vested in the heirs, subject to the payment of the legacies, if they were a charge upon it.

It cannot be argued that by the use of the same words in the same sentence, you are to gather a different intention in the testator as to one subject matter from what he has as to another. The object to be sought in construing a will is the testator's intention. When we find in reference to this clause that the testator could not have intended to pass real estate, we must infer that he did not intend to pass any property to which the word surplus would be applicable.

It has been put forward that the word *surplus* refers only to the personal estate in the hands of the executor.

(1) 1 Ves. & B. 466. (2) 18 Ves. 40.

Supposing this to be so, there would still be a large fund undisposed of to go to the heirs. It would seem to have been the testator's intention that the charitable legacies should be paid on his death; payment of them is not postponed as in the case of some others. This being so, the legacies were then due, and if due, the amount due could be ascertained. If, therefore, the latter clause has any reference to these legacies, it must be applied then, for there is no means of recovering a portion of these legacies back in case of a deficiency, to be determined years afterwards, and the will does not contemplate more than one payment. The executors, however, must retain sufficient in their hands to pay the other legatees and to produce the annuities payable to the widow and Mrs. *Hallett*. Whatever remains of the fund which produced the annuities, at the death of the annuitants, was undisposed of, and must go to the heirs. It is submitted that when these charitable legacies were paid by the executors, the executors waived all claims against the charities in case of a deficiency and the charities all claims in case of a surplus. There was then neither surplus nor deficiency, as there remained, after payment of legacies, sufficient to pay the annuities.

The testator made his will but twelve days before his death, and when "weak in body," and at a time when he knew substantially the amount of his property as it would be at his death.

If you deduct the amount of legacies from the total estate, the balance represents a capital just sufficient at six per cent. to yield the annuities, and he inadvertently did not dispose specifically of this capital, and the proper construction would be to say the respondents are entitled to whatever "surplus" or sums of money would be left after laying aside sufficient capital to pay these annuities. In the absence of any clause in the will declaring an intention to dispose of his whole estate,

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

as is found in the wills under discussion in *Enohin* v. *Wylie* (1), and *Hughes* v. *Pritchard* (2), and in view of the fact that the testator knew that there would be a surplus of some £8,000, or nearly half of his whole estate, it seems impossible to suppose that if he intended to dispose of it he would not have used different language from the ambiguous clause at the end of his will. *Coard* v. *Holderness* (3).

Mr. *Sturdee* for respondents:

The fact that the testator declares it to be his last will and testament shows conclusively that he was making, in his own opinion at least, a will disposing of his entire estate.

Mr. *Jarman* has, in his Rule 16 of Construction, well laid down the law. Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are in all cases to receive a construction which will give to every expresssion some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction that is to be preferred which will prevent a total intestacy (4).

The residuary clause as to personalty certainly gives any surplus to these charities. The annuitants were dead, and the capital set aside to pay the annuities now is a *surplus* covered by the residuary clause. The case of *Smyth* v *Smyth* (5) is perhaps the latest case, and we submit on the authority of that case that by surplus he meant any surplus of the property out of which these legacies were to be paid, viz: The general personal estate.

(1) 10 H. L. C. 1.
(2) 6 Ch. D. 24.
(3) 20 Beav. 147.
(4) See also, Redfield on Wills (4 Ed.), vol. 1, p. 427.
(5) 8 Ch. D. 56.

Mr. *Kaye*, Q. C., followed on behalf of the resopndents: The testator had two things at heart, his family and his religion. He distributes certain legacies to his family and the balance to his religion. He orders his executors to provide for his family for an uncertain number of years and then he says, if there is not enough the charities will suffer, if there is surplus then the charities will benefit.

Where a will deals with both real and personal estate, as in this case, it is a rule of construction that a residuary clause will be construed to cover both real and personal estate, as was decided in the case of *Smyth* v. *Smyth* (1), and cases there cited.

The will directs £300 per annum to be paid to the testator's wife, and £200 to his sister *Rachel*, during their natural lives. These sums are not charged on or payable out of a specific fund. There is no difference between an annuity and a legacy. They both stand on the same footing. In the event of any deficiency both would abate *pro rata*. *Wright* v. *Callendar* (2). To assume, therefore, that a certain amount must be set apart for the annuities, is assuming what is contrary to fact and law. When the testator speaks of surplus or deficiency, he clearly means of what he has been speaking in the former part of his will, viz.: his estate. He is not speaking of what his property was at the time of making his will, but what it would be at the time of his death. In this will the words are general, not special—there is nothing to control or limit them. As the will speaks from the testator's death, the argument that the estate about equals what would be required to pay legacies and produce sufficient on interest to pay the annuities, cannot apply. The death of the testator occurring shortly after making the will, can have no bearing on the case: he might have lived years; and

(1) 8 Ch. D. 561. (2) 2 DeG. M. & G. 655.

1882

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

the court cannot look at the amount of the personal estate to aid in construing a will (1).

If the argument that it is necessary to set aside a sufficient amount of the estate to produce interest to pay the annuities were to prevail, it might happen that such a large sum would be needed for that purpose as to leave nothing to pay the charitable bequests. Who, in such case, is to judge of the necessary amount, and the rate of interest on which to base the calculation? There would also, on the death of the annuitants, be an intestacy as to the sum so set aside; an intestacy as to a large amount of the estate, with the possibility of these general legacies being left unpaid.

If the doctrine propounded by Mr. Justice *Wetmore* were to prevail, viz., that the surplus or deficiency refers to the money coming from *Chestnut*—the effect would be to make a new will for the testator, instead of construing the one he has made, which is contrary to the principle that "the words must be read in their ordinary sense, as written." See *Grey* v. *Pearson* (2).

From the clauses of this will, it is evident the time to ascertain the surplus or deficiency spoken of would not be upon the death of the testator, as some of the legacies are not to be paid until a future day.

Dr. *Barker*, Q. C., in reply.

RITCHIE, C. J.:—

The case states that:

Gilbert T. Ray, late of the city of *Saint John*, by his last will and Testament, dated 11th October, 1858, among other bequests gave to his wife, *Amelia Ray*, £300 per annum during her life, and the use of the house and furniture on *Carmarthen Street*, in said city; to his sister *Rachel*, widow of *W. P. Hallett*, of *New York*, £200 per annum during her life, and on his sister's decease, £100 per annum for eight years thereafter to be divided equally among his sis-

(1) See Wigram on Wills, 4th ed., 92.

(2) 6 H. L. C. 61.

ter's unmarried daughters. He also gave to the "*Worn-out Preachers and Widows Fund* in connection with the *Wesleyan Conference*" the sum of £1250, and to the *Missionary Society* in connection with the said Conference" the sum of £1,500. These charitable funds are represented by the respondent, "The Annual Conference of *New Brunswick* and *Prince Edward Island* in connection with the Methodist Church of *Canada*." He also gave to the "*Bible Society*" £150, now represented by the respondent, "The *New Brunswick Auxiliary Bible Society*." After disposing of a large amount of his property in bequests, in which all his next of kin were named, he closed his will in the following words:

"Should there be any surplus, or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests; viz:

"Worn-out Preachers and Widows' Fund; Wesleyan Missionary Society; Bible Society."

In addition to this the testator owned real estate in the city of *St. John*, with reference to which no mention whatever is made in his will. When the case came before Mr. Justice *Duff* in the Supreme Court in Equity of *New Brunswick*, he decreed against the heirs at law and representatives of the testator, and held that these several parties: The *Worn-out Preachers and Widows' Fund*, the *Wesleyan Missionary Society*, and the *Bible Society* were entitled to the whole surplus of the estate. This went on appeal to the Supreme Court of *New Brunswick*, and there Mr. Justice *Palmer* was also of opinion that the whole residuary real and personal estate of the testator should go to these beneficiaries. The majority of the court, however, held that only the surplus of the personal property mentioned in the Will passed and that the heirs-at-law, having no interest in that, this surplus should be divided among the beneficiaries, but as regards the land in the city of *St. John* not disposed of, that went to the heirs-at-law. With this conclusion I entirely agree. At the time of this suit, those persons who had a life-interest were dead, and all the annuities and bequests had been paid, and

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Ritchie, C.J.

there being a very large surplus of the estate remaining in the hands of the surviving executor, the heirs-at-law and next of kin of *Ray* claim it as being residuary legatees of his estate undisposed of under his will. I think that although, when the estate came to be wound up, it was found that there was a very large surplus of personal estate, including certain lands in *Sussex*, which were made personal estate, that is to say over which the executors were given control, and which they had power to realize, the proper construction of the will is that the testator clearly intended to dispose of all his personal property. The words used are "should there be any *surplus* or *deficiency*." What surplus do they refer to if not to the surplus of the general personal estate and the amount realized by the sale of the *Sussex* lands? I am entirely unable to see what other surplus could meet the exigencies of the case and the words of the will. The appeal should be dismissed.

STRONG, J.:—

I see no difficulty in construing this will in the same way as the Supreme Court of *New Brunswick*.

The testator gives a number of pecuniary legacies, including an annuity of £300 to his wife and one of £200 to his sister, and also £1,250 to the respondents, "The Worn-out Preachers' and Widows' Fund"; £150 to the respondents, the Bible Society, and £1,500 to the Wesleyan Missionary Society; he also devises two parcels of real property to devisees named in the will, and leaves 540 acres of land, situate in the county of *Sussex*, to be disposed of by his executors "at a time when they shall deem it most advantageous." The will concludes with the following provision, which alone has given rise to any question:

Should there be any surplus or deficiency, a *pro rata* addition or deduction, as the case may be, to be made to the following bequests,

viz: Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society.

There being a considerable surplus of personal estate and some real estate undisposed of, after paying the pecuniary legacies and setting apart a fund sufficient to produce an income equal to the annuities to the testator's widow and sister, this surplus both of realty and personalty was claimed by the three charities mentioned in augmentation of the pecuniary legacies which had already been paid them. The majority of the court below held that the charities are entitled to the surplus of the fund in the hands of the executors, composed of the residue of personalty and the proceeds of the *Sussex* lands, and that the real estate undisposed of, other than the *Sussex* lands, descended as on an intestacy to the heirs at law. One learned Judge, Mr. Justice *Palmer*, was of opinion that the word "surplus" in the concluding provision of the will already stated carried not only the residue of the personal estate, but also all the realty not specifically devised.

It has been contended on the appeal before this court that nothing passed under this general bequest of the surplus, but that the next of kin are entitled as upon an intestacy to the whole residue of the personalty, including the capital of the funds invested to answer the annuities to the testator's wife and sister. Whilst I am clearly of opinion that the realty other than the *Sussex* Lands does not pass under the gift of the surplus, but descends to the heirs at law, I am equally in accord with the court below in their determination that the gift of the surplus does carry the whole residue of personalty, including the reversionary interest in the corpus of the fund invested for the annuitants. The direction that the *Sussex* lands are "to be disposed of by the executors" being imperative and not discretionary, except as to the time of conversion, includes a power of sale and

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Strong, J.

a trust of the proceeds to be applied for the purposes of the will, namely, in the payment of the legacies bequeathed by the testator in the same manner as the general personal estate, the sums to be produced by the sale thus forming with the personalty a blended fund for the payment of legacies (1). Then the word "surplus" has reference to the fund out of which the legacies are payable. The words "surplus" and "deficiency" apply to the same antecedent subject, and "deficiency" can only refer to the fund for the payment of legacies, which, as I have already said, is the general personal estate, and the money produced by the sale of the *Sussex* lands. And as it was in the case of a deficiency of this fund that the three charitable legacies were to abate, so it was in the event of there being a surplus of the same fund, that they were to be augmented. Had the legacies, by any provision to be found in the will, independently of this gift of the surplus, been charged on the realty, I should have been of opinion that the real estate not specifically devised, passed under the word "surplus;" but I cannot agree that the legacies were charged on the real estate generally. The will contains nothing to warrant such a proposition. There is no doubt that many authorities, such as *Greville v. Browne* (2), shew that where pecuniary legacies are bequeathed, and then the testator has given the "residue of his real and personal estate," the legacies are charged on the real estate; but it is a *petitio principii* to apply such an argument here, for the very question in the present case is whether the word "surplus" is used by the testator as an equivalent for "residue of real and personal estate," or whether it means only "residue" of the fund out of which pecuniary legacies are payable.

For these reasons it follows that the surplus

(1) *Singleton* v. *Tomlinson*, 3 App. Cases 404.

(2) 7 H. L. Cas. 689.

given to the charitable corporations includes only the residue of personalty and the proceeds of the *Sussex* lands, and does not carry the realty not specifically mentioned.

Then it was argued on behalf of the appellants that the capital sums set apart and invested for the benefit of the annuitants were not to be included in the surplus, but were, in the event, which has happened, of the personal estate being ample for the payment of all the legatees, to be considered as undisposed of personalty, and as such to go to the next of kin. This proposition is wholly untenable. The residuary clause with which the will concludes is to be construed as a gift of the residue of the testator's personal estate, and it surely cannot be seriously questioned that the capital invested to secure the life annuities sinks into the residue upon the death of the annuitants. The circumstance that pecuniary legacies are also given to the residuary legatee, which can be paid *in presenti*, whilst the payment of so much of the residue as is made up of the capital of the annuities must be deferred until after the death of the annuitant can make no difference in the right of the residuary legatee to that capital when the annuities fall in. Take the case of a testator directing his whole estate to be invested in an annuity given to A for his life, with a general residuary gift to B; could it be doubted that B, the residuary legatee, would eventually be entitled to the amount invested to secure the annuities? And in what respect does the present case differ from that supposed. A gift of the residue of personalty wholly excludes the next of kin, for under it everything which would be distributable in the event of an intestacy, including all reversionary interests, passes to the legatee. If, therefore, we were to give effect to this argument, we should be altering the testator's will by

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Strong, J.

interpolating an exception in favour of the next of kin of the reversionary interest in the capital of the annuities.

No question was made as to the capacity of the respondents, the three charitable societies, to take these legacies. It was conceded that they were all incorporated and authorized by statute to hold lands, and as to so much of the bequest as consists of impure personalty derived from the sale of the *Sussex* lands, no question can arise under 9 *Geo.* 2, c. 36, since that statute is not in force in the Province of *New Brunswick* (1). The appeal must be dismissed with costs.

FOURNIER, J.:—

Le testament de *Gilbert T. Ray*, dont l'interprétation fait le sujet de la difficulté en cette cause, ayant déjà été cité textuellement par ceux des honorables juges qui viennent d'exprimer leur opinion, je me dispenserai de le transcrire de nouveau ici, me bornant à donner un résumé de ses principales dispositions.

En tête de ce document se trouve la déclaration suivante:

This is the last Will and Testament of *Gilbert T. Ray*, of the City of *Saint John, N.B.*, at present residing in *Granville, N.S.*

Elle est suivie de la nomination des exécuteurs testamentaires parmi lesquels se trouve l'intimé *Lockhart.*

Viennent ensuite deux legs annuels, l'un à dame *Amelia Ray*, son épouse, de la somme de £300, avec l'usage d'une maison meublée, sa vie durante; l'autre, de £200, à sa sœur *Rachel*, veuve de *W. B. Hallett*, aussi sa vie durante, et à son décès une somme de £100 par année, pendant huit ans à ses filles non mariées, etc.; aux ministres retirés (*Worn-out Preachers*) et au fonds des veuves, en rapport avec la "Conférence Wesléyenne", la somme de £1,250 à être payée à même les argents

(1) *Whicker* v. *Hume*, 7 H. L. 123.

qui lui sont dus par *Robert Chesnut*, de *Fredericton*; à la Société Biblique, £150; à la Wesleyan Missionary Society, £1,500; à *Alfred Ray*, ses terres de marais dans le comté d'*Annapolis*, plus une somme de £1,000, pour le bénéfice de ses enfants, la dite somme à être payée dans quatre ans; à *William Ray*, £2,000; *Charles Ray*, £2,000; à *Amelia Fraser*, épouse de *John Fraser*, la maison et le lot sur la rue *Carmarthen*; à *Charles Pritchard*, la somme de £400 à lui être payée à son âge de majorité.

Il y a en outre douze autres legs particuliers à diverses personnes, de sommes d argent, variant de £10 à £600.

Ces legs sont suivis d'une déclaration que le testateur possède 540 acres de terre dans le comté de *Sussex*, dont il autorise l'aliénation par ses exécuteurs à l'époque qu'ils croiront la plus avantageuse, mais sans leur donner aucune direction quant à l'emploi des deniers en provenant.

Vient enfin la disposition qui a donné naissance au présent litige; elle est ainsi conçue:

Should there be any surplus, or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz.:—
Worn-out Preachers and Widows' Fund.
Wesleyan Missionary Society.
Bible Society.

De l'aveu de toutes les parties en cette cause les nombreux legs particuliers faits par ce testament ont été acquittés. Les rentes viagères, ou legs annuels, en faveur de la veuve du testateur et de sa sœur *Rachel*, veuve *Hallett*, sont éteintes par le décès de ces deux dames. Il est admis aussi que les seules charges dont la succession reste grevée sont 1° le paiement annuel, pendant 8 ans aux filles non mariées de madame *Hallett*, savoir: *Elizabeth C. Hallett*, *Fanny Hallett*, and *Margaretta Ray Hallett*, puis 2° le legs de £400 à être payé à *Charles Pritchard*, fils de *Joseph Pritchard*, à son âge de majorité, devenu majeur depuis.

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Fournier, J.

La valeur actuelle de la succession d'après l'état fourni par *Lockhart*, le seul exécuteur survivant, serait de $38,000, sur laquelle il n'y aurait à faire que la diminution des deux sommes ci-dessus mentionnées. Il resterait donc un surplus considérable.

Les choses étant en cet état, *Lockhart*, le seul exécuteur testamentaire survivant, assigna comme seules parties intéressées, ceux des légataires qui sont défendeurs devant la cour de première instance à l'effet d'obtenir une sentence ou décret de cette cour déclarant auxquels d'entre eux devait appartenir le surplus des biens du testateur non absorbé par ses diverses dispositions particulières.

La Cour Suprême du *Nouveau-Brunswick*, siégeant en équité sous la présidence de l'honorable juge *Duff*, a déclaré que le résidu des biens, tant mobiliers qu'immobiliers, du dit *Gilbert T. Ray* devait appartenir, sujet aux diverses charges ci-dessus mentionnées, aux sociétés religieuses intimées "The Annual Conference of *New-Brunswick* and *Prince-Edward Island*, in connection with the Methodist Church of *Canada*, et "The *New-Brunswick* Auxiliary Bible Society." Ce jugement ayant été porté en appel à la Cour Suprême du *Nouveau-Brunswick*, il fut confirmé, excepté quant aux quatre lots de terre situés dans la cité de *Saint-John*, qui furent déclarés ne pas faire partie du surplus à être ajouté aux legs des intimées. C'est ce dernier jugement qui est maintenant soumis à la révision de cette cour par les appelants, qui sont tous héritiers ou maris de quelques-unes des héritières du testateur *Gilbert T. Ray*.

Leur prétention est qu'après le paiement de tous les legs et l'extinction des annuités créées par le susdit testament, le surplus de tous les biens, soit mobiliers, soit immobiliers, doit leur revenir à titre d'héritiers pour être partagé entre eux. Le testateur, suivant eux, n'en

ayant point fait de disposition. Sa succession se trouve *ab intestat* quant à ce surplus. Les diverses sociétés religieuses intimées prétendent, au contraire, qu'il en a été disposé en leur faveur par la clause du testament déclarant que, dans le cas de *surplus* ou *déficit*, il faudra, suivant le cas, ajouter ou retrancher à leurs legs.

De l'interprétation de cette clause dépend la solution de la question soulevée.

Il n'est pas douteux qu'un des premiers devoirs du juge dans l'interprétation d'un testament est de s'efforcer de découvrir la véritable intention du testateur et de lui donner effet; mais, dans le cas actuel comme dans toutes les causes de ce genre, la difficulté est de constater cette intention. Les termes employés par les testateurs et la nature des dispositions testamentaires variant pour ainsi dire dans chaque cas, les précédents sont ici de peu de secours. C'est, en conséquence, aux principes généraux qu'il faut recourir pour trouver la solution de la présente difficulté.

On a vu, par les dispositions du testament rapportées ci-dessus, que le testateur a fait preuve d'une grande libéralité envers sa femme et ses proches parents. N'ayant point d'enfant, il a laissé à sa femme une rente annuelle de £300 et à sa sœur une autre rente de £200; à ses nièces, filles de cette sœur, une somme de £100 pendant huit ans, après la mort de leur mère; à ses neveux des sommes considérables et des propriétés immobilières à l'un d'eux. Il semble n'en avoir oublié aucun. Rien n'indique donc dans ce testament que le testateur ait voulu priver ses héritiers de sa succession. Aucune disposition ne les exclut, et il est de principe que même de simples expressions négatives ne suffiraient pas pour exclure l'héritier légitime, mais qu'il est nécessaire pour cela qu'il y ait une disposition formelle qui donne les biens de la succession à d'autres personnes. Le présent testament n'en contient aucune, à moins que

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Fournier, J.

l'on ne considère comme telle les expressions au sujet du surplus ou du déficit.

Quelle a pu être l'intention du testateur en employant les termes surplus ou déficit ? Se rapportaient-ils dans son esprit à toute sa succession, ou ne les appliquait-il, comme l'a pensé l'honorable juge *Wetmore*, qu'au surplus des argents qui lui étaient dus par *Robert Chesnut*, sur lesquels devaient se prendre les £1250 donnés aux *Worn-out Preachers* et au fond des veuves. Ou bien encore, le testateur voulait-il par ces termes faire allusion au surplus ou déficit qui pouvait avoir lieu après le placement des fonds nécessaires pour assurer le paiement des annuités, ou encore, le surplus de tous les capitaux, argents, biens personnels de toute espèce enfin qui devait inévitablement rester après le paiement des legs et l'extinction des annuités. Voilà bien des possibilités ; nous n'avons que l'embarras du choix et il n'est pas peu considérable.

L'idée que les termes surplus ou déficit pouvaient se rapporter à toute la succession est nécessairement exclue par la nature des dispositions du testament fait peu de jours avant la mort du testateur, à une époque où il était malade et ne pouvait plus songer à faire des affaires qui auraient pu matériellement altérer sa fortune. S'il était en état de faire un testament valable, on doit considérer qu'il connaissait parfaitement l'état de ses affaires, et qu'il ne pouvait pas ignorer que sa succession valait à peu près ce que l'inventaire, fait peu de temps après, a constaté, £18,592.2.7.

Avec l'idée de la valeur réelle de ce qu'il possédait, il ne pouvait certainement lui entrer dans l'esprit qu'après avoir fait des dispositions qui n'absorbaient qu'à peine une moitié de sa fortune, il avait à prévoir le cas d'un déficit, lorsqu'il devait au contraire savoir que, tous les legs payés, il devait encore rester une moitié de sa fortune, composée des capitaux qui devaient être

employés à servir les annuités. Il ne pouvait pas avoir de doute à ce sujet. Le caractère des libéralités faites à sa femme, à sa sœur et à ses nièces devait nécessairement, dans son esprit, exiger l'application de capitaux suffisants pour produire le montant des annuités constituées. Il a dû penser que ses exécuteurs testamentaires en agiraient ainsi, après avoir payé tous les legs exigibles au moment de son décès.

La nature des dispositions indique clairement qu'un tel règlement devait avoir lieu peu de temps après l'ouverture de la succession, car la plupart des legs, à l'exception des annuités et de deux autres sommes, sont payables sans délai déterminé, et conséquemment immédiatement exigibles. Telle a été l'interprétation adoptée par les parties intéressées. Elles n'ont pas cru que le testateur avait ajourné le paiement de leurs legs à une époque éloignée, dépendant entièrement d'événements incertains, comme la mort de son épouse, arrivée en 1875, et celle de sa sœur en 1876 et devant se prolonger encore après le décès de cette dernière, pendant huit ans en faveur de ses filles. Il est certain que non. Le testament est au contraire fait dans la vue d'un règlement immédiat, excepté comme il a déjà été dit des deux autres legs. Dans le cas d'un tel règlement, prévu sans doute par le testateur, les legs une fois payés, et les capitaux nécessaires pour assurer les annuités placés, il était assez naturel pour lui de penser qu'il pourrait y avoir un certain montant au-dessus ou au-dessous du capital qu'il fallait investir pour assurer les annuités. Dans le premier cas, le surplus devait être partagé de la manière indiquée par la clause en question ; de même que dans le second cas, le déficit devait être comblé aux dépens des mêmes legs. Tout cela suppose une opération qui devait se faire presqu'aussitôt après la mort du testateur et non pas 26 ans après, c'est-à-dire à l'expiration de toutes les annuités. Le résultat défi-

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Fournier, J.

nitif de l'exécution du testament ne peut servir à l'interprétation d'une clause qui devait immédiatement recevoir son exécution. Pour saisir le sens de cette clause obscure, il faut se reporter à l'époque du testament, alors on comprend mieux que le surplus ou déficit dont le testateur a fait mention devait être le résultat qu'il entrevoyait comme la conséquence du règlement immédiat de sa succession.

En interprétant la disposition de cette manière, il se serait encore trouvé un surplus d'environ $8,000 ; mais d'un autre côté le testateur pouvait penser que quelques-unes de ses créances ou des capitaux pourraient diminuer de valeur et amener peut-être un déficit. C'est sans doute pour cette raison qu'il a fait usage des deux mots surplus ou déficit. A ce point de vue les deux mots s'expliquent d'une manière naturelle et *tous deux* reçoivent leur interprétation ; tandis qu'en les appliquant à la totalité de la succession il faut pour les interpréter omettre la possibilité entrevue par le testateur d'un déficit, et, dans ce cas, la clause n'est pas interprétée dans son entier, puisqu'on l'applique à une certitude absolue au lieu de l'alternative possible prévue par le testateur. Ce n'est plus son intention que l'on constate, mais c'est une disposition que l'on fait pour lui en supprimant la possibilité d'un déficit. De cette manière on arrive à un résultat qui n'a jamais dû entrer dans l'esprit du testateur, celui de lui faire donner, au moyen de ces expressions vagues et obscures, plus de la moitié de sa succession.

A part de cette interprétation qui consiste à dire que le testateur avait en vue un surplus ou déficit après le paiement de tous les legs et le placement de tous les capitaux nécessaires pour produire les annuités, il y a encore celle suggérée par l'honorable juge *Wetmore*, tendant à faire l'application de ces termes au surplus ou déficit des argents dus par *Robert Chesnut*. Ainsi que

l'honorable juge en a fait mention, l'état de la succession produit par l'exécuteur testamentaire *Lockhart*, les legs en question payés, il reste encore un surplus de $1,200 sur la créance *Chesnut* qui pouvait être réparti suivant le désir du testateur. Il aurait pu se faire qu'il y eût un déficit dans la rentrée de cette créance, et c'est peut-être à une probabilité de ce genre que pensait le testateur lorsqu'il a fait la disposition dont il s'agit. L'une ou l'autre de ces deux explications me paraît plus conforme aux intentions du testateur que celle qui lui fait léguer plus de la moitié de sa succession, en donnant au mot surplus une signification à laquelle il ne pensait pas, puisqu'il ne séparait pas l'idée du surplus de la possibilité d'un déficit. Il y a en faveur de l'une ou l'autre de ces deux interprétations la possibilité de faire l'application des deux termes employés par le testateur, car dans l'un et l'autre cas, il ne pouvait dire avec certitude s'il y aurait ou non un surplus, tandis que le doute était impossible s'il avait en vue la totalité de la succession.

Quant à l'interprétation du mot "*surplus*" comme n'étant pas suffisant dans le cas actuel pour transmettre les propriétés immobilières, j'adopte le raisonnement de l'honorable juge en chef *Allen*, établissant bien clairement, suivant moi, que la disposition est tout à fait insuffisante pour produire cet effet.

Des différentes applications possibles du mot "surplus" mentionnées plus haut, il reste encore celle qui consisterait à l'appliquer aux biens mobiliers seulement, restant entre les mains des exécuteurs testamentaires après le paiement des legs et l'extinction des annuités. A cette interprétation j'oppose le raisonnement fait plus haut pour réfuter l'application que l'on veut faire du mot "surplus" à la totalité de la succession : ce n'est pas le cas prévu par le testateur. Il ne pouvait pas avoir un seul instant l'idée qu'il y aurait

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Fournier, J.

un déficit; il devait, au contraire, être bie ncertain qu'après déduction faite des sommes léguées, sa succession mobilière laisserait un surplus considérable. Ce devait être pour lui une certitude absolue à laquelle il n'est pas possible de faire l'application d'une phrase comportant un doute. Si son intention eût été de léguer le résidu de ses biens, il n'aurait certainement pas fait usage des deux mots surplus ou déficit. Il se serait évidemment borné à parler du résidu.

Quoi qu'il en soit, le moins que l'on puisse dire, c'est que, dans les circonstances de la cause, cette clause du testament fait naître tant de doute qu'il n'est guère possible de lui donner effet sans s'exposer à faire un testament pour le testateur. Il n'y a aucune raison de donner une interprétation forcée à ces termes, dans le but d'assurer l'exécution complète du testament. Toutes ses dispositions positives ont été exécutées ; chacun des légataires a reçu ce qu'il devait recevoir. Dans un cas semblable, le doute qui rend l'exécution d'une telle disposition aussi incertaine doit tourner au bénéfice de l'héritier légitime. Dans le cas d'une telle interprétation, il est vrai qu'il reste une partie de la succession dont le testateur n'a point disposé. C'est vrai, mais ce n'est pas un événement très rare, et lorsqu'il se présente, la loi supplée à l'omission du testateur. Rien n'oblige un testateur à faire une disposition de tous ses biens par testament. S'il est vrai que l'on présume ordinairement qu'il a voulu disposer de la totalité, faut-il au moins pour cela qu'il y ait dans le testament des expressions générales qui puisse établir que telle a été son intention. Nous n'en trouvons aucune dans le testament en question. Les expressions en tête du testament : "This is my last will and testament," font bien voir que c'est le testament auquel il s'arrête et le seul auquel il entend donner effet, si toutefois il en a fais d'autres ; mais cette déclaration ne fait aucunement

voir l'intention de disposer de la totalité de succession. Pour réaliser cette intention, si elle eût existé, il faut des dispositions formelles pouvant avoir cet effet.

It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an active disposition.

Si les expressions générales qui, dans bien des cas, ont été jugées suffisantes pour opérer une disposition de toute la succession, comme celles-ci par exemple : "*All that I am worth*," "*all that I shall die possessed of*, "*real and personal, of what nature and kind soever*," "*such* "*wordly property wherewith it has pleased God to bless me in this world, I give*," etc., se rencontraient dans le présent testament, on pourrait avec raison en tirer la conclusion que les mots *surplus* ou *déficit* doivent se rapporter à une disposition universelle et qu'ils doivent en avoir les effets, au moins quant aux biens mobiliers. En l'absence de semblables expressions, je ne puis pas donner aux mots surplus et déficit une autre signification que celle que j'ai essayée de leur trouver et que j'ai exposée plus haut. C'est sur cette signification que je m'appuie pour conclure que le testateur n'a pas disposé de toute sa succession et que le *surplus* qui devait être adjugé aux intimées devait être seulement l'excédant des capitaux nécessaires au service des annuités,—les capitaux eux-mêmes devant retourner aux héritiers du testateur, faute de disposition suffisante pour les transmettre à d'autres personnes.

HENRY, J :—

The will in this case was made on the 11th October, 1858, and the testator died on the 23rd of the same month; and, probate having been granted to his executors, they, on the 25th July, 1859, filed an inventory of his estate amounting to £18,592 2s 7d., or $74,390.11.

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Henry, J.

The legacies to be paid under the will amounted to £10,350 or $41,400.

The testator left to his widow an annuity of £300, or $1,200, a year during her life, and the use of a house, valued at £1,500, or $6,000, and the furniture therein. He also left to his sister *Rachel* an annuity of £200, or $800, a year for her life, and at her death one-half that sum to her daughters for 8 years.

It appears and it is admitted, that after the paying the legacies and annuities, there remained of the estate at the time of the commencement of the suit, undisposed of in the hands of the surviving executor in the shape of land in the county of *Sussex*, valued at $608, mortgage securities $17,005, stocks $14,900, debentures $6,600 and cash $349.12, making in all $39,462.12.

The widow of the testator died in 1875, and his sister *Rachel* in 1876. The only remaining charges on the estate under the will are a legacy of £400 to *Charles Pritchard*, and the annuity of £100 to the daughters of *Rachel* the sister of the testator.

The appellants claim to be entitled to the balance as next of kin and heirs at law of the testator. The respondents claim it under the last clause of the will.

The testator, by his will, after giving an annuity of £300 and the use of a house and furniture to his widow during her life, and an annuity of £200 to his sister *Rachel* during her life, made bequests to the respondents amounting in the aggregate to £2,900, and several bequests to some of the appellants and others amounting to $7,840, and concludes his will by these words "should there be any surplus or deficiency a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz: Worn out preachers and widows fund. Wesleyan Missionary Society. Bible Society."

Our judgment therefore depends solely on the construction to be put upon this clause of the will.

The testator was a permanent resident of *St. John, New Brunswick*, but his will shows it was made at *Granville*, in *Nova Scotia*, where, it states, he was "at present residing." Being absent from his place of business when the will was executed it is not unreasonable to conclude that he had not all the means of reference for information as to the value of his estate which he otherwise would have had, and that may account for the large part of it left specifically undisposed of. We cannot speculate as to the result of a more specific disposition under other circumstances. It is, however, reasonable to conclude that had he known or thought, at the time of making his will, of the value of his estate, he would have disposed of it more specifically. If indeed he had reason to believe his estate was as valuable as it really was, would he, if he intended so large a bequest to the respondents, have given them the specific sums bequeathed to them respectively, or is it not the reasonable presumption that he intended to make a distribution of his estate in something like the proportions stated in his will, but that he wished to have the annuities and legacies to his relatives and other friends, securely provided for, and that any unimportant deficiency or excess should affect only the legacies to the respondents. We must gather the intentions of the testator from his will, and from that alone where it is unambiguous. Where it is otherwise, we are not only permitted, but bound, to call to our aid, in considering the matter, the surrounding circumstances, including the quality, extent and value of his whole estate, and, looking at the whole will, come to a conclusion as to the intentions of the testator. It is an elementary principle of the law that it requires an express devise or bequest to oust the heir-at-law, or, what may be as effectual, a clearly manifested intention shown in the will to oust him. The party seeking to

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Henry, J.

do so has the burden on him of showing it, and if there is any reasonable ambiguity as to the right or claim of a residuary or other legatee, the heir is entitled. That principle is clearly applicable in this case, if the residuary clause admits of two constructions—one favorable, the other adverse to the claim of the respondents

In resolving the difficulty it becomes necessary to enquire, in the first place, at what time under the will was the distribution to be made? If the inventory showed sufficient to pay and provide for the specific legacies other than those to the respondents, independent of the security necessary to provide for the payment of the annuities, the other legacies vested and the legatees could, in a short time after the inventory was filed, being the time provided by law for distribution, have enforced their claims to them. The inventory having been filed in July, 1859, we find nothing in the case to show when the specific legacies were paid except those to the respondents, which was in November and December, 1860. The receipts for the same are, in one case, for "one thousand two hundred and fifty pounds bequeathed to the worn-out Preachers and Widows Fund in connection with the Wesleyan Conference here." Another for "One thousand five hundred pounds bequeathed to the Wesleyan Missionary Society in connection with the Conference here;" and the third for "One hundred and fifty pounds bequeathed to the Bible Society."

Those entitled to the legacies just mentioned, at the dates of the payments to them, received from the executors the several sums as and for the bequests made to them respectively by the testator. They received, and the executors paid, those several legacies, with, as we must assume, a full knowledge of all the circumstances of the estate and of the terms of the will. It is very questionable in my mind, whether the parties who

received payment of those legacies on the terms stated in the several receipts would not be estopped from claiming further of the estate. The words used make no reference to any specific legacy, but refer to and include all *bequeathed by the testator*. The parties entitled to the legacies had then the alternative of accepting or refusing the several amounts, and in doing the latter might have waited until some future time to have ascertained whether they would be entitled to claim more under the residuary clause, or run the risk of getting less. The residuary clause (so called), in the shape we find it, is an unusual one. In the usual residuary clauses the terms are plain and simple ; they, in most cases, provide for giving unqualifiedly the residue of the estate. Here the residuary clause operates both ways ; either to add to or diminish the amounts of certain preceding specific legacies. A different construction must therefore be be given to it. It gives nothing absolutely ; and not only so, but provides for even a deduction from previous bequests. We must, therefore, ascertain from the whole will what the testator intended when he made provision for the result of "any surplus or deficiency."

As I have already shown, parties interested as legatees, the payment of whose legacies was not postponed, might, under the law, have enforced the payment of all the legacies at or about the date of the payment of the legacies to the respondents. We are not informed whether they did so or not; but it may be presumed from what we do know, that they pressed for payment at the usual time, and the respondents may also have done so. There was no provision in the will for ascertaining the amount of the several legacies to be paid to the respondents more than once ; and, when once done, I think it must be considered as final. It was a question of deduction from or addition to the amount of the specific legacies to them ; and the case is, therefore, very different from

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Henry, J.

what it would have been had no question of *deduction* required to be settled. That question had to be considered in connection with the provision for addition, if the value of the estate entitled the respondents to it. When, therefore, they received the respective amounts, they saved themselves from the *chances of a reduction*, and that, it appears to me, taken in connection with the receipts signed, is evidence of a waiver of any further claim. At the time (in 1860) when the respondents received the amount of the specific legacies, in what position was the estate, and what course had the executors to adopt to secure to all parties the rights they obtained under the will, and, at the same time, to secure themselves? After the lapse of over twenty years we are apt to look at the present position of the estate and be thereby influenced. It is, however, wrong to do so. That a comparatively large balance remains undisposed of is fortunate; but it was not necessarily so, and although the assets in 1860 warranted the belief that the estate would eventually be sufficient to meet the provision for the annuities and unconditional legacies, it might have resulted very differently. The assets were largely composed of property liable to loss and deterioration, such as vessels liable to be lost, damaged, or decreased in value, and unsecured debts due to the estate. This information I have got from the inventory. We have none as to the position or value of the assets when the legacies were paid to the respondents; but we have this fact, that several of the debts are marked "doubtful" in the inventory. No general account of the executors showing receipts and payments was in evidence, and all we have is a statement of what, at the time the present suit was commenced, was then alleged to be in the hands of the surviving executor. This gives us no information as to the position of the estate in December, 1860. We cannot therefore judge

as to it when the payments of the legacies in question were made, and cannot decide whether or not it was, at that time, for the interests of the respondents to have accepted the sums paid them as in full for what was bequeathed to them. Their acceptance of the amount of the specific legacies is, however, affirmative evidence that it was so. In taking this position, however, I do not, in the absence of more positive evidence, insist upon their receipt of the specific legacies as a full and complete bar to the claim they now make; but as evidence to aid us in the construction of the ambiguous clause in question, so far as their acts are evidence of the construction put upon it by themselves at the time. Independently, however, of every other consideration let us see, as far as we can from the evidence before us, what were the duties and responsibilities of the executors in December, 1860, before the payments in question were made. They had then, as shown by the inventory, an estate amounting in gross to $74,368.50.

They had, then, that sum available to provide for the annuities and legacies. I have made a calculation of the amount the executors should retain for the annuities, which constituted the first charge, and for the unconditional legacies, and find that for that purpose nearly the whole sum would be required, leaving little or nothing for the conditional legacies to the respondents. Did then the testator intend that should be the mode of dealing with his estate, or did he mean that the matter of his estate should remain open and undistributed, and the matter of the adjustment, under the residuary clause, postponed until the lapse of the annuities by the death of his widow and his sister *Rachel*? We find the former lived seventeen and the latter eighteen years after his death; and, for all we know, they might in the course of nature have lived many years longer. I cannot bring myself

1881

RAY v. THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Henry, J.

to the conclusion that the latter is the proper construction of the clause. We must read the will, as I before said, not by any speculation as to how he would have disposed of the balance now claimed had he known positively how the administration of his estate would have resulted, but by the words he uses in respect to his bequests. And if we can find a reasonable interpretation we should at once adopt it in preference to one of an opposite character. We must assume, in the absence of postponing provisions, that he meant his estate to be administered in the usual legal way and within the prescribed time. Did he desire the estate not to be governed by the law as to estates generally? We would look for some manifestation of such in the will; but such is not to be found in it; we cannot therefore attribute to him any such desire. He, in my opinion, therefore, virtually instructed his executors within the prescribed period to ascertain how much of his estate, specially undevised, would be necessary to secure the annuities and pay or secure the unconditional legacies, and to apply the balance to the payment of the conditional legacies to the respondents. If not sufficient to pay the whole, then to pay in the proportion he prescribed. If more than sufficient, to distribute the surplus in the same proportion. Taking the clauses giving the specific sums to the respondents, with the residuary clause, they are just the same as, and no more, in my opinion, than a provision in the will, stating that if any balance remained after providing for the annuities and unconditional legacies, it was to be distributed to the respondents in the proportion of £1,250 to one; £1,500 to another; and £150 to the third. Each of those specific bequests is just as effectually made to depend on a contingency in the one case as in the other; and the question is, what that contingency is, and when it was to arise and govern the dis-

tribution? I have called the clause in question a residuary clause, but it is not so in the usual acceptation of the term. It amounts to nothing more than conditional bequests to the bodies named. The usual residuary clause is evidence of an anticipated surplus from the whole or certain prescribed parts of an estate. The clause in this will is evidence that the testator was altogether uncertain whether there would be sufficient to pay even the whole or any part of the specific bequests to the respondents.

I have fully considered the bearing of the cases cited at the argument, and others, from which I am justified in saying that it requires, in order to divest the heir-at-law, that it should conclusively appear on the face of the will to have been the testator's intention to do so; in fact, that the testator should clearly manifest his intention of disposing of the whole of his estate.

I will refer to two cases in proof of the positions I have taken.

In *Hughes* v. *Pritchard* (1), in 1877, the words used by *James*, L. J., as showing the purport of the will in that case, are:

> In order to make a disposition of all my estate, real and personal, I give Whiteacre to *A.*; Blackacre to *B.*; £1,000 to *C.*; my shares to *D.*, and I make *E. F.* and *G.* my residuary legatees.

The question at issue was whether such a devise would include a farm to the residuary legatees which was not specifically devised, and it was held that it did, to the exclusion of the heir-at-law.

Bramwell, L. J., in his judgment, uses these words:

> But it is true that though he says "I ordain this to be my last will and testament," if he had omitted to dispose of any portion of it, it would follow then that the intention he had expressed would be unfulfilled as to part of his estate. But that is not so, because, after giving, as has been observed, gifts of personalty and devises of realty he finishes in this way: I make my sister, *Mary Pritchard*, and

(1) L. R. 6 Ch. 24.

1881

RAY
v.
THE ANNUAL CONFERENCE OF NEW BRUNSWICK, &c.

Henry, J.

the others my residuary legatees, that is to say, legatees of the residue. Residue of what? Why, residue of that of which he had been previously disposing of parts.

The learned judge thought, from the tenor of the will generally and the words "the estate which God has been pleased in his good providence to bestow on me," which are very comprehensive, and upon which much stress was laid, that the testator did not intend to die intestate as to the farm then in question.

In that case the residuary clause is altogether unambiguous and very comprehensive. In this the provision is of very uncertain meaning and reference. There are no words showing, as in the case cited, the intention of the testator to dispose of his whole estate. In that the testator expressly stated his intention to devise and bequeath all the estate, real and personal, which it pleased God to bestow on him. Here no such intention is manifested or declared. In this case we have not only the absence of any expression of such intention, but a disposition which can be understood, as the intention of the testator to make his bequests to the repondents wholly to rest on the contingency which I have explained.

As I before stated, the onus of sustaining the bequests is on the respondents; and in order to divest the heir-at-law the devise must be certain and unambiguous.

The prevailing rule is laid down by Lord *Mansfield*, C. J., in *Roe ex dem. Willing* v. *Tend* (1), thus:—

> In cases between the heir and the devisee the question is not whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did; the proof lies on the devisee.

The same doctrine is applicable to this case and must guide us.

After the best consideration I have been able to give

(1) 2 W. R. 214.

to the matter, I have arrived at the conclusion that the respondents have failed to show, as they were bound to do, a devise to them sufficient to oust the heirs. At the very least, there are grounds for serious doubts which should not exist in a case in which it is sought to oust the right of the heirs-at-law and which alone are sufficient, in my opinion, to prevent the recovery of the respondents; such doubts should not be resolved in favor of the latter upon mere speculation. If they have failed to remove all such doubts, the heirs are entitled to our judgment. I think there are such doubts at all events in this case, and therefore our judgment should find that the balance now in contest was undisposed of by the will—that no provision was therein made for the disposition of it, and that to that extent the testator died intestate.

I think the appellants are entitled to our judgment in their favor, and that the appeal should be allowed with costs

GWYNNE, J.:—

It may be that if the testator had thought that his estate would have turned out as valuable as it has done, he might have made a different disposition of the surplus; but the question we have to deal with is, what is the disposition which he has made of his property by his will, and upon this point I concur in the construction put upon the will by the majority of the court below, and in the reasons given for that judgment.

Appeal dismissed with costs.

Solicitor for appellants: *F. E. Barker.*

Solicitors for respondents, *The Annual Conference, &c.: A. A. & R. O. Stockton.*

Solictors for respondents, *The N. B. Auxiliary Bible Society: H. L. Sturdie.*

1881
*Nov. 17.
1882
*May 13.

THE QUEEN ..... APPELLANT;

AND

JOSEPH DOUTRE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Counsel fees, Action for—Retainer for services before Fishery Commission—Jurisdiction.

The suppliant, an advocate of the Province of *Quebec*, and one of Her Majesty's counsel, was retained by the Government of *Canada* as one of the counsel for *Great Britain* before the Fishery Commission which sat at *Halifax* pursuant to the Treaty of *Washington*. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "That each of the counsel engaged was to receive a refresher equal to the retaining fee of $1,000, that they were to be at liberty to draw on a bank at *Halifax* for $1,000 a month during the sittings of the commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the Commissioners was $5,500,000. The suppliant claimed $10,000 as his remuneration, in addition to $8,000 already received by him.

Held 1. Per *Fournier, Henry* and *Taschereau*, J. J.: that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that $8,000 awarded him in the Exchequer Court was a reasonable sum.

2. Per *Fournier, Henry, Taschereau* and *Gwynne*, J. J: By the law of the Province of *Quebec*, counsel and advocates can recover for fees stipulated for by an express agreement.

---

*PRESENT—Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

3. Per *Fournier* and *Henry*, J. J.: By the law also of the Province of *Ontario*, counsel can recover for such fees.

4. Per *Strong*, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional renumeration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid.

5. Per *Ritchie*, C. J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at *Ottawa*, in *Ontario*, for services to be performed at *Halifax*, in *Nova Scotia*, it was not subject to the law of *Quebec*: that in neither *Ontario* nor *Nova Scotia* could a barrister maintain an action for fees, and therefore that the petition would not lie.

6. Per *Gwynne*, J.: By the Petition of Right Act, sec. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England*, under similar circumstances. By the laws in force there prior to 23 and 24 *Vic.* cap. 34 (Imp.) counsel could not, at that time, in *England*, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.

APPEAL from of the Exchequer Court of *Canada*.

The respondent filed a petition of right claiming from Her Majesty a sum of $10,000 as being the balance of the value of his work and labor, care, diligence and attendance in and about the preparation of and conducting Her Majesty's claim before the *Halifax* Commission, which sat under the Treaty of *Washington*, in the summer of 1877, at *Halifax*, to arbitrate upon the differences between *Great Britain* and the *United States* in connection with the value of the inshore fisheries, etc., and for money by respondent paid, laid out and expended in travelling and remaining at divers places on Her Majesty's business connected with the said claim.

1881

THE QUEEN v. DOUTRE.

The respondent had been paid the sum of $8,000, and the Crown defended on the ground that the amount paid was accepted in full by the suppliant.

That if not accepted in full by the suppliant, the amount paid was a sufficient remuneration for his services, and that a petition of right did not lie to enforce a claim for counsel fees under the circumstances of this case.

The other facts and pleadings are fully stated in the judgments. The cause was tried before Mr. Justice *Fournier*, Mr. *Lash*, Q.C., and Mr. *Hogg* appearing on behalf of the Crown and Mr. *Haliburton*, Q.C., and Mr. *Ferguson* for the suppliant.

On the 13th January, 1881, Mr. Justice *Fournier* delivered the following judgment in favor of the suppliant:

"On the 1st day of October, 1875, the suppliant, an advocate and a Queen's counsel, residing in the city of *Montreal*, was retained by the then Minister of Justice, to act as counsel for the Government of *Canada* before the Fishery Commission, charged by the treaty of *Washington* between Her Majesty and the *United States* of *America* (8th May, 1871,) with the duty of deciding the amount to be paid by the Government of the *United States* for the privilege given to their citizens of using the fisheries of *British North America* in accordance with the XVIII Art. of the treaty. The letter retaining the services of the suppliant as counsel in the matter is as follows:—

DEPARTMENT OF JUSTICE, CANADA,
OTTAWA, 1st October, 1875.

SIR,—The Minister of Justice desires me to state that the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at *Halifax* under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel in conjunction with

Messrs. *Samuel R. Thomson*, Q.C., of *St. John, N.B.*, and *Robert L. Weatherbe*, Barrister, of *Halifax*. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject.

Your obedient servant,

(Signed) *H. BERNARD,*
D. M. J.

Jos. Doutre, Esq., Q.C.
Montreal.

"The suppliant alleges that from that time (1st October 1875) he held himself at the disposal of the officers of the Crown, and was thereafter in correspondence with the Department of Marine and Fisheries, to whom the management of the Fishery Commission and the carrying out of the fishery clauses of the said treaty had been delegated. That he received most voluminous communications at different times, with request to make himself familiar with the contents thereof, and that in order to fulfil his duties he was obliged to frequently travel from *Montreal* to *Ottawa*, &c. That when the commission was organized, he was requested to repair to *Halifax* to attend the sittings of the commission, commencing on the 15th June, 1877, and lasting until 23rd November following.

"That the sittings of the commission having been considered to last about six months he removed to *Halifax* with his family, and was there during the whole of that period attending day by day to the duties of his office.

"That by the award rendered by the commissioners the 23rd November, 1877, an indemnity of $5,500,000 was granted to Her Majesty's Government in return for the privileges accorded to the citizens of the *United States* under article XVIII of the said Treaty. That for more than two years he was employed in preparing and supporting the claim of Her Majesty.

1881

THE QUEEN v. DOUTRE.

"That the expenses incurred by him in the performance of his duties exceeded eight thousand dollars and that he had not received anything as remuneration for his services.

"That considering the magnitude of the case, involving a claim of over fourteen millions of dollars, and resulting in an award of five millions and one half, and considering also the importance of the questions in dispute, which engaged the policy of the empire on most delicate subjects of international law, the moral responsibility of the petitioner, his prolonged studies and anxiety of mind were taxed to the extent of bringing heavy and lasting loss in his professional affairs, and to disarrange and entirely alter his family and domestic arrangements, the whole at heavy consequential expense and cost.

"That on the eve of leaving his home for *Halifax*, to wit: in May (1877), the petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement under which the petitioner should be paid one thousand dollars a month for current expenses while in *Halifax*, leaving the final settlement of fees and expenses to be arranged after the closing of the commission.

"That soon after the closing of the commission the suppliant, with the view of facilitating an immediate and amicable adjustment, limited his claims to $8,000, over and above the amount previously paid to him.

"That he was entitled to a much larger sum, and that in consequence of the expenses and loss of time incurred in travelling, corresponding, and otherwise endeavoring to obtain a settlement of his claim, with interest upon the amount thereof, he was entitled now to demand and receive $10,000 over and above the amount provisionally paid to him. Then follows two other allega-

tions, one claiming the same amount as a *quantum meruit* for his services, and the other that Her Majesty's representatives had recognized his rights to the indemnity claimed.

"The answer of the Attorney General admits that the suppliant acted as one of the counsel for the Crown, but denies all other statements, and concludes as follows:

"'I submit that the suppliant as such counsel cannot enforce a claim for counsel fees, and that no action lies for the recovery thereof, and I claim the same benefit from said objection as if I had demurred to the said petition.'

"The suppliant then joined issue on all the paragraphs of the defendant's statement of defence, and as to paragraph 6 he specially replied that he is an advocate of the province of Quebec and as such fulfils the duties of solicitor, barrister, &c., and that it was as such advocate that he was retained by the Crown by the letter from the Department of Justice dated the 1st October, received by him at *Montreal*, from whence he wrote his reply agreeing to act for the Crown as requested, and that, as such advocate of the province of Quebec, he is by law of that province entitled to claim and recover from the Crown the amount claimed by him.

"On this issue a portion of the evidence relating to the value of the suppliant's services was taken at *Montreal*, and the balance was taken before me in open court, as well as the evidence, much more important, relating to the agreement as alleged by the suppliant in reference to his remuneration as counsel.

"Although the parties have argued several questions of importance there is really only one point upon the determination of which the decision of this petition rests: it is to determine whether a contract was in fact

1881

THE QUEEN v. DOUTRE.

made between the parties, as alleged in the 9th paragraph of the petition, and whether, under that contract, the suppliant is entitled to recover by petition of right, the value of the services he rendered as an advocate and a counsel engaged by the Crown to act for it before the Commission at *Halifax* on the fishery question? I will not now refer to the question raised as to the place where the contract was entered into, as it is of importance only as regards the admissibility of the suppliant's evidence on his own behalf. I will express my opinion on this point at a later stage, when I will refer to the evidence relating to the contract, its conditions and other circumstances which affect its character.

"The fact that there was a contract to pay a certain sum of money disposes of the objection made to the jurisdiction of this court by the counsel for the Crown for the first time on the argument. The Exchequer Court in *England*, having jurisdiction in all cases of demand by a subject against the Crown for money due or land claimed, the Exchequer Court of *Canada* having jurisdiction in similar cases, I need not add anything on this point, which does not seem to me to offer any difficulty.

"The evidence given in support of the alleged contract is both written and oral. The first consists of letters filed by the suppliant and the written memorandum of *Mr. Whitcher*, Commissioner of Fisheries, taken at the time of the interview which took place between the Minister of Marine and Fisheries and the suppliant, and at which interview the amount of remuneration to be paid to the counsel engaged before the commission at *Halifax* was settled upon; and the second consists of the oral testimonies of the Minister of Marine and Fisheries, Sir *Albert Smith*, that of his deputy, *Mr. Whitcher*, and that of the suppliant. An unfortunate

circumstance has deprived the suppliant of the possibility of producing the original of a letter addressed by him to the Minister, Sir *Albert Smith*, in which letter he explicitly stated the amount of remuneration that was to be paid to him and his colleagues. Although every effort has been made in the department to find this letter, the receipt of which is acknowledged, it has not been found. A press copy of the letter was sent by the suppliant to his colleagues at *Halifax*, and handed over from one to the other in order to let them know what was their position as to fees, and this copy also could not be found. Under such circumstances the suppliant is entitled to offer secondary evidence of the contents of the letter containing the agreement arrived at between himself and the Minister of Marine and Fisheries. This evidence was received, and consists of the statements made by the petitioner, and of his letters on this subject to his colleagues—and the evidence of the Commissioner of Fisheries, Mr. *Whitcher*. Mr. *Doutre*, referring to the lost letter, says in his evidence:

I had a press copy of it, and in order to show my colleagues the ground on which we stood in *Halifax* it passed from one to another, and as I thought that I had fulfilled all the objects for which we had to go to *Halifax*, I never kept it. In that letter I stated to the Minister that the period of time during which I was going to be absent being so long, I did not think I could go there without taking my family with me, that the distance was so great that I could not expect to come home during the six months that the commission was expected to sit, that I could not leave my base of supplies without feeling that I would not be embarrassed for want of money in *Halifax*. I went further, and suggested that we should each receive a refresher of one thousand dollars, and that we should, while in *Halifax*, be able to draw on the bank at *Halifax* for $1,000 per month to meet our expenses. On this I received a telegram from the Minister to come to *Ottawa*. I came and had a conversation with him and Mr. *Whitcher*. The three of us were alone, and this was the only interview that I had on the

1881

THE QUEEN v. DOUTRE.

subject. I insist upon this, because afterwards Sir *A. J. Smith* pretended that Sir *A. T. Galt* and Mr. *Ford*, the British Agent, and Mr. *Bergne*, Secretary of the Commission, at *Halifax*, knew something of the arrangement made with me. That could not possibly be, because that was the only occasion on which I had a conversation with the Minister on the subject, and the only person present then was Mr. *Whitcher*. The Minister had my letter in his hand, and he said: "I would like to know what you mean by future arrangement as contained in your letter." I had stated that we would settle finally the amount of remuneration and expenses after the commission would be over. I said: "I mean that I am too ignorant of the adventure into which I am entering to state precisely what the remuneration should be. I do not know how we will come out of that commission. I have no power to bind my colleagues, and I am making such arrangement as will suit them temporarily until the commission is over, and then it can be settled finally." I stated that for those two reasons—that I could not bind my colleagues, and that I was too much in the dark to determine anything precisely—I insisted upon making some temporary arrangement, which would relieve us from money embarrassment while we were away."

Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the Commission you will be lenient or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said: "You may put it on that basis if you like, but it "is only then that we will be able to settle the matter." This ended the conversation. The $1,000 were expected to meet our expenses, and we were going to live in a place where we did not know how the expenses might run.

Q. You proposed then that you should receive $1,000 refresher and $1,000 a month while in *Halifax*?—A. Yes.

Q. And subsequently to settle for your expenses and fees?—A. Yes.

Q. About what time was the date of that interview?—A. That interview must have taken place about the 23rd or 24th of May, because on the 25th I wrote to my several colleagues, telling them what had been done, and in each of these letters they stated to me—it was particularly mentioned—that the arrangement was purely a temporary one——

Objected to as secondary. Evidence allowed under reserve of objection.

A. (Continued.) The letter which I now produce and fyle as Exhibit No. 4 was written to Mr. *Thomson* on the very day that

I wrote that letter which is missing. There are two letters, dated the 7th May, one to Mr. *Thomson* and the other to Mr. *Weatherbe*. The one to Mr. *Thomson* was written on the 7th May, and on Saturday I wrote to Mr. *Weatherbe* to the same effect. Here is a letter written on the 30th of May to Mr. *Davies* living at *Charlottetown*, who was, at the time, Attorney General in his province.

This was after that interview, so that the letters written immediately after my letter to the Minister agree together, and all show the agreement between the Minister and myself.

"According to Sir *Albert Smith's* statement of what took place at that interview, the nature of the agreement arrived at would be totally different from what is alleged by the suppliant. Instead of being, as alleged by Mr. *Doutre*, a provisional understanding that the amount of fees to be paid him would be only definitely settled upon when the final award of the commissioners was given, the arrangement, as remembered by Sir *Albert Smith*, was a final arrangement, and was such as stated by Mr. *Doutre*, except as to the latter part, which leaves the question of the amount unsettled.

"They are both in direct contradiction on this important point. I will therefore also read the evidence given by Sir *A. Smith*. He says:

My memory of the conversation is this: they had already received $1,000 which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award, it would be a matter for the Government to consider if they were to get a gratuity after the case was over; that was my understanding.

Q. Then $2,000 would be the amount in full up to that time?—A. Yes, that was my understanding; Mr. *Doutre* said, I recollect distinctly, something about gratuity if we succeeded in getting a handsome award. That then it would be a matter for the Government to consider whether they would make gratuity.

Q. But the contract for payment was limited to $1,000?—A. Yes.

Q. And anything further than that was to be a gratuity?—A. That was my understanding of it, and that is what I communicated to my colleagues and to Mr. *Ford*. I know that Mr.

1881

THE QUEEN v. DOUTRE.

Ford and I discussed the question. Mr. *Doutre* knows that too. I told him more than once that I would have to communicate the matter to Mr. *Ford*.

Q. That a $1,000 a month while in *Halifax* was to cover the services and expenses?—A. I understood it so. I remember that Mr. *Doutre* stated on this occasion that he intended to take his family to *Halifax*, but that was a matter I did not think the Government would be justified in paying his expenses. That was personal to himself.

Q. You certainly did not agree to pay the expenses of his family?—A. As a member of the Government I could not assume any such liability as that.

"I find here two contradictory statements. The suppliant swears the amount of fees was to be settled upon after the final determination of the proceedings of the commission, whilst Sir *Albert Smith* states that the payment of $1,000 per month so long as the sittings of the commission would last was all that he agreed to pay. The suppliant also adds that his expenses as well as those of his family were to be paid above the amount to be paid him for his fees. Sir *Albert Smith* does not contradict this statement, but says that as a member of the Government he could not have assumed that responsibility.

"The witnesses who have made such contradictory statements are both men of honor and of equal respectability—neither one nor the other can be suspected of wishing to mislead the court. It can only be a question of memory, so that if no corroborative evidence was given I would have, independently of the fact that the suppliant's evidence is that of an interested witness, come to the conclusion that he had not proved the contract on which he has based his claim. But it appears that there was a third party present at the interview in question, whose testimony must be taken into consideration, and it induces me to adopt one version in preference to that of the other. It was Mr. *Whitcher* who was then present in his official capacity,

and who, as Commissioner of Fisheries, attended under the direction of the Minister to almost all matters connected with the Fisheries Commission at *Halifax*. There was no matter of importance concluded without his knowledge, and his evidence in his position must therefore have great weight in deciding what agreement was arrived at.

Mr. *Whitcher's* evidence :

Q. You have heard the letter written by Mr. Doutre, May, 1877, with regard to the remuneration of counsel ?—A. Yes.

Q. Had you that letter in your possession ?—A. There were several discussions with regard to the remuneration of counsel. On one occasion I remember the Minister asked Mr. *Doutre* to put the demand of the several counsel in writing. This letter, I suppose, would be the result of that. I saw it in the hands of the Minister and it formed the subject of a discussion with the Minister. The last place that I saw that letter was in the hands of Mr. *Ford*, with whom the Minister was consulting with regard to the rates to be allowed. I searched the records to make sure that it had not escaped attention. I looked not only in the records but also among the semi-official letters which are not on record in the department, but could not find it.

Q. Subsequent to the receipt of the letter Mr, *Doutre* had an interview with the Minister in reference to this question, had he not ? —A. Yes, Mr. *Doutre* was there quite a number of times, but I remember one particular instance when he pressed for a decision as well for the other counsel as on his own behalf. That was the occasion, if I recollect rightly, when this letter was discussed, but there had been other discussions at intervals prior to that.

Q. What took place at that interview ?—A. It would be difficult to say what occurred, there was so much conversation.

Q. Who was present ?—A. I was present, but took no part in the conversation.

Q. Who else was present ?—A. The Minister and Mr. *Doutre*.

Q. This letter, you say, was discussed, was any definite arrangement arrived at ?—A. The general character of the conversation was that the Minister seemed a little unwilling to have the thing open, and was pressing for some definite terms, as I understood it. It ended in an understanding that this would be a temporary arrangement so far as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000

1881

THE QUEEN v. DOUTRE.

for refresher, and $1,000 per month while the commission sat. There was some difference as to the junior counsel, but that is not pertinent to this. Further remuneration to these amounts was to form the subject of after consideration. I do not pretend to recite the words, there were so many conversations that it would be impossible to remember them all.

Q. Did you make a note of the conversation?—A. Yes. As I was paymaster throughout the whole commission I kept memoranda of all agreements.

Q. Have you a memorandum of that agreement?—A. I have memoranda of all discussions which took place, but of course these are to a certain extent official records, and I have no authority for laying these before the court. They contain other matter not at all pertinent to the case.

Q. Have you the memorandum here?—A. I have, there is an entry on the 10th May, 1877. I may statethat there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall* and others engaged upon the commission. This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and all expenses paid at *Halifax*." This, if I recollect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find amongst a number of other entries dated 23rd of May, the following:—"Agreed with counsel another $1,000 refresher and $1,000 per month during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

Q. You have repeated one expression that you said you thought was used in the interview between Mr. *Doutre* and the Minister, that is "gratuity"?—A. I took the liberty of saying that those were not the words used, but the substance of them.

Q. What did you understand by the use of that word?—A. In connection with it being a temporary arrangement, it would be the final remuneration, you use the word "gratuity" when the money is not definite. If I go out on special service I would receive so much, and if, according to the issue of it I would get so much more, I would consider it a gratuity because it is not specified.

"This evidence, corroborated by the memorandum taken at the time of what took place during the interview between the Minister of Marine and Fisheries and the suppliant, confirms on every point the statement made

by Mr. *Doutre*, and if we add to this the evidence to be gathered from the letters written by the suppliant to his colleagues, there is no doubt what conclusions ought to be arrived at.

"It must also be remarked that Sir *Albert Smith* admits that the only person he spoke to about the fees counsel were to receive was Mr. *Doutre*, and that he made no agreement whatever with the other counsel, Mr. *Doutre* acting officiously as senior counsel for his colleague. He had no authority to bind them, a fact which he states positively, and which Mr. *Thomson* one of the counsel corroborates. Then what was his first duty after he had concluded this agreement with the Minister? To communicate these conditions to his colleagues, and I find he did so as may be seen by the following letters:

"Letter to Mr. *Thomson*:

I have just written to Honorable *A. J. Smith* a confidential letter, in which I tell him that yourself and Mr. *Weatherbe* had left in my hands the question of our remuneration as counsel, but that I did not feel like taking the responsibility of committing us to any definite thing deprived as I was of your advice; that, however, I owed it to you and myself to take the necessary measures to provide for the present and the approaching session of the commissioners, that I thought we were entitled, as a mere temporary arrangement, to a refresher of $1,000 each, and that provisions should be made in your bank in *Halifax* where we could each draw one thousand dollars a month, beginning on the first of June. Adding that our sojourn in *Halifax* would necessarily be expensive, and that cut as we would be from our base of supply, we should feel at ease in this respect. This leaves the thing intact for further arrangements.

"Letter to Mr. *Davies*:

I have been in *Ottawa* at different intervals, and at a time I met there Mr. *Thomson* and Mr. *Weatherbe*. We understood you were prevented from coming by your parliamentary duties; we had spoken together of the advisability of coming to some understanding in regard to our fees with the Government, but Mr. *Thomson* and Mr. *Weatherbe* left without coming to anything in this respect. After their departure I went again to *Ottawa* with Messrs. *Galt*, *Ford* and *Bergne*,

1881

THE QUEEN v. DOUTRE.

and I submitted the following proposition, viz: That each of us should receive a refresher equal to the original retainer, and that we should be allowed to draw on some bank in *Halifax* a similar amount to such retainer every month while being there, leaving a final arrangement to be made after the award, giving me to understand that if we were not very successful we would ask little or nothing.

This last part, however, is verbal only; what is written is that the above proposition would be a temporary arrangement, as I had no time to bind my colleagues. This was agreed upon. You may therefore draw upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer.

"In addition to these letters the suppliant wrote on the 25th May, 1877 to Sir *A. J. Smith* informing him that he communicated to Messrs *Thomson* and *Weatherbe* the substance of their agreement in respect to the remuneration of counsel, viz: "I wrote to Messrs. *Thomson* and *Weatherbe* the substance of our arrangement as regards counsel."

"On the same day, in writing to Mr. *Whitcher* on various matters concerning this business, he says: "I wrote to Messrs. *Thomson* and *Weatherbe* the substance of the arrangement concerning the counsel. I think you should write to Mr. *Davies*." It appears from the date of two of these letters that they were written immediately after the letter he sent to Sir *Albert Smith*, as regards counsel fees, and in both of which he repeats the agreement made with the Minister, and states that it was provisional.

"Here also we find that immediately after sending this letter to the Minister he writes on the 30th May, to the Hon. *T. H. Davies*, informing him that the proposal he made had been accepted, summing up the result of his proceedings, viz: "I submitted the following proposition that, viz: each of us should receive a refresher equal to the original retainer, and that we be allowed to draw on some bank in *Halifax* a similar amount. Such retainer every month while there,

leaving a final arrangement to be made after the award, giving me to understand that if we were not very successful we would ask little or nothing. This last part, however, is verbal only, what is written is that the above proposition would be a temporary arrangement, as I had no right to bind my colleagues. This was agreed upon. You may, therefore, draw immediately upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer."

"It is clearly established by these letters, the two first being written on the 7th May, 1877, before the interview with the Minister, that Mr. *Doutre* referred to this arrangement as being a provisional arrangement. Now, relying upon the evidence of the suppliant, the evidence of Mr. *Whitcher*, and the notes he took down during Mr. *Doutre's* interview with the Minister, the letters addressed by suppliant to his colleagues, and taking into consideration the important fact that Sir *Albert Smith* has not in his possession any letters or notes referring to this matter to corroberate his statement, I have arrived at the conclusion that the proposal made to the Minister by Mr. *Doutre* by the letter which the Crown has been unable to produce, but the terms and conditions of which have been proved by the suppliant and other letters, was accepted by the Minister at the interview which took place between them on the 23rd May, and at which interview Mr. *Whitcher* was present taking notes, and that the terms of the agreement were as follows: That each of the counsel engaged would receive a refresher equal to the first retainer of $1,000, that they could draw on a bank at *Halifax* $1,000 per month while the sittings of the commission lasted, that the expenses of the suppliant and of his family would be paid, and that the final amount of fees or remuneration to be paid to counsel

1881

THE QUEEN v. DOUTRE.

would remain unsettled until after the award of the commissioners.

"From the evidence adduced I find that these are the terms and conditions of the contract entered into between the suppliant and the Minister of Marine and Fisheries.

"It was at *Ottawa* the contract was concluded during the interview which Mr. *Whitcher* attended, to which Mr. *Doutre* had been specially called.

"Being of opinion that the contract was concluded at *Ottawa* and not at *Montreal* as contended for by the suppliant, the question which was raised as to the admissibility of the suppliants' evidence on his own behalf must, therefore, be decided in accordance with the law in force in *Ontario*.

"The law in *Ontario* allows a party to a suit to be heard on his own behalf, I, therefore, find that the evidence of the suppliant which would not be admissible in this case according to the laws of *Quebec*, forms part of the record and is legal evidence.

"I do not think there is any weight in the observation made by Sir *Albert Smith* that he had no right to assume the responsibility of paying the expenses of Mr. *Doutre's* family.

"Sir *Albert Smith* had, over this question of expenses, which was only one of the several points to be considered, when determining the amount of remuneration to be paid counsel, the same authority he had to agree to pay the amounts specified as refreshers and the other sums payable monthly, it being a matter of agreement. I am of opinion that the evidence shows the payment of these expenses was one of the stipulations of the contract. Moreover, his authority to enter into such an agreement has not been denied by any of the pleas set up by the defence, he alone has referred to it. Now, whether the suppliant could bring an action before a

1881

THE QUEEN v. DOUTRE.

Court of Justice to recover the amount due him under an agreement for his services as advocate, counsel, &c., is a point which cannot admit of a doubt after the decisions which have been given by courts of justice in the province of *Ontario* and *Quebec*. See *McDougall v. Campbell* (1). *Beaudry v. Ouimet* (2).

"Moreover, in this case the right of action is based on a contract made by the Government under the authority, first of the treaty of *Washington*, 8th May, 1871, and then of 35 *Vic.* c. 2, which incorporated as part of the law of *Canada*, the fishery articles of the treaty. It is under article 25 of the treaty which imposes upon each of the high contracting parties the obligation to pay the counsel retained by them to prepare and support their case before the commission, that this contract has been made.

"This obligation, independent of the decisions of the courts, gives to the counsel engaged a right of action to recover a remuneration for their services. This right of action, in the present case, as I have just stated, is founded on a statutory enactment, and as I am of opinion that the suppliant's right to recover is based on the law and the agreement entered into between the parties, I have not deemed it necessary to examine the point raised, whether on a simple case of *quantum meruit*, the suppliant could have recovered the value of his services in the present case, as they were rendered outside of the *forum* of courts of justice. I am of opinion that the facts of the case do not allow me to consider this question. But as I have shewn above, the contract has not determined a fixed amount of remuneration to be paid; on the contrary, it was agreed upon between the parties that the amount would be settled only after the award of the commissioners. Since that time the parties have been unable to arrive at a settlement, and

(1) 41 U. C. Q. B. 345. (2) 9 L. C. Jur. 158.

1881

THE QUEEN v. DOUTRE.

it is therefore now the duty of the court to determine the amount from the evidence adduced in the case.

"In order to arrive at a proper and equitable conclusion on this point, it is necessary for me to take into consideration, not only the amount of professional work done before the commission which sat for six months, but also the enormous amount of work bestowed in preparing the case, the magnitude of the amount involved, estimated by the Canadian Government at $12,000,000, the importance of the questions in dispute, the responsibility of the counsel and the result of the award. In order to give an exact idea of this I cannot do better than cite a part of the evidence relating to this branch of the case.

"It will be seen that the suppliant did not act only as counsel to argue the case and give his opinion, but acted also as solicitor and advocate by preparing and conducting the procedure before the commission.

Immediately after my letter of acceptance I received most voluminous correspondence from *Ottawa*, all marked "Confidential," which I could not read or study at my office without running a risk of breaking the seal of confidence which was impressed upon every paper transmitted to me, so I had to work at home and at night giving opinions on all those papers, as I was requested to do. Almost every time that I received papers from the department I was requested after reading them to give my opinion or impression on the subject. If it were not loading the case with too voluminous papers, I could show what I received gradually from the department, but it is an immense mass of paper and I do not know that it is of any use putting it in.

I had many interviews with the Department of Marine and Fisheries, generally with the Minister himself, or the Commissioner of Fisheries, Mr. *Whitcher*. At times I spent three weeks in *Ottawa* in consultation, in order to see what kind of questions we would bring before the Commission, it was a most intricate matter, unknown to any member of any bar, and unknown also to the department in which it had originated, we were in complete darkness * * * I have referred now to the only two meetings, one in *St. John, N.B.*, and the other in *Ottawa*, that we had of the counsel together. In addi-

tion to that, I was very often called upon to come up from *Montreal* to *Ottawa* to consult with the department; I was also charged by Mr. *Ford* to prepare rules of procedure for the commission and I spent here some eight or ten days in selecting books in the Parliament Library to support the contention that we were interested in—books on international law, some sixty or seventy volumes, which I requested to be sent to *Halifax* for the use of the commission—I could not designate those books without knowing whether they would be suitable, and so to make that selection of sixty or seventy volumes I had to handle some two hundred volumes first.

In the interval between my appointment in the fall of 1875 up to the meeting of the commission I received many papers, some of which are fyled. I received them periodically and several times during the week at times, but at other times at greater intervals.

"We can imagine the amount of work performed by counsel by referring to Mr. *Whitcher's* answer to the following question:

Q. During the two years prior to the meeting of the commission, or from October, 1875, when Mr. *Doutre* was retained, until the Commission sat, you say that Mr. *Doutre* made numerous visits to *Ottawa* in the preparation of the case?

A. Yes, there was an immense mass of material to be dealt with and digested, and there was a very indefinite proceeding before us with regard to what portions of this could be used for legal effect, and what form the case should take and what evidence was necessary, and we communicated to the counsel all the materials accumulated there for use as it might be determined by the British and Canadian Government. All this was referred to them, and they were asked to examine it carefully and pronounce their opinions upon it, and from my own knowledge of the labor involved in getting it up I think they must have had a hard time of it going through it.

"If we remember that the matter in dispute relates back to the American War of Independence of 1775, and that it was discussed at length at the treaty of *Paris* 3rd Sept., 1783, then again at *Ghent* at the treaty of December 24th, 1814, but not included in that treaty, because the high contracting parties could not agree, and that it was only after overcoming many difficulties, after the seizure of vessels, and the exchange of lengthy correspondence between the interested parties, that the

1881

THE QUEEN v. DOUTRE.

question was finally referred to International Commissioners, who passed the convention of 1818, by which both countries were guided until 1847, when the parliament of *Canada* initiated the proceedings which resulted in the treaty of reciprocity of the 5th June, 1854, between the United States of *America* and *Canada*, and remember that after and since the expiration of the treaty of the 17th March, 1866, this question remained unsettled up to the time of the Washington treaty, which adopted as the proper mode of settlement of this much vexed question the reference of the whole matter to the commission at *Halifax*; and if we consider the large field of study and the amount of researches necessary to grapple this case properly, I think it is impossible to over estimate its importance, and it will be easier to value the large amount of work done by counsel in preparing this case, which cannot be said to be of less importance than the *Geneva* arbitration under the some treaty, and in supporting the claim of Her Majesty before the commission at *Halifax*, and I do not think it can astonish us, if Mr. *Doutre*, in his evidence, says that he has been exclusively engaged working for the Government of *Canada* for 240 days. I will again give an extract of the evidence on this point.

I was engaged in this matter during eight months. I consider constantly, that is to say six months in *Halifax*, one month that I devoted to coming here to *Ottawa*, and putting together all the time that I spent at home on the papers and writting letters, I put at one month, and I think it is a very moderate estimate. This would make out that I was engaged in this matter 240 days. I put this down at $50.00 a day which is the remuneration which I generally charge to other clients, and my expenses at the rate of $20.00 a day, that is exclusive of travelling expenses going to and coming from *Halifax*, which I put at $275.00. The expenses in *Montreal* during my six months absence I put at $250.

When I go to *England* and on my return make out the account of my expenses I find that they average $20.00 a day. I have been coming to *Ottawa* and returning to *Montreal*, but that is included in the 240 days.

"During a short adjournment of the commission Mr. *Doutre* was absent from *Halifax* for six or eight days, during that time he was engaged on other business for two days. I would be disposed to deduct them from the 240 days during which he says he was at work on matters relating to the Fishery Commission, but it appears to me that he credited that short absence when he computed the number of days he was employed at home as when he puts the time he devoted at home to this work he states it is a very moderate estimate. If I entertained any doubt that Mr. *Doutre* was getting paid twice for these few days I would order him to be interrogated *de novo* on this point, but believing he has given the exact number of days I will not do so, and I will adopt that number of days during which he says he was employed at the work for which he had been retained.

"Now is the sum of $50 per day which the suppliant claims, a reasonable amount? Mr. *Doutre* tells us that it is the price he gets ordinarily when he is obliged to absent himself from his office, exclusive of his expenses, which he always demands.

"His evidence on this point is corroborated by that of a number of distinguished members of the bar of *Montreal*, who being called as witnesses in this case prove that the sum of $50 per day, exclusive of expenses, is the ordinary amount charged by them in important cases which entail the absence of the lawyer from his office. Some extracts of the evidence on this point prove this conclusively

"*W. H. Kerr*, Q.C., after referring to two cases, in one of which his fees were $3,500 and the other $4,000, says:

I have received on many occasions for trials, here, at the rate of one hundred dollars to one hundred and fifty dollars a day for attendance in court. In a recent case, in the case against Sir *Francis*

1881

THE QUEEN v. DOUTRE.

Hincks and other directors of the Consolidated Bank, I received twelve hundred dollars. I think it lasted six days and one day in the Court of Queen's Bench on the reserved question.

"In the case of *Hon. A. Angers, Attorney-General for the Province of Quebec*, and *The Queen Insurance Company*, which lasted one day and a-half, his fee as one of the three counsel employed was $500, the other two counsel, *J. C. Abbott*, Q.C., and Mr. *Doutre*, the suppliant, received a similar amount.

"In the case of the *Hamilton Powder Company* for insurance, the trial having lasted four and one-half days, his fee was $600, and that of Mr. *Carter*, Q.C., for the defence, $1,000. Among other cases, he cited the cases of *Worms*, *Caldwell* and *Foster*, extradition cases, in which the *United States* were interested, and his fee in each of these cases was $1,000. The time given to each of them was not more than 3 or 4 hours.

"Mr. *Laflamme* Q.C., received $4,000 fees in the case of the *Bank of Toronto* and *The European Insurance Company*. In the case of *Simpson* v. the *Bank of Montreal*, his fee was over $5,000. These cases did not oblige him to leave the city, and one of them did not take more than three or four months of his time. In the case of the *St. Albans* Raiders, his fee was $1,500. In the case of *Fraser*, which, without including the time he spent in preparing the argument, lasted about two months, his fees were $6,000.

"In the case of the explosion of the ferry boat at *Longueuil* he got $1,000 for one day he was engaged on the case.

"In the matter of the seignorial indemnity claimed by Mr. *DeBeaujeu*, in which Mr. *Laflamme* was occupied for a few months, but with the understanding that he could attend to his business at the office three days in the week, his fee was $5,000.

"Mr *F. X. Archambault* says that in his practice, which is both civil and criminal, the retainers or extra fees

vary from $500 upwards and sometimes $1000, it depends on the importance of the case and its difficulties.

"In a case against one *Henault*, although there were three *cap. ad resp.* it was practically only one case, which took about one month of his time, he charged $2,800. In the case of *Martin* v. *Gravel* which was appealed to the Privy Council, he received $2,000. He cannot remember all the cases in which he received such large fees, but mentions these as examples. He states that in all important cases, either civil or criminal, a retainer of from $400 to $500 is generally charged. As to the sum of $50 per day, exclusively of expenses, claimed by Mr. *Doutre*, Mr. *Archambault* says: "I think a charge would not be looked upon in *Montreal* (and in *Quebec* also, I suppose, although I have not practised there) as at all exaggerated fixed at the rate mentioned by Mr. *Doutre* in his evidence $50 00 a day and expenses. That is what I charge when I have to go to *Quebec* to look after charters. That is my usual charge. I charged up to $1,500 to obtain a charter during last session, and it did not take more than a fortnight of my time.

"Messrs. *Duhamel* and *Walker* with Mr. *Archambault*, state that $50 per day and expenses is a reasonable charge for the services rendered by the suppliant.

"Messrs. *W. Robertson*, Q.C., and *W. Ritchie*, Q.C. spoke of the fees received by the lawyers of the city of *Montreal* in the like manner as the other barristers who had been examined as witnesses.

"Mr. *Thomson*, Q.C., the eminent lawyer of the bar of *St. John*, whose untimely death shall long be regretted, and who was one of Mr. *Doutre's* colleagues, in his evidence said that $100 per day would have been a reasonable enough remuneration. All lawyers agree in saying that under such circumstances it is not only necessary when estimating the value of the service of

1881

THE QUEEN v. DOUTRE.

counsel to take into consideration the amount involved in the case, the difficulties and the novelty of the question to be treated, but also the length of time the counsel may be absent from his office, which absence always very seriously affects his business.

"This was certainly the case for the suppliant, and for Mr. *Thomson*—by their absence, which lasted six months, they almost ruined their professional business. It is in evidence that the income of the suppliant, owing to his absence, was reduced from $16,000 to $4,000. Although the disastrous consequences of this absence cannot be taken into consideration in estimating the amount of his fees, and the suppliant must console himself for this loss with the thought that he has achieved together with his colleagues a remarkable success, yet the absence anticipated, which was considered would last six months, must be borne in mind as being one of the elements upon which the remuneration is to be determined. All the lawyers who have been examined as witnesses have drawn a considerable distinction between the fees charged for services rendered at the ordinary place of business of counsel, and those for services rendered which necessitate an absence, thereby leaving it impossible for them to direct and watch over the business of their office.

"Although this evidence seems to be irresistible, we can also, in order to ascertain whether the amount demanded is not exaggerated, compare it with the amounts paid by the unsuccessful party to this celebrated case.

"The Government of the *United States* paid its agent and counsel, Hon. *Dwight Foster*, for his services in the same case, $9,000, exclusive of all his expenses and those of his family. The other two counsel engaged with him and who commenced to take part in the proceedings before the commission only on the 15th of

August, received each $5,000, exclusive of all their expenses and those of their family. It is clear from this that Mr. *Doutre's* demand is far from being excessive.

"For these various reasons I am of opinion that the sum of $50 per day as a remuneration and the sum of $20 per day for his expenses, including the expenses of his family, would be a reasonable amount as a remuneration for the services rendered, and that the agreement entered into between the parties was to that effect. In adopting these figures, it will be seen that the Crown is not made to pay more to the suppliant than what the suppliant and a great number of other lawyers would have charged to their ordinary clients in important cases, the importance of which would never equal the importance of the case which the suppliant conducted before the commission at *Halifax*. By taking these figures in computing the amount of the remuneration and adding thereto certain sums for travelling expenses, &c, mentioned in the suppliant's deposition, it will be found that the total amount exceeds $16,000. The Government have paid suppliant $8,000, which leaves a balance in favor of the suppliant of over $8,000, but as he has by letter, dated May 16th, 1878, reduced his demand to $8,000, I will adopt that sum as being the amount due.

"The suppliant by his petition claims, outside of the amount due him for his remuneration and expenses, a sum of $2,000 damages for the loss of time and expenses incurred while endeavoring to effect an amicable settlement with the Government which had retained him and with the present Government of the day.

"To obtain this settlement he made several trips to *Ottawa*, entertained a lengthy correspondence with divers Ministers and Members of Parliament in order to avoid the necessity of having recourse to a petition of right to obtain his due, which he thought would be

1881

THE QUEEN v. DOUTRE.

a scandal, as it related to a matter of international rights of great importance.

"Whilst recognising the honorable motives which induced the suppliant to act in this manner, and admitting that he has, no doubt, been put to large expenses, I cannot entertain such a claim. It cannot be recognized as a legal claim. It is very true that the suppliant, hoping to obtain an amicable settlement, delayed the filing of his petition of right. This delay took place for the benefit of the Government, and in justice and equity, the Government ought to pay him interest. But, under the peculiar circumstances of this case, the obligation to pay interest is a moral obligation and not a legal obligation which a court of justice could enforce. The suppliant, therefore, must rely on the spirit of equity and justice of the Government.

"On the whole, I am of opinion that the suppliant is entitled to receive from the Crown the sum of $8,000, as a remuneration for his services with interest on that amount since the 29th August, 1879, the date upon which the petition of right was received by the Secretary of State, the whole with costs."

The usual motion to revise the judgment was made, but it was refused.

The case was thereupon appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q. C., and Mr. *Hogg* with him, for appellant:

The suppliant's services, for which he now sues the Crown, were rendered as one of the counsel in the British interests before the "*Halifax* Commission," which sat under the Treaty of *Washington*. The services were to be rendered at *Halifax*, in *Nova Scotia*; therefore the law of the place of performance governs as to the right of the parties under the contract (if any) entered into between Her Majesty and the suppliant.

Story, on Conflict of Laws (1), lays down the law as follows on this point:

"Where the contract is either expressly or tacitly to be performed in any other place (than where it is made) there the general rule is in conformity to the presumed intention of the parties that the contract as to its validity (except as to form), nature, obligations and interpretation, is to be governed by the law of the place of performance."

This statement of the law is adopted by *Dicey*, on Domicile (2); same doctrine in *Von-Savigny's* Private International Law (3); see also *Beard* v. *Steele* (4); *Lloyd* v. *Guilbert* (5).

Now whether the contract should be governed by the law of *Ontario*, where it was made, or by the law of *Nova Scotia*, where the services were performed, the suppliant cannot recover for his fees. The case of *Baldwin* v. *Mongomery* (6) has decided that the English rule on this subject is in force in *Ontario*.

In *England*, *Kennedy* v. *Broun* (7) decides that:

"The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." The case, therefore, decides that there is an absolute incapacity to contract. A physician's case is different; there, there is no incapacity, and an express contract is binding. According to usage, no action lies for their fees, and unless there be an express contract, they are presumed to be governed by the usage.

Now the services rendered by the suppliant in this case were "advocacy in litigation," within the meaning of that term as used in *Kennedy* v. *Broun*. The proceedings in *Halifax* were proceedings such as are

(1) 6 Edt. p. 354.
(2) P. 152.
(3) Pp. 151-2-3 and 163.
(4) 34 U. C. Q. B. 54.
(5) L. R. 1 Q. B. 122.
(6) 1 U. C. Q. B. 283.
(7) 13 C. B. N. S. 677.

1881

THE QUEEN v. DOUTRE.

usual in a court. The suppliant himself in his evidence admits it, for he says :—"It was a court like this court; there was only one witness examined at a time, so only one lawyer was employed at a time, &c;" and, again, he says: "The proceedings were the same as in a court of law."

The language used in *Kennedy* v. *Broun* (1) covers exactly suppliant's position.

But it is contended that, in addition to services as an advocate, the suppliant performed other services, such as coming to *Ottawa*, preparing case, &c., for which he can recover. There are two answers to this. First, the sum paid him is sufficient to cover all such expenses; and, secondly, these services were merely auxiliary to the service as an advocate, and if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal. I do not contend that a counsel should act for nothing, or that he should be satisfied with what his client may seem fit to give, for the moment I am dealing with the naked legal question as to his right to recover by action for his fee, and on this point the law is clear, and the rule laid down in *Kennedy* v. *Broun* has been extended in 1870 to non-litigious business by *Moystyn* v. *Moystyn* (2), so that even if this court were of opinion that the services rendered were not advocacy in litigation, the suppliant cannot recover. See also *Veitch* v. *Russell* (3), and *Hope* v. *Caldwell* (4). As to *McDougall* v. *Campbell* (5), relied on by the judge of the court below, it was held that the plaintiff there could enforce a claim for counsel fees upon an express promise to pay an amount fixed by a third person. The claim here is on a *quantum meruit*,

(1) Pp. 737 & 738.
(2) L. R. 3 Ch. App. 457.
(3) 3 Q. B. 936.
(4) 21 U. C. C. P. 241.
(5) 41 U. C. Q. B. 332.

and in that respect *McDougall* v. *Campbell* does not apply. Moreover, I submit, that the decision of the majority of that court, which is not binding on this court, is erroneous and contrary to the law of *England*, in force in *Ontario*, on this subject.

The learned counsel then referred to the contract as gathered from the evidence, and contended that by the terms of the contract, the suppliant could not recover, as he expressly agreed to accept a gratuity, leaving it entirely in the hands of the Government what it should be; and also contended, upon the evidence, that, even admitting the suppliant's view of the contract, it was proved beyond all doubt that suppliant had been paid at the rate of $30 per day and his expenses for the actual time he had been employed as counsel, and that the amount paid was a sufficient remuneration.

I will now take up suppliant's contention that because he is an advocate of the bar of *Quebec*, the law of *Quebec* governs, and that by that law he is entitled to recover upon this petition.

To this we submit, 1st. That by sec. 19 of the Petition of Right Act, the law of *England* must be looked to, and that if in *England* no action lies against the Crown for counsel fees, in *Canada*, no such action can be taken against the Crown by petition of right. 2nd. That if the law of *Quebec* governs, suppliant's evidence is inadmissible.

The principal cases in *Quebec* on the subject are. *Devlin* v. *Tumblety* (1), *Grimard* v. *Burroughs* (2). The head note to this case is: "A barrister or attorney cannot recover, on a *quantum meruit* and verbal evidence of value of services, the amount of a fee claimed by him over and above the amount of his taxed costs from his client." *Amyot* v. *Gugy* (3), *Larue*

(1) 2 L. C. Jur. 182.
(2) 11 L. C. Jur. 275.
(3) 2 Q. L. R. 201.

1881

THE QUEEN v. DOUTRE.

v. *Loranger*, appeal side Q. B. reported in legal news of 4th Sept., 1880.

My last point is: the Crown is not liable to pay interest on the suppliant's claim. The statutes relating to interest do not apply to the Crown. *Re Gosman* (1).

Mr. *Laflamme*, Q. C., for respondent:

The rights, privileges, liabilities and remedies of the members of legal profession in *England* are very different from those of the members of the same profession in *Canada*.

In *Ontario* the professions of barrister and attorney may be united in one person, and so in *Quebec* and in *Nova Scotia* and *New Brunswick*, whilst in *England* they cannot. In *Ontario* a barrister, who is also an attorney, and even if not an attorney, may deal directly with the client, and recover his counsel fees and other costs by action from his client. This principle is sanctioned by legislation in *Ontario*, in giving powers to courts to make tariffs, &c., providing for counsel fees, &c., also by decisions of the courts.

See *McDougall* v. *Campbell* (2) and other decisions and statutes there referred to.

This right of action of a barrister to recover counsel fees by suit, whether according to a tariff (if there is one) if the proceedings in respect of which the services were rendered were in a suit, or in other cases to recover upon a *quantum meruit*, has long been recognized in *Quebec*.

The cases of *Larue* v. *Loranger* (3) and *Devlin* v. *Tumblety* (4), cited by the counsel for the Crown in this case, do not negative this right of action. The point which they decide, and notably the

(1) 17 Chy. D. 771.
(2) 41 U.C. Q.B. 345.
(3) In Review, Vol. II of Legal News 155 and Vol. III Legal News 284.
(4) 2. L. C. Jur. 182.

latest case, *Larue* v. *Loranger* (in appeal), being, as will be seen on close examination, that where there is a tariff recognized fixing the fees for certain classes of work, an action upon a *quantum meruit* will not lie, but the counsel must either be satisfied with what the tariff allows, or be in a position to prove a distinct agreement with the client for a sum certain in excess of the tariff allowance.

Where, however, there is no tariff applicable and no special agreement made, an action on the *quantum meruit* will still lie in *Quebec*, and such is this case, and such was also the law of *Quebec* prior to 23 and 24 *Vic.* See *Amyot* v. *Gugy* (1).

In *France* I find also that, where there is no tariff, the counsel alone is the judge of the value of his services, and if he charges too high, the client can appeal to the council of law. See *Morin, Discipline des cours* (2). *Duchesne* and *Picard, Manuel de la Profession d'Avocat* (3). *Journal de Palais* (4).

Our civil code also recognizes the right of a barrister to sue for services rendered by Art. 2260, that applies to all kinds of professional services.

It has been contended that because the services were performed at *Halifax*, the principles of our law should not govern this case. Now by the pleadings, and it is also proved by the evidence in the case, the contract was made in *Montreal*, the respondent undertook, as a counsel of the bar of the province of *Quebec*, to represent Her Majesty wherever the Commission sat. If it had sat in *New York*, it would not have been the law of *New York* that would have governed. It was an accident that *Halifax* was chosen as the seat of the Commission. When Mr. *Doutre* was arguing the case,

(1) 2 Q. L. R. 201.
(2) P. 815.
(3) P. 150.
(4) 16 Vol. p. 815.

1881

THE QUEEN v. DOUTRE.

he was not acting as a *Nova Scotia* barrister, in fact he would have no *locus standi* as such. When a counsel is acting before an arbitration, or say the Supreme Court, or even the Privy Council, he is entitled to all the rights and privileges of the profession to which he belongs.

Now with respect to the contract, I submit it is first of all established by the treaty, for in it we find a provision that counsel were to be employed, and surely when one party requests the services of another, and the latter agrees to give them, there is a complete contract. What were the conditions of the contract in this case? On this point I rely upon the finding of the Judge who tried the case, and contend that the evidence clearly establishes that the money received by the suppliant was in accordance with the provisional arrangement made, viz: Counsel was to receive a retainer, a refresher and expenses, and a reasonable sum at the conclusion of the business. It is contended on the other side that the word "gratuity" should be construed in its technical sense. Now there can be no doubt that what was meant here was, the fee, the *honorarium*, which cannot be valued in money. It was an obligatory gratuity and is synoymous with *quantum meruit.*

Mr. Doutre stood on his professional dignity and relied on the rule of the French law, and said I exact so much for expenses and I exact a gratuity at the end. Sir *Albert Smith* admits it was to be proportioned to the result, and the result in this case was an award of over $5,000,000

The case of *Devlin* v. *The Corporation of Montreal* is is not reported, but, as Mr. Justice *Taschereau* remembers, in that case our Court of Appeal held that Mr. *Devlin* was entitled to certain fees for professional services rendered to the corporation and for which there

1881

THE QUEEN v. DOUTRE.

was no provision in the tariff. With reference to the value of the services in this case, there is no evidence on the part of the crown.

The only other point raised is as to the jurisdiction of this court.

The pleadings of the crown gave no intimation of the question which it intended to raise as to the right of a Canadian counsel to bring a petition of right for services as counsel rendered to the crown.

The only reference to the right of the petitioner to bring a petition of right is in paragraph 3, which is confined to denying that petitioner was employed for more than two years, and that the expenses incurred by him exceeded eight thousand dollars as alleged, and concludes as follows: "and I submit that the expenses incurred by the suppliant in connection with his family and the loss alleged in connection with his professional affairs and family and domestic arrangements, form no part of any claim which can be enforced against Her Majesty in the premises by petition of right."

The respondent, by the pleadings, having confined this objection to expenses, admitted the right of the petitioner to bring a petition of right for services rendered as counsel.

The Court of Exchequer in *England* had and still has jurisdiction in all suits by subjects to recover lands or money from the Crown in *England*, or as it is sometimes termed, the "Imperial Crown."

If therefore the suppliant has a remedy at all against the Crown in *Canada* in respect of his claim in this case, the Court of Exchequer in *Canada* must have exclusive jurisdiction in that behalf, as the claim of the suppliant is of such a nature as would have come within the jurisdiction of the English Court of Exchequer (Revenue side) in consequence of it being for the recovery of money from the Crown by a subject; section 58 of S. and E. Act.

1881

THE QUEEN v. DOUTRE.

The next question to be considered is whether a subject has, under the circumstances and for the causes in the petition of right alleged, any remedy at all against the Crown.

Section 19, clause 3, of the Petition of Right Act, declares that "nothing in said act contained shall give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy in *England* under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 and 24 *Vic.* c. 34," and counsel for the Crown contend that prior to 23 and 24 *Vic.* a subject would not have been entitled to any remedy against the Crown by the laws in force in *England* prior to the passing of the said 23 and 24 *Vic.* under similar circumstances to those under which the suppliant seeks relief in this case, and that therefore the suppliant's petition of right will not lie.

The suppliant contends that this is not really a question of jurisdiction, because section 58 of the Supreme and Exchequer Court Act virtually declares that this court shall have exclusive jurisdiction in all cases in *Canada* for the recovery of money from the Crown, and the clause of the Petition of Right Act above quoted merely declares that the Petition of Right Act "shall not give any remedy, &.," and does not declare that the court shall not have jurisdiction in such a case if a remedy or right already existed. The real question then to determine is whether the suppliant would have been refused relief as against the Crown prior to 23 and 24 *Vic.* if he had been proceeding against the Crown in *England* for similar causes of action incurred under and affected by circumstances similar to those affecting his claim in this suit.

To decide this question the phrase "under similar circumstances" must be properly construed, as upon the

construction of this the solution of the question depends.

There have not been cited on behalf of the Crown any authorities, nor can such be found, deciding that if a British subject, being a member of the legal profession in *Canada*, had been employed by the Crown in *England* under the circumstances and for purposes similar to those set forth in the suppliant's petition, he would have had by the laws then in force in *England* no remedy against the Imperial Crown for the value of his services performed pursuant to such retainer or employment.

The only argument on the part of the Crown upon this point is one of inference drawn from the fact that it was decided prior to 23 and 24 *Vic.*, that an English Barrister had no right in *England* to sue for his counsel fees earned in a suit or matter in litigation in any of the English courts of justice.

The English cases cited by the counsel for the crown only decide the question of the right of English barristers to sue in *England* upon a *quantum meruit* for their remuneration as counsel in suits or proceedings in courts, the judgment in the case of *Kennedy* v. *Broun* (1) being distinctly and clearly limited to this point.

The suppliant therefore contends that there was no decision against the right of even an English barrister to recover for services such as are claimed for in this suit, the services claimed for having in no sense been rendered in connection with litigation or proceedings in any of the courts of justice

"Similar circumstances" therefore did not exist in the cases cited by the crown; and the argument deduced from section nineteen of Petition of Right Act and the English cases referred to does not apply to plaintiff's remedy by petition of right in this country.

(1) 13 C. B. N. S. 677.

1881

THE QUEEN v. DOUTRE.

But even if an English barrister could not have recovered for services performed in *England*, such as have been performed for the crown in *Canada* by the suppliant, as he is not an English barrister, but a *Quebec* counsel (including in that term the terms advocate, attorney and proctor) it does not follow that he could not recover.

RITCHIE, C. J.:

The contract relied upon by the respondent in this suit has to be gathered from the evidence of Messrs. *Doutre*, *Whitcher* and Sir *Albert Smith*, and I will therefore cite such portions of their evidence as in my opinion show where the agreement was entered into and what the nature of that agreement was.

Mr. *Doutre*, in his evidence, after stating that he had written a letter to the Minister of Marine and Fisheries, which contained the basis of the terms upon which he was willing to go to *Halifax* and act as one of Her Majesty's counsel before the Fishery Commission, says:

I received a telegram from the Minister to come to *Ottawa*. I came and had a conversation with him and Mr. *Whitcher*. The three of us were alone, and this was the only interview that I had on the subject. I insist upon this, because afterwards Sir *A. J. Smith* pretended that Sir *A. T. Galt* and Mr. *Ford*, the British agent, and Mr. *Bergne*, Secretary of the commission at *Halifax*, knew something of the arrangement made with me. That could not possibly be, because that was the only occasion on which I had a conversation with the Minister on the subject, and the only person present then was Mr. *Whitcher*. The Minister had my letter in his hand and he said: "I would like to know what you mean by future arrangement as contained in your letter?" I had stated that we would settle finally the amount of our remuneration and expenses after the commission would be over: I said, "I mean that I am too ignorant of the adventure into which I am entering to state precisely what the remuneration should be, I do not know how we will come out of that commission. I have no power to bind my colleagues, and I am making such arrangements as will suit them temporarily until the commission is over, and then it can be settled finally." I stated that

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

for these two reasons—I could not bind my colleagues, and that I was too much in the dark to determine anything precisely—I insisted upon making some temporary arrangements which would relieve us from money embarrassment while we were away. Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the commission you will be lenient, or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said: "You may put it on that basis if you like, but it is only then that we will be able to settle the matter." This ended the conversation. The $1000 was expected to meet our expenses as we were going to live in a place where we did not know how the expenses might run.

Q. You proposed then that you should receive $1,000 refresher and $1,000 a month while in *Halifax*? A. Yes.

Q. And subsequently to settle for your expenses and fees? A. Yes.

Q. About what was the date of that interview? A. That interview must have taken place about the 23rd or 24th of May, because on the 25th I wrote to my several colleagues telling them what had been done, and in each of these letters, they stated to me, it was particularly mentioned that the arrangement was purely a temporary one.

The letter which I now produce and fyle as exhibit No. 4 was written to Mr. *Thomson* on the very day that I wrote that letter which is missing. There are two letters dated the 7th May, one to Mr. *Thomson* and the other to Mr. *Weatherbe*. The one to Mr. *Thomson* is as follows:—"I have just written Hon. *A. J. Smith* a confidential letter in which I tell him that yourself and Mr. *Weatherbe* had left in my hands the question of our remuneration as counsel, but that I did not feel like taking the responsibility of committing us to any definite thing, deprived as I was of your advice; that, however, I owed it to you and myself to take the necessary measures to provide for the present and the approaching session of the commissioners, that I thought we were entitled as a mere temporary arrangement to a refresher of $1,000 each, and that provision should be made in your bank in *Halifax* where we could each draw one thousand dollars a month, beginning on the first of June, adding that our sojourn in *Halifax* would necessarily be expensive, and that cut as we would be from our base of supply, we should feel at ease in this respect. This leaves the thing intact for future arrangements." This was written on the 7th of May, and on the same day I wrote to Mr. *Weatherbe* to the same effect. Here is a letter written on the 30th of May to Mr. *Davies* living at *Charlottetown*, who was at the time Attorney-General in his province. It is as follows:—"I

1882

THE QUEEN v. DOUTRE.

Ritchie,C.J.

have been in *Ottawa* at different intervals, and at a time I met there Messrs. *Thomson* and *Weatherbe*. We understood you were prevented from coming by your parliamentary duties. We had spoken together of the advisability of coming to some understanding in regard to our fees with the Government, but Messrs. *Thomson* and *Weatherbe* left without coming to anything in this respect. After their departure I went again to *Ottawa* with Messrs. *Galt, Ford* and *Bergne*, and I submitted the following proposition, viz:—That each of us should receive a refresher equal to the original retainer, and that we be allowed to draw on some bank in *Halifax* a similar amount to such retainer every month while being there, leaving a final arrangement to be made after the award, giving to understand that if we were not very successful we would ask little or nothing. This last part, however, is verbal only; what is written is that the above proposition would be a temporary arrangement, as I had no right to bind my colleagues. This was agreed upon. You may therefore draw upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer." This was after that interview so that the letters written immediately after my letter to the Minister and the letter written after the interview with the Minister agree together, and all show the agreement between the Minister and myself.

Then Mr. *Doutre* produces the following letter which he received from Mr. *Whitcher*:

The entry in my note-book is perfectly correct. Sir *A. J. Smith's* agreement with you was also discussed before Mr. *Ford*. If Mr. *Weatherbe* has made any note different from mine such as makes it appear to be an arrangement acquiesced in by Sir *A. J. Smith* or Mr. *Ford* it is incorrect. Your arrangement was made with the Minister, and Mr. *Ford* assented as agent of the British Government. My memorandum book shows two entries, one dated 10th of May, 1877, and reads: "Counsel want $1,000 each as refresher and temporary arrangement for $1000 per month and all expenses paid at *Halifax*," the other is dated 23rd May, 1877: "agreed with counsel another $1,000 refresher and $1,000 per month during the session of commission, all expenses of travelling and subsistence, and a liberal gratuity on the conclusion of the business." These are records of my interviews with the Minister.

And as to the junior counsel, Mr. *Doutre* says:

Mr. *Davies* and Mr. *Weatherbe*, who were retained as junior counsel, were treated as we were—that is, received $1,000 retainer and $1,000 refresher, and $1,000 a month while in *Halifax*.

Q. Is Exhibit No. 12, now fyled, a letter sent to you from Mr. *Weatherbe?* A. Yes; on the 10th of April, 1879, Mr. *Whitcher* sent to Judge *Weatherbe* the following memorandum:

"My recollection is clear that Mr. *Doutre's* letter for self and *confrere*, stipulating for retainer, refresher and personal expenses, was temporary, and that the final settlement was not to take place until the result of the commission. This was acquiesced in by Sir *Albert Smith* and Mr. *Ford*. I was present at the discussion. My note book contains the following: "—

Then follow the entries that I have already read.

Mr. *Whitcher* stating what took place after the receipt of Mr. *Doutre's* letter, with regard to the remuneration of counsel, gives the following evidence:

I remember one particular instance when he pressed for a decision as well for the other counsel as on his own behalf. That was the occasion, if I recollect rightly, when this letter was discussed, but there had been other discussions at intervals prior to that.

Q. What took place at that interview? A. It would be difficult to say what occurred, there was so much conversation.

Q. Who was present? A. I was present but took no part in the conversation.

Q. Who else was present? A. The Minister and Mr. *Doutre.*

Q. This letter, you say, was discussed: was any definite arrangement arrived at? A. The general character of the conversation was, that the Minister seemed a little unwilling to leave the thing open, and was pressing for some definite terms, as I understood it. It ended in an understanding that this would be a temporary arrangement so far as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000 for refresher and $1,000 per month while the commission sat. There was some difference as to the junior counsel, but that is not pertinent to this. Further remuneration to these amounts was to form the subject of after consideration. I do not pretend to recite the words used; there were so many conversations that it would be impossible to remember them all.

Q. Did you make a note of the conversation?

A. Yes; as I was paymaster throughout the whole of the commission, I kept memoranda of all agreements.

* * * * * * * *

Q. Have you the memorandum now here?

A. I have. There is an entry on the 10th May, 1877, I may state that there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall*, and others engaged upon the commission.

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and temporary arrangement for $1,000 per month and all expenses paid at *Halifax*."

This, if I connect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find, amongst a number of others, entries dated 23rd of May, the following:—"Agreed with counsel another $1,000 refresher, and $1,000 per m. during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

* * * * * * * *

Q. Were all the counsel to get the same remuneration?

A. No; The first arrangement was that Mr. *Doutre* and Mr. *Thomson* were to receive $1,000 each, and Mr. *Weatherbe* and Mr. *Davies* $600 each, but at the conclusion, in consequence of this successful issue, and the amount of labor, I suppose, all the counsel were put upon the same footing. I paid them the advanced rate by the authority of the Minister.

* * * * * * *

Q. The next arrangement was that of the 23rd of May? A. Yes.

Q. Where was that made? A. In the Minister's room.

Q. Who was present? A. I recollect Mr. *Doutre*, the Minister and myself.

Q. With whom was the arrangement made—with the Minister or with you? A. It was not with me.

Q. You took no part in making the arrangement? A. I took no part in it.

Q. Did the Minister seem anxious that a final arrangement should be made? A. He preferred it.

Q. And Mr. *Doutre* preferred that a final arrangement should not be made? A. He preferred for the satisfaction of himself and the other counsel that it should be settled afterwards.

Q. Did the Minister suggest a final arrangement? A. I do not recollect the Minister suggesting anything, but the result of it was a temporary arrangement.

* * * * * * * *

The liberal gratuity was to be included. I may not have been very accurate in punctuating the entry. The words are—"And $1,000 per month during session of commission, all expenses, travel and subsistence, and a liberal gratuity on conclusion of business."

Sir *Albert Smith's* evidence as to this agreement is as follows:

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

Q. Will you state what arrangement was made?

A. My memory of the conversation is this: they had already received $1,000 retainer, and we were to give them $1,000, which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award it would be a matter for the Government to consider whether they were to get a gratuity after the case was over. That was my understanding.

Q. Then $2,000 would be the amount in full up to that time?

A. Yes, that was my understanding. Mr. *Doutre* said, I recollect distinctly, something about some gratuity, if we should succeed in getting a handsome award, that then it would be a matter for the Government to consider whether they would make a gratuity.

Q. But the contract for payment was limited to $1,000? A. Yes.

Q. And anything further than that was to be a gratuity?

A. That was my understanding of it and that is what I communicated to my colleagues and to Mr. *Ford*, I know that Mr. *Ford* and I discussed the question. Mr. *Doutre* knows that too, I told him more than once that I would have to communicate the matter to Mr. *Ford*.

I think it cannot be doubted that everything that had taken place up to the time of the making of the alleged contract was considered as fully paid up and satisfied, and that the arrangement at *Ottawa*, which forms the basis of this suit, was without regard to the past but solely in reference to the sittings of the commission at *Halifax*. In negotiating this arrangement, authorized or not, Mr. *Doutre* unquestionably at *Ottawa* acted for the other counsel as well as for himself in reference to the remuneration for services to be performed at *Halifax*. That he did so, his letters to these gentlemen place beyond question. Whether authorized or not, he acted for them and in their name, he communicated to them that he had done so, and, so far from any repudiation on their part, they unquestionably not only acquiesed but in the most unequivocal manner adopted his act and in accordance with it drew the money thereby arranged to be paid.

If this arrangement was not made in *Ottawa* to be carried out in *Nova Scotia*, but is to be treated as a *Quebec*

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

contract as regards Mr. *Doutre*, I should like to understand how it is to be treated as regards the other counsel, for by one and the same arrangement, arranged by one and the same person, at one and the same time, and at one and the same place, viz., at *Ottawa*, the services of one and all of the counsel were to be remunerated, and by which, it cannot be doubted, that one and all were finally to be placed on the same footing—though it was at first contemplated that the remuneration of the juniors was to be on a smaller scale, which, however, was subsequently rectified, and it was finally arranged that all should fare alike. In addition to which this cause was tried and decided as on an *Ontario* contract, and Mr. *Doutre* was examined and proved his case as the principal witness, which he could not have done in the province of *Quebec*.

I am of opinion that the arrangement between the suppliant and the Minister of Marine and Fisheries, relied on in this case as a binding contract, took place at *Ottawa*, in reference to services to be performed by Mr. *Doutre*, as a barrister and Queen's counsel in *Nova Scotia*, and not in *Quebec*, and is not to be governed by the law of *Quebec*. In my opinion, the law in *Ontario* and *Nova Scotia* is the same as to the right of a barrister to maintain an action for counsel fees, and therefore it is immaterial whether the law of the place where the arrangement was entered into, viz., *Ontario*, or where the services were to be performed, viz., *Nova Scotia*, is to govern.

I concur in the views as enunciated by Chief Justice *Robinson* in *Baldwin et al.*, v. *Montgomery* (1), and by Chief Justice *Harrison* in *McDougall* v. *Campbell* (2), and as held in the Supreme Court of *New Brunswick in re Bayard* (3), and in *Keir* v. *Burns* (4), viz: that independent

(1) 1 U. C. Q. B. 283.
(2) 41 U. C. Q. B. 332.
(3) 6 New Brunswick R. (1 Allen) 359.
(4) 9 New Brunswick R. (4 Allen) 604.

of statute counsel fees are not the subject-matter of debt to be recoverable in an action by a barrister as a remuneration for his services; that the same rule applies in the provinces where the common law prevails, as in *England*, and must govern until altered by the legislature, as was done in *New Brunswick* in the case of physicians by the act 56 Geo. III. c. 16.

Chipman, C. J., in the Supreme Court of *New Brunswick, in re Bayard* (1) says:

Although fees to counsel are considered honorary, that is, not the subject-matter of debt to be recoverable in an action by a barrister, as a remuneration for his services, yet the reason of this is not that the barrister is supposed to bestow his services gratuitously, but that he should always be paid beforehand, because counsel are not to be left to the chance whether they shall ultimately get their fees or not—their emoluments are not to depend on the event of the cause. This is fully set out in the case of *Morris* v. *Hunt* (2). In this case *Bayley*, J. says: "It is the duty of counsel to take care if they have fees that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees." Such is the state of things in *England*, and although in this province, as in most of the other British colonies, the position of the profession differs much from that in *England*, from the necessity which exists of uniting in the same person the office of barrister and attorney, the duties of which are frequently much blended, and the attorney is often, as it would appear to have been in the present case, the only counsel for his client, we do not think that the lien of the attorney here on the money in his hands can go beyond what it is in *England*. The same rule must govern in both countries until it is altered by the legislature, as has been done in this Province in the case of physicians by the Act 56 Geo. III. c. 16.

In the case of *Baldwin et al.* v. *Montgomery* (3), Chief Justice *Robinson* in *Ontario* then *Upper Canada* says:

The principle of law will apply which denies to counsel and physicians the right to sue for their professional services; a principle which, it is thought in *England*, for the advantage as well as for the

(1) 6 New Brunswick R. 361. (2) 1 Chit. 544.
(3) 1 U. C. Q. B. 284.

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

honor of the profession, should be maintained in force, and for reasons which apply here equally as in *England*.

In the case of *Kerr* v. *Burns* (1), *Carter*, C.J., delivering the judgment of the court, to which I was a party, says:

> On the other question arising in this case, namely, the right of a barrister to maintain an action against his client for professional services, we entertain no doubt whatever. The only cases cited in favor of this right were from the courts of the *United States*, and in those very cases it is admitted that the decisions are at variance with the law of *England*. We feel ourselves bound by the law of *England*, even if we doubted its policy, a matter on which, however, we are entirely free from doubt. The system under which the bar of *England* has existed for centuries, and maintained its acknowledged character of independence and honourable usefulness, ought to be sufficient for the bar of a British colony; and we think we should be materially injuring the position and efficiency of the bar, were we to change that system, and enable them to recover as for ordinary work or labour, on a *quantum meruit*. That dignity and standing in court which is supposed to appertain to a barrister, would hardly be raised by his appearance as a witness in his own case, to rate his own forensic talent and learning at his own estimate, to hear them depreciated by his own client and his professional rivals, and to have them finally judged by a tribunal, not perhaps very adequately qualified to appreciate his real merits.

Since the cases of *Baldwin* v. *Montgomery*, *in re Bayard* and *Kerr* v. *Burns* were decided, we have the celebrated case of *Kennedy* v. *Broun* (2), in which it was distinctly held that the relation of counsel and client rendered the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation, and that a promise made by a client to pay money to a counsel for his advocacy, whether made before, during, or after the litigation, had no binding effect; and in the equally celebrated case of *Swinfen* v. *Lord Chelmsford* (3), *Pollock*, C. B., delivering the judgment of the court, says:

(1) 6 New Brunswick R. 609. (2) 13 C. B. N. S. 677.
(3) 5 H. & N. 920.

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

We are all of opinion that an advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express, or implied. Cases may indeed occur where on an express promise (if he made one) he would be liable in *assumpsit*, but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty in the proper discharge of which, not merely the client, but the court in which the duty is to be performed and the public at large have an interest.

In *Kennedy* v. *Broun* (1), *Erle*, C.J., delivering the judgment of the court, says:

He is entrusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech, which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with a boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to his client; and such men are the guarantees for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them. * *

Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. * * * *

On principle, then, as well as on authority, we think that there is a good reason for holding that the relation of counsel and client in

(1) 13 C. B. N. S. at p. 737 *et seq.*

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff created neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise. * * * * * *

With respect to the claim for compensation for leaving *Birmingham* and coming to *London* and for services in issuing publications for the purpose of creating a prepossession in favour of the defendant, there are several answers, of which two will suffice. The first is that these services were auxilliary to the service as an advocate; and, if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal. * * * *

Of the judgment in the case of *Kennedy* v. *Broun*, Chief Justice *Harrison* of *Ontario* thus speaks in *McDougall* v. *Campbell* (1):

It has in *England* from time immemorial been considered essential to the honor and dignity of the bar that there should be no traffic about counsel fees, no power to make contracts of hiring and service in reference to them. This has become a well understood and generally respected canon of English law. Under its operation there has existed in *England* for centuries as able, learned and distinguished a bar as ever existed in any, or does exist in any part of the world. If the preservation of the canon be necessary in *England*, it is, in my opinion, none the less necessary in this province, where the professions of barrister and attorney are often united in the same person, and where the dignity and zeal of the barrister, if not carefully guarded, is in danger of being lost in the mere zeal of an attorney. The bar of this province has not suffered from the limited operation of the English rule. Personally, I deplore that there has ever been any encroachment on the integrity of the English rule. And if there is to be any further encroachment, the work will not be mine or with my assent. If the days should ever come when barristers, instead of being paid their fees when retained, may contract for future payment, and sue in the event of non-payment, and be sued for non-performance of contract, as in the case of an ordinary contract for hiring and service, I do not think the public will gain anything, and I am sure the profession will lose by the change.

The public and the profession have in truth a common interest in maintaining the honor and dignity of the bar. In a country like ours,

(1) 41 U. C. Q. B. 359.

1882

THE QUEEN v. DOUTRE.

Ritchie, C.J.

where honor and dignity depend more on personal conduct than on trappings of office, nothing should be done which would have a tendency in personal conduct to lessen the honor and dignity so essential to the maintenance of a high standard of professional rectitude at the bar. As said by *Erle*, C. J., in *Kennedy* v. *Broun*, 13 C. B. N. S. 677, 738: "If the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words, sold and delivered according to contract for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded."

The same distinguished judge in the same instructive judgment (p. 737) also uses these works: "The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz.: the administration of justice."

I confess I never read this inspiriting judgment without, if possible, having increased veneration and increased love for the profession to which I owe so much.

It may be a weakness on my part, but it is a weakness in which I believe I shall glory as strength as long as I have any being.

I am not unimpressed with what my brother *Gwynne* says as to the effect of the Petition of Right Act in this case, but as I have a strong opinion on a ground raised and argued at the bar which is an answer to the case, I prefer resting my judgment on this point, which to my mind is clear. As the question suggested by my brother *Gwynne* has not been as fully argued before us as I should like it to be, without a full discussion of this important point, I should not like to express an opinion.

I think the appeal should be allowed with costs.

STRONG, J.:—

I am unable to aquiesce in the judgment just delivered by the Chief Justice, for I cannot bring myself to the conclusion that the suppliant, an advocate of the Province of *Quebec*, practising and having his domicile in that Province, is disentitled to recover fees for pro-

1882

THE QUEEN v. DOUTRE.

Strong, J.

fessional services, for the reason that he performed such services at *Halifax* in *Nova Scotia*, under an agreement made with the Government of the Dominion, having its seat at *Ottawa*, in the Province of *Ontario*, through the intervention of a minister of the Crown. For, assuming that by the law of both the Provinces of *Ontario* and *Nova Scotia* no action can be maintained for counsel fees, I doubt if the law of those Provinces is applicable to the present case, for I incline to think the right to recover depends on the law of *Quebec*, which recognizes a legal liability to pay counsel fees upon a *quantum meruit* as well as under an express agreement. Denial of the right to recover counsel fees in *England* is, as I gather from Lord C. J. *Erle's* most learned judgment, in *Kennedy* v. *Broun* (1), not based on any principles of policy applicable to the public at large, but merely on the long usage of the English bar, and on principles of policy established in the interests of the profession. I consider therefore, that the decision referred to merely establishes that an English barrister, who, by the rules of his profession, is presumed always to render his professional services for honorary fees only, cannot maintain an action for them, and not that such a rule would apply to a foreign advocate who was not prohibited, either by the law of his domicile, or by the usages governing the profession to which he belonged, from enforcing a legal remedy for his remuneration.

Further, even if the laws of *Ontario* or *Nova Scotia* were applicable, I should hesitate long before I acceded to the proposition, that a rule, which seems to me to be founded principally on historical reasons and others incidental to the professional status of the bar in *England*, was a part of the common law of *England* which had been introduced

(1) 13 C. B. N. S. 677.

into the provinces in question, in both of which the distinction which is so carefully preserved in *England* between the professions of barrister and attorney is entirely disregarded, the great majority of the profession practising in both characters. I am aware that there are decisions in *Ontario* adverse to this view, but I consider the late case of *McDougall* v. *Campbell* (1) as throwing so much doubt on these cases that they are no longer to be relied on.

Whilst, however, expressing these doubts as a reason for not being able to rest my judgment on the same grounds as those expressed by the Chief Justice, I desire to be understood as giving no opinion upon the questions referred to, which it is unnecessary I should do, since it appears to me, after a very careful consideration of the evidence, that by the terms of the agreement between the suppliant and Sir *Albert Smith*, as proved by the suppliant's own evidence, and that of his witness, Mr. *Whitcher*, as well as by the testimony of Sir *Albert Smith*, the suppliant is precluded from setting up any legal right to recover fees for the services rendered by him to the Government, beyond the amount which has been admittedly paid to him. The passages in the evidence to which I refer, are as follows:

Mr. *Doutre*, in his evidence, says:

I insisted upon making some temporary arrangements which would relieve us from money embarrassment while we were away. Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the commission you will be lenient, or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said "you may put it on that basis if you like, but it is only then that we will be able to settle the matter." This ended the conversation. The $1,000 were expected to meet our expenses, as we were going to live in a place where we did not know how the expenses might run.

(1) 41 U. C. Q. B. 332.

1882

THE QUEEN v. DOUTRE.

Strong, J.

Mr. *Whitcher:*

Q. Have you the memorandum here? A. I have. There is an entry on the 10th of May, 1877. I may state that there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall* and others engaged upon the commission. This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and temporary arrangement for $1,000 per month and all expenses paid at Halifax."

This, if I connect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find amongst a number of other entries dated 23rd of May, the following: "Agreed with counsel another $1,000 refresher and $1,000 per m. during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

Q. You wrote to Mr. *Doutre*, I believe, giving a copy of those memoranda, look at the exhibit produced and say whether it is a correct copy of the entries that you have read? A. It is my handwriting, but I am inclined to think that it was written subsequently to one for the use of the Department of Justice, at the time that Mr. *Doutre* and the other counsel were appealing for a consideration of their claims. We communicated them officially to the Department of Justice, after having been asked to report the substance of the agreement with the counsel. This having been called in question, I find that I wrote a note to Mr. *Doutre* stating that the entry in my note-book was perfectly correct, and giving him the memorandum.

Q. You had previously sent memoranda of those discussions to the Department of Justice? A. Yes. This note that you have produced was marked "private," and should not have been produced in this case. My time was very much occupied with the duties of my office and I would naturally communicate the information asked from me more freely than I would have done if I had supposed that it would be produced as evidence in a legal case. The note corresponds in substance with the entries that I made in my note-book.

Q. Were these memoranda made at the time? A. Yes.

Sir *Albert Smith:*

Q. Do you remember having an interview with Mr. *Doutre* with reference to the compensation that he was to receive as counsel? A. Yes.

Q. Will you state what that interview was? A. I think that Mr.

Doutre and I had several conversations on the subject, but I do not recollect of having any conversation with the other counsel at all as to their compensation. A short time before the commission opened at *Halifax*, Mr. *Doutre* was in my office. He referred to it in his evidence, and Mr. *Whitcher* did also. I think Mr. *Whitcher* was present on that occasion.

Q. Will you state what arrangement was made? A. My memory of the conversation is this: they had already received $1000 retainer, and we were to give them $1,000, which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award it would be a matter for the Government to consider whether they were to get a gratuity after the case was over. That was my understanding.

Q. Then $2,000 would be the amount in full up to that time? A. Yes, that was my understanding. Mr. *Doutre* said, I recollect distinctly, something about some gratuity, if we should succeed in getting a handsome award that then it would be a matter for the Government to consider whether they would make a gratuity.

Q. But the contract for payment was limited to $1,000? A. Yes.

Q. And anything further than that was to be a gratuity? A. That was my understanding of it, and that is what I communicated to my colleagues and to Mr. *Ford*. I know that Mr. *Ford* and I discussed the question. Mr. *Doutre* knows that, too. I told him more than once that I would have to communicate the matter to Mr. *Ford*.

Q. That $1,000 a month, while in *Halifax*, was to cover both the services and expenses? A. I understood it so. I remember that Mr. *Doutre* stated on this occasion that he intended to take his family to Halifax, but that was a matter that I did not think the Government would be justified in paying the expenses. That was personal to himself.

The effect of this evidence is, in my opinion, to establish beyond question that the engagement entered into by Sir *Albert Smith* on behalf of the Government to pay any fees in excess of the $1,000 per month during the sittings of the commission was purely honorary.

This I take to be the plain meaning of Mr. *Doutre's* own statement, when he says that Sir *Albert* put the question to him:

Do you mean that if we obtain nothing from the commission you will be lenient or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?

1882

THE QUEEN v. DOUTRE.

Strong, J.

To which question Mr. *Doutre* replied:

You may put it on that basis if you like, but it is only then we will be able to settle the matter.

Therefore had we nothing but Mr. *Doutre's* own statement, I should consider that, so far from there having been any express contract to pay a reasonable remuneration for the services of counsel in excess of the $1,000 per month, there was an express engagement on his part to trust to the honour and liberality of the Government. But the evidence of Mr. *Whitcher*, the Commissioner of Fisheries, a witness called by the claimant, puts this beyond all doubt, for in the memorandum made by him at the time of the interview of the 23rd May, 1877, between Sir *Albert Smith* and Mr. *Doutre*, it is in so many words expressed, that any sum to be paid at the conclusion of the arbitration in excess of the $1,000 per month, was not to be a matter of right but a "gratuity." It is to be observed that this memorandum is not objected to by Mr. *Doutre*, but is expressly recognized by him as containing a correct record of the arrangement come to by him with the Minister. Mr. *Whitcher* says he believes he made the memorandum in question, in the usual way, the moment he returned from the Minister's room to his desk. A copy of this memorandum also appears to have been sent by Mr. *Whitcher* to the Department of Justice as containing a correct record of what had passed at the interview in question.

Mr. *Whitcher* having stated that his memorandum correctly embodied the substance of the conversation between Mr. *Doutre* and the Minister, and having represented it in the way I have mentioned, as correctly embodying the substance of the conversation, I cannot consider the signification which, in a subsequent part of his evidence, he attaches to the word "gratuity," as meaning an unascertained sum or remuneration to be subsequently fixed, as materially

varying its force and effect, more especially as the memorandum appears to have been adopted by Mr. *Doutre* in the terms in which it was expressed, and is, as regards the use of the word "gratuity," in its ordinary signification, entirely corroborated by Sir *Albert Smith's* testimony and not inconsistent with that of Mr. *Doutre* himself.

Sir *Albert Smith* states that the arrangement was that, if a handsome award was obtained, it would be for the Government to consider whether they would make a gratuity. This evidence, in my opinion, clearly shows that Mr. *Doutre* agreed to trust to the honour and generosity of the Government to pay any fees in excess of the $1,000 per month The consequence must be that, not only is such an honorary and gratuitous undertaking no foundation for an action, but it excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered, assuming that the law is as the suppliant contends, that such an action would, in the absence of an express agreement, have been maintainable. That this is the legal effect, if the view I take of the evidence is correct, is manifest from numerous authorities, of which I may mention one or two. Mr. *Pollock*, in his learned work on Contracts (1), after referring to the case of *Taylor* v. *Brewer*, which I will presently mention more fully, thus clearly states the principle:

> Moreover, a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration, which would be inferred from the transaction, if there was no express agreement at all.

In *Roberts* v. *Smith* (2),

> There was an agreement between A and B, that B should perform certain services, and that in the event (let us say No. 1) A should

(1) Ed. 2. p. 43.

(2) 4 H. & N. 315.

1882

THE QUEEN v. DOUTRE.

Strong, J.

pay B a certain salary, but that in another event (No. 2) A should pay B whatever A might think reasonable. Event No. 2 having happened, the court held there was no contract which B could enforce. Services had indeed been rendered, and of the sort for which people usually are paid and expect to be paid, so that in the absence of express agreement there would have been a good cause of action for a reasonable reward. But here B had expressly assented to take whatever A should think reasonable, which might be nothing, and had thus precluded himself from claiming to have whatever a jury should think reasonable.

In *Taylor* v. *Brewer* (1) the bankrupt, of whom the plaintiff was the assignee, had performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right." Lord *Ellenborough*, C. J., in giving judgment says:

But here, I own it, I think there was an engagement accepted by the bankrupt on no definite terms, but only on confidence that if his labour deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted, and the same thing does not unfrequently happen in contracts with several of the departments of Government.

Grove, J., said:

I consider the resolution to import that the committee were to udge whether any or what recompense was right.

LeBlanc, J.:

It seems to me to be merely an engagement of honor.

Bayley, J.:

The fair meaning of the resolution is this: that it was to be in the breast of the committee whether he was to have anything, and if anything, then, how much?

The case of *Roberts* v. *Smith*, cited in the extract given from Mr. *Pollock's* work, followed this case of *Taylor* v. *Brewer*, and is, as already stated, to the same effect; and the case of *Bryant* v. *Flight* (2), in which a contrary

(1) 1 M. & S. 290. (2) 5 M. & W. 114.

1881

THE QUEEN v. DOUTRE.

Strong, J.

opinion was held by a majority of the court, Baron *Parke* dissenting, must be taken as overruled by *Roberts* v. *Smith* (1).

It appears to me very clear, therefore, that the suppliant performed the services for which he sues under an agreement with the government which disentitles him to maintain his petition of right.

He must be taken to have relied exclusively upon the honour, good faith and liberality of those who employed him, and not on any binding legal obligation to pay.

There was, however, in addition to the arrangement about the gratuity for services to be rendered, an express agreement to pay Mr. *Doutre's* disbursements for travelling in going to and returning from *Halifax*, and his expenses at *Halifax*, which seems to me to depend on different considerations. I know of no authority deciding that, even in *England*, a counsel leaving home to perform professional services may not legally stipulate that his client shall pay his expenses. No instances of such a question having ever arisen is to be found in the books, it is true, but this is probably for the reason that the etiquette of the bar there forbids such an agreement. However that may be, such agreements are not unusual in this country, and I find nothing to warrant me in holding that they are not valid.

I am therefore of opinion that the suppliant is entitled to recover his travelling expenses, and also his personal expenses of living at *Halifax*. I should have mentioned that Sir *Albert Smith* denies that any such arrangement to pay expenses was come to, but I think I must adopt Mr. *Whitcher's* memorandum, which was a written record of the agreement made at the time, as

(1) See also Leake on Contracts, p. 14; Story on Agency, sec. 325, 11th edit.; Wharton on Agency, sec. 324; Pothier on Obligations, No. 47.

1882

THE QUEEN v. DOUTRE.

Strong, J.

correctly stating the terms which were arrived at, and this clearly states that the expenses were to be paid extra.

The evidence does not contain sufficient material to enable me to fix the amount of these expenses, and I therefore think there should be a reference to the registrar to take an account of the claimant's reasonable personal expenses whilst travelling to and from *Halifax*, and whilst in attendance upon the Commission under his retainer at *Halifax*.

FOURNIER, J., adhered to the judgment delivered by him in the court below.

HENRY, J.:—

I am of opinion that the appeal should be dismissed.

I agree in the conclusion that there was an agreement entered into between the Government and the respondent that "the final amount of fees or remuneration to be paid to counsel would remain unsettled until after the award of the commissioners." Mr. *Whitcher*, in his evidence, used the word "gratuity," but it is clear that term was not used in its technical sense, but that all parties intended that some reasonable amount should be given in addition to the sum agreed to be paid down.

The first objection was that the counsel could not recover for his fees at all in a petition of right. I have satisfied myself that a counsel should recover for his fees in this country. Here a counsel stands on a very different footing from that of an English barrister. The duties of professional gentlemen here are very different from those of the English counsel, and I am of opinion, therefore, that it would be improper to introduce in this country the rule which prevails in *England*, viz.: that a counsel

1882

THE QUEEN v. DOUTRE.

Henry, J.

fee is a mere honorarium and cannot be recovered by action. Here counsel act as attornies, solicitors and advocates at the same time, and their duties are not separated, and they ought not to be denied the right to recover the value of their services as such. It has been decided in *Quebec*, and it has been all but decided in *Ontario*, and I take it to be the policy here, that everybody should be paid for the services he renders. I have, therefore, come to the conclusion that counsel can recover here for any fees that they have contracted for in exchange for their services. I do not see why the law should be otherwise in this country. The only difficulty I had was, that inasmuch as the statute says that a subject can recover against the Crown only in such cases as a subject could recover in *England*, whether under the petition of Right Act the suppliant could recover against the Crown, as in *England* he could not recover in a similar action.

I have arrived at the conclusion that where there is a contract between the subject and the Crown, and the subject alleges a breach of that contract, a petition of right will lie. Although an English counsel could not recover in *England* on a similar contract, yet the intention of Parliament was that all contracts entered into with the Dominion Government could be enforced in the Exchequer Court.

As to the damages, I do not think that the amount awarded is unreasonable. We all know that parties are put to extraordinary expense when they are obliged to leave their homes and reside in a strange city attending a matter of such importance as the one on which the suppliant was employed. In the old country a much larger bill would have been charged and paid, and in such matters it is usual to provide liberally.

Under all the circumstances I am in favour of dismissing the appeal.

1882

THE QUEEN v. DOUTRE.

TASCHEREAU, J. :

J'en suis aussi venu à la conclusion, avec mon honorable collègue qui vient d'opiner, que cet appel doit être rejeté, quoique sur des motifs un peu différents des siens.

Je suis d'avis que cette cause doit être régie par le droit de la province de *Québec* ; en premier lieu, parce que c'est à *Montréal* que l'Intimé a reçu la lettre du ministre de la Justice demandant ses services, et c'est à *Montréal* que l'Intimé a accepté cette demande, et s'est engagé à donner ses services comme un des avocats du gouvernement canadien devant la Commission des Pêcheries. Et en second lieu, et surtout parce que je considère qu'un des membres du Barreau de la province de *Québec* qui accepte la charge d'une affaire quelconque comme *avocat*, le fait, ne peut le faire, que comme avocat de la province de *Québec*, comme membre du Barreau de la province de *Québec*, et que tout ce qu'il fait comme *avocat*, quel que soit le lieu où il exerce sa profession, soit en *Angleterre*, devant le Conseil Privé, ou ailleurs, quel que soit le lieu où ses services ont été actuellement demandés et retenus, il le fait à titre d'avocat et de membre du Barreau de la province de *Québec* et avec ses droits et privilèges comme tel. De fait, il n'est avocat qu'à ce titre. Il peut, en certaines circonstances, exercer sa profession en dehors de cette province, mais c'est toujours à titre d'avocat de cette province qu'il le fait. Le client qui retient ses services pour être exercés en dehors de la province se met, dans ses relations avec lui, sur le pied ordinaire d'un client vis-à-vis d'un avocat de la province, dans la province. Par exemple, si pendant que M. *Doutre* se trouve à *Ottawa*, un client le retient pour aller plaider une cause devant le Conseil Privé, ce ne sera pas la loi d'*Ontario*, quoique le contrat y ait été fait, ni la loi Impériale quoique les services soient rendus en *Angleterre*, qui régiront les relations

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

entre M. *Doutre* et son client, mais bien la loi dans la province de *Québec*; parce que ce client ne l'a retenu et engagé que comme avocat, et que M. *Doutre* est avocat de la province de *Québec*, et je le répète n'est avocat qu'à ce titre.

De la part de Sa Majesté, il est d'ailleurs admis, quoique nié d'abord, que la cause de la présente action a pris naissance dans la province de *Québec*. A la page 3 du factum, au soutien de l'appel, je lis:

It is submitted that a new trial should be ordered on the ground of the reception of improper evidence, viz:

(1) The Suppliant's own evidence—the cause of action having arisen in the Province of Quebec, and the suppliant's evidence therefore not being admissible.

Etant posé le principe que la loi de la province de *Québec* régit cette cause, la question de savoir si une action en justice compète à M. *Doutre* pour le recouvrement de ses honoraires comme un des avocats de Sa Majesté devant la Commission des Pêcheries se trouve tranchée. Car, sous le régime de cette loi, cette question ne souffre pas de doute. Voir *Amyot* v. *Gugy* (1) et les autorités y citées aussi *Devlin* v. *Tumblety* (2), *Beaudry* v. *Ouimet* (3), *Grimard* v. *Burroughs* (4), *Vandal* v. *Gauthier* (5), *Larue* v. *Loranger* (6). Aussi, dans le même sens, *Grimard* v. *Burroughs* (7). Voir aussi l'arrêt de la cour de Cassation du 16 décembre 1818 mentionné à *Favard* (8).

Dans une cause de *Devlin* v. la *Corporation de Montréal*, la Cour d'Appel, le 13 mars 1878, accorda à M. *Devlin* $2,500 pour ses honoraires comme avocat de

(1) 2 Q. L. R. 201.
(2) 2 L. C. Jur. 182.
(3) 9 L. C. Jur. 158.
(4) 3 L. C. Jur. 84.
(5) 5 Rev. Lég. 132.
(6) 2 Leg. News 155 and 3 Legal News 284, where the claim for fees was not maintained by the Court of Appeal, but because there was a tariff regulating those fees, and no special agreement to pay any extra remuneration had been proven by the plaintiff.
(7) 11 L. C. Jur. 275.
(8) V. dépens, page 55, 1ère col.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

la Corporation sur les expropriations requises pour le Parc (*Mount Royal Park*) sur une preuve de la valeur des services du demandeur faite dans la cause, aucun tarif existant pour tels services, confirmant le principe du jugement rendu en Cour Supérieure par le juge *Johnson*, le 30 mai 1877, quoique réduisant le montant qu'il avait accordé. Le passage du jugement de la Cour Supérieure,—sur la partie de la demande pour honoraires sur les expropriations pour le parc, est comme suit :

Considering also that from the professional and other evidence adduced by Plaintiff, it was proved that the said mentioned services were worth the sum of ten thousand dollars; and further that in the Judgment of this Court, after duly weighing such evidence, the said Plaintiff is entitled to receive from the Defendant for such last mentioned services four thousand dollars.

Le jugement de la Cour d'Appel dit :

Considering also that in the Judgment of this Court after duly weighing such evidence the said Respondent (*Devlin*) is entitled to receive from the Appellants (The Corporation of *Montreal*) for such last mentioned services (on Mount Royal Park expropriations) two thousand five hundred dollars.

C'est bien là, admettre dans les deux Cours, qu'un avocat peut recouvrer la valeur de ses services sur le *quantum meruit*, quand ses services sont rendus hors de cour ou ne sont pas prévus par le tariff.

Grimard vs. Burroughs et *Larue vs. Loranger* ont été invoqués de la part de Sa Majesté comme contraires à la réclamation de l'Intimé. Mais, en y référant on verra que les décisions dans ces causes vont à dire que quand il y a un tarif d'honoraires l'avocat et procureur ne peut exiger de rémunération plus élevée que le tarif, quand il n'y a pas eu engagement spécial de la part du client de lui payer plus que les honoraires accordés par le tarif. Il est évident, en conséquence, que ces causes n'ont pas d'application ici. Il n'y avait pas de tarif pour les avocats engagés devant la Commission des Pêcheries.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

Je réfère aussi aux articles 1722 et 1732 C.C. Aussi à l'art. 2260 C.C. qui dit que l'action de l'avocat est prescrite par cinq ans. Avant les cinq ans, il y a donc action.

Aussi à *Troplong*, Mandat Nos. 223, 249, 253, 630, 643, 644, 645; 27 *Laurent Nos.* 334 à 343; 6 *Boileux* 148, 574, 575; et au 2e vol. Rapport des Codificateurs (sixième rapport) pages 7 et 8.

Il en est de même dans l'*Ile Jersey* et la *Louisiane*, dont les lois dérivent en grande partie des lois françaises ou leur sont semblables. Voir la plaidoirie de sir *Roundell Palmer* (maintenant lord *Selborne*) dans la cause "*The Jersey Bar.*" (1) Et pour la *Louisiane*, les causes de *Hunt* v. *The Orleans Cotton Press Company* (2), *Re Succession of Macarty* (3), *Brewer* v. *Cook* (4), *Edelin* v. *Richardson* (5), *Re Succession of Lee* (6).

Je n'aurais pas cru devoir tant appuyer sur une proposition qui ne me semble plus discutée ni mise en doute dans la province de *Québec*, si ce n'eût été de la négation de cette proposition dans cette cause par les savants avocats de l'appelante.

J'en viens maintenant à la preuve faite dans la cause, remarquant d'abord que, d'après les lois de la province de *Québec*, M. *Doutre* ne pouvait être entendu comme témoin à l'appui de sa demande, et que son témoignage produit au dossier comme témoin entendu pour lui-même, ne peut être pris en considération dans l'examen de cette cause. La section 63 de l'acte qui constitue la Cour de l'Echiquier, 38 Vict., ch. 11, énacte spécialement que :

Issues of fact, in cases before the said Court, shall be tried according to the laws of the Province in which the cause originated, including the laws of evidence.

(1) 13 Moo. P. C. C. 263.
(2) 2 Robinson, 404.
(3) 3 Louisiana An. Rep. 517.
(4) 11 Louisiana An. Rep. 637.
(5) 4 Louisiana An. Rep. 502.
(6) 4 Louisiana An. Rep. 578.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

Et la section 13 de l'acte 39 Vict., ch. 27, étend cette clause aux *petitions of right.*

Avant d'entrer dans l'examen des témoignages produits au dossier il faut constater quelle est la contestation liée entre les partis, *the matters in issue*, tel qu'appert au dossier. D'abord, quelle est la demande du pétitionnaire ?—Purement et simplement une action bâsée sur le *quantum meruit* pour services professionnels rendus pour Sa Majesté et à sa demande devant la Commission des Pêcheries, et pour la préparation de la cause de Sa Majesté devant la dite commission, avec en outre une obligation réclamant les dépenses encourues par le pétitionnaire dans l'exécution de ses devoirs comme tel avocat, et donnant ses dépenses comme se montant à plus de $8,000, et un autre alléguant que le pétitionnaire a été employé pendant plus de deux ans à l'exécutiou de ses dits devoirs. Le pétitionnaire ajoute qu'il a reçu une somme de $8,000 sur le paiement de ses services, pour laquelle il crédite Sa Majesté. Il allègue aussi que par un arrangement provisoire avec le département des Pêcheries, il avait été convenu, avant son départ pour *Halifax*, où la Commission devait siéger, que le gouvernement lui paierait $1,000 par mois pour ses dépenses courantes durant son séjour à *Halifax*, laissant le règlement définitif, tant des dépenses que des honoraires du pétitionnaire, à être fait après la clôture des travaux de la Commission. Tels sont les allégués essentiels de la demande.

Pour Sa Majesté, le procureur-général de la Puissance a plaidé en réponse à cette demande comme suit :

In answer to the said Petition, I, the Honorable James McDonald, Her Majesty's Attorney General for the Dominion of Canada, on behalf of Her Majesty, say as follows :

1. The admissions herein contained are made for the purposes of this matter only.

2. I admit that the suppliant acted as one of the Counsel for the Crown before the Fishery Commission referred to in the said petition

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

of right, but I have no knowledge of the alleged retainer or of the terms thereof and I deny the same and put the suppliant to such proof thereof as he may be advised to make.

3. I deny that the suppliant was for more than two years employed in preparing and supporting the claim of Her Majesty as alleged in said petition, and that the expenses incurred by him in the performance of the duties of his said office, exceeded eight thousand dollars as alleged; and I submit that the expenses incurred by the suppliant in connection with his family and the loss alleged in connection with his professional affairs and family and domestic arrangements, form no part of any claim which can be enforced against Her Majesty in the premises by Petition of Right.

4. I am informed and therefore allege that the arrangement made with the suppliant referred to in his petition under which he was to be paid one thousand dollars a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the said one thousand dollars per month, was with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses; I am informed and therefore allege that the sum of eight thousand dollars paid to the suppliant as mentioned in his petition included the moneys payable under such arrangement, and I submit therefore that the suppliant has no further claim against the Crown in the matter. Even if it should be held that no final arrangement as to the amount to be paid the suppliant was come to, I submit that the suppliant cannot recover more than the said sum of eight thousand dollars for his expenses and for the services rendered.

5. I deny that the Dominion Government have recognized the suppliant's right to be paid his said claim.

6. I say that the suppliant was, when acting in connection with the matter referred to in his petition, one of Her Majesty's Counsel learned in the law, and that the services rendered by him in the said matter, were rendered as such Counsel. The eight thousand dollars paid him, more than covered any expenses to which he was properly put, on behalf of Her Majesty. I submit that the suppliant as such Counsel cannot enforce a claim for Counsel fees, and that no action lies for the recovery thereof, and I claim the same benefit from this objection, as if I had demurred to the said petition.

I pray that the suppliant's petition may be dismissed with costs.

Le pétitionnaire a répliqué à ce plaidoyer comme suit:

1. The Suppliant joins issue on paragraphs Nos. 2, 3, 4 and 5 of Defendant's statement of Defence.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

2. And as to paragraph 6 of said statement of defense, Suppliant saith that he is an advocate of the Province of Quebec, and as such, was retained by the Crown as set forth in his petition; that the letter of the Department of Justice retaining him, and the amount of his retainer were received by him at Montreal, in the province of Quebec, from whence he wrote his reply agreeing to act for the Crown as requested; that as such advocate of the Province of Quebec, he is by the law of that Province entitled to claim and recover from the Crown the amount claimed by him as such advocate, under the facts set forth in his petition; and he further saith that the sum of eight thousand dollars paid him did not more than cover the expenses that he was properly put to in the premises in behalf of Her Majesty; and he claims the same benefit from this replication as if he had demurred to the said sixth paragraph of statement of defence.

Voyons maintenant quelle est la preuve au dossier sur les issues ainsi jointes.

D'abord, tant qu'au fait que le Ministre de la Justice a retenu les services de M. *Doutre* comme un des avocats et conseils pour Sa Majesté devant la Commission des Pêcheries, la lettre même du Ministre de la Justice sur le sujet a été produite. Cette lettre est en termes des moins équivoques et le pétitionnaire ne pouvait faire une meilleure preuve. Mais cette preuve lui était-elle nécessaire? Il a agi aussi ouvertement et publiquement que possible dans l'exécution de ses devoirs comme tel avocat pour Sa Majesté: le gouvernement lui-même lui a payé $8,000 sur ses dépenses, et cependant, le Procureur-général vient plaider ici qu'il ne sait pas et nie même que M. *Doutre* ait été retenu tel qu'il l'allègue comme avocat pour Sa Majesté!!! N'a-t-on pas lieu de s'étonner d'un tel plaidoyer de la part du Procureur-général? Tant qu'au troisième plaidoyer, de la part de Sa Majesté, il n'est qu'une admission que le pétitionnaire a été employé au moins deux ans dans l'exécution de ces devoirs, et que ses dépenses se montent à au moins $8,000. Que la Couronne puisse prétendre que les $8,000 qu'elle a payées à M. *Doutre* la libère complètement vis-à-vis de lui cela se comprend mais

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

qu'après lui avoir payé ces $8,000 comme son avocat devant la Commission des Pêcheries, elle vienne devant une Cour de Justice nier que M. *Doutre* ait été son avocat devant cette Commission, démontre bien que ceux que la Couronne charge de défendre ses intérêts devant les tribunaux oublient quelquefois la dignité et le caractère de leur client.

Tant qu'à la partie niant que Sa Majesté soit obligée de payer les dépenses encourues par le pétitionnaire pour sa famille à *Halifax* durant la Commission, d'après la preuve, telle qu'elle me semble être au dossier, cette partie de la cause est sans importance.

Tant qu'au 4me plaidoyer de la part de Sa Majesté, allant à alléguer que les $8,000 déjà payées à M. *Doutre* ont été acceptées par lui comme paiement entier de ses services et dépenses, la preuve sur cette partie de la cause est contradictoire. D'après le témoignage de Sir A. *Smith*, alors Ministre des Pêcheries, il en serait ainsi, et l'arrangement qu'il aurait fait, pour Sa Majesté avec M. *Doutre* est que les $8,000 seraient acceptés par lui comme réglant entièrement sa réclamation tant pour ses dépenses que pour ses honoraires. Mais M. *Whitcher*, le Commis aire des Pêcheries pour la Puissance, et le paie-maître de la Commission à *Halifax*, jure positivement que l'arrangement fait entre M. *Doutre* et le Ministre des Pêcheries n'était que provisoire, et qu'un arrangement final au sujet du paiement des services de M. *Doutre* ne devait avoir lieu qu'à la conclusion des travaux de la Commission. M. *Whitcher* prit un mémoire par écrit de la conversation entre le ministre et M. *Doutre* et dans ce mémoire, il se sert du mot "*gratuity on the conclusion of the business.*" Mais il explique qu'en prenant cette note, il ne s'est pas servi des mots mêmes du ministre et de M. *Doutre*, mais qu'il n'a fait que noter la substance de leur convention. Il jure positivement que :

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

It ended [l'entrevue de M. *Doutre* avec le ministre] in an understanding that this would be a temporary arrangement so for as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000 for refresher and $1,000 per month while the Commission sat. Further remunération to these amounts was to form the subject of after consideration.

Une note de M. *Whitcher* à M. *Weatherbe*, un des avocats retenus avec M. *Doutre*, dit:

My recollection is clear that *Doutre's* letter for self and confrères stipulated that the agreement about retainer, refresher and personal expenses was provisional and that settlement for professional services was deferred till the result of the Commission. This was acquiesced in by Sir *A. Smith* and Mr. *Hind*.

Comme je l'ai dit, Sir *A. Smith* contredit ce témoignage et jure que le paiement des $1,000 par mois ajouté à celui des $2,000 fait antérieurement devait être en satisfaction pleine et entière des services de M. *Doutre*.

Le juge en cour inférieure a adopté la version de M. *Whitcher*, et je suis d'avis qu'il ne pouvait guère faire autrement.

Et Sir *A. Smith* et M. *Whitcher* sont certainement deux témoins des plus respectables, mais il fallait ici accepter le témoignage de l'un et exclure celui de l'autre, il fallait choisir. Le juge *a quo* a cru que celui de M. *Whitcher* devait prévaloir, vû que lui seul avait pris note par écrit de la convention des parties, tandis que M. *Smith* ne se fiait qu'à sa mémoire qui pouvait lui faire défaut. J'ajouterai que le témoignage de M. *Whitcher* est entièrement corroboré par les lettres de M. *Doutre* aux autres avocats dans la cause, écrites lorsqu'il s'agissait de fixer avec le gouvernement leur rémunération commune pour leurs services sur la Commission des Pêcheries Celle à M. *Thomson* est prouvée par lui-même entendu comme témoin. Il est de règle certainement qu'une partie ne peut se faire une preuve par les lettres, qu'elle peut écrire, mais ici, c'est comme

faisant partie du *res gestæ* que l'on pourrait peut-être prendre ces lettres de M. *Doutre* en considération.

D'ailleurs, avec la preuve qui existe au dossier, la cour inférieure aurait eu le droit de déférer le serment supplétoire à M. *Doutre* (1), et si la cour inférieure avait ce droit, cette Cour, siégeant en appel d'une cause régie par la loi de la province de Québec l'a aussi. *Ferrier* v. *Dillon* (2), *Daley* v. *Chévrier* (3).

Or, comme le témoignage de M. *Doutre* se trouve déjà au dossier, quelle objection peut-il avoir à le lire comme donné sous serment supplétoire sur cette partie de la cause. Si la cour en voyait, il n'y aura qu'à déférer régulièrement le serment supplétoire à M. *Doutre*, et après avoir eu ses réponses, à donner le jugement final dans la cause. Le résultat sera bien le même. Et prenant pour certain que M. *Doutre* ne jurera pas autrement qu'il l'a fait, la cause me semble tranchée, et la preuve me semble parfaite du fait que les $8,000 payées n'étaient qu'un paiement provisoire, et que le règlement définitif ne devait avoir lieu qu'à la conclusion de la Commission. Il ne faut pas perdre de vue que si cette cause, qui, il est admis, a été prise comme un *test case* pour définir les droits non-seulement de M. *Doutre*, mais aussi de tous les autres avocats qui ont agi conjointement avec lui pour la Couronne devant la Commission des Pêcheries, eût été intentée au nom d'aucun autre des dits avocats, M. *Doutre* eût alors comme témoin ordinaire prouvé que l'arrangement fait avec le gouvernement n'était que provisoire.

Tant qu'à la preuve faite du *quantum meruit*, elle est des plus parfaites dans une cause de ce genre, où cette preuve est toujours difficile. Je n'ai rien à ajouter là-dessus aux remarques du savant Juge *a quo*, qui a

(1) Arts. 1246, 1254 C.C. (2) 12 L. C. Jur. 202.
(3) 1 Dorion, Q. B. Rep. 293.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

analysé les témoignages et démontré clairement que la somme de $8,000 qu'il a accordée au pétitionnaire lui est bien et justement due par le gouvernement. De fait, au lieu de $50 c'est $100 par jour que j'aurais accordé au pétitionnaire Si l'on considère la gravité des intérêts que M. *Doutre* était chargé de représenter devant la Commission des Pêcheries, l'importance et la nouveauté des questions qu'il a eu à y traiter : si l'on considère que des millions étaient demandés et des millions ont été obtenus pour le gouvernement : si l'on considère la preuve faite par M. *Whitcher* et M. *Walker* du travail préparatoire qu'a dû s'imposer et que s'est imposé M. *Doutre* pour l'exécution des devoirs de la charge importante que le gouvernement lui avait confiée : si l'on prend en considération, que pour remplir ses fonctions, il a dû passer six mois à *Halifax*, et laisser complètement son bureau et sa clientèle, que la preuve établit être une des plus considérables de la ville de *Montréal*, l'on est surpris que sa Majesté ait été avisée de le forcer à recourir aux tribunaux de justice pour obtenir le paiement de la somme qu'il demande pour ses services.

[TRANSLATED.]

TASCHEREAU, J :—

I also have arrived at the conclusion, with my learned colleague *Henry*, that this appeal should be dismissed, but for reasons somewhat different from his.

In the first place, I am of opinion that this petition should be decided according to the law of the Province of *Quebec*, because it was at *Montreal* that the respondent received the letter of the Minister of Justice requesting his services, and that it was at *Montreal* the respondent consented to be retained and agreed to give his services as one of the Canadian counsel before the Fishery Commission; and also, and more particularly, because I

consider that when a member of the bar of the Province of *Quebec* agrees and undertakes to give his services as an advocate, he does, and he can only do so, as an advocate of the Province of *Quebec*, and as a member of the bar of the Province of *Quebec*; and that in all the services he performs as such advocate, in whatever place he acts, whether before the Privy Council or elsewhere, and whether he was retained in one place rather than another, it is always as an advocate and a member of the bar of the Province of *Quebec* that he is acting, and as such he is entitled to all their rights and privileges. In fact he has no other right to act. He can, no doubt, exercise his profession in certain cases outside of his province, but it is always in the capacity of a barrister of his province that he acts. The fact of a person retaining a counsel to give his services outside of his province creates the ordinary relationship which exists between client and counsel in that province to which the counsel belongs.

For example, suppose that while Mr. *Doutre* is in *Ottawa*, he is retained by a client to go and argue a case before the Privy Council, it will not be the law of *Ontario*, although the contract was made in *Ontario*, or the law of *England*, where the services are to be rendered, that will regulate the rights of the parties, but rather the law of the Province of *Quebec*, because the client has retained and engaged him as advocate, and Mr. *Doutre* is an advocate of the Province of *Quebec*, and, I repeat it, he has no other right or title to act, except as such.

Her Majesty has, however, admitted, although at first denied, that the cause of action has arisen in the Province of *Quebec*. At page 3 of the appellant's factum I find the following passage:

> It is submitted that a new trial should be ordered on the ground

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

of the reception of improper evidence, viz.: (1) The suppliants own evidence, the cause of action having arisen in the Province of *Quebec* and the suppliant's evidence, therefore, not being admissible.

It being admitted that this case should be decided according to the law of that Province, the question whether Mr. *Doutre* has a right of action to recover his fees as one of Her Majesty's counsel before the Fishery Commission is found to be solved. Under that law this question does not admit of doubt. See *Amyot* v. *Gugy* (1) and authorities there cited. *Devlin* v. *Tumblety* (2), *Beaudry* v. *Ouimet* (3), *Grimard* v. *Burroughs* (4), *Vandal* v. *Gautier* (5), and *Larue* v. *Loranger* (6), where the claim for fees was not maintained by the Court of Appeal, but it was because there was a tariff regulating those fees and no special agreement to pay any extra remuneration had been proven by the plaintiffs. The decision in the case of *Grimard* v. *Burroughs* (7) was in the same sense. See also *Cour de Cassation arrêts du* 16 *decembre*, 1818 vo. *Depens* (8).

In the case of *Devlin* v. *The Corporation of the City of Montreal* the Court of Appeal on the 13th March, 1878, granted to Mr. *Devlin* $2,500 for his fees as the corporation lawyer on the Mount Royal Park expropriations, after weighing the evidence given in the case of the value of his services, there being no tariff regulating fees for such services, and thereby affirming the principle upon which the judgment of Mr. Justice *Johnson* in the court below had been given (30th May 1877), although reducing the amount.

The *considerants* of the judgment of the Superior Court on that portion of this claim which related to his

(1) 2 Q. L. R. 01.
(2) 2 L. C. Jur. 182.
(3) 9 L. C. Jur. 158.
(4) 11 L. C. Jur. 275.
(5) 5 Rev. Leg. 132.
(6) 2 Leg. News. 155; and in appeal 3 Leg. News. 284.
(7) 11 L. C. Jur. 275.
(8) P. 55. 1 Col.

fees as counsel on the expropriations of the park, are as follows:

Considering also that from the professional and other evidence adduced by plaintiffs, it was proved that the said mentioned services were worth the sum of ten thousand dollars; and further, that in the judgment of this court, after duly weighing such evidence, the said plaintiff is entitled to receive from the defendant for such last-mentioned services four thousand dollars.

The Court of Appeal gave as one of its *considerants*:

Considering also, that in the judgment of this court, after duly weighing such evidence, the said respondent (*Devlin*) is entitled to receive from the appellants (*The Corporation of Montreal*) for such last-mentioned services (on Mount Royal Park expropriations) two thousand five hundred dollars.

This is certainly an affirmance by both courts of the principle that an advocate can recover the value of his services on a *quantum meruit* when his services are given out of court, or their value not fixed by the tariff.

Grimard v. *Burroughs* and *Larue* v. *Loranger* were relied on by Her Majesty's counsel as contrary to the respondent's pretension. But on reference to these cases, it will be found that all that has been decided is that when there is a tariff of fees and there has been no contract on the part of the client to pay more than what the tariff allows, the advocate or counsel cannot claim more than what is allowed in the tariff. It is quite evident that those cases have no application to the present case, for there was no tariff of fees in force for the counsel who were engaged before the Fishery Commission. See also the following articles of the code: Arts. 1722 and 1732, and Art. 2260, which enacts that an action for fees is prescribed by five years. Before five years the action will lie. See also *Troplong* vo. *Mandat* (1), 27 *Laurent* (2), 6 *Boileux* (3), and the Report of the Codifiers (4).

(1) Nos. 223, 249, 253, 630, 643, 644, 645.
(2) Nos. 334, 335.
(3) Nos. 145, 574, 575.
(4) vol. 2, 6th Report, pp. 7 and 8.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

The law is the same in *Jersey Island* and in the State of *Louisiana*, the laws in force there being in great part derived from the French law, or are similar. See the argument of Sir *Roundell Palmer*, now Lord *Selborne*, in the case of *The Jersey Bar* (1). In *Louisiana* see *Hunt* v. *The Orleans Cotton Press Co.* (2), *Re Succession of Macarty* (3), *Brewer* v. *Cook* (4), *Edelin* v. *Richardson* (5), *Re Succession of Lee* (6).

I should not have thought it necessary to dwell at length on a proposition which I believe is no longer denied or even doubted in the Province of *Quebec*, if the learned counsel representing Her Majesty had not urged the contrary.

I will now refer to the evidence given in the case, and will state at once that, according to the laws of the Province of *Quebec*, Mr. *Doutre* could not be heard as a witness on his own behalf, and that the evidence of Mr. *Doutre*, which is of record as evidence on his own behalf, cannot be taken into consideration in determining this case. Sec. 63 of the Act 38 *Vic.* c. 11, which establishes the Exchequer Court of *Canada*, expressly enacts :—"Issues of fact, in cases before the said court, shall be tried according to the laws of the Province in which the cause originated, including the laws of evidence." And sec. 13 of 39 *Vic.* c. 27, makes this clause applicable to petitions of Right.

Before considering the evidence which is of record in this case, it is necessary to determine what are "the matters in issue" between the parties as appears by the record.

In the first place, what does the suppliant claim in his petition? It is simply a claim based on a *quantum meruit* for professional services rendered for Her Majesty

(1) 13 Moo. P. C. C. 263.
(2) 2 Robinson 404.
(3) 3 Louis. An. Rep. 517.
(4) 11 Louis. An. Rep. 637.
(5) 4 Louis. An. Rep. 502.
(6) 4 Louis. An. Rep. 578.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

and at her request by the suppliant before the Fishery Commissioner, together with an allegation claiming the expenses incurred by the suppliant in the execution of his duties as advocate, and stating that these expenses amounted to more than $8,000, and an averment that the suppliant was engaged for over two years in performing his duties. The suppliant also states that he has received a sum of $8,000 on account of his services, and for which sum he credits Her Majesty. He alleges also that by a provisional agreement, made with the Department of Marine and Fisheries, it was agreed, before his departure for *Halifax*, where the commission sat, that the Government would pay $1,000 per month during his stay in *Halifax* for his current expenses, leaving the amount to be paid for his fees and expenses to be determined after final settlement of the matters before the commission. These are in substance the material allegations of this petition.

In answer to the petition the Attorney-General, on behalf of Her Majesty, pleaded as follows:

[His Lordship read the statement in defence (1)].

The suppliant replied as follows:

[His Lordship read the replication (2)]

Now let us examine the proof adduced in support of the issues joined.

In the first place, as to the fact, whether the Minister of Justice retained the services of Mr. *Doutre* to be one of the advocates and counsel of Her Majesty before the Fishery Commission, the letter of the Minister of Justice on the subject was fyled, and no better proof could be given by the suppliant in support of this allegation. But was it necessary for him to prove this fact? He acted publicly and openly in his said capacity of advocate of Her Majesty. The government has paid him $8,000 towards his expenses, and we find the Attorney-

[(1) See p. 404.] [(2) See p. 405.]

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

General, in his statement of defence, stating that he does not know, and denying, that Mr. *Doutre* was retained, as he alleges, as one of Her Majesty's advocates!! Have we not reason to be surprised at finding such a plea on behalf of the Attorney-General?

As to the third plea, it is simply an admission that the suppliant was engaged for at least two years in the performance of his duties, and that his expenses were not less than $8,000.

That the Crown should allege that the payment of $8,000 to Mr. *Doutre* was in full of all claims by Mr. *Doutre*, I can quite understand, but after having paid him $8,000 for such services, that the Crown should, in a court of justice, plead that Mr. *Doutre* was not retained as an advocate by Her Majesty before the Fishery Commission, shows clearly that those whom the Crown entrusts with the duty of defending its interests before the courts sometimes forget the dignity and character of their client. To that portion of the statement of defence which alleges that Her Majesty was not bound to pay the expenses of Mr. *Doutre* and of his family while the commission sat at *Halifax*, I may state that I do not attach much importance, and the reason I do not, is on account of the nature of the evidence, which is to be found in the record on this point.

The fourth plea alleges that the $8,000 paid to Mr. *Doutre* were accepted by him as a payment in full for his services and expenses. The evidence on this part of the case is contradictory. According to Sir *A. Smith*, then Minister of Marine and Fisheries, it would seem that such was the case, and that the arrangement made by him on behalf of Her Majesty was that the $8,000 should be accepted by Mr. *Doutre* as settling in full his claim for his fees as well as for his expenses. Mr. *Whitcher*, however, the Commissioner of Fisheries for the *Dominion*, and paymaster of the commission

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

sitting at *Halifax*, swears positively that the arrangement made between Mr. *Doutre* and the Minister of Marine and Fisheries was provisional, and that a final settlement as to the amount to which Mr. *Doutre* would be entitled for his services would be determined only after the conclusion of the business. Mr. *Whitcher* took down in writing a memorandum of the conversation between Mr. *Doutre* and the Minister of Marine and Fisheries, and in that memorandum he made use of the following words, "a gratuity on the conclusion of the business." But he goes on to explain that when taking down the memorandum he did not take down *verbatim* what was said between the Minister and Mr. *Doutre*, but he merely put down the substance of their conversation. He swears positively "That it ended" (that is to say, the conversation between Mr. *Doutre* and the Minister) "on the understanding that it would be a temporary arrangement; so far it was not specified, that is to say there was to be $1,000 paid for retainer, $1,000 for refresher, and $1,000 per month while the commission sat. Further remuneration to these amounts was to form the subject of after consideration."

In a note addressed by Mr. *Whitcher* to Mr. *Weatherbe*, one of the counsel retained with Mr. *Doutre*, the former states:

> My recollection is clear that *Doutre's* letter for self and *confrères* stipulated that the agreement about retainer, refresher and personal expenses was provisional, and that settlement for professional services was deferred till the result of the commission. This was acquiesced in by Sir *A. Smith* and Mr. *Ford*.

The judge sitting in the Exchequer Court has adopted Mr. *Whitcher's* version of the arrangement, and I am of opinion that he could not well have arrived at another conclusion. No doubt both Sir *A. Smith* and Mr. *Whitcher* are witnesses of the highest respectability, but it was necessary to adopt one version and to exclude the other—a choice had to be made. The judge

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

a quo has thought that Mr. *Whitcher's* version should prevail, as he had noted in writing at the time the conversation of the parties, whilst Sir *A. Smith* relied entirely upon his memory, which may have failed him. I may add that Mr. *Whitcher's* testimony is corroborated by letters written to the other counsel engaged in the case by Mr. *Doutre* at the very time he was making an arrangement for them all with the Government for their services before the Fishery Commission. True, the letter to Mr. *Thomson* is proved by himself, heard as a witness, and it is a well-known rule that a party cannot make evidence for himself by letters which he has written, but here this letter can be taken into consideration as forming part of the *res gestæ*.

Moreover, with the evidence which is of record, it would have been quite competent for the court below to have examined Mr. *Doutre* under oath (1), and if the court below had that power this court, sitting as a Court of Appeal in a cause to be determined according to the laws of the Province of *Quebec*, has the same power (2).

Now, as we find Mr. *Doutre's* testimony of record in the case, what objection could there be to read it as if given under the oath put by the court officially? If the court were of opinion that it could not look at the evidence, then all that need be done would be to examine Mr. *Doutre* under such oath, and, after having taken down his answers, to render judgment. The result would be the same. But being positive that Mr. *Doutre* would not swear to anything else than what he had already sworn to, there is complete proof to my mind that the sum of $8,000 paid was simply a provisional payment, and that the final settlement should take place after the closing of the business, and this virtually settles the

(1) Art. 448 C. C. P.

(2) *Ferrier* v. *Dillon*, 12 L. C. Jur. 202. *Daley* v. *Chevrier*, 1 Dorion's Q. B. Rep. 293.

1882

THE QUEEN v. DOUTRE.

Taschereau, J.

case. It must also be borne in mind that if this petition (which has been admitted to be a test case in order to determine the rights, not only of Mr. *Doutre*, but also of the other counsel employed by the crown before the Fishery Commission) had been fyled by any of the other counsel, then Mr. *Doutre's* evidence would have been admissible, and he would have proved that this arrangement with the Minister of Marine and Fisheries was a provisional arrangement.

As to the evidence on the *quantum meruit*, it is as complete as it was possible to make it in a case of this kind, and it is always difficult to make proof of a *quantum meruit*. On this point I can add nothing to what has been said by the learned judge of the court below, who has analyzed the evidence, and has clearly established that the amount of $8,000 which he awarded to the suppliant was well and justly due him by the Government. I would have granted the suppliant $100 per day instead of $50. If we take into consideration the important interests which Mr. *Doutre* was representing before the Fishery Commission, the important and new points which he had to master and deal with; and we must not lose sight of the fact that millions of dollars were claimed and millions were awarded; and if we remember the amount of preparatory work which Mr. *Whitcher* and Mr. *Walker* have proved Mr. *Doutre* had to perform in order to fulfil satisfactorily the important services which he had been asked by the Government to render, and if we take into consideration that he was obliged to pass six months at *Halifax*, and to be away from his office and his clients—and there is evidence that his practice was one of the largest in *Montreal*—I must admit that I am surprised to find that Her Majesty has obliged Mr. *Doutre* to have recourse to a court of justice to get paid the amount which he claims for his services.

1882

THE QUEEN v. DOUTRE.

GWYNNE, J.:—

If the contract upon which the suppliant is sueing had been a contract entered into by him with the Minister, who did enter into the contract sued upon, for professional services to be rendered to himself personally, within the Province of *Quebec*, by the suppliant in his character of an advocate practising at the bar of that province, it may be admitted, that by the law of the Province of *Quebec*, the suppliant could have sued his client upon such contract in the courts of that province. *McDougall* v. *Campbell* (1) is an authority in support of the proposition that in the courts of the Province of *Ontario* also an action will lie at the suit of a barrister against his client for professional services rendered by the former to the latter, under a contract in that behalf; the authority of that judgment is, in some degree, weakened by the dissenting judgment of the Chief Justice of the court. Whether there is any difference between the law of *Nova Scotia* and that of *Ontario* upon the subject, and whether the same considerations which influenced the majority of the court in *McDougall* v. *Campbell* would prevail in the courts of *Nova Scotia*, upon the same question arising there, and that case being brought to the notice of the courts, may be open to doubt.

As to the contract with which we have to deal, it must, I think, be held to have been entered into in the Province of *Ontario* for professional services to be rendered in the Province of *Nova Scotia*, in a court of justice established under the authority of the Treaty of *Washington* for adjudicating upon a litigious matter of a national character, in controversy between the two nations of *Great Britain* and the *United States of America*. The contract, therefore, in my opinion, cannot be affected by the law of the Province of *Quebec*, or

(1) 41 U. C. Q. B. 332.

by the circumstance that the suppliant is an advocate practising at the bar of that province, and as such could maintain in the courts of that province a suit against a private client to recover remuneration for his services, and in the view which I take, it is not necessary for us to decide whether the case of *McDougall* v. *Campbell* was well or ill-decided, for this case cannot be governed, as it appears to me, by the law as affecting private contracts between a client and his counsel or advocate, whether that law be the law as it prevails in the Province of *Quebec*, or in *Nova Scotia*, or in *Ontario*.

As to the terms of the contract, we must, I think, adopt the evidence of Mr. *Whitcher*, and hold it to have been to the effect that, in addition to the retainer, then already paid, the suppliant should receive a further sum of $1,000, which was called a refresher, and also $1,000 more per month, during the session of the commission at *Halifax*, and, on the conclusion of the business, all expenses of travel and subsistence, and a liberal gratuity. Whether the term "liberal gratuity," as here used, should be received in the strict sense of the word "gratuity," is a question which, in view of the circumstances under which Mr. *Whitcher* says it was promised, namely, as a something to be given to the suppliant for services to be rendered after they should be rendered, when their value could be better estimated, seems to me to be open to doubt. Certainly if, as I understand Mr. *Whitcher*, the suppliant was led to regard it as a something, which, although undefined in amount, was to have in it the element of liberality, which he was induced by the promise to expect to receive as a return or recompense for his services, it could not properly be called a gratuity, which involves the idea of the absence of any equivalent or consideration being given for it; but this is a question also, which, in the view I take, it is unnecessary to decide.

1882

THE QUEEN v. DOUTRE.

Gwynne, J.

The suppliant's remedy against the Crown is prescribed by the Petition of Right Act, 38 *Vic.* c. 12. That act constitutes the suppliants sole *locus standi*. His right to the benefit of this remedy against the Crown must be governed wholly by the provisions of that act, and if it does not give to the suppliant the remedy of which he is seeking to avail himself, he cannot prevail as against the Crown, notwithstanding that he might maintain an action against a private client upon a similar contract. The object of that act, as its title indicates, is "to provide for the institution of suits" against the Crown by petition of right, and it enacts in its 8th sec. that "nothing in this act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England*, under similar circumstances by the law in force there prior," &c.

It was argued, that the proper construction of this clause was merely that the 38 *Vic.*, c. 12 did not *give* the remedy asserted in the present case, and it was contended that it was not necessary that it should, for that the remedy was *given* by the 58th sec. of the Exchequer Court Act, which was passed upon the same day, viz., 38 *Vic.* c. 11, but a reference to this 58th sec. shows this contention not to be well founded, for it merely enacts that the court, besides certain concurrent original jurisdiction given to it, not comprehending the present case, "shall have exclusive original jurisdiction in all cases in which demand shall be made or relief sought in respect of any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown." Now, relief under this section is also limited to cases in which relief might be sought against the Crown in the Court of Exchequer in *England* on its revenue side, so that, whichever

1882

THE QUEEN v. DOUTRE.

Gwynne, J.

statute we refer to, we must conform to the law prevailing in *England*, and as it would be administered there, in a similar case; nor does the amendment of the 58th sec. of 38 *Vic.* c. 11, which is effected by 39 *Vic.* c. 36, sec. 18, make any difference, for the amendment only gives to the Exchequer Court additional jurisdiction in all cases in which demand shall be made or relief sought in respect of any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its plea side against any officer of the Crown. Now it is clear beyond all doubt, that in *England* no counsel could maintain an action against a client to recover any sum of money promised to be paid by the client to such counsel for his advocacy, whether the promise should be made before or during or after litigation. The case of *Kennedy* v. *Broun* (1) is sufficient authority for this proposition. It is clear, therefore, that no counsel in *England* could, in like circumstances, have any remedy against the Crown by Petition of Right.

But it is contended that the expression in the above 8th sec. of 38 *Vic.*, c. 12, "under similar circumstances by the laws in force there," that is, in *England*, makes it necessary to import into the consideration of the case the fact that the suppliant is an advocate of the bar of the Province of *Quebec*, and that, in that province, he could maintain an action at law against a private client, and that, assuming the law of *Ontario* to prevail as the province in which the contract was entered into, he could, upon the authority of *McDougall* v. *Campbell*, also maintain an action in the courts of *Ontario* upon a like contract against a private client. It is contended, therefore, that the question arising upon the application of the 8th sec. of 38 *Vic.* c. 12, is not whether a counsel in *England*, upon such a contract made in *England* as

(1) 13 . B. N. S. 677.

1882

THE QUEEN v. DOUTRE.

Gwynne, J.

was made here with the Dominion Government, could have a remedy by petition of right against the Crown, but whether the suppliant, assuming him to be entitled to maintain an action at law in the courts of the provinces, against a private client for professional services rendered to such client, is not *therefore* entitled to this remedy by petition of right against the Crown. In this manner only, as is contended, can effect be given to the words "under similar circumstances," &c., &c., in the Dominion Act.

Viewing that contention in the most favorable light possible for the suppliant, the question raised by it in substance amounts to this: if the contract which was entered into by the Minister of Marine and Fisheries with the suppliant had been entered into with him by a person duly authorized to act for and to represent the Imperial Government, and if the Imperial and not the Dominion Government had been the superior with whom through such agent the contract now relied upon by the suppliant was made, could the suppliant in such case proceed by petition of right in *England* against Her Majesty? And, to my mind, it appears to be clear that he could not. He would, in such case, be in no better position than an English counsel entering into a like agreement for his professional services. Whether the suppliant could, or could not, maintain an action at law in the provincial courts against a private client for professional services, would not enter into the consideration of the case. The question whether he could proceed by petition of right in *England* must be regulated solely and exclusively by the law of *England*, which does not give to the subject such remedy in such a case, and the effect of the 8th section of the Dominion Act, in my opinion, is, that the subject shall have no remedy by petition of right against the crown in the Dominion of *Canada*,

1882

THE QUEEN v. DOUTRE.

Gwynne, J.

if he would not have been entitled to the like remedy in *England* in similar circumstances by the law as in force there. The effect of the statute, as it appears to me, is, that (whatever may be the difference between the law of *England* and the laws of the respective provinces of the Dominion, as to the right of a counsel to maintain an action against a private client for professional services,) as affects the public represented by the crown, the law of *England* and that of the Dominion of *Canada* is the same, and it excludes a counsel in the case of a contract with the crown for his advocacy from all remedy by petition of right, to enforce such contract, thus placing all subjects of the crown in the like position under similar circumstances.

The appeal, therefore, in my opinion, should be allowed.

Appeal dismissed with costs.

Attorneys for appellant: *O'Connor & Hogg.*

Attorney for respondent: *R. G. Haliburton.*

1881

*May 5,6,7.

*Dec. 13.

LOUIS DUPUY, *ès-qualité*.....APPELLANT;

AND

DAME M. M. DUCONDU *et al*.....RESPONDENTS.

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

Sale en bloc—Deficiency—Warranty, effect of.

By a deed executed October 22nd, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw mill, the right of using a road to mill, four acres of land, and all right and

* PRESENT: Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry and Gwynne, J.J.

1881

DUPUY
v.
DUDONDU

title obtained from the Crown to 255 square miles of limits for a sum *en bloc* of $20,000, the respondents ceded and transferred "with warranty against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles; in the description of the limits given in the deed, the following words are to be found: "Not to interfere with limits granted or to be renewed in view of regulations." The limits were, in 1867, found in fact to interfere with anterior grants made to one *H.*

Held, That the respondents having guaranteed the appellants against all troubles whatsoever, and at the time of such warranty the said 50 miles of limits sold having become, through the negligence of respondent's *auteurs*, the property of *H.*, the appellants were entitled, pursuant to Art. 1518 C. C., P. Q., to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to Art. 1515 C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the court of first instance, and that upon a report to be made by experts to that court on the value of the same at the time of eviction the case be proceeded with as to law and justice may appertain.

Per *Henry* and *Gwynne*, J. J., dissenting, That the only reasonable construction which could be put upon the words "with warranty against all troubles generally whatsoever" in the deed, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves, as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses should enjoy the limits therein described, notwithstanding it should appear that they were interfered with by a prior license. But, assuming a different construction to be correct, there was not sufficient evidence of a breach of the guarantee.

APPEAL from a judgment rendered by the Court of Queen's Bench, *Montreal* (*Sir A. A. Dorion*, C. J. and *Monk*, *Ramsay* and *Cross*, J.J.), confirming a judgment of the Superior Court, *Joliette* (*Olivier*, *J.*), whereby the action of *T. H. Cushing*, plaintiff, now represented by appellant, against the respondents, was dismissed.

The facts of the case are briefly these: The late *Edward Scallon*, of *Joliette*, lumber merchant, by pro-

mise of sale, dated 10th July, 1858, agreed to sell to *Benjamin Peck* or his assigns, "a saw mill built of stone, situated on the *L'Assomption* river, in the second range of township of *Keldon*, in the parish of *St. Charles Borromée*, in the said district of *Joliette*, with its saws, straps, gearing, water power, booms, chains, anchors.

"The right of using the road leading from the Queen's highway to said mill.

"Four acres of land bounded as follows: in front by the Queen's highway, in rear by the brink of the hill, on the north side by the road leading from the Queen's highway to the mill, on the south side by the land owned by the seller with the right of passing over the land of the seller along the bank of the river from the mill to the boom.

"All the right and title obtained by seller from the Crown to certain timber limits situated on the banks of *L'Assomption* river and its tributaries, the *Black* river and river *Ducharme*," in all thirteen limits covering an area of 256 square miles, for the sum of $20,000 and other considerations. After *Scallon's* death, his successors, represented by respondents, in execution of the promise of sale, by notarial deed of the 16th March, 1865, "did cede, transfer and abandon with *promise of warranty against all troubles generally*," to the appellant as *Peck's* assign, the immoveables and rights which the late *Edward Scallon* had promised to sell to the said *Peck*, giving the description *verbatim* as in the promise of sale of the 10th July, 1858.

The sellers by this deed also acknowledged that the $20,000, price of sale of the said limits, had been paid to the said late *Edward Scallon* in the manner stipulated for in the paper-writing of the 10th July, 1858. They recognized also having received from the said *B. D. Peck*, his representatives and assigns, the costs of the renewal of all the licenses for said limits dating from 10th July, 1858, up to the 16th March, 1865.

1881

DUPUY v. DUCONDU.

It was, however, afterwards discovered that there was a deficiency of fifty square miles in the extent of the timber limits sold, and thereupon *P. E. McConville*, as agent for the respondents, for the purpose of making good the above deficiency of fifty miles of timber limits, by another notarial deed dated 22nd October, 1866, "did cede and transfer, *with warranty against all troubles generally whatsoever*, to the appellant present and accepting thereof, an equal quantity of fifty miles of timber limits on the *L'Assomption* river, and described as follows in the English language, to wit:

"No 25. 25 square miles { "Commencing at the upper end of limit No 94, on the south west side of *L'Assomption* river, *granted to late Edward Scallon*, and extending five miles on said river, and five miles back from its banks, making a limit of twenty-five square miles, *not to interfere with limits granted or to be renewed in virtue of regulations.*"

"No. 26. 25 square miles { Commencing on the north-east side of *L'Assomption* river, at the upper end of limit No. 96, *granted to late Edward Scallon*, and extending five miles up the river, and five miles from its banks, making a limit of twenty-five square miles, *not to interfere with licenses granted or to be renewed in virtue of regulations.*" And the licenses for the year 1866, 1867, were handed to Mr. *Cushing*, and a sum of $500 for all claims whatsoever up to that day was paid by respondents.

With a view to work these 50 miles of limits, and to bring the wood down by the river *L'Assomption*, the plaintiff in 1867-1868, caused the rocks to be blasted, and the obstructions existing in the river to be removed, and constructed four dams to hold in the water and facilitate the bringing down of the wood from said limits.

But it was found that these limits also interfered

with limits granted to *George B. Hall*, and the matter having been referred to the Crown Lands Department, it was ascertained that the limits assigned by the last deed of 22nd October, 1866, to appellant by respondents *did not exist*, and were covered by the licenses previously granted to Mr. *Hall* as far back as 1853. Conformably to the foregoing facts plaintiff (appellant) brought his action and prayed for a condemnation against the defendants in the sum of $58,200, leaving them, however, the option of immediately placing him in possession of the quantity of 50 miles of limits, either those sold him by the deeds of 10th July, 1858, and of the 16th March, 1865, or else those above described, and in either case asking condemnation for $8,200 damage only.

The defendant, *Dame Clothide Scallon*, pleaded separately from the other defendant, but she, as well as the others, set up against the action a *défense en fait* followed by a peremptory exception. By the latter plea the defendants allege:

That by the deed of 22nd October, 1866, the plaintiff acknowledged having received from the defendants the licenses for the two timber limits which he pretended then to be deficient upon those sold him by the late *Edward Scallon*, and the said defendants.

That by the same deed the plaintiff acknowledged having received from the defendants a sum of $500 for all rights and claims whatsoever that he might have had until that time against the defendants by reason of the deeds made by said *Edward Scallon*, or by the defendants in favor of said plaintiff or his predecessors (*auteurs.*)

That the parties to the said deed reciprocally and in good faith gave to each other a general acquittance of all claim that might exist on one side or the other.

There was a cross-action, but the judgment rendered on the cross-action was not appealed from.

1881

DUPUY v. DUCONDU.

The plaintiff, by his answers to the defendants' peremptory exceptions, alleged that it was only in consideration of the cession and abandonment made to him, in full ownership, by defendants of the 50 miles of limits in question, and of the undertaking on their part to secure him in the enjoyment thereof with warranty against all possible disturbance, encroachment or trouble of whatever nature or kind, and upon the payment to him made of the sum of $500, that he consented to grant acquittance of the claims he had against the defendants, the said acquittance relating chiefly to divers claims which the plaintiff had against the defendants for encroachments they had made upon his limits and other properties.

Upon this issue the parties went to proof, and judgment was rendered against the plaintiff dismissing his action, which judgment was confirmed in the Court of Queen's Bench (appeal side.)

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

The action in this case arises out of an agreement, dated 22nd October, 1866, between *T. H. Cushing*, appellant's representative and the respondents, by which the latter expressly sold and conveyed to said *Cushing*, with promise of warranty against all hindrances, 50 miles of limits, Nos. 25 and 26, in lieu of limits 97 and 98 that were wanting in a previous transaction. *Cushing* only found out in 1868 that he could not get possession of limits 25 and 26, the Government having previously sold them to one *Hall*, and thereupon this action was commenced against *Scallons's* estate upon a breach of the express warranty contained in the agreement. The Superior Court and the Court of Appeal dismissed our action on the ground that the warranty did not extend to these licenses; in other words, that the warranty only meant the seller had the

licenses and the buyers stood in his room and place with the Crown.

I submit that view is erroneous. These licenses are issued under Con. Stat. Can. ch. 23, and under Order in Council August, 1851, licentiates were entitled to renewal perpetually, and the Courts of *Quebec* have so held. *Watson* v. *Perkins* (1).

Under the code, art. 1592, they are bound to deliver us what is sold to us, and having found *Hall* in possession they were bound to put us in possession; the burden is upon them to show that *Hall* had no right to be there. We say also that, under the departmental regulations, it is provided, if any conflict between adjoining owners arises, it shall be determined in the office, and we say the Commissioner having given his decision against us, that was practically an eviction and there was no need on our part to produce *Hall's* licenses. The bargain was, that they were to give us licenses which would have been renewed from year to year, and we complain that they had no such licenses to give us. We have given legal evidence that we could not get possesion as Mr. *Hall* had been lumbering for ten years on this land. *Harper* v. *Charlesworth* (2).

As to the obligation of the seller I will cite arts. 1491, 1492, and 1493, 1500, 1505. See also *Troplong Vente* (3).

Now as to the warranty—The respondents, by notarial deed, acknowledge their obligation in the most formal manner to make up the deficit of these fifty miles, and they convey to plaintiff, with express warranty against all hindrances whatsoever, not the licenses simply, but the specific quantity of 50 miles of limits indicated in the licenses set forth in the deed. It can-

(1) 18 L. C. Jur. 261. (2) 4 B. & C. 509.
(3) Nos. 263, 264.

1881

DUPUY v. DUCONDU.

not have been meant to weaken or impair the warranty in the prior part of this deed.

The danger of prior title was one it was quite competent for *Scallon's* representatives to warrant against, which was legally and appropriately done by just such a warranty clause as was used. Every grant from the Crown, whether of timber limits or of the soil itself, is made subject to the conditions stated in the deed or the statute authorizing it, that in cases of a prior grant, and in other instances also, the grant shall be void; but it could not surely be pretended that the holder of such a title or a person holding a quit claim deed could not be held to the consequences of a sale with warranty, because for the purpose of indicating the property sold, the original title was recited in the deed of sale, especially as in the case in question in this cause, the sale was avowedly made to effectually replace a like quantity which the purchaser had the most undoubted right to have from the vendors, and the warranty stipulated has no meaning unless attaining that object or its legal equivalent.

If the appellant is right, as he believes, in claiming that warranty against non-delivery exists in his favor, this, it seems, is decisive of the case, for the other points mentioned in the judgment and invoked by respondents have no force to prevent reversal of the judgment appealed from.

It is clear that the five hundred dollars cash paid by respondents at the execution of the deed of 22nd October, was in no way meant to stand alone as a sufficient consideration for the deed, if the fifty miles of limits failed, and that the right of appellant to indemnity for failure to convey these fifty miles is unaffected by the payment of said sum, which appears to have been paid as the difference in value between limits Nos. 97 and 98 and Nos. 25 and 26

1881

DUPUY v. DUCONDU.

If it be a fact that the possibility of not getting the limits was foreseen at the execution of the deed of the 22nd October, this is all the more reason why it is covered by the warranty, especially when this was the only thing to which the warranty could apply. See articles 1506, 1507, 1508, 1524, 1511, 1512, 1514, 1515, 1516, 1487, C. C.

Then that there was good cause and consideration for the stipulation fully appears in the deed itself.

These licenses were represented to the buyer as having been all renewed. Now, it appears that *Scallon*, instead of renewing all the licenses, put the money in his pocket, and therefore we find his succession recognizing that he was obliged to make them good.

It is in evidence that when the plaintiff wished to take possession of these limits he found there another person (*Hall*) who had been in possession of them for a period long prior to the deed of 22nd October, 1866. Was he therefore obliged to take recourse by petitory action against *Hall*, or had he not the right to take a direct action against the respondents ? It seems to us that this last course was open to him, for he had never had delivery of the limits from defendants according to terms of art. 1493 of the Civil Code. Several witnesses were examined, and all agreed in saying that the greater part of the land comprised in these licenses was covered by prior licenses granted to *Hall*. If counsel permits evidence to be gone into, it is too late afterwards to object, and I submit that point was waived.

Then the decision given by the Commissioner of Crown Lands is binding. See *Kennedy* v. *Lawlor* (1), and in this court *Farmer* v. *Livingstone* (2).

Independently of that, we contend the proof of *Hall's* right of preference to the limits in question is legally

(1) 14 Grant 224.

(2) 5 Can. S. C. R. 221.

1881

DUPUY v. DUCONDU.

proved by the official documents and plans of the Crown Lands Department.

Then it is argued also on the other side, that there is no proof of *McConville's* agency with power to give this warranty, but they themselves rely on this deed, and it is too late now for them to raise that point here. *McConville* was a witness for the defence, and there was no dispute as to his power to enter into the deed.

As to damages I refer to art. 1511.

Mr. *Trenholme* followed on behalf of the appellant:

The case of *Watson* v. *Perkins* (1) clearly establishes that the right and title in timber limits is a real right, and that the same rules apply in cases of sale of timber limits as of immoveable property. Now, this being admitted, can it be said that a man who goes into the market and pays $50,000 for limits, and it turns out there are no limits, is not even entitled at least to a return of the price paid? This brings me to discuss the judgment appealed from. There is, I respectfully submit, manifest error in saying respondents were under no obligation to make good the 50 miles conveyed to us. That point was not dealt with in the Superior Court. The deed of 1866 admits there was an obligation to make good these 50 miles, and then they superadded a warranty. Did they plead they were never obliged to this? I could stop and say if there was mistake, it was for respondents to plead it and prove it.

I will now say that they were bound to give us the deed of 1866. By the promise of sale in 1858 they sold their right and title; if these words are used it is because they are descriptive of the species of ownership which they had, and does not mean there is any defect in the title, and when the property is specified, the

(1) 13 L. C. Jur. 261.

seller is responsible in damages, for when a party sells, he warrants by law that he is the owner of the thing sold, and express warranty covers all defects. See *Duranton* (1), *Laurent* (2).

Mr. *Pagnuelo*, Q. C., and Mr. *McConville*, for respondents:

If it were true that the warranty clause was inserted not by mistake but deliberately; if it were true that *Hall* had prior licenses, and that *Scallon* had been guilty of pocketing $800; that plaintiff never had possession, and that all the parties interested had agreed to submit the difficulty to the commissioner, and he had decided against us, we admit we would be bound, and this appeal would have to be allowed. But we deny all these propositions, and we contend that the documents produced show that these assertions are without foundation. The point for decision in this case is whether we have fulfilled our original agreement by which we sold simply our rights to these limits. Now, in 1865, when it became necessary to fulfil the agreement entered into between *Scallon* and *Peck*, instead of following the original agreement of 1858, by which we sold simply our rights to cut timber on 256 miles of timber limits, the notary at the beginning of the deed inserted a general warranty clause which is to be found in all printed forms of notarial deeds of sale. It was evidently a *lapsus calami*, the intention of the parties clearly to fulfil the promise made in 1858, and nothing more. *Peck* had bought *Scallon's* licenses such as they were, at his own peril; all licenses were issued with such reservations under a statute, and under regulations published in the official *Gazette* of August 16th, 1851. *Peck* therefore made the risk his own by bargaining for "all the right and title obtained from the crown to certain timber limits, and also "the

(1) 16 vol. 264. (2) 24 vol. Nos. 257 to 260.

1881

DUPUY
v.
DUCONDU.

right of using and cutting timber on said limits is now given to the full extent which the said *Edward Scallon* possesses from the crown," and no more. Under such circumstances, and for either of these two reasons, to wit, the knowledge of the danger of eviction and the fact that he bought at his own risk, *Peck* could not claim back any portion of the price paid for such limits already granted to other parties or covered by former licenses in that wild, unsurveyed and unexplored part of the country, unless there be a positive and clear clause of warranty (1510, 1512, 1523, C. C.); and even then he could not claim any damage at all.

The undertaking by *Edward Scallon*, to give a good and sufficient deed to *Peck* on the payment of the price stipulated, had reference only to the mill, and went no further. There is an express stipulation to that effect.

There was no occasion to grant a deed for the timber limits, as the licenses were yearly renewed, and in 1855 were renewed in the name of the plaintiff, and were, together with his possession, the only deeds that could be granted to him and that he required. *Scallon* transferred to *Peck* the right he had to the renewal of the licenses, and *Peck* was to possess all the rights, under such licenses, that *Scallon* would have had. The licenses for the then current year were sufficient to entitle the plaintiff to a renewal in his own name; and it is not denied, but admitted that he availed himself of this right.

However, on discovering that licenses for Nos. 97 and 98 were missing, the appellants, by deed of 22nd October, 1865, substituted for them Nos. 25 and 26. Now, this deed shows that it was made for the purpose also of giving effect and fulfilling the bargain of 1858 in so far as the timber licenses were concerned. It is stated that, under and by the terms of this bargain, Mr. *Scallon* had agreed to sell to Mr. *Peck* 256 miles

1881

DUPUY v. DUCONDU.

of timber limits; this declaration can have no further extension than the writing of 1858 will warrant; it simply means therefore that Mr. *Scallon* had sold and transferred over to Mr. *Peck* such rights in timber limits intended to cover an extent of 256 miles, as he himself held under licenses from the Crown, and no more.

As to our pocketing $800, it is not stated or proved that we received the amount, but simply that all dues of the Crown were paid. It was stipulated that *Cushing* should pay ground rent, but there is no evidence that *Cushing* ever paid for these two licenses. The plaintiff held at that time licenses from the crown, and was perfectly well aware that they could not avail as against a former grantee; and further, the licenses themselves contained that reservation.

Under such circumstances, he accepted licenses Nos. 25 and 26 at his own risk, and no guarantee of any nature existed on the part of the defendants: art. 1020, 1523, C. C.; *Pothier* (1); *Troplong* (2).

A timber limit is something in its nature more aleatory than a venal office, on account of the uncertainty of its value, and even of its existence, against which the statute and the license itself forewarned the grantee.

The statute (R. S. C. ch. 23) enacts that if, by reason of inaccuracies in the surveys, or for any other cause, a license should include lands already granted, the license last in date is of no effect, and no claim shall lie against the crown.

What the defendants meant to guarantee was not the existence of the limits, but that of the license; all they transferred was the license and the rights that might accrue under it.

If it were intended that the guarantee should go

(1) Vente, No. 185.

(2) Vente, 480, 482, 495, 503, 506, 522.

1881

DUPUY
v.
DUCONDU.

further, it should have been expressly declared and warranted that the license was the one first issued, that the limits did exist, and that the plaintiff would have the peaceful enjoyment of them. In the absence of such a special guarantee, all the plaintiff can claim is that he shall enjoy the benefit of the licenses just as the defendants would have done.

We see an example of such a guarantee in 2 *Boniface*, p. 119, where the seller of a venal office stipulated a guarantee against the suppression of the charge, and was held liable in damages on account of new offices being created.

Also in art, 1577 C. C., which provides that when a debt or other incorporeal right is sold, and the seller, by a simple clause of warranty, obliges himself for the solvency of the debtor, the warranty applies only to his solvency at the time of the sale; if there is no clause of warranty, he is only responsible for the existence of the debt.

The learned counsel then reviewed the evidence and contended that the plaintiff had not proved that *Hall* held licenses covering the territory included in limits Nos. 25 and 26.

Let us now examine the plaintiff's other propositions necessary to establish his demand, that the Crown Land Commissioner was the proper authority to decide upon a question of timber limits or berths.

Under the rules and regulations adopted on 8th August, 1851, "in cases of contestation as to the right to berths or the position of bounds, the opinion of the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere, is to be binding on the parties, unless and until reversed by arbitration within three months after notification of such opinion has been communicated to the parties, or their representatives on the premises, or sent to their address, or by decision of court."

The licenses for Nos. 25 and 26 were issued under these regulations, which were revoked and replaced by new regulations only on 13th June, 1866, as appears from official *Gazette* of 23rd June, 1861, not fyled in this cause.

By these new regulations, disputes as to berths were to be settled by "the decision of the crown timber agent of the locality, or the inspector of crown timber agencies, or other officer authorized by the commissioner of crown lands." Never was the commissioner or his assistant invested with this supreme authority of deciding upon disputes between grantees of timber limits; practical men are always chosen. But we have only to look at the regulations of 1851 under which both the licenses of Mr. *Hall* and licenses Nos. 25 and 26 to estate *Scallon* were issued, and the only persons invested with that right are the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere.

Plaintiff was asked under oath to produce a copy of any claim in writing made by him with the commissioner; he answered that he could not find any copy.

The defendants then applied to the crown lands department for a copy of any claim filed by the plaintiff, and the result is the production of a memorandum dated 13th November, 1869, made and signed by plaintiff on behalf of *Theophilus Cushing*, the then proprietor *pro formâ* of the limits.

All he claims, then, by that memorandum is to b maintained in the possession of Nos. 94, (29), and (30) to the exclusion of Mr. *Hall*, who advanced p 26, ten-sions even against a portion of them.

This very important fact shows conclusive y that the plaintiff did not lose his right to limits N os. 25 and 26 (of 1866) through a decision of the cro wn lands com-missioner rendered in 1874, as the question was not submitted to him, and plaintiff had virtually given

1881

DUPUY v. DUCONDU.

them up in 1869 and even in the fall of 1868, when he gave way without resistance before Mr. *Hall's* men and agents, then in 1869 by this document, and next year by ceasing to renew the licenses.

Art. 1521 C. C. rules the present case.

Finally, supposing it to be true that the whole of Nos. 25 and 26 are covered by licenses issued in 1853 in favor of Mr. *Hall*, the plaintiff is precluded from claiming a cent from defendants on that ground, because he accepted them, together with $500, in full settlement of all claims whatever against the defendants; he accepted these licenses 25 and 26 issued in 1866, such as they were, as he had accepted No. 97 and 98 in 1858, such as they were at that time, whether they were prior or posterior to Mr. *Hall's*.

The present claim is but an attempt to take an advantage of an evident *lapsus calami* in order to have all the benefits of, and be relieved of, all the risks assumed in a *bonâ fide* contract, fairly executed by respondents. As to bad habits of notaries introducing clauses of style. *Trolong de la Prescription* (1); *Laurent de Villargue Repertoire* (2).

Mr. *Trenholme*, in reply.

RITCHIE, C. J.:—

It is quite clear that the release contained in the deed of the 22nd of October, 1866, does not extend to or in any way affect the warranty contained in that deed in relation to the fifty miles of limits thereby conveyed to the plaintiff; therefore the peremptory exception of defendants must fail, the replication of the plaintiff being a good and sufficient answer.

There is nothing whatever in the evidence or circumstances surrounding this transaction to justify our going behind the deed of 22nd October, 1866. My

(1) No. 62. (2) Verbo "style", 100.

brother *Fournier* has made this so manifest in the judgment he is about to deliver, which he has kindly permitted me to peruse, and in which I entirely agree, that it would be waste of time for me to discuss the question at greater length. Agreeing then, as I do, with the learned Chief Justice of the Queen's Bench that:

It is plain that the appellant, having by the deed of the 22nd day of October, 1866, discharged the respondent from all claims whatsoever arising out of the previous deed of the 16th March, 1865, cannot now refer to the original sale and promise of sale to sustain his present action. Whatever rights he might have had under the original deed, have been finally adjusted by the transaction of the 22nd of October, 1866—

on the same principle I am at a loss to conceive how it can be invoked by the respondents to defeat any rights the appellant may have acquired by the deed of the 22nd October, 1866, or to control or in any way prevent that deed from having its full effect in accordance with the terms and provisions therein contained, by which the rights of both parties must, in my opinion, be governed. "It is, therefore," as the the learned Chief Justice says, "under this last deed alone that the appellant can have any claim against the respondents, and any reference to other deeds, and to the obligations of the respondents under those deeds, is only calculated to create confusion, as such reference can have no effect whatsoever on the determination of this case."

By the deed of 22nd October, 1866, compensation is made to *Cushing*, assignee of *Peck*, for the deficit of fifty miles of the 250 miles of limits *Scallon* had, by deed of 6th March, 1865, agreed to sell to plaintiff in these words:

Et en vertu de ce titre feu M. *Scallon* s'était obligé de vendre deux cent cinquante six milles de limites pour couper du bois sur les terres de la Couronne situées sur la rivière de l'*Assomption* et ses tributaires la rivière *Noire* et la rivière *Ducharme*, et comme il

1881

DUPUY v. DUCONDU.

Ritchie, C.J.

se trouve un déficit de cinquante mille pour compléter la dite quantité de deux cent cinquante six milles cédés au dit M. *Théophilus H. Cushing* par l'acte de dépôt, cession et transport du seize mars mil huit cent soixante et cinq, le dit Sieur *McConville* pour et au nom qu'il agit, voulant compléter le déficit qui se trouve a, par les présentes, cédé et transporté avec la garantie de tous troubles généralement quelconques au dit M. *Théophilus H. Cushing*, ici présent et acceptant, la dite quantité de cinquante mille de limites sur la dite rivière l'*Assomption*, et désignée comme suit, en langue anglaise, savoir:

No. 25. 25 Square miles } Commencing at the upper end limit No. 94 on the south west side of L'*Assomption* river, granted to late *Edward Scallon* and extending five miles on said river, and five miles back from its banks, making a limit of twenty-five square miles, not to interfere with limits granted or to be renewed in virtue of regulations.

And for the damages in these words:

De plus, le dit M. *Théophilus Cushing* déclare que le dit M. *McConville* pour et au nom qu'il agit lui a présentement payé la somme de cinq cent dollars cours actuel pour toutes réclamations généralement quelconques qu'il aurait pu avoir contre la succession du dit feu *Edward Scallon* et ses représentants légaux, déclarant en outre au moyen des présentes qu'il n'a plus rien à prétendre ni réclamer pour aucunes fins, causes ni raisons contre ces derniers, lui résultant soit d'actes ou faits jusqu'à ce jour, leur donnant quittance et décharge générale et finale.

And

Et de son côté, le dit M. *McConville* pour et au nom qu'il agit donne au dit M. *Théophilus H. Cushing* et à tous autres qu'il appartiendra quittance générale et finale, et déclare en outre pour et au nom qu'il agit, qu'il n'a plus rien à prétendre ni réclamer en aucunes façons, causes, ni raisons quelconques contre le dit M. *Théophilus H. Cushing*, et résultant à la dite succession de feu *Edward Scallon* ses héritiers ou légataires universels sus-nommés jusqu'à ce jour, et lui en donne quittance et décharge générale et finale, sans que les présentes ne puissent préjudicier en aucunes façons quelconques aux droits et recours que la succession du dit feu *Edward Scallon*, ses représentants légaux, peuvent exercer contre *James Payton*, commercant de bois, de township de *Rawdon*, à raison d'une vente de billots par lui faite au dit feu M. *Edward Scallon* suivant contrat.

It is claimed that the "guarantie de troubles géné-

ralement quelconques" does not guarantee that the licenses were valid and subsisting, conveying to the holder the right purporting to be thereby conveyed, but that the same were to be taken and accepted subject to the proviso in the licenses contained, that they were not to interfere with limits granted or to be renewed in virtue of regulations.

The decision of the Court of Queen's Bench turns upon the assumption that respondents, having obtained licenses from the Crown for the limits in question, and having transferred those limits to the appellant, they have fulfilled their obligation, and that the appellants assumed the risk of any loss which might arise from the existence of a previous license for the same, or any portion of the same limits, and as to which the warranty did not extend, and that there was no cause or consideration for the guarantee. This is in truth the main and substantial question in the case, and was so treated by the respondent in his factum.

I think there was a clear case of misinterpretation of the contract. It seems to me the guarantee is not limited in any such way, and so to read it would make it meaningless; the clause in the license is for the protection of the Crown, the guarantee in the deed is for the protection of the assignee and to prevent his being subjected to the trouble and loss which would result from the limits having been already granted, and therefore subject to be renewed to other parties in virtue of regulations.

If this was not the intent and object for which the guarantee was given, it simply meant nothing, and if licenses, valueless by reason of the ground being already licensed to other parties, could be held as within the contemplation of the parties, how could the deficit be made good, and the object of the parties and of the giving of the deed be accomplished, viz:—"Pour com-

1881

DUPUY v. DUCONDU.

Ritchie, C.J.

pléter la dite quantité de deux cent cinquante six milles ?"

It is very clear to my mind that the original quantity having fallen short and the parties representing *Scallon*, being liable and ready to make up the deficiency, as by the giving of the deed of the 22nd October it is clearly admitted they were bound to do, did it by transferring these limits with a warranty that they were good, valid and subsisting licenses, and if they were not they would guarantee the holders of the licenses against all troubles whatsoever that might thereafter arise, by reason of the insufficiency to convey the right thereby purported to be conveyed. Without this guarantee, if the licenses should prove ineffective, the deficiency would not be made up as intended; with the guarantee, in such an event, the guarantee would furnish an equivalent, and so the evident intention of all parties that the deficiency should be made up, successfully carried out; therefore, while the respondents did not and could not convey to the appellant an indefeasible title to these timber limits, they undertook to convey such a title as the timber licenses granted by the Crown professed to give, and, in effect, guaranteed that if the licenses did not convey such a title they would indemnify the appellant against any loss which might arise to him by reason of the insufficiency of the licenses; in other words, by their guaranteeing, they assumed the licenses were, at the time of the transfer, in force, entitling the appellant to all the rights and advantages accruing to a license under a valid subsisting license and with which no other person had any right to interfere, that is to say, that they did not when so assigned interfere with limits already granted or to be renewed in virtue of regulations, and that they would guarantee the appel-

lant against any trouble that might arise by reason of any such outstanding or prior right.

Then, again, it is said there is no cause or consideration for this guarantee; but it seems to me the very best cause and consideration appears on the face of the deed itself; the representatives of *Scallon* discover that they cannot make good the undertaking of *Scallon*, that he having agreed to sell 250 miles they were fifty short, by reason of which *Cushing* representing *Peck* had a claim on them, to settle and dispose of which, it is agreed that they will give *Cushing* $500 for damages sustained, or difference in value of lots, and fifty miles of other limits in lieu of the deficiency, which they propose to do by transferring two other limits of fifty miles by a good and sufficient title.

To make good this deficiency, it is absolutely necessary that they should have right to those limits, that the licenses they claim the right to transfer should be valid and sufficient to convey the fifty miles, for if not valid and sufficient for that purpose and not conveyed by a good and sufficient title, matters would remain just as they were, the deficiency would not be made up, and without a guarantee of title, *Cushing*, while relinquishing his claim under the deed of 16th March, 1865, would have no security that he was actually obtaining what they proposed to give in lieu of such claim, viz., fifty miles of limits.

In consideration of *Cushing* releasing the succession of the late *Scallon* generally from all claims up to the date of the deed, they agree to pay him $500 damages, and to cede to *Cushing*, with guarantee against all troubles whatever, the limits in question, by which operation the deficiency is secured to *Cushing* under the license if good and valid, or under the guarantee should the lease prove valueless. A better cause or consideration for a guarantee I cannot very well conceive.

1881

DUPUY v. DUCONDU.

Ritchie, C.J.

As to *force majeure*, I cannot see there was anything of the kind in this case; had the licenses been issued and been good, valid and effectual at the time of transfer, and on the termination the Crown had refused to renew them, I can readily understand how, in such a case, respondents should be held to have fulfilled their undertaking, and should be held harmless as to any loss the appellant might make by such refusal. I think it is abundantly clear from the evidence in the case, as well on the part of the defendant as on that of the plaintiffs, that the limits in question were held by *Hall*, and in his possession at the time of the giving of this guarantee under a prior license, and so the license proposed to be transferred was of no effect and consequently there was a breach of the guarantee.

As to the damages, I think they should be estimated as follows:—

The whole purchase money or value of the mill, etc., and all the limits having been $20,000, experts shall ascertain the value of the mill and the land, and deducting the amount from the said $20,000, the balance will be the price of all the limits sold, *viz.*, 250 square miles; a fifth of this balance will be the price paid for the fifty square miles, from which, deducting $500 already paid by respondents as being the difference in value between the fifty miles which were wanting and the substituted fifty miles, the balance arrived at will be the amount to which plaintiff is entitled to on account of his purchase money, together with interest from 22nd October, 1866; and if the property at the time of eviction has increased in value, then plaintiff would be entitled to recover such increased value in addition to the price paid, of which the experts could be directed to enquire; but the eviction being so soon after the 22nd October, 1866, there would be probably no increase in the value.

1881

DUPUY v. DUCONDU.

Fournier, J.

And finally, experts to ascertain also the amount expended by plaintiff in improvements, and this amount, with interest from the date at which it was expended, being added to the above balance of purchase money and increased value, if any, shall be the total sum which the plaintiff is entitled to recover, with costs in the different courts.

STRONG, J., concurred in the judgment of *Fournier*, J.

FOURNIER, J. :—

La première question à examiner et à résoudre est de savoir exactement en quoi consiste le contrat intervenu entre les auteurs des parties pour la vente du moulin et des limites qui faisaient l'objet de la promesse de vente du 10 juillet 1858 entre *Edward Scallon* d'une part et *Benjamin D. Peck* de l'autre, ainsi que du contrat de vente en date du 16 mars 1865 fait en exécution de cette promesse de vente. Est-il vrai, comme le prétendent les Intimés que la vente n'est que du moulin et des quatre acres de terre avec un certain droit de passage, et qu'elle ne comprend aucunement les droits et titres obtenus de la Couronne par le vendeur, aux treize limites énumérées dans la promesse et dans l'acte de vente ? C'est-à-dire qu'aucune partie des $20,000, prix de vente, n'a été payée comme la considération de la cession de ces limites, lesquelles auraient été données sans considération à l'acheteur, comme le prétend le conseil des Intimés, —ou bien, cette vente n'est-elle pas au contraire, la vente de plusieurs choses ne formant qu'*un tout*,—qu'une seule exploitation, comme l'était le moulin en question et les limites qui fournissaient le bois de commerce nécessaire à son alimentation ?

La solution de cette question se trouve dans les termes de la promesse de vente et surtout dans l'acte de vente qui a définitivement fixé les droits des parties.

1881

DUPUY v. DUCONDU.

Fournier, J.

Pour appuyer leur prétention que les limites de bois ne font pas partie de la vente, et qu'aucune considération n'a été fournie pour icelles par l'acheteur, les intimés se fondent sur certaines expressions de la promesse de vente, qui, si elles étaient prises seules et sans égard aux termes formels de l'acte de vente, pourraient rendre assez plausible leur prétention. En effet on y trouve le passage suivant au sujet des limites :

> The right of using and cutting timber on said limit is *now given* to the fullest extent which the said Edward Scallon possesses from the Crown.

Et cet autre concernant le moulin :

> "Now, if upon the payment of the above sum as specified *for payment of the said mill*, I, Edward Scallon, *give a good sufficent title* of the above named mill, then this obligation shall be null and void, otherwise remain in full force and virtue.

C'est sur les mots "*now given*" dans la première citation que les intimés appuient leur proposition que les limites ont été données sans considération, et ils invoquent pour la confirmer les expressions qui se trouvent dans la seconde "*the above sums as specified for payment of the said mill.*"

Ce n'est pas en prenant des expressions isolées que l'on doit interpréter un acte ; lorsqu'il y a doute sur sa signification, c'est par l'examen de l'ensemble des conventions qu'il contient que l'on doit arriver à connaître la véritable intention des parties. En faisant application de ce principe à la promesse de vente en question, on y découvre facilement la nature du contrat des parties. Par cette promesse *Edward Scallon*, sur paiement de $20,000 s'obligeait de vendre (*has agreed to sell*) à *B. D. Peck*, non pas seulement le moulin comme le prétend les intimés, mais, comme on le verra par la citation ci-après, quatre différentes propriétés : 1o d'abord le moulin et ses agrès, etc., etc. ; 2o le droit de se servir du chemin conduisant du chemin public au moulin ;

1881

DUPUY
v.
DUCONDU.

Fournier, J.

3o quatre acres de terre y désignés ; 4o tout droit et titre qu'il a obtenu de la couronne à certaines limites dans les termes qui suivent :—

KNOW all men by these presents, that I, EDWARD SCALLON, of Industry village, in the district of Joliette, Canada East, stand bound and obliged to Benjamin D. Peck, Esquire, of Portland, State of Maine, in the full and just sum of thirty thousand dollars. The condition of this obligation is this, that this day I, Edward Scallon have agreed to sell to the said Benjamin D. Peck, or his assigns : A saw mill built of stone, situated on the L'Assomption river, in the second range of Township of Keldon, in the parish of St. Charles Borromée, in the said district of Joliette, with its saws, straps, gearing, water power, booms, chains, anchors.

The right of using the road leading from the Queen's highway to said mill.

Four acres of land bounded as follows : in front by the Queen's highway, in rear by the brink of the hill, on the north side by the road leading from the Queen's highway to the mill, on the south side by the land owned by the seller with the right of passing over the land of the seller along the bank of the river from the mill to the boom.

All the right and title obtained by seller from the Crown to certain timber limits situated on the banks of L'Assomption river and its tributaries, the Black river and river Ducharme as here enumerated and numbered as follows :

No. 94, twenty-five miles situated on the L'Assomption river.
No. 96, twenty-five miles situated on the L'Assomption river.
No. 97, twenty-five miles situated on the L'Assomption river.
No. 98, twenty-five miles situated on the L'Assomption river.
No. 27, twelve miles situated on the Black river.
No. 27½, twelve miles situated on the Black river.
No. 28, twelve miles situated on the Ducharme river.
No. 93, eighteen miles situated on the L'Assomption river.
No. 92, twenty-four miles situated on the L'Assomption river.
No. 91, eighteen miles situated on the L'Assomption river.
No. 90, twenty-four miles situated on the L'Assomption river.
No. 132, eighteen miles situated on the Black river.
No. 133, eighteen miles situated on the Black river, being in all an area of 256 miles.

La promesse de vente est donc d'un ensemble de propriété composé de quatre lots différents. L'expression de la considération qui suit l'énumération des

1881

DUPUY v. DUCONDU.

Fournier, J

propriétés ne peut laisser aucun doute sur ce sujet : "This bargain is made for and in consideration of the "sum of twenty thousand dollars, five thousand the "said seller acknowledged having received, &c., &c." Les mots "this bargain" ayant rapport à toute la transaction font bien clairement voir que la considération de $20,000 est pour toutes les propriétés décrites et non pas pour une seule en particulier.

Les mots " now given " au sujet des limites, venant après l'expression de la considération de $20,000, ne peuveut pas signifier " donner " dans le sens d'une donation gratuite, ils signifient dans cette phrase, donner pour la considération ci-dessus exprimée. Le mot " donner " doit avoir ici la signification qu'il a dans l'art. 1472, C.C. définissant la vente : " Un contrat par lequel une personne *donne* une chose à une autre moyennant un prix en argent que la dernière s'oblige de payer." Il faut encore observer que les mots *now given* ne se rapportent qu'au droit d'entrer en possession des limites et de les exploiter immédiatement, sans égard aux délais qui doivent s'écouler pour le paiement du prix de vente avant que l'acheteur puisse obtenir un titre définitif.

Il en est de même de l'expression " The above sums as specified *for payment of the said mill.*" Le mot *mill* n'est seul employé que pour abréger, en évitant de répéter l'énumération de toutes les propriétés, que dans la première partie *Scallon* s'obligeait de vendre et qui sont comprises dans l'expression de la considération " This bargain is made, etc., etc. "

Si cette interprétation n'était pas bien fondée, il n'y aurait pas que les limites qui auraient été données, il y aurait encore le droit de passage et les quatre acres de terre. Une telle interprétation serait manifestement contraire à l'intention des parties.

En effet, pourquoi les limites auraient-t-elles été

données ? Est-ce parce que ce genre de propriété est sans valeur, ou bien encore, est-ce que les conventions en question font voir de la part de *Scallon* une intention de faire une libéralité à *Peck* ? Ni l'une ni l'autre de ces suppositions ne sauraient être acceptées pour un seul instant. Indépendamment de la preuve faite en cette cause, il est de notoriété publique que les limites ou licences pour exploiter le bois de commerce sur les terres de la couronne ont une grande valeur. Il s'en vend fréquemment et pour des prix considérables, dépassant presque toujours la valeur des moulins qui servent à leur exploitation. Dans une vente comme celle dont il s'agit, l'objet principal de la vente était sans doute les limites—le moulin n'était qu'un acessoire assez facile à remplacer, tandis que le moulin seul, sans limites, n'aurait eu à peu près aucune valeur. Si, après un examen attentif des conditions de la promesse de vente, il pouvait rester encore un doute sur l'intention des parties, les citations ci-après faites de l'acte de vente le feront bientôt disparaître.

Comme on l'a déjà vu par les termes de la promesse de vente, ce n'est qu'après le paiement entier du prix de vente que *Scallon* s'obligeait de donner "*a good sufficient title.*" C'est ce que ses représentants ont fait en faveur de l'acquéreur des droits de *Peck* par l'acte de vente du 16 mars 1865, consenti en exécution de la promesse de vente, dans le but de donner *a good sufficient title* que *Scallon* s'était engagé de fournir.

Pour mieux faire ressortir le peu de valeur des arguments des intimés, concernant la vente des limites, je serai obligé de citer d'assez longs extraits de l'acte de vente.

Après l'énonciation des qualités des parties, et une déclaration de dépôt de la promesse de vente ci-dessus citée, l'acte de vente procède ainsi :

Les dites parties de première part ès-dites qualités déclarent qu'en

1881

DUPUY
v.
DUCONDU.

Fournier, J.

exécution au dit acte du dix juillet mil huit cent cinquante-huit, dont dépôt est ci-dessus fait, elles cèdent, transportent et abandonnent avec promesse de garantir chacun en droit soi, de tous troubles généralement quelconques, au dit Monsieur Théophilus Hamilton Cushing, comme étant aux droits et représentant le dit sieur Benjamin D. Peck, à ce présent et acceptant pour et au nom du dit M. Théophilus H. Cushing, ses hoirs ayant cause et successeurs, le dit François Benjamin Godin, Ecuier, son procureur comme susdit, les immeubles et droits que le dit feu Edward Scallon avait promis et s'était obligé de vendre au dit sieur Benjamin D. Peck, desquels immeubles et droits la désignation et description est ci-après donnée littéralement et verbatim et telle qu'elle se trouve en langue anglaise au dit acte du dix juillet mil huit cent cinquante-huit, savoir :

Suit la description des propriétés vendues exactement dans les mêmes termes que ceux de la promesse de vente citée ci-dessus, et immédiatement après cette description et l'énumération des limites à bois, l'acte continue ainsi :

Ainsi que le *tout* se trouvait, comportait et étendait de toutes parts circonstances et dépendances au dix juillet mil huit cent cinquante-huit, époque de la promesse de vente faite par le dit feu M. Edward Scallon, au dit Benjamin D. Peck, à l'exception cependant du bois qui a pu être coupé par ce dernier, ou ses représentants sur les dites limites depuis la passation du dit acte en dernier lieu mentionné jusqu'à ce jour, ainsi que le dit acquéreur le reconnait et dont et du tout il se déclare content.

Pour par le dit sieur acquéreur partie de seconde part jouir, u r faire et disposer *du tout présentement vendu en toute propriété* en vertu des présentes.

Les dites parties de première part ès-qualités déclarent que la somme de vingt-mille dollars, cours actuel, prix stipulé dans l'acte du dix juillet mil huit cent cinquante-huit précité, pour lequel le dit feu M. Scallon s'était obligé de passer titres en bonne et due forme *du tout présentement* vendu au dit Benjamin D. Peck ou représentants aussitôt que le paiement intégral en aurait été effectué suivant les termes portés au dit acte du dix juillet mil huit cent cinquante huit en capital et intérêt, qu'icelle dite somme aurait été entièrement et finalement payée tant en capital qu'en intérêts accrus sur les divers termes d'échéance stipulés dans la dite promesse de vente, et en donnent à qui de droit quittance générale et finale.

En conséquence, en vertu des présentes, les dites parties de première part ès-qualités mettent et subrogent le dit M. Théophilus

Hamilton Cushing partie de seconde part en *tous droits, noms, raisons, actions et privilèges* qui pouvaient résulter au dit feu M. Edward Scallon sur les dites limites, et lui ont présentement remis toutes les dites licences entre les mains du dit sieur Godin son procureur comme susdit, ainsi que ce dernier le reconnaît et en donne ès-qualité quittance à qui de droit, excepté celles de mil huit cent cinquante-sept et mil huit cent cinquante-huit et celles de mil huit cent cinquante-huit et mil huit cent cinquante-neuf qui n'ont pas été délivrées, celles de la présente année n'ont pas été délivrées n'ayant pas encore été retirées du bureau de l'agent des bois de la Couronne pour l'Ottawa inférieure, mais les dites parties de première part s'obligent de remettre au dit M. Cushing les dites licences ou copie d'icelles à leurs frais et dépens à demande.

De son côté, le dit M. Théophilus H. Cushing par son dit procureur promet et s'oblige de se conformer à toutes les règles et règlements auxquels les dites limites peuvent être assujéties envers le gouvernement de Sa Majesté en cette province, comme aussi de lui payer tous les droits qui peuvent être dus pour la coupe du bois sur les dites limites.

Au moyen de tout ce que dessus exprimé les dites parties de première part ès-qualités ont cédé et transporté au dit M. Théophilus H. Cushing partie de seconde part, pour lui ses hoirs et ayant cause, tous droits de propriété, fonds, très fonds, noms, raisons, possession et autre choses généralement quelconques qu'elles pourraient avoir demander ou prétendre en ou sur ce que dessus vendu, dont et du tout elles se sont démis et dessaisis pour en vêtir le dit M. Théophilus H. Cushing, ses hoirs et ayant cause, consentant qu'il en soit saisi et mis en possession par et ainsi qu'il appartiendra, constituant à cette fin pour procureur le porteur des présentes lui donnant pouvoir de ce faire ; car ainsi, etc.

Si la promesse de vente du 10 juillet 1858 ne contient pas une clause de garantie aussi précise que celle de l'acte de vente ci-dessus cité, c'est qu'elle ne constituait pas le titre définitif, mais elle contient cependant l'obligation formelle d'accorder cette garantie dans la promesse de donner *a good sufficient title* après paiement entier du prix de vente. Peut-on dire que les héritiers *Scallon* auraient exécuté cette convention en offrant à *Cushing* un titre sans garantie ou même un titre dont la clause de garantie aurait été omise ? Non, car il est de principe que le vendeur est tenu de garan-

1881

DUPUY v. DUCONDU.

Fournier, J.

tir à moins de stipulation contraire—mais il y a plus dans le cas actuel, la condition de fournir un titre bon et suffisant (a good and sufficient title) contient l'obligation de donner un titre avec garantie. Un titre sans garantie ne pourrait être considéré, d'après la loi de la province de *Québec*, un titre bon et suffisant. C'est ainsi que les héritiers *Scallon* l'ont compris en insérant la clause de garantie ci-dessus, laquelle, au lieu d'être un *lapsus calami* de la part du notaire, est évidemment en exécution de la promesse de donner un bon titre. La clause de garantie insérée dans cet acte est la clause ordinaire que l'on trouve dans toutes les ventes sérieuses et importantes. Elle est d'un usage général, et personne, on peut dire, n'aurait l'idée, dans la province de *Québee*, d'acheter des propriétés de l'importance de celle dont il s'agit sans cette stipulation de garantie. Les intimés ne pouvant nier avec succès l'existence de cette clause, essaient d'en restreindre l'effet à la vente du moulin, mais contrairement à leurs prétentions, cette clause est générale et s'applique à toutes les propriétés vendues par *Scallon*. Elle ne contient pas de restriction—elle couvre toutes les propriétés en propres termes par les expressions suivantes : "Avec promesse " de garantir chacun en droit soi, de tous troubles géné- " ralement quelconques, au dit M. *T. H. Cushing*, etc., " etc., les immeubles et *droits* que le dit feu *Edward* " *Scallon* avait promis et s'était obligé de *vendre* au dit " sieur *Benjamin D. Peck*, desquels immeubles et droits " la désignation est ci-après donnée littéralement et *ver-* " *batim* et telle qu'elle se trouve en langue anglaise au " dit acte du 10 juillet 1858, savoir, etc, etc." Cette référence à la description contenue dans la promesse de vente, indépendamment de la généralité des termes, fait bien voir que la garantie devait s'appliquer aux licenses ou permis de coupe de bois, comme aux autres immeubles vendus.

En examinant les termes de la promesse de vente, j'ai dit que l'obligation de vendre embrassait comme un tout les diverses propriétés y décrites. L'acte de vente rend évidente cette interprétation, en ne référant à ces propriétés que comme un tout. Après leur description, il est déclaré que la vente en est faite, ainsi que le *tout* se trouvait et comportait et étendait, etc., etc. Il en est de même de la clause de saisine qui est en ces termes : " Pour par le dit sieur acquéreur partie de seconde part, jouir, user, faire et disposer *du tout* présentement vendu en toute propriété en vertu des présentes." On retrouve encore la même qualification dans la clause portant quittance du prix de $20,000, " pour lequel le dit feu sieur *Scallon* s'était obligé de passer titres en bonne et due forme *du tout* présentement vendu, etc., etc." S'il fallait ajouter encore à cette démonstration, on pourrait recourir à l'acte du 22 octobre 1866, qui contient encore dans les termes les plus clairs et les plus positifs l'admission que la vente a été faite avec garantie de tous troubles des *immeubles* et *droits* que feu *Edward Scallon* s'était obligé de vendre. Il faut donc conclure de tout cela que la vente a été faite de toutes les propriétés en question comme *un tout* et pour une seule considération, $20,000. S'il existait réellement quelque différence importante entre les conventions de la promesse et l'exécution de la vente, n'est-ce pas le dernier acte qui doit les régler. Le contrat entre les parties n'est devenu parfait et définitif que par ce dernier acte. C'est lui qui contient leurs véritables conventions ; s'il y a eu quelque dérogation, ce que je n'admets pas, c'est du consentement des deux parties. S'il y avait eu erreur, on aurait sans doute attaqué l'acte pour cette cause. Cela n'a pas été fait, les conventions contenues dans l'acte de vente restent entières. L'obligation de livrer 256 milles de limites n'ayant pu recevoir son exécution parce qu'il s'est trouvé un déficit de 50 milles pour

1881

DUPUY v. DUCONDU.

Fournier, J.

compléter la quantité convenue, l'acte en dernier lieu cité a été passé entre les mêmes parties dans le but spécial de combler le déficit. Par cet acte les intimés ont *cédé et transporté*, avec la garantie de tous troubles généralement quelconques au dit *L. H. Cushing*, la dite quantité de cinquante milles de limites sur la dite rivière de *L'Assomption* et désigné comme suit en langue anglaise, savoir :

No. 25. 25 square miles } "Commencing at the upper end limit No. 94 on "the south west side of L'Assomption river, "granted to late Edward Scallon and extending five miles on said "river and five miles back from its banks, making a limit of twenty "five square miles, not to interfere with limits granted or to be "renewed in virtue of regulations."

No. 26 25 square miles } "Commencing on the north east side of L'Assomp- "tion river, at the upper end of limit 96, granted "to late Edward Scallon, and extending five miles up the river and "five miles back from its banks, making a limit of twenty-five square "miles, not to interfere with licences granted or to be renewed in "virtue of regulations."

Les licenses de ces limites pour les années 1866-7 furent alors remises au dit *Cushing*, pour par lui le dit M. *Cushing*, ses hoirs ayant cause et successeurs, jouir, faire et disposer du tout comme bon lui semblera, d'exploiter et couper du bois dans et sur les dites limites à la charge de se conformer en tout aux règles et règlements auxquels les dites limites peuvent être assujéties envers le gouvernement de Sa Majesté en cette province, comme aussi de lui payer tous les droits qui peuvent être dus pour la coupe du bois sur les dites limites.

La preuve fait voir que le déficit qu'il s'agissait de combler par cet acte provenait de ce qu'une partie des limites en premier lieu cédées se trouvait alors sujette aux droits antérieurs de *G. B. Hall*, comme premier concessionnaire. Malheureusement il en a été de même pour les limites cédées en second lieu.

Il s'agit maintenant de déterminer l'étendue de la

garantie des intimés en vertu du dernier acte. C'est avec connaissance parfaite de la cause qui avait amené le déficit, et dans le but évident de se garder contre une semblable éventualité qu'a été faite la deuxième cession.

La garantie stipulée devait donc, dans l'esprit des parties, porter sur cette cause d'éviction. C'est sans doute pour cette raison que la clause qui la contient est si générale et si absolue.

Les intimés prétendent cependant qu'elle ne l'est pas, qu'au contraire, elle contient plusieurs restrictions, la 1ère que les limites en second lieu cédées n'interviendront pas avec d'autres limites déjà cédées ou qui peuvent être renouvelées en vertu des règlements ; la 2ième que cette cession est faite, comme la 1ère, "*à la charge de se conformer en tout aux règles et règlements* auxquels les dites limites *peuvent être assujéties.*"

Quant à la 1ère restriction, celle protégeant la Couronne contre les conséquences d'une concession antérieure, il est clair qu'elle ne se trouve pas dans la clause de garantie, c'est dans la description de la limite qu'elle est insérée, et, en faveur de la Couronne seulement. Les intimés n'ont pas fait de cette réserve de la Couronne une restriction à leur garantie, elle ne se trouve mentionnée que dans la description de la propriété cédée, et ne peut, conséquemment, aucunement affecter leur convention de garantie qui a pour but précisement de couvrir ce danger. Si, d'un côté on peut dire à l'appelant que dans tous les cas, il était averti par les termes de la license de la cause probable d'éviction, de l'autre, il peut répondre que c'est contre ce danger prévu, et dont il avait déjà été la victime, qu'il s'est prémuni par la clause de garantie.

Pour éviter les conséquences de cette garantie, les intimés prétendent encore assimiler l'effet de cette réserve en faveur de la Couronne à une éviction pour cause de *force majeure* ou *fait du prince.* Cette pré-

1881

DUPUY v. DUCONDU.

Fournier, J.

tention n'est aucunement fondée, car en loi, on ne doit considérer le fait du prince comme un cas fortuit et une force majeure que lorsque personne ne peut le prévoir ni l'empêcher. Certes, ce n'est pas le cas actuel, car non-seulement le fait était prévu, mais il était déjà accompli au moment de la cession.

Rien n'était plus facile pour les intimés que de s'en assurer, puisque c'est par le fait de leur auteur *Scallon* que la priorité du titre qu'il avait sur *Hall* a été perdue. Si on ne peut pas assimiler le cas actuel au fait du souverain, les intimés auraient encore bien moins raison de prétendre que ce prétendu fait du souverain, prévu et même accompli, ne pouvait pas en loi faire le sujet de la garantie. La jurisprudence établit le contraire, comme on peut s'en assurer en référant au Rép. de *Merlin*. Vo. "Fait du souverain." Si la garantie n'avait pas lieu dans le cas actuel, il faudrait contrairement à cette autorité conclure que l'on ne peut pas légalement stipuler la garantie contre le fait du souverain. Ce qui serait une erreur évidente.

L'éviction dont *Cushing* a été la victime n'a été amenée par aucune infraction aux obligations que lui imposaient ces règles et règlements auxquels il devait se soumettre. Elle n'a été causée que par la négligence de *Scallon* à faire régulièrement ses renouvellements de licences.

Cette négligence ayant eu pour conséquence de permettre aux licences de *Hall* de prendre effet, il s'en est suivi devant l'assistant commissaire des terres et ses employés, conformément à la loi, et aux règlements du département, les procédés qui ont eu pour résultat l'éviction de *Cushing*.

Les intimés soutiennent qu'ils ne peuvent être tenus responsables des conséquences de cette éviction, parce que *Cushing* ne les a ni notifiés ni mis en cause pour le défendre. S'il se fût agi d'une action devant les tribu-

naux au lieu de procédés administratifs, les intimés pourraient sans doute se plaindre de n'avoir pas été appelés en garantie dans les délais voulus. Mais il est clair que les procédés du code de procédure ne pouvaient s'appliquer à la décision de questions uniquement de la compétence du départemement des terres. D'après les lois et règlements concernant ces sortes de contestations, le Département n'avait à décider que sur les prétentions respectives de *Hall* et de *Cushing*. Ces lois et règlements n'établissent aucun mode de faire intervenir ou mettre en cause dans ces procédés d'autres parties pouvant y avoir des intérêts. En n'appelant pas les intimés en garantie dans ces procédés, *Cushing* ne s'est donc rendu coupable d'aucune négligence qui puisse compromettre sa position.

Tout au plus, tombe-t-il sous l'effet de l'art. 1520. C. C. " La garantie pour cause d'éviction cesse lorsque " l'acheteur n'appelle pas en garantie son vendeur dans " les délais prescrits par le code de procédure civile, si " celui-ci prouve qu'il existait des moyens suffisants " pour faire rejeter la demande en éviction."

Les intimés n'ont pas fait cette défense pour la raison évidente qu'il n'y avait aucun moyen d'empêcher l'éviction de *Cushing*, résultant de la négligence de Scallon à renouveler ses licences, et du fait qu'il avait vendu avec garantie des limites qui avaient cessé de lui appartenir au temps même de la vente.

La deuxième restriction consistant dans l'obligation de se conformer aux règles et règlements du département des terres ne porte que sur la manière d'exercer les droits conférés en vertu de la licence. Il n'y a aucune plainte à ce sujet contre *Cushing*, et c'est, comme on l'a vu plus haut, pour une autre cause que l'éviction a eu lieu.

Les motifs ci-dessus exposés m'amènent à la conclusion que l'acte de cession du 22 octobre 1866 contient

1881

DUPUY v. DUCONDU.

Fournier, J.

une garantie expresse contre le danger d'une seconde éviction pour cause de priorité de titre.

En outre de la question de garantie, il y en a plusieurs autres qui ont été décidées par le jugement de la Cour Supérieure, mais sur lesquelles la Cour du Banc de la Reine n'a point exprimé d'opinion. L'opinion de cette cour sur la question de garantie rendait inutile une décision sur les autres points. La majorité de cette cour adoptant une conclusion différente, on doit s'assurer si, malgré son droit à une garantie, l'appelant n'a pas failli dans la preuve de faits essentiels au succès de sa cause.

Un des considérants du jugement est que d'après l'article 1204 du Code Civil du *Bas-Canada*, la preuve offerte doit être la meilleure dont le cas, par sa nature, soit susceptible, et qu'une preuve secondaire ou inférieure ne peut être reçue à moins qu'au préalable il n'apparaisse que la preuve originaire ou la meilleure ne peut être fournie, et que l'article 14 du dit Code Civil frappe de nullité ce qui est fait en contravention d'une loi prohibitive.

Ces propositions de droit sont sans doute bien fondées. Mais la preuve faite en cette cause donne-t-elle lieu à leur application ? Il eût, sans doute, été mieux de produire les licences de *Hall* que d'en faire la preuve par d'autres documents. Cette preuve consiste dans les exhibits No. 14 et D, produits à l'enquête et dans les plans des lieux provenant du département des terres. Cette preuve ne laisse aucun doute sur la priorité des licences de *Hall*. Est-il vrai de dire que ces documents ne font qu'une preuve secondaire ou inférieure ? Ce serait le cas, si par plusieurs textes de nos lois ils n'étaient déclarés la meilleure preuve que l'on puisse faire, celle qui résulte de la production de documents, revêtus du caractère de l'authenticité. Un acte authentique passé devant notaire a-t-il plus de force

1881

DUPUY
v.
DUCONDU.

Fournier, J.

probante qu'un autre acte auquel la loi accorde également l'authenticité. Y a-t-il des degrés dans la force probante des actes déclarés authentiques par le code civil ou par un statut? Certainement non. Ils font tous pleine foi de leur contenu au même degré.

Les exhibits cités, établissant l'existence des limites de *Hall* sont de la catégorie de ceux que l'article 1207 C.C., déclare authentiques et faisant preuve de leur contenu. Un des paragraphes de cet article s'exprime ainsi : " Les archives, régistres, journaux et documents " publics des divers départements du gouvernement " exécutif et du parlement de cette province."

La 32e *Vict.*, chap. 10, (stat. de *Québec*, 1869) contient les dispositions suivantes sur le même sujet, s.-s. 2, " les archives, registres, journaux et documents pu- " blics des divers départements du gouvernement exé- " cutifs de cette province ;—s.-s. 3, les copies et extraits " officiels des livres et documents et écrits ci-dessus men- " tionnés, les certificats et tous les autres écrits qui peu- " vent être compris dans le sens légal de la présente sec- " tion quoique non énumérés." Ces autorités font voir que la legalité de la preuve de l'existence des limites de *Hall* est établi par le Code Civil aussi bien que par les statuts. Cela doit certainement suffire,

Un autre motif de ce jugement est que le demandeur (appelant) n'avait pas le droit de soumettre à une décision à l'amiable la vérification des lignes de divisions des limites en question. Ce considérant ne me paraît pas mieux fondé que le précédent. *Cushing* troublé, comme il l'était par *Hall*, dans son exploitation qu'il fut forcé d'abandonner, devait-il se croiser les bras ? On me répondra peut-être que non, mais on dira avec les intimés qu'il ne s'est pas adressé au tribunal qui avait juridiction dans une contestation de ce genre, savoir, celui de l'inspecteur des licences à *Bytown* (*Ottawa*) en vertu des 16me et 17me articles des

1881

DUPUY v. DUCONDU.

Fournier, J.

règlements du département des terres, en date du 8 août 1851. Cette objection serait sérieuse si la loi n'avait pas modifié ces règlements en donnant au Commissaire et à l'Assistant Commissaire des terres les pouvoirs les plus amples pour la décision de ces sortes de contestations. L'appelant avait le choix de deux tribunaux, celui de l'Inspecteur des licences ou celui du Commissaire ou de son assistant. Les deux lui étaient ouverts. Peut-on lui reprocher de s'être adressé, comme il l'a fait, à la plus haute autorité. Il avait indubitablement, comme on le verra par la citation ci-après, la faculté de s'adresser au département des terres dont le Commissaire et son assistant avaient tous les pouvoirs nécessaires pour adjuger sur cette contestation. La 36me Vict., ch. 8, sec. 1, s.s. 1, contient la disposition suivante sur le sujet.

There shall continue to be an assistant Commissioner of Crown Lands, who shall be appointed, from time to time as a vacancy occurs, by the Lieut.-Governor in council, and he shall have the superintendence of all the officers, clerks, messengers or servants, and the general control of all the affairs of the department; his orders shall be executed in the same way as those of the Commissioner of Crown Lands himself, and his authority shall be deemed to be that of the head of the department, so that he can validly affix his signature, in this said quality, and thereby give force and authority to all acts, receipts, permits of occupations, contracts or deeds of sale or location.

Tickets, letters patent, adjudication revocations of sales or locations and all other documents whatsoever which are or may be within the juridiction of the Department.

Cette section ne laisse certainement aucun doute sur la compétence de l'assistant commissaire à prononcer sa décision sur la réclamation qui lui a été soumise par *Cushing*.

Du fait que la durée des licences ne doit être que du 1er juin au 30 avril de chaque année, et que l'année 1866 s'est écoulée sans que *Cushing* ait éprouvé aucun trouble, l'Honorable juge de la Cour Supérieure en a

1881

DUPUY
v.
DUCONDU.

Fournier, J.

tiré la conclusion que les défendeurs avaient satisfait à leur obligation. Mais on ne peut en arriver là qu'en oubliant qu'au moment de la cession du 22 octobre 1866 les représentants de *Scallon* cédaient des droits qu'ils n'avaient plus. De plus, ils s'étaient obligés de céder une licence contenant la condition de pouvoir être renouvelée en se conformant aux règles du département des terres. Ces renouvellements sont à la volonté du concessionnaire, *licenciate*. Il est à peu près sans exemple qu'un concessionnaire qui n'a contrevenu à aucune de ses obligations se soit vu refuser un renouvellement. Cette tenure, quoique en apparence très précaire dépend en réalité, pour sa durée, de la volonté du concessionnaire. Il est de notoriété publique que les marchands de bois ont toujours conservé à volonté leurs limites en dépit de cette précarité qui semble n'avoir été imposée que comme un moyen puissant de forcer les concessionnaires d'être exacts dans le paiement des droits de la couronne. En cédant une licence qui ne pouvait pas être renouvelée pour la raison qu'elle appartenait à *Hall*, les intimés ne remplissaient donc pas leur obligation. Il est vrai que c'est après avoir pris lui-même les renouvellements des licences cédées que *Cushing* a été troublé par *Hall*, mais ce trouble n'a pu avoir lieu que parce que les renouvellements se trouvaient sans effet, en conséquence de la violation de l'obligation de céder des licenses à des limites sur lesquelles personne n'aurait de priorité de titre. Si *Cushing* n'a pu faire de renouvellements effectifs, c'est en conséquence de l'insuffisance de son titre, et c'est aux héritiers *Scallon* à répondre des conséquences en vertu de leur garantie.

Enfin, l'honorable juge a admis un autre moyen invoqué par les intimés. C'est celui tiré du défaut de production des procurations autorisant *McConville*, à agir comme procureur des parties qu'il représentait

1881

DUPUY
v.
DUCONDU.

Fournier, J.

aux divers actes cités dans la déclaration et notamment celui du 22 octobre 1866. C'est sans doute un moyen très rigoureux—si surtout l'on considère que ces mêmes actes sont invoqués par les Intimés dans leur exception péremptoire. Mais il est vrai qu'ils ont eu le soin d'accompagner cette exception d'une défense au fonds en fait générale—ce qui aurait nécessité la production des diverses procurations si les intimés eussent persisté jusqu'à la fin dans leurs dénégations. Mais dans leurs répliques aux réponses du demandeur à leur exception péremptoire en droit perpétuelle, les intimés ayant invoqué eux-mêmes l'acte du 22 octobre 1866, sans cette fois l'accompagner de la défense au fonds en fait, ils doivent être considérés comme s'étant départis de leur injuste dénégation. Cette réplique contient une admission de l'acte du 22 octobre 1866 qui rend inutile la production des procurations. En bonne procédure il était du devoir des intimés de renouveler leurs dénégations ou de déclarer qu'ils persistaient dans celles qu'ils avaient déjà faites,—par cette omission ils ont réparé celle commise par le demandeur en ne produisant pas ces procurations. Aucune des objections que je viens de passer en revue ne formant d'obstacle sérieux contre la demande de l'appelant, je suis venu à la conclusion qu'en conséquence de l'éviction que *Cushing* a soufferte il y a lieu à des dommages et intérêts conformément à l'art. 1518, c'est-à-dire que l'appelant a droit de réclamer des intimés : 1o. La valeur des limites dont il a été évincé, proportionnellement au prix total de $20,000. 2o. Les sommes dépensées dans les années 67–68 pour le nettoyage de la rivière afin d'y faire flotter le bois de commerce, aussi celles employées à la construction de chemins et de maisons et écuries nécessaires à l'exploitation des dites limites. Il aurait aussi droit à l'accroissement de valeur que pouvaient avoir les dites

limites en 1868, époque à laquelle *Cushing* en a été évincé de fait.

Pour arriver à la détermination exacte du montant des dommages et intérêts il manque dans la preuve un élément indispensable, c'est la valeur des limites en question proportionnellement au prix total de vente qui était de $20,000. C'est cette proportion du prix de vente qui devait être accordée à l'appelant, l'augmentation de valeur, plus les sommes ci-dessus mentionnées, dépensées en travaux d'améliorations. Pour établir cette proportion je suis d'avis que la cause devrait être renvoyée à la cour inférieure, etc., etc., pour y être procédé par experts, etc., etc., pour constater cette proportion.

HENRY, J.:—

I have not prepared a written judgment in this case, as my brother *Gwynne* favored me with the reading of a lengthy one prepared by him some time ago, and which embraces my views on the several points to which it refers. I may add, however, that admitting the respondents are liable under the covenant, the appellant is not entitled to recover for several reasons:

1st. He has shown no eviction. The purchaser went into full possession of all the lands and premises he purchased, made roads through the "limits" and cut a number of logs which he voluntarily abandoned to a party who claimed the land on which they had been cut without, as I can see, any reason whatever. He therefore, by his own act, gave up possession and the right to the limits now in dispute.

2nd. It is admitted that the limits sold and covenanted for covered the lands originally, and the evidence, to my mind, shows that if the right to the limits was subsequently lost or interfered with, it was a loss for which the purchaser was liable, and not the covenantor.

1881

DUPUY v. DUCONDU.

Henry, J.

3rd. No title was shown to the *locus* by *Hall*, who claimed under the adverse licenses. They were not produced on the trial, nor their contents shown, nor was any survey of them shown. It was not, therefore, shown that they touched or included any part of the *locus*. It is, on the other hand, shown by the evidence, that even had they been put in evidence the rights under them would have been restricted to the one side of the height of ground between two rivers, while the *locus* was on the other. I think the decision of the assistant commissioner of crown lands—not having been made under the proceedings provided by the statute—is not binding on the respondents who got no notice of the proceedings before him, and were no parties to them.

I concur, then, in the judgment to which I before referred, and think the appeal should be dismissed with costs.

GWYNNE, J. :—

With great deference to my learned brothers, with whom I am unable to agree, I must say, that in the judgment of the Court of Queen's Bench, *Montreal*, in appeal, as well as in that rendered by the learned judge of the Superior Court of the district of *Joliette*, before whom the case was originally tried, I entirely concur. If I am in error in the view which I take, it is at least a satisfaction to me to be in such good company. By the deed of the 10th July, 1858, after reciting therein an agreement made by *Edward Scallon* to sell to *Benjamin D. Peck*, or his assigns, a saw mill built of stone, and four acres of land annexed thereto, together with all the straps, gearing, water-power, booms, chains and anchors to the mill belonging and the right of using a road leading from the Queen's highway to the mill; and all the right and title obtained by *Scallon* from the crown to certain timber limits situate on the banks of the River *l'Assomption* and its tributaries, the *Black River* and the *River Ducharme* particularly enumerated

1881

DUPUY v. DUCONDU.

Gwynne, J.

by numbers, among which were Nos. 97 and 98 (stated as covering each 25 miles on the river *l'Assomption*), and being in all 13, and stated as covering an area of 256 miles, at and for the price or sum of $20,000, of which $5,000 was acknowledged by the deed to have been then paid, and the balance was made payable in five annual instalments of $3,000 each, with interest, *Scallon* bound himself in the penal sum of $30,000, with a condition thereunder written, that if, upon payment of the above sums as specified for payment of the said mill, the said *Edward Scallon* should give a good and sufficient deed of the above mill, then the said bond or obligation should be null and void. The deed also contained the following clause: "The right of using and cutting timber on said limits is now given to the full extent which the said *Edward Scallon* possesses from the crown." As to these licenses it was also by the deed agreed that they should be renewed in the name of *Scallon*, and that the cost and expenses of such renewals should be paid by *Peck* as well as the moneys which should accrue to the crown for the limits and for timber duty to be cut on the limits, and that *Peck* should conform to the regulations of the Crown Land Department, and that after the last instalment of the $20,000 should be paid, the licenses might be taken out in the name of the purchaser.

Now, by this deed it appears that all the title *Scallon* agreed to give for the timber limits mentioned therein, including those numbered 97 and 98, was such title as he had and no more: and that title he did give; all his title to those limits passed by the deed. The vendee, however, by the deed agreed that the renewals to be taken out for them, which were to be taken annually, should be taken out and paid for by the vendee in *Scallon's* name until the last instalment of the $20,000 should be paid, when the vendee might procure their issue in his

1881

DUPUY v. DUCONDU.

Gwynne, J.

own name. These numbers 97 and 98, it may be here remarked, covered the following limits: namely, 97, ten miles in length up the river *l'Assomption*, measuring from the upper boundary line of No. 94, and on the left bank as you ascend the river and extending to a line back 2½ miles from and parallel with the river; and 98, the like length up the river, measuring from the upper boundary line of No. 96, which is a continuation of the upper boundary line of limit No. 94, and extending 2½ miles from the river on its right bank as you ascend it. For the protection of his own rights, the onus lay upon the vendee to see to the renewal of those licenses which he undertook to do in *Scallon's* name, whose only interest was to see that they should be renewed by the vendee in his (*Scallon's*) name, as security to the latter until his last instalment of the $20,000 should be paid. The agreement itself vested in *Peck* all *Scallon's* title to those timber limits which was all in relation to them that he had sold or agreed to sell.

Why *Peck* and his assigns did not, if they did not, enjoy the benefit of those limits numbered 97 and 98, or why renewals of them were not issued from year to year, does not clearly appear. The onus of taking what proceedings might be necessary to procure the renewals, lay upon *Peck* and his assignees.

It was alleged by the plaintiffs, but I see no proof of the allegation, that *Peck* and his assigns paid yearly the moneys payable for their renewal to *Scallon* who neglected to renew Nos. 97 and 98, and appropriated to his own use the moneys paid to him to be applied for their renewal amounting to $800.

The only evidence which the plaintiffs offered in support of this allegation, is a passage referred to by them in a deed dated the 16th March, 1865, executed by the plaintiffs and the heirs of *Scallon*, who was then dead, which does not support the allegation. The deed

at the place referred to declares that the whole $20,000 had been paid, and further, that the cost of the renewal of the timber licenses transferred to *Peck* by the deed of 1858 had been paid by *Peck* and his assigns, and that those licenses had been renewed each year in the name of *Scallon* as had been undertaken by *Peck*.

This passage is obviously no proof of the allegation that *Peck* or his assigns had paid the moneys for renewal of the licenses to *Scallon*; the passage simply amounts to a declaration or admission by the parties to that deed that *Peck* and his assigns had, at their own cost and charges, renewed the licenses in *Scallon's* name, as in the terms of the deed of 1858, it was their duty to do.

The plaintiffs also offered evidence which was objected to as not the best evidence procurable upon the point—that by the books of the department in the possession of a witness named *Bell*, but which books were not produced, it appeared that for the year 1858, or any subsequent year, no renewal had been obtained for Nos. 97 or 98. This evidence was objected to upon the ground that if this appeared by books in the department, these books should have been produced to enable the parties sought to be affected by such entry to see if it, in truth, were so, and if so to examine the parties making the entries as to their correctness, and in explanation of the cause of the non-renewal; but assuming the fact to be as suggested, that at the time of the execution of the deed of 1858 *Scallon* had not renewed his licenses for the limits 97 and 98 for that year, it appears by the regulations of the department put in evidence that he had still the right to do so, and that he transferred such right to *Peck*, who could have procured the renewal of the licenses for those limits to be issued in right of *Scallon* for 1858, and each subsequent year, if non-payment of the license fees was

1881

DUPUY v. DUCONDU.

Gwynne, J.

all that stood in the way of their being issued, for it is not alleged or pretended that in consequence of *Scallon's* omission to renew in 1858, his right to renew was lost by reason of a subsequent grant of the same limits by the Crown Land Department to any other person. So that the fact of *Scallon* not having renewed his licenses for limits 97 and 98 in 1858, if true, would not have afforded any reason for the non-renewal of these Nos. 97 and 98 by *Peck* in virtue of the provisions of the deed of 1858 in the subsequent years. The true reason for the non-renewal of the licenses for those numbers is to be found, I apprehend, in the fact which appeared in evidence, that by reason of an error in the measurement of the limits lying lower down the river than Nos. 94 and 96, the upper boundary lines of those latter limits were placed higher up the river than they ought to be, and that, in truth, there was no such distance as ten miles higher up the river l'*Assomption* to represent the whole extent in length of the limits 97 and 98; and if that was the reason then the defect was not one which would give any claim whatever under the deed of 1858 against the heirs of *Scallon*, or against *Scallon* himself, who by that deed only agreed to give just such title as he had to those limits, and no more. Now that this was the reason for Nos. 97 and 98 not being renewed, I think, appears by the fact which does plainly appear in the evidence, that in 1866 the Crown Land Department issued licenses Nos. 25 and 26, the former in substitution for 97, and the latter for 98, and that these licenses, Nos. 25 and 26 respectively, comprise limits extending only five miles up the river instead of 10, from the upper limits of 94 and 96, and five miles in width from the river, instead of 2½ miles, covering the same quantity of land as did 97 and 98 respectively, although differently shaped and covering one-half of the precise land com-

prised in 97 and 98 respectively. These licenses Nos. 25 and 26 were issued from the same office of the Crown Land Department as 97 and 98 had been issued from, and the limits therein described were granted to and in the name of "the heirs of the late *Edward Scallon*;" from this form of expression the natural and reasonable presumption is that the licenses were granted to *Scallon's* heirs in right of *Scallon* who had been the licensee of 97 and 98, which covered respectively half of the identical limits described in 25 and 26. There can, I think, be no doubt that the limits described in 25 and 26 were granted as they were "to the heirs of the late *Edward Scallon*" in substitution for Nos. 97 and 98, for the reason that there was found not to be ten miles up the river from Nos. 94 and 96 to meet the requirements of 97 and 98. We see here a good reason, and, in the absence of any evidence to the contrary, I think we may take it to have been the real one, for the substitution and for the licenses for 97 and 98 not having been renewed. Now, immediately prior to the execution of the deed of the 22nd October, 1866, which is relied upon as containing what is insisted upon as the guarantee for the alleged breach of which this action is brought, the condition of the parties was this: *Scallon* by the deed of 1858, had already transferred to *Peck* all his right, title and interest in the timber licenses enumerated therein, including Nos. 97 and 98. By the deed of 1865, the *Scallon* succession had conveyed the mill and the four acres of land thereunto annexed, with the roadway mentioned in that deed, in fulfilment of the condition of the obligation in that behalf, contained in the deed of 1858, upon the part of *Scallon*, his heirs and assigns, to be fulfilled; all therefore that remained for the heirs of *Scallon* to do was, as the parties named under the designation of "the heirs of the late *Edward Scallon*," as licensees of the limits des-

1881

DUPUY v. DUCONDU.

Gwynne, J.

cribed in the licenses 25 and 26, to transfer them to the assignee of *Peck*, who was entitled to receive them as a fruit growing out of the right which *Scallon* had had by reason of his having been the licensee named in 97 and 98, all which right he had transferred to *Peck* by the deed of 1858. In so far as *Scallon's* heirs were concerned, they were under no obligation to do anything more; and, although it appears that a sum of $500 was allowed by them to the plaintiff, for the reason that the haul to the river was greater in the limits Nos. 25 and 26, by reason of their greater depth from the river, than had been that of the limits described in 97 and 98, it does not seem to me that the *Scallon* succession was under any obligation to make such or any allowance; for that *Scallon* had a right, title and interest in the limits described in the licenses Nos. 97 and 98 at the time of the execution of the deed of 1858, and that by that deed he did transfer to *Peck* all such right, title and interest, and that this was all he agreed to do, appears to me to be clear. All right to renew those licenses thenceforth belonged to *Peck* and his assigns, and if the Crown Land Department had, for any reason other than prior forfeiture by *Scallon* and a subsequent grant of the same limits to some other person, of which there is no evidence or pretence whatever, refused to renew such licenses, the loss consequent upon such refusal must have fallen upon *Peck*, who had acquired, as all that he was entitled to, all *Scallon's* rights whatever they were on the 10th July, 1858; and when, therefore, Nos. 25 and 26 were issued to and in the name of the heirs of *Scallon* in recognition, as we must take them to have been, of *Scallon's* rights in 97 and 98, and in substitution for those latter, they enured in the hands of *Scallon's* heirs to the benefit of the assignee of *Peck*, as a fruit issuing from the rights of *Scallon* which had been transferred to *Peck* and his assigns by the deed of

1858. The heirs of *Scallon* were, in fact, trustees of those limits for the plaintiff, the assignee of *Peck*, who could have compelled their transfer to him. It would have been impossible for them to have resisted the right of the plaintiff, as assignee of *Peck* under the deed of 1858, to have had those licenses Nos. 25 and 26, which covered one-half of the precise limits described in 97 and 98 respectively, and which were given the additional width to make up for the diminished length, transferred by a legal instrument to the plaintiff. In such a state of things it is obvious that in any deed to be executed by the heirs of *Scallon*, transferring those licenses to the plaintiff, any covenant or guarantee by them as to the goodness of the title purported to be given by those licenses, or the insertion of anything directly or indirectly imposing upon the heirs of *Scallon* any greater liability than was by the deed of 1858 imposed upon them, would be altogether out of place, improper and without any cause, motive or consideration therefor; and the evidence does not supply anything which is suggestive even of any cause, motive or consideration for their incurring such obligation. In this condition of things the deed of the 22nd October, 1866, was executed. Now apart from, and laying aside, all question as to whether it was, or not, necessary for the plaintiffs to have offered evidence of the right of *McConville* to represent and bind the parties which in that deed he is said to represent, that deed declares that :

The said *Sieur McConville*, for and in the name of those for whom he acts, declares that the said parties whose attorney he is, have, in execution of the said deed under private signature of date of the 10th July, 1858, and each for himself, ceded with warranty against all disturbances generally whatsoever to the said Mr. *Theophilus H. Cushing*, as exercising the rights of the said Mr. *Peck*, the immoveable property and the rights which the said late *Edward Scallon* had promised and obliged himself to sell to the latter by and in virtue of the said deed of deposit, cession and transfer of date of 16th

1881

DUPUY
v.
DUCONDU.

Gwynne, J.

March, 1865, of which immovables and rights the designation and description is given literally and verbatim in the said deed of cession, as also it is found in the said deed of the 10th July. 1858.

And in virtue of this title, the late Mr. *Scallon* obliged himself to sell 256 miles of limits for cutting timber upon the crown lands situated on the river *l'Assomption* and its tributaries *Black River* and River *Ducharme*, and as there exists a deficit of 50 miles to complete the said quantity of 256 miles ceded to the said Mr. *Theophilus H. Cushing* by the deed of deposit, cession, and transfer of the 16th March, 1865, the said Sieur *McConville*, for and in the name of those for whom he acts, wishing to complete the deficit which exists, has by these presents ceded and transferred, with warranty against all disturbances generally whatsoever, to the said Mr. *Theophilus H. Cushing*, hereto present and accepting, the said quantity of limits on the said river *l'Assomption* and designated as follows in the English language, to wit:

No. 25. 25 square miles. } Commencing at the upper end limit No. 94, on the south-west side of *l'Assomption* river, granted to late *Edward Scallon*, and extending five miles on said river and five miles back from its banks, making a limit of 25 square miles, not to interfere with limits granted or to be renewed in virtue of regulations.

No. 26. 25 square miles. } Commencing on the north-east side of *l'Assomption* river, at the upper end of limit 96, granted to late *Edward Scallon*, and extending five miles up the river and five miles back from its banks, making a limit of 25 square miles, not to interfere with licenses granted or to be renewed in virtue of regulations.

The licenses for the said quantity of fifty miles of limits for the years 1866 and 1867 have now been handed to the said Mr. *Cushing*, as he acknowledges and grants acquittance and discharge thereof to whom it shall appertain.

For the said Mr. *Cushing*, his heirs, assigns and successors, to enjoy, have and dispose of the whole as to him shall seem fit; to make operations and to cut timber in and upon the said limits at the charge of conforming himself in all respects to the rules and regulations to which the said limits may be subjected towards Her Majesty's Government in this province; as also to pay thereto all the dues that may be exigible for cutting timber on the said limits * * * Further, the said Mr. *Theophilus H. Cushing* declares that the said Mr. *McConville* for, and in the name of those for whom he is acting, has now paid him the sum of $500 currency for all claims generally whatsoever that he might have against the succession of the said late *Edward Scallon* and his legal representatives; declaring, more-

over, by these presents that he has nothing further to pretend or claim for any objects, causes, or reasons against the latter, accruing to him either from deeds or acts up to this day, giving them general and final acquittance and discharge.

1881

DUPUY v. DUCONDU.

Gwynne, J.

Now, with reference to this deed, it is to be observed that the allegation therein, that in virtue of this title the late Mr. *Scallon* obliged himself to sell 256 miles of limits for cutting timber, &c., is not a correct statement of the purport, tenor and effect of the deed of 1858, which is the only instrument containing the obligation which *Scallon* had in his lifetime entered into with *Peck* in relation to these timber limits. That instrument, as we have seen, only professed to sell and transfer, and did transfer to *Peck* and his assigns all the right, title and interest which *Scallon* had under and in virtue of the licenses therein enumerated, which professed to cover 256 miles of limits, and the operation of the deed of 1866 is to cede and transfer the licenses No. 25 and 26, and all the right, title and interest of the licensees therein named, under and in virtue of such licenses, to the limits therein described, to have and to hold the same to the use of *Cushing*, his heirs and assigns, so as, however, not to interfere with limits granted, or to be renewed in virtue of regulations to which, if any such there should prove to be, the licenses 25 and 26 were in express terms made subject.

The contention of the plaintiff is, that the words "with warranty against all disturbances generally whatsoever" being inserted in connection with the words "ceded and transferred, &c., &c.," operate as a warranty that the 50 miles of limits, as described in the licenses, had not, nor had any part thereof, been granted to any other person, and that no part of such limits was liable to be interfered with by any other person whomsoever. So to construe these words would be to subject the heirs of *Scallon* to an obligation which by the deed of 1858 they were not subjected to, and would make the

1881

DUPUY v. DUCONDU.

Gwynne, J.

guarantee to be altogether *sans cause*, as no cause, motive or consideration whatever existed for the heirs of *Scallon* to give any such guarantee.

The alleged interruption which is relied upon by the plaintiff as a breach of the warranty, construing it as the plaintiff construes it, shows how utterly absurd it would be for any vendor of these timber licenses to give such a guarantee. The interruption is alleged to have been made in virtue of a title conferred by a prior license issued from a wholly different office, and describing limits situate upon a different river altogether. The fact that the description inserted in licenses so issued might overlap each other was an event so probable from the manner in which the licenses are issued, that the Crown Land Department takes the precaution of drawing the attention of all licensees to the fact by inserting in express terms in every license the provision that they are liable to be interfered with by any prior license, if any there should prove to be, and by their regulations, which provide that in such case the subsequent licensee shall have no claim whatsoever against the government in respect of any such interference. Now, that any licensee, when selling one of these licenses, should give his guarantee that his license should not be interfered with by the owner of any previous license of the existence of which he was not and could not be aware, which in effect would be a guarantee that his license should not, in the hands of his assignee, be affected by the condition to which it was in express terms made subject, would be absurd in the extreme; but the insertion of such a guarantee in a deed executed by the heirs of *Scallon*, situate as they were in the present case, could be attributed only to ignorance or inadvertence; the only reasonable construction, therefore, which can be put upon the words "with warranty against all disturbances generally whatsoever" in the

deed of October, 1866, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses shall enjoy the limits therein described, notwithstanding it should appear that they are interfered with by a prior license, to which they are, in express terms, contained in the license themselves, made subject; or, in other words, that while holding the limits under the licenses they shall be relieved from the effect of a condition which constitutes an express term, subject to which alone the license can be held.

For these reasons I am of opinion that the judgment should be sustained, and that the appeal should be dismissed with costs.

But assuming the deed of 1866 to be subject to the construction put upon it by the plaintiff, there was no sufficient evidence given of any breach of the guarantee, construing it as the plaintiff desires to have it construed. As to license No. 25, which was a substitute for 97, no question arises, for no interference with the limits described in it is pretended to have occurred. If any reliance is to be placed upon the map annexed to the printed case, it appears that the plaintiff himself, subsequently to the transfer to him of license No. 25, accepted from the Crown Land Department a license, numbered 37, which that map exhibits as encroaching upon part of the limits described in No. 25, but that is a matter of no importance in the present case. The plaintiff's claim is reduced to the alleged interference with the limits described in license No. 26, and no evidence whatever was given, which could affect the defendants, to show that *Hall*, the alleged claimant, had any prior license which interfered with the limits described in license No. 26, or that his licenses, which

1881

DUPUY v. DUCONDU.

Gwynne, J.

were admitted to be for limits upon the river *Matawin*, made those limits cross the height of land separating the watershed of that river from the watershed of the river l'*Assomption* and reach to the latter river; comprehending thus, not merely the additional width given to the limits described in license No. 26 over what had been described in license 98, but comprehending even the limits described in license 98, which was a subsisting license at the time when the license under which *Hall* acquired any rights was said to have first issued. What appeared in evidence was, that while the plaintiff was in possession and enjoyment of the limits described in license No. 26, and after he had cut a quantity of timber thereon, *Hall*, who claimed under a license issued to him for limits situate upon the river *Matawin*, whose watershed is wholly distinct from that of the river l'*Assomption*, claimed the timber so cut, as cut upon his limits, to which claim the plaintiff, notwithstanding a strong and almost violent presumption that such claim could not be supported, appears to have at once yielded, and to have paid *Hall* a trifling sum for the timber, trifling for the reason which constituted the strong presumptive evidence against his claim, namely, that being cut within the watershed and valley of the l'*Assomption*, by which alone the logs could be conveyed to market through lands covered by other licenses belonging to the plaintiff, to his mill at the mouth of the river, they were not available to *Hall*, whose mills were at the mouth of the *Matawin*, to which river the logs could not have been at all hauled, or if at all, not at a cost which would have warranted their being conveyed to that river, and so were useless to *Hall*. The plaintiff, as dispensing with evidence of the contents of *Hall's* license, and of the limits which it described, and of its being prior to the plaintiff's

1881

DUPUY v. DUCONDU.

Gwynne, J.

license, and having precedence over it, relies upon a letter of the Commissioner of Crown Lands, dated 24th April, 1874, wherein he asserts that *Hall* had a license having priority over license No. 26, but this letter cannot deprive the defendants of their right to compel the plaintiff to prove, by legal evidence, an interruption of his possession by a superior title: true it is, that by the regulations of the department, subject to which the licenses are issued, the holders of the licenses for the time being are subjected to certain special provisions for determining disputes between contestants as to the right and position of berths or limits, but such special provisions being in derogation of the general law can only affect the parties actually contesting about the situation of the limits. There is nothing in the guarantee of the defendants, construing it as the plaintiff desires to construe it, which subjects them to any such mode of determining their liability. The matter relied upon by the plaintiff as a breach of their warranty must be established by evidence in accordance with the provisions of the general law; they have a right to insist upon strict legal evidence that the interruption was under superior title, and that, too, under the circumstances appearing in evidence, superior to the title granted, not only by license 26, but to that which had been granted by license 98, part of which is comprised in 26; and such evidence was the more important to be given in a case like the present, in which it appears that the plaintiff so readily submitted to the claim of *Hall*, made as it was, in the face of strong presumptive evidence against its validity. But, in truth, in whatever way the Commissioner of Crown Lands may have satisfied his mind of the matters asserted in his letter referred to, the evidence fails to show any proceeding to have been taken of the character of an investigation, which,

1881

DUPUY v. DUCONDU.

Gwynne, J.

under the provisions of the regulations in that behalf, was made binding on the plaintiff. There does not appear to have been any contestation between *Hall* and the plaintiff as to the boundaries of their respective limits brought under the notice of the proper authority by the statute and the regulations in that behalf authorized to decide between contestants.

The plaintiff submitted at once to *Hall's* demand. *Hall*, influenced, perhaps, by the fact that, if there were any more timber upon limit No. 26 (as to which there was evidence given by defendants calculated to create a doubt), he could not carry to his mill, or make it available, and, perhaps, doubting the goodness of his claim, and content with the easy success of his demand for the timber cut, or for some other reason, declined to become a party to any contestation with the plaintiff under the provisions of the regulations. The plaintiff took no steps to make him a party. The regulations provide that, as between contestants as to the right to berths or the position of bounds, the opinion of the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere, is to be binding on the parties, unless and until reversed by arbitration within three months after the notification of such opinion has been communicated to the parties or their representatives on the premises, or sent to their address, or by decision of court; and that the surveyor of licenses at *Bytown* and officer thereunto authorized elsewhere shall, at the written request of any party interested, issue instructions stating how the boundaries of timber berths should be run to be in conformity with existing licenses.

Now, there was no evidence whatever that anything of the nature here indicated occurred. There was, in fact, no evidence that anything was done which, by the special regulations in derogation of the general law, was made binding upon the plaintiff, or gave him an

1881

DUPUY
v.
DUCONDU.

Gwynne, J.

opportunity to appeal from the decision as erroneous. There was, in short, no evidence of anything which could give to the letter of the Commissioner of Crown Lands the character of an adjudication binding upon the plaintiff, nor, *a fortiori*, upon the defendants, but even if the plaintiff was bound thereby, the defendants are not deprived of their right, when sued upon their guarantee, to insist upon strict proof of the breach relied upon, according to the course of the general law, wholly irrespective of the special regulations affecting owners of berths, by which regulations the defendants have not consented that any liability arising under their guarantee shall be governed. In a recent case, the Court of Appeal of the High Court of Justice in *England* (1) has held that, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved in the action against him equally as it was necessary to have been proved against the principal debtor ; so in like manner, as it appears to me, the defendants in this action, upon their guarantee, are entitled to strict proof of *Hall's* title irrespective of anything which may have taken place between the plaintiff and him, which, as between them, could amount to an adjudication under the provisions of the regulations to which the licenses were subject.

It is unnecessary, in my opinion, to show, as could be readily done, that the plaintiff has offered no evidence entitling him to any damages, if his evidence had gone far enough to raise a question as to damages. In every particular necessary to the maintaining an action, plaintiff's case, in my judgment, fails.

There was evidence adduced by the defendants that at the time of the trial there was no valuable timber to

(1) *Ex parte Young* v. *Kitchen*, Weekly Notes, May 21, p. 80.

1881

DUPUY v. DUCONDU.

Gwynne, J.

be seen on limit 26. The plaintiff's counsel, however, contended that the plaintiff was entitled to recover what he gave for that limit, which, as he contended, was the limit 98, but the foundation of his claim is that he never got limit 98. If he had gotten it, he got all *Scallon* agreed to give; but assuming that the plaintiff is entitled to recover what he gave for 26, it having been taken as a substitute for 98, what the plaintiff gave for 98 is what he gave for 26, and when we look at the deed by which 98 was sold, we find not only that all *Scallon* agreed to sell was his right thereto, but that the price agreed to be paid and paid by *Peck* is stated to be for the mill, and its appurtances, and all *Scallon's* interest in the timber limits named, no sum being mentioned as the price of any of the limits, so that it is impossible to say what price, if any, in particular, was the price paid as the price of No. 98, or whether the limits were not all thrown in as having no special value apart from the mill, and its appurtenances.

Appeal allowed with costs.

Solicitors for appellant: *Beique & McGoun.*

Solicitors for respondent: *McConville & McConville.*

1880

*Nov. 8.

1881

*Feb'y. 1.

REUBEN LEVI.....APPELLANT;

AND

JAMES REED.....RESPONDENT.

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

Jurisdiction—Appeal, Right of—Slander—Damages, Special and vindictive—Appeal as to quantum of damages.

L., appellant, sued *R.*, the respondent, before the Superior Court at *Arthabaska*, in an action of damages (laid at $10,000) for verbal slander. The judgment of the Superior Court awarded to the

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

1880

LEVI v. REED.

appellant a sum of $1,000 for special and vindictive damages. *R.* appealed to the Court of Queen's Bench (appeal side), and *L.*, the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because *L.* had not proved special damages, and the amount awarded was reduced to $500, and costs of appeal were given against the present appellant. *L.* there upon appealed to the Supreme Court.

Held,—(*Taschereau*, J., dissenting)—1. That *L.*, the plaintiff, although respondent in the court below, and not seeking in that court by way of cross-appeal an increase of damages beyond the $1,000, was entitled to appeal, for in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce* v. *Hart* (1) reviewed and approved.

2. In an action of damages, if the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages.

APPEAL from a judgment of the Court of Queen's Bench, rendered at *Quebec*, in an action of damages for slander, originally instituted at *Arthabaskaville* by the appellant, and praying for a condemnation of ten thousand dollars against the respondent. By such judgment the damages awarded by the Superior Court at *Arthabaska* were reduced from one thousand dollars to five hundred dollars, and the costs of both parties in the Court of Queen's Bench were awarded against the appellant.

This was an action by one medical practitioner against another for damages for slander.

The defences to the action were: the general issue; that defendant was not injured and received no damage;

(1) 1 Can. S. C. R. 321.

1880

LEVI v. REED.

compensation of injuries; and privileged communications.

The accusations particularly insisted on by appellant were imputations of his ignorance; that he was not a good doctor; that he killed people by the medicine he gave them; malpractice; that he attended people he could do no good to in order to make a bill; and that he was mad.

The evidence is sufficiently referred to in the judgments hereinafter given. On the argument it was admitted that the respondent had made use towards the appellant of language which was not justified nor privileged by the occasion. The principal questions on this appeal were, whether the Court of Appeal was justified in reducing the damages from $1,000 to $500, and 2nd, whether the case was appealable to the Supreme Court.

On the latter point, Mr. *Laurier*, Q. C., argued that the judgment appealed from to the Court of Queen's Bench was for $1,000, and that the present appellant, not having taken out a cross appeal, had acquiesced in the judgment, thereby reducing the matter in dispute between the parties to a sum less than $2,000, and therefore the present appellant had debarred himself of the jurisdiction of this court. See *Sirey* code annoté de Proc (1).

Mr. *Irvine*, Q.C, relied on the case of *Joyce* v. *Hart* (2) in which this court had reviewed all the decisions and had laid down the rule that it was the amount claimed by the declaration which was the amount in dispute.

The case was then heard on the merits.

Mr. *Irvine*, Q.C., and Mr. *Gibsone* for appellant:

The question here is whether this is a case in which the Court of Queen's Bench ought to have disturbed the judgment of the court of original jurisdiction. The

(1) Art. 453, p. 299, Par. 1, No. 7. (2) 1 Can. S. C. R. 321.

only reasons given for reducing the amount were first, because the court considered that appellant had not proved that he suffered any amount of special damages, and that the respondent had been subjected to a much larger amount of costs by the adduction on the part of the appellant of illegal evidence. Now, the principle of reducing the amount of damages because certain costs ought to have been adjudicated against appellant is very erroneous; it would have been more proper to have charged us with the costs of certain witnesses. However, I contend that the judgment of the Superior Court ought not to have been disturbed on that ground.

In this case the defendant pleaded the truth of what he had said. When he gave his evidence, he was permitted by the court to answer fully, and in such a manner as to impress upon the public the truth of his slanders; in fact, after hearing the evidence of Dr. *Reed*, it must have been almost universally believed that his charges against Dr. *Levi* were true, inasmuch as it could not be presumed that Dr. *Reed* was guilty of perjury. Had the medical testimony not been taken, the position of matters would have stood thus: Dr. *Reed* did state him to be a poisoner, and he was a poisoner (and so on as regard the other accusations), but Dr. *Reed* had no right to make these statements, and therefore we condemn him; thus if we reject the medical testimony, the appellant will suffer a greater injury to his reputation than the one he was complaining of.

The next ground was, that there was no proof of special damage. Now, I hold it is only necessary for us to prove that a loss to him was the result, and there is evidence that certain parties refused to employ him on account of these reports. It is contended, on the other side, that the appellant's practice increased. But suppose it did increase, is it to be said that it would

1880

LEVI v. REED.

not have increased more if he had not been injured? Although no actual amount can be shown, yet, as sworn to by some of the medical gentlemen, "the damage that would be done to Dr. *Levi* would be serious." "The damage is serious."

Although it must be evident from the citations made that the actual damage done the appellant in the practice of his profession must have been and still is very great, let it be assumed, for the sake of argument, that no actual damage was proved, and that the appellant was entitled only to what is kown to our law as "*dommages vindictifs*," retributive or exemplary damages. In such case it will be seen that the amount awarded was by no means excessive. Our law differs from the law of *England*, and awards damages without proof of damages to punish the moral wrong, and as a solatium for the mental suffering to the person whose sense of honor has been justly offended.

It is also specially to be borne in mind that defamation in our law is considered an offence which is destructive of society and one which specially should be punished with heavy damages; thus it is laid down by *Darreau's* Traites des injures (1).

Our own courts have decided that exemplary damages will be given without proof of actual damage and that the court will assess the exemplary damages, thus carrying out the doctrine of our law which leaves the case *à l'arbitrage du juge*. *Stephen's* Digest Vo. Damages (2).

Why it has been thought proper to disturb the judgment of the judge in the court below, to whose arbitrament the case is by law left, is difficult to ascertain, especially as that judge was personally present when the witnesses for the plaintiff were heard.

In estimating the damages the court took into con-

(1) Vol. I., p. 8, 1st. sec.; Vol. II., p. 425.

(2) Page 378, Nos. 55, 56, 57.

sideration the respective conditions of the parties. The appellant was a young man who had graduated with honors at *McGill*, and had only been 18 months in practice.

With respect to the respondent, his reputation was that of a clever doctor, with 27 years experience in the practice of his profession—a successful practitioner, a man of great wealth, possessing considerable influence in the community, having enjoyed all possible municipal honors as warden of the county, mayor, &c., and having great influence also through large investments of moneys in the county in question.

Mr. *Laurier*, Q C., for respondent:

There is no question of law in issue between the parties. The only question upon which this court would be called upon to adjudicate, would be as to whether the evidence warrants the conclusion arrived at by the Court of Appeal, or the conclusion arrived at by the Superior Court in the first instance.

It is contended that Courts of Appeal are not justified in disturbing the judgment of the court of original jurisdiction unless there has been some gross error. If this ruling be not adopted, it would be disturbing the whole course of our jurisprudence.

In the province of *Quebec*, where, in the courts of first instance, the judge acts both as judge and jury, Courts of Appeal are *ex necessitate* compelled to review questions of fact as well as questions of law, but it may well be asked whether such a duty was one contemplated to be devolved upon the Supreme Court of *Canada*. It may well be asked whether it would be conducive to the public weal, that the Supreme Court should in purely civil cases undertake to scan and scrutinize the evidence, and to review facts already reviewed by a court of appeal. It would seem, on the

1880

LEVI v. REED.

contrary, that questions of fact settled by Courts of Appeal are no more debatable before the Supreme Court, and that the mission of the Supreme Court in such cases should rest on the high ground of the law, and upon no other. In the Court of Appeal I argued that there was no evidence of special damages and no actual loss had been suffered. This was the main point upon which the two courts differed. The Superior Court allowed the large sum of $1,000 for "special and vindictive damages."

On the other hand, the Court of Appeal expressly avers in its judgment, that no special damages have been proved, and diminishes accordingly the amount of damages granted by the Superior Court. Upon this point, the respondent confidently submits that the evidence warrants, without any possibility of cavil, the view adopted by the Court of Appeal: no proof whatever has been made of special damages.

Another reason given by the Court of Appeal to reduce the amount granted by the Superior Court, was the large amount of useless costs made by the appellant, in examining witnesses who should never have been examined, with the hope that perhaps he might find out that the respondent had, in some private and intimate conversation, blackened his character.

The appellant entered also into another kind of evidence still more illegal and irrelevant. The declaration complained that the respondent had attacked both the honesty and skill of the appellant as a physician. Instead of proving that language which he thought slanderous, and resting his case there, and thus putting the respondent on his defence, the appellant chose to bring medical evidence, at great cost, in order to prove the *rationale* of his treatments.

As the whole expense of this irrelevant and illegal evidence had to be borne by the respondent, the amount

allowed by the original judgment was reduced accordingly by the judgment of the Court of Appeal.

But it was urged in the court below that the respondent had shown great malice, that he was a wealthy man, and that the amount of $1,000 for vindictive damages alone, was not excessive. The Court of Appeal —Mr. Justice *Ramsay* dissenting—was of a different opinion.

[The learned counsel then reviewed the evidence, and contended that an examination of the case would fully support the view taken by the Court of Appeal.]

RITCHIE, C.J.:—

[After stating the facts of the case proceeded as follows:]

I do not know that in the whole course of my judicial experience I ever knew of a man who has been so persistently pursued by such slanderous, scandalous and malicious statements as was the appellant in this case, and certainly I have never heard of a brother practitioner trying to obstruct the success of a young man, who has just been admitted to practice, by such conduct as that with which the respondent in this case is charged.

It is alleged in the declaration, and the allegations have been fully sustained by the evidence, that the respondent

On the 4th September, 1877, at the court house at *Inverness*, in the presence of persons esteemed by the appellant, did publish and say, falsely and maliciously, of the appellant: 'You are a murderer.' 'You asked me to murder that woman.' Dr. *Levi* is the most ignorant man in the profession.'

And again, that at *Inverness*, about the same time, in the presence of witnesses, respondent said:

Dr. *Levi* was attending *Morley Lambly* for his eye, he was doing the boy no good, he would have blinded him. Dr. *Levi* went to attend a little boy of Mr. *Ross's* after I gave the boy up, he knew he could do him no good, his object was to extort money from the boy's father, knowing Mr. *Ross* was a rich man.————I and another

1881

LEVI
v.
REED.

Ritchie, C.J.

doctor were attending Mrs. *Cox* and we gave her up, but Dr. *Levi* was sent for and he said he could cure her, and, after the first dose of medicine Dr. *Levi* gave her, the woman died.————I have twice met Dr. *Levi* in consultations, and on both occasions Dr. *Levi* was wrong, but he would not confess it.————Dr. *Levi* is wrong in every case he attends, and mostly all his patients die after the first dose of medicine he gives them.

That on the 15th September, A.D. 1877, respondent said at *Inverness*, in presence of witnesses: If you want a doctor you should send for Dr. *Shee*, as Dr. *Levi* is no doctor. Dr. *Levi* poisoned *Robert Reinhardt*, and Dr. *Hume* can prove it.

The declaration further alleges that in or about the 20th September, A.D., 1876, the respondent, speaking to one *John Cox*, said:

If Dr. *Levi* was allowed to do what he wanted to do, your wife would have been dead and Dr. *Levi* would have been arrested and put in jail.

And on another occasion, speaking to appellant's patients, respondent said:

If Dr. *Levi* had been allowed to do what he wanted to do in the case of Mrs. *John Cox* she and her child would have been dead, and Dr. *Levi* would have been hanged.————Dr. *Levi* poisoned *Robert Reinhardt*. Dr. *Levi* is sometimes out of his mind and mad.

Then what do we find? That when the trial is going on this gentleman is put into the witness stand and persists in his denunciations. However, fortunately for the appellant, medical gentlemen from *McGill College* came down from *Montreal* to justify the appellant's treatment of his patients, and with their evidence the appellant's character has been entirely vindicated, and it was proved that he was a worthy member of his profession.

Now, the learned Judge who had tried this case, and had considered all the circumstances, came to the conclusion that there was not the slightest excuse for inducing the respondent to have shown towards the appellant such persistent hostility.

The Superior Court gave as its *considérants*:

The principal *considérant* of the judgment of the Superior Court, was expressed as follows: The facts reproached to the defendant are proved. With the view of injuring the plaintiff in the practice of his profession, he seems to have missed no occasion of giving him the worst possible reputation as a physician. His persistence in that respect has been remarkable, and was manifested in the most insulting manner, even in the evidence which he was called upon to give in this cause. The defendant has not proved any provocation on the part of the plaintiff, and I have sought in vain for a justification of the language which he has made use of * * * * The plaintiff had therefore good reason to institute the present action. That the false and malicious accusations proffered against him must have deeply wounded him, and must have caused him damage in the exercise of his profession, and in his pecuniary interests (*intérêts matériels*), is self evident.

The judgment of the Court of Appeal partly concurred in the judgment of the Superior Court, but differed as to the amount of damages to be awarded, on the ground that no special damages had been proved. This is a mistake, because in the record I find that there is one instance, at any rate, in which appellant has clearly proved *actual damage*. A Mrs. *Rolston*, who was desirous of seeing a physician, was told that she had better go to Dr. *Levi*, as Dr. *Reed* was not coming. What does she answer?—"I do not like to go to Dr. *Levi*, some bad reports are going about him, he gives wrong medicine, I would rather wait." Then again we find in the evidence Mr. *Patrick Browne*, who says:

Most decidedly I was prevented from employing Dr. *Levi*, on account of these reports. I would not employ him after the reports I heard on any account, on no condition would I employ him.

Under such circumstances I have no hesitation in saying that the judge gave moderate damages, and I would have given probably more. Where reputation was to be for weal or for woe, and you find a man, having twenty-seven years experience in the practice of his profession, and who has acquired a high reputation for

1881
LEVI
v.
REED.
Ritchie, C.J.

ability and learning, without proving any provocation whatsoever, undertaking to ruin professionally a young man by malicious and unfounded accusations, I think the sum of $1,000 is very moderate, and I cannot see on what principle the amount was reduced by the court below, especially when by the judgment the apellant was condemned to pay the costs of the appeal. I think appellant got no more than what he was justly entitled to, and here also I think, as in the case of *Gingras* v. *Desilets*, that the cases of *Lambin* v. *South Eastern Railway Company* (1), and *Ball* v. *Ray* (2), are apposite to the one now before us, and therefore that the judgment of the Superior Court should be reinstated.

FOURNIER, J. :—

L'appelant a poursuivi l'intimé devant la Cour Supéieure à *Arthabaska*, pour la somme de $10,000 de dommages pour diffamation. Le jugement de cette cour lui en a accordé $1,000 pour dommages *spéciaux et vindictifs*. Le présent intimé *Reed*, trouvant cette condamnation excessive, en a interjeté appel devant la Cour du Banc de la Reine, qui a adopté cette manière de voir et réduit la condamnation à $500 avec les frais d'appel contre *Levi*. Ce dernier se trouvant lésé à son tour par ce jugement qui, non-seulement le prive de la moitié de la somme accordée par la cour de première instance, mais qui par la condamnation aux dépens d'appel a encore l'effet d'absorber la somme de $500, que cette cour considérait comme une compensation suffisante des injures dont il se plaignait, en a appelé à cette cour. Les deux premières cours ont été d'accord à reconnaître que l'appelant *Levi* avait été victime d'une diffamation de la plus haute gravité. Cependant, sans le présent appel, le résultat de son recours à la justice, serait de sortir de cour calomnié et puni par l'obliga-

(1) 5 App. Cas. 361. (2) 30 L.T. N. S. 1.

1881

LEVI v. REED.

Fournier, J.

tion de payer une certaine somme pour frais excédant le montant qui lui a été accordé par la Cour du Banc de la Reine. Sous les circonstances de cette cause l'appelant mérite-t-il de subir la déplorable situation qui lui est faite?

Avant de répondre à cette question, je suis obligé de faire quelques observations sur l'objection que l'Intimé soulève à la juridiction de cette cour. C'est la question sans cesse renouvelée de savoir si le droit d'appel, dans un cas comme celui-ci, doit être réglé par le montant de la demande ou par le montant du jugement. Je n'entends pas discuter cette question, car je la considère comme réglée par le jugement dans la cause de *Joyce* vs. *Hart* (1). La règle adoptée par cette cour est conforme à la section 25 du ch. 78 des statuts refondus B.C., et à la jurisprudence adoptée en dernier lieu par les tribunaux de la province de *Québec*, après plusieurs décisions en sens inverse sur cette même question. Les termes de l'acte de la Cour Suprême et d'Echiquier donnant l'appel à cette cour étant les mêmes que ceux qui donnent l'appel dans la province de *Québec*, cette cour a cru devoir adopter la jurisprudence des tribunaux de *Québec* pour interpréter cette clause de notre acte. Conformément à la décision dans la cause de *Joyce* vs. *Hart*, c'est le montant de la demande et non celui de la condamnation qui doit servir à déterminer le droit d'appel. Dans la présente cause le montant de la demande est de $10,000,—quoique le jugement de la Cour du Banc de la Reine ne soit que de $500. Conformément à cette décision, je suis d'avis qu'il y a appel de ce jugement à cette cour.

Je n'ai trouvé nulle part dans le *cas spécial* qui nous est soumis, la preuve d'un acquiescement au jugement. Il faut remarquer que nous devons décider cette cause telle qu'elle nous est soumise du consentement

(1) 1 Can. S. C. R. 321

1881

LEVI v. REED.

Fournier, J.

des deux parties. Il est certain que si la cause n'était pas appelable leur consentement ne donnerait pas à cette cour le droit d'entretenir l'appel, mais il est évident qu'elle l'est d'après le montant de la demande

Je crois devoir citer en entier le consentement qui forme le *cas spécial* qui nous est soumis.

CONSENT.

The parties consent and agree to the statement of special case hereto annexed, consisting of the Declaration, the Pleas, the depositions of the witnesses examined by both parties, except those of William Edwards, John Gorman, William Lowry, James Bracken, James McCammon, Mary Ann Henderson (Mrs. Rolston) and Thomas Armstrong, together with the documents connected with said depositions. The petition by plaintiff in court below for transmission of record to Montreal with affidavits and judgment thereon. Motion for transmission of record to Montreal affidavit and judgment thereon. The judgment of the Superior Court given at Arthabaskaville. The judgment of the Court of Queen's Bench, (appeal side) rendered at Quebec, on the fifth day of June instant. The parties also consent that the exhibits produced by the Appellant in the Superior Court, being a pamphlet written by Dr. Hingston, a communication from the Medical Faculty of McGill College, and a Registrar's certificate, be transmitted to the Supreme Court of Canada as forming part of the said special case.

Quebec, 30th June 1880.

SEWELL GIBSONE & AYLWIN,
Attys. for Appellant.
LAURIER & LAVERGNE,
Attys. for Respondent.

On voit par ce consentement que la déclaration du demandeur *Levi* en forme partie. En y référant on voit qu'elle conclut au paiement d'une somme de $10,000, de dommages. Aucun des autres documents qui y sont énumérés ne font voir qu'il y a eu acquiescement au jugement accordant $500. La juridiction de cette cour apparaissant clairement par le dossier fait en vertu du consentement ci-dessus cité, je suis en conséquence d'avis que l'on doit procéder à rendre le jugement sur le mérite de la cause.

1881

LEVI v. REED.

Fournier, J.

Sous ce rapport il ne saurait y avoir de difficulté. Les deux cours appelées à juger cette cause ont été d'accord que le présent intimé *Reed* devait être condamné pour les faits diffamatoires qui lui sont imputés. Elles n'ont différé d'opinion que quant au montant, l'une a accordé $1,000, et l'autre trouvant le montant trop élevé l'a réduit à $500. En référant à ces deux jugements on voit que la cour ne soulève aucune question de droit. La seule question que nous avons à considérer est de savoir si la preuve est suffisante pour justifier la condamnation de la Cour Supérieure, ou celle de la Cour du Banc de la Reine.

L'appréciation des dommages et intérêts est une des questions les plus difficiles et les plus délicates de notre droit.

Il n'est pas, dit *Duranton* (1), de matière plus abstraite que celle relative aux dommages et intérêts ; aussi la loi n'a-t-elle pu tracer que des principes généraux, en s'en remettant à la sagesse des tribunaux pour leur application, selon les circonstances et les faits de la cause.

Il n'y a donc en semblable matière aucunes règles précises qui puissent servir à guider le juge dans la détermination du montant des dommages réclamés, et conséquemment pas de risque de violer la loi en fixant un montant plutôt qu'un autre. Comme le dit *Laurent*, l'arbitraire est ici dans la nature des choses.

Il est vrai qu'il est impossible d'évaluer en argent le dommage moral, le montant des dommages-intérêts sera donc toujours arbitraire : est-ce 1,000 francs, est-ce 10,000 francs. Et pourquoi 10,000 plutôt que 9,000 ? on ne le sait ; mais qu'importe ? De ce que le juge ne peut pas accorder une réparation, on ne peut pas conclure qu'il ne doit accorder aucune réparation. L'arbitraire est ici dans la nature des choses et il peut tourner à bien, parce qu'il permet au juge de prononcer des peines civiles sans limite aucune donc en les proportionnant à la gravité du tort moral (2).

L'étendue du dommage causé et le montant des dom-

(1) No. 480, vol. 10.

(2) Laurent, Vol. 20, p. 415, No. 395.

1881

LEVI v. REED.

Fournier, J.

mages et intérêts sont des questions de faits sur lesquelles les juges des trois cours qui ont été appelées à se prononcer sur cette cause ont exactement les mêmes pouvoirs souverains et arbitraires, d'en décider suivant leurs consciences. Il est de notre devoir de décider la question du montant des dommages et intérêts, comme c'était également le devoir de la Cour Supérieure et de la Cour du Banc de la Reine, suivant notre conscience. C'est surtout sur ces questions qu'on peut dire sans crainte de se tromper, "autant de têtes, autant d'opinions." Appréciant à notre manière les faits sur lesquels se sont déjà prononcées les Cours Supérieure et du Banc de la Reine, allons-nous déclarer que dans une chose si difficile à évaluer, elles se sont trompées toutes deux, et qu'un troisième chiffre fixé par nous arbitrairement comme les autres, est le véritable chiffre qu'elles aurait dû fixer comme on trouve la solution d'un problême d'arithmétique? A cette question je répondrai comme l'auteur cité ci-dessus, pourquoi $500, pourquoi $1,000, et pourquoi pas $2,000. La profonde méchanceté des calomnies répandues par l'intimé contre l'appelant lui méritait aussi bien une condamnation pour ce montant que pour l'un ou l'autre de ceux qui ont été prononcés? Fixerons-nous donc un troisième montant en conservant le pouvoir que nous avons d'arbitrer les dommages suivant notre conscience? Je ne suis pas de cet avis; si le montant accordé en première instance n'est pas de nature à blesser nos sentiments de justice, ne fait pas voir qu'il y ait erreur ou partialité de la part du juge, je crois que c'est notre devoir de l'adopter Il est de règle qu'un jugement de première instance ne peut être infirmé que lorsqu'il y a erreur évidente soit sur le fait soit sur le droit. Autrement la présomption légale est en faveur du jugement et il doit être maintenu.

Puisque dans le cas actuel la Cour du Banc de la

1881

LEVI v. REED.

Fournier, J.

Reine a reconnu, et que les parties l'admettent devant cette cour, qu'il n'y a dans le jugement de première instance, ni erreur de droit, ni erreur de fait, qu'il n'y a de différence entre les deux cours que sur l'appréciation des dommages laissée à leur arbitrage, n'est-ce pas le cas de faire application de la règle qu'aucune erreur n'étant démontrée, le jugement de première instance doit être confirmé.

Le juge de première instance, pour se déterminer à fixer le montant qu'il a adopté, a eu un avantage que n'ont pas eu les juges des deux autres cours. La plupart des témoins, et en particulier l'intimé, ont été examinés devant lui. Il a sans doute été influencé dans sa décision, comme d'ailleurs le fait voir son jugement par l'aggravation des injures répétées avec persistance devant la cour, en présence d'un nombreux public. Il avait droit de prendre ces faits en considération.

Bien qu'il y ait presque similitude entre le droit anglais et le droit de la province de *Québec*, sur les questions de dommages, je crois devoir m'abstenir de citer les décisions des tribunaux anglais—les principes du droit français devant ici recevoir leur application.

HENRY, J. :—

In conformity with the principles laid down in the previous case of *Gingras* v. *Desilets*, which are applicable to this, I think the appeal must be allowed as to the question of jurisdiction. In the case of *Joyce* v. *Hart* this court came to the conclusion that the amount of damages claimed in the writ of summons should be the criterion by which the appeal should be allowed. This court came to the conclusion—that in all cases in which the plaintiff would have a right of appeal, the defendant also would have the right of doing so. In this case it is said that because plaintiff was satisfied with $1,000 damages awarded to him by

1881
LEVI
v.
REED.
Henry, J.

the court of first instance, he has lost all right of appeal, but this was not the amount in dispute between the parties, and carrying out the principle laid down in *Joyce* v. *Hart*, by which we are bound, we cannot entertain his objection.

As to the amount of damages awarded, I do not think there can ever be a case in which exemplary damages may be given, if this is not one. I entirely concur with the judge who tried the case, that appellant was entitled to both real and exemplary damages, and as it is a case where damages cannot be measured, I do not think we ought, under the circumstances, to disturb the judgment of first instance.

TASCHEREAU, J.:—

By sec. 5 of 42 *Vic.*, ch. 39, and the last words of sec. 8 thereof, there is no appeal in the province of *Quebec* but from the Court of Queen's Bench. Sec. 8 gives an appeal in *Quebec* cases, only in any action, suit, cause, matter or other judicial proceeding wherein the matter in controversy amounts to the sum or value of $2,000. Now, as appeals are given only from the Queen's Bench, it seems clear that the matter in controversy must be taken to be the matter in controversy "in the Queen's Bench."

Now, here, did the amount in controversy in the Queen's Bench amount to $2,000? Certainly not. Because *Levi*, the plaintiff, acquiesced in the judgment of the Superior Court, giving him $1,000; and *Reed*, the defendant, appealed to the Queen's Bench only to get relieved of this $1,000. The contestation in the Queen's Bench between the parties was then only on a matter of $1,000, and so is not appealable to this court.

And this is not contrary to *Joyce* v. *Hart* (1). For in *Joyce* v. *Hart*, the matter before the Queen's Bench did

(1) 1 Can. S. C. R. 321.

1881

LEVI v. REED.

Taschereau, J.

amount to $2,000. There the plaintiff's action for $2,000 had been dismissed in part by the court of original jurisdiction. He (the plaintiff) brought that judgment on appeal to the Queen's Bench, so that the Queen's Bench had before them a case wherein the matter in controversy amounted to $2,000, whilst here, it had before them only a $1,000 case.

Could it be contended that if a plaintiff by his declaration demands $2,000, and on the day of the return, or at any time during the progress of the case, fyles a retraxit for $1,000, the case would be appealable to this court? Then, all that a plaintiff has to do to bring even a one hundred dollars to this court is to add $1,900 to his demand and fyle at any time a retraxit for these $1,900. The jurisprudence of the province of *Quebec* on an analogous question cannot be invoked here, because there sec. 25 of ch. 77 of the Consolidated Statutes (C. S. L. C.) expressly enacts that "whenever the jurisdiction of the court, or the right to appeal from any judgment of any court, is dependent upon the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different." This enactment does not rule the appeals to this court. In limiting the appeal to this court to the cases wherein the value of the matter in controversy amounts to $2,000, it seems to me that the intention of the parliament was that none but cases involving before this court an amount of $2,000 or more should be brought here; that the matter to be settled by this court should not be less than $2,000 in value; that the costs of an appeal to this court would be too large, if the matter to be determined by this court did not amount to $2,000. In this case, clearly, we have a matter in dispute amounting to $1,000 only. We, therefore, in my opinion, have no jurisdiction.

The majority of the court, however, is of opinion that

1881

LEVI v. REED.

Taschereau, J.

the Supreme Court Acts do not require that the amount of the matter in controversy before this court should be of two thousand dollars, and that if the amount demanded by the declaration was $2,000, this alone gives jurisdiction to this court upon an appeal by the defendant, whatever reductions on that amount have been made in the court below by the plaintiff, and my opinion is overruled.

GWYNNE, J.:—

An objection was taken in this case that no appeal lies to this court for the reason that, although the plaintiff claimed in his declaration $10,000 damages, the sum of $1,000 was all that was awarded to him by the court of first instance, and that by the Act constituting this court it is enacted that no appeal shall be allowed from any judgment rendered in the province of *Quebec* in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars.

Whatever might be my opinion, if this point was now up for the first time, I am of opinion that it is concluded in favor of our jurisdiction by the judgment of this court in *Joyce* v. *Hart* (1). That there is a difference in the circumstances of this case from those upon which the point was raised in *Joyce* v. *Hart*, I am free to admit, but it is impossible not to perceive that the principle which in that case the court clearly enunciated and made the basis of their decision is equally applicable to this case as to that, notwithstanding the difference which exists between the circumstances of the two cases, and this court is equally bound by any principle of law clearly enunciated and laid down as the basis of the judgment of the court in a prior case, as it would be by the decision itself where the circumstances of the cases are identical. See the

(1) 1 Can. S. C. R. 321.

judgment of Lord Justice *Thesiger* in *Kaltenbach* v. *McKenzie* (1), and *Household Fire Insurance Co.* v. *Grant* (2). Whether in every case this court should for all time be bound by a judgment which may have enunciated a principle of law which, upon further consideration by the same judges, or by others constituting the court at a future time, might be thought to be erroneous, is not the question here. If that case should arise, I confess, I think, that nothing short of a thorough conviction that the principle laid down is erroneous, and that the interests of justice demand its reversal, would justify us in reversing it; but in a matter affecting the jurisdiction of the court, which depends solely upon the construction of the statute constituting it, if in the construing it there be any doubt, I think it is our duty, in the interest of justice, so to construe it as to support our jurisdiction; for by declining to exercise it, we might perhaps do most grievous wrong; and as the court has put such a construction upon the Act as maintains our jurisdiction, I think that construction should be sustained, unless the legislature shall interfere.

In this particular case, and I say it with the greatest deference and the most profound respect for the learned judges of the Court of Queen's Bench in the province of *Quebec*, from which court this appeal comes, I cannot but think that the appellant has most just grounds of appeal from the judgment pronounced by the majority of the court. With the reasons given for that judgment I find myself unable to concur. This is not a case in which the plaintiff, in order to recover, is required to show special damage; and for so very aggravated a wrong, so persistently repeated and attempted to be justified in such a manner as to aggravate the injury, I cannot conceive how the sum of $1,000 damages can be deemed to be excessive. So neither can

(1) 3 C. P. D. 484. (2) 4 Ex. D. 219.

1881

LEVI v. REED.

Gwynne, J.

I concur in the other reasons given for reducing the amount awarded by the judge of first instance, namely, that the defendant in the court below has been subjected to a much larger amount of costs than he should have been, by the adduction on the part of the plaintiff of illegal evidence.

The evidence here referred to was said to be the evidence of the medical gentleman called by the plaintiff to contradict the medical evidence which the defendant, on being examined by the plaintiff to prove the slanders complained of, took the opportunity of giving in his own favor. Such evidence was, in my judgment, not only quite legal evidence, but such as, under the circumstances, the plaintiff's counsel very naturally felt called upon to advise the plaintiff to give, and was very proper to be given. For my own part, I must say that I have great difficulty in prescribing a limit to the amount of damages proper to be awarded in so aggravated a case.

Appeal allowed with costs.

Attorneys for Appellant: *Sewell, Gibsone & Aylwin.*

Attorneys for Respondent: *Laurier & Lavergne.*

1881

*March 10.

*Dec. 7.

JAMES McDOUGALL.....APPELLANT;

AND

DAVID CAMPBELL.....RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage, agreement to postpone—Non-registration—Priority.

In 1861, *W. M.*, the owner of real estate, created a mortgage thereon in favor of *J. T.* for $4,000. In 1863 he executed a subsequent mortgage in favor of *J. M.*, the appellant, to secure the payment of $20,000 and interest, which was duly registered on the day of

*PRESENT.—Sir William J. Ritchie, Kt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

1881

MCDOUGALL v. CAMPBELL.

its execution. In 1866, *W. M.* executed another mortgage to the respondent *C.*, for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and *J. M.* executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent *C.* should have priority over his. In 1875, *J. M.* assigned his mortgage for $20,000 to the *Quebec* Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which *C.* had neglected to register.

C. filed his bill against the executors of *W. M.*, and against *J. M.*, and the Bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to *J. M.*, who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. *J. M.* thereupon appealed to the Supreme Court of *Canada*.

Held, affirming the judgment of the Court of Appeal, (*Strong*, J., dissenting), that as appellant could not justify the breach of his agreement in favor of *C.*, he was bound both at law and equity to indemnify *C.* for any loss he sustained by reason of such breach.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1) allowing an appeal from a decree of the Court of Chancery (2).

The plaintiff *David Campbell*, being about to advance money to *William McDougall* on property on which the appellant, *James McDougall*, had a prior mortgage, procured a written consent by appellant that the proposed mortgage to him should have priority over his.

The consent was as follows:

"Know all men by these presents, that I, *James McDougall*, of the city of *Montreal*, miller, hereby declare and agree that a certain mortgage now being made by my brother, *William McDougall*, of *Baltimore*, in the county of *Northumberland*, miller, unto and in

(1) 5 Ont. App. R. 503. (2) 26 Grant 280.

1881

McDOUGALL v. CAMPBELL.

favor of *David Campbell*, of *Cobourg*, Esquire, upon his milling and other property, near *Baltimore*, as described in a mortgage prior to mine made in favor of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* four thousand dollars with interest, shall stand as the first charge upon the property so described, and that my mortgage, which I now hold on the same property, shall be postponed thereto and shall rank thereafter notwithstanding priority of date and registration.

"In witness whereof I have hereunto set my hand and seal, this 7th day of February, A.D. 1866.

" (Signed) *James McDougall.*"

The mortgage to *James McDougall*, referred to in this deed, was dated 24th October, 1863, and registered the same day, and was for $20,000. The mortgage to *Taylor*, was dated 12th July, 1851, and was for $4,000.

The mortgage by *William* to *Campbell*, also for $4,000, was dated 28th January, 1866, and was intended to be substituted for the mortgage to *Taylor*, and the money advanced by *Campbell* was, in fact, applied to the discharge of the mortgage to *Taylor*. In 1875, *James McDougall* assigned his mortgage to the *Quebec Bank* to secure a liability to the bank, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of which *James McDougall* did not mention to the bank. The plaintiff (*Campbell*) filed a bill against the executors of *William McDougall*, the *Quebec Bank* and the present appellant, asking for the sale of the land; payment of any deficiency by the executors, and that appellant might be ordered to make good any loss by reason of the assignment of the mortgage.

The Court of Chancery was of opinion that the respondent was not entitled to relief; the Court of Appeal for *Ontario* held that the bill as against the exe-

1881

McDOUGALL v. CAMPBELL.

cutors of *William McDougall* and the *Quebec Bank* should be dismissed. "As to *James McDougall*, the plaintiff should have a decree for the payment of the mortgage money and interest, the amount of which to be computed by the registrar, and as between the plaintiff and *James* no costs to either party up to the issuing of the decree now directed."

From this judgment the appellant appealed to the Supreme Court of *Canada*.

Mr. *Maclennan*, Q. C., for appellant :

The ground on which the court seems to rest its judgment, is that the appellant owed the plaintiff the duty of notifying the bank of the paper he had signed, and that having failed in that duty he must make good the loss, although it is admitted that ordinarily no such duty exists. But it is argued, that because the bank gained priority, the security was more beneficial to them, and that this was an advantage to the appellant, and it is therefore only just and reasonable that he should pay off the plaintiff's mortgage. If, however, the appellant owed no duty to the plaintiff to give notice, it is difficult to see how it can make any difference whether the result was or was not advantageous.

As the decree now stands, it is simply an order upon the appellant to pay off the plaintiff's mortgage, principal and interest, because the plaintiff has lost his priority by the prior registration by the bank of their assignment; the appellant does not owe the debt by covenant or otherwise, and the suit is not for either redemption or foreclosure. It must therefore be shown that the appellant, by some wrongful or inequitable act, has caused the loss.

The only act done by the appellant was the assignment of the mortgage to the bank. This was done first on the 17th November, 1875, and afterwards by a more

1881

McDOUGALL v. CAMPBELL.

formal instrument on the 16th March, 1876; the assignment was not registered till nearly six weeks afterwards on the 24th April, and the appellant had nothing to do with the registration. The injury to the plaintiff did not arise from the assignment—that was perfectly harmless; the injury arose from the bank's registering and the plaintiff's omission to register, and then only by force of the statute which made the plaintiff's instrument void as against the bank; while both were unregistered, the plaintiff's priority was undisturbed.

The appellant cannot be held liable now unless he became liable by the very act of assignment, nor unless the plaintiff could have filed the bill against him the very moment the assignment was made to the bank.

The appellant could not have given notice to the bank, for he had no knowledge. The important thing for the bank to know was, not merely that the agreement had been signed by appellant, but that it had been acted on, and that plaintiff had, if such was the fact, advanced his money on the faith of it. The appellant could not notify the bank of this, for he did not know it. The plaintiff had not notified him, and it is not now proved as a fact in the cause. The evidence fails to show that the plaintiff ever knew of the existence of the document, or relied upon it in any way.

If the not giving such notice as would subject the bank to the agreement referred to has the effect contended for by the plaintiff, one answer to his claim is, that he has not proved, by an examination of those who represented the bank, or otherwise, that the bank had no such notice, and the evidence of the appellant shews the contrary sufficiently for his exoneration.

If the plaintiff would be entitled to relief notwithstanding the absence of fraud, because the appellant, by his own neglect, had been benefited to the

1881

McDOUGALL v. CAMPBELL.

extent of the plaintiff's mortgage, the plaintiff has failed to prove such benefit to have been received by the appellant. Equity does not relieve against the operation of the registry law except on the ground of fraud on the part of those against whom the relief is to be given. The appellant had a right to assign the mortgage, and the bank to register the assignment. If the plaintiff did not choose to register the instrument under which he now claims, and to thus give notice of it to all the world, he cannot claim to be relieved from the consequences of his own ten years' negligence in giving such notice, by now insisting that it was the duty of the appellant to keep the matter in his mind for all that long period for the plaintiff's benefit, and in assigning to assume (without having been informed) that the plaintiff had acted on the paper, but had not registered it, and to have given notice of these facts to the bank before assigning his own mortgage. The appellant got no advantage from the bank not being informed of the plaintiff's mortgage having priority.

The decisions under the statute 27th *Elizabeth* apply in principle, and are to the effect that a voluntary grantee has no remedy or redress either against a subsequent purchaser, or against the grantor or even against the unpaid purchase money, though on the subsequent transaction all parties had notice of the voluntary settlement; and no matter what covenants the voluntary settlement may contain. The principle of these decisions is, that to give active relief on the first instrument which the statute had declared void, would be to impair the effect of the statute; and the same reasoning applies to the Registry Acts; and the existence of valuable consideration makes no difference. *Kerr* on Frauds (1); *Daking* v. *Whymper* (2).

(1) Pp. 169, 170.

(2) 26 Beav. 568.

1881

McDOUGALL v. CAMPBELL.

Mr. *Boyd*, Q. C., for respondent:

The reasoning of V. C. *Blake*, in his judgment in the Court of Appeal *Ontario* (1), is correct, and the respondent is entitled as against the present appellant to be paid all the costs of the litigation. The litigation was entirely occasioned by the wrongful act of the present appellant.

The instrument executed by the defendant, being a declaration and contract, that his own mortgage, though prior in point of date and registration, and by consequence superior to the plaintiff's, shall be postponed to the plaintiff's, and shall rank thereafter, it follows that the defendant could obtain no benefit from the lands embraced in the plaintiff's mortgage, or in respect of his equity of redemption, except by redeeming that mortgage. The defendant subsequently assigned his mortgage to the *Quebec Bank* for valuable consideration, the full benefit of which he received. By that assignment he covenanted with the bank that he had in himself good right, full power, lawful and absolute authority to assign the mortgage-money and interest to the bank, and also that he had not at any time theretofore made, done, or executed, or knowingly suffered, any act, deed, matter or thing whatsoever, by means whereof the premises, or any part thereof, were or was charged, encumbered or in any way affected in title, estate, or anywise howsoever.

By virtue of the apparent priority of his mortgage referred to in his agreement, and of the absolute and unqualified assignment which he made, he has actually obtained the full benefit of the mortgage, as a first mortgage prior to the plaintiff's, and so profited to the extent of four thousand dollars and interest, which as between himself and the plaintiff was a preferential charge, but which he has succeeded in postponing in

(1) 5 Ont. App. R. 503.

favor of himself and his assignees, to his gain and the plaintiff's loss.

It was inconsistent with his declaration and agreement, and with his duty in the premises, for the defendant to execute such an assignment. He should have transferred only the interest which, as between himself and the plaintiff, he was entitled to, and not the absolute interest which he appeared to have.

The respondent hoped, that notwithstanding the improper form of the assignment, the defendant might have given such notice to the bank of the existence of the plaintiff's rights as would have preserved those rights, and the bill was originally framed on this hypothesis.

The bank, however, by its answer denied notice, and the present appellant by his answer, so far from setting up that he had given any notice which would in anywise affect the position of the bank or the plaintiff, alleged that he received no consideration for the declaration and agreement, declared that when he made the assignment to the bank he had not in his mind that instrument, and if he had, it would probably not have occurred to him to make any mention thereof to the bank, and submitted that the prejudice to the plaintiff was due to his own neglect in not registering the document.

It would be manifestly unjust, in view of the facts hereinbefore stated, and of the evidence, that the appellant should be permitted to profit by his own wrongful act. It appears that he derived personal profit, by reason of the assigment to the *Quebec Bank*, to the amount due on the plaintiff's mortgage, and the respondent submits that the decree of the Court of Appeal is correct except as to the said costs, as to which the said respondent submits the decree should be amended.

1881

McDOUGALL v. CAMPBELL.

The following authorities were cited by counsel. *Judd* v. *Green* (1); *Re Phœnix Life Assurance Co.* (2); *Redfearn* v. *Ferrier* (3); *Weir* v. *Bell* (4).

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

RITCHIE, C. J. :—

It is manifest that the plaintiff was induced to lend his money on the agreement under the hand and seal of defendant *James McDougall*, that the mortgage to be taken as security therefor should stand as a first charge on the property, and have priority over the defendant's mortgage, which should be postponed thereto, and should rank thereafter, notwithstanding priority of date and registration. Had this been a mere representation made by defendant to plaintiff, with a view to induce him to alter his position and advance his money, and plaintiff on the strength of such representation had acted on such representation and changed his position and advanced his money, it is quite clear that, as between these parties, the party so representing and so inducing the actions of the other party would never be allowed to repudiate the representation, and by his own act, in direct opposition thereto, deprive the party to whom it was made of the benefit thereof, and secure such benefit to himself. How much stronger this case where plaintiff's security was a solemn covenant and agreement under seal. The instrument containing this agreement with the plaintiff, the intending mortgagee, that his mortgage should have priority, amounted to a contract with him, that out of the proceeds of the property, his, plaintiff's mortgage, should be first satisfied. If by reason of defendant's assignment of his mortgage to the bank, without notice of this agreement, the agreement cannot have effect,

(1) 33 L. T. N. S. 596.
(2) 2 Johnson Chy. 441.
(3) 1 Dow. P. C., 50.
(4) 3 Ex. Div. 238.

1881

McDOUGALL v. CAMPBELL.

Ritchie, C.J.

and thereby plaintiff is deprived of such priority or satisfaction, why, as against defendant, who by his act has prevented his agreement from operating as intended, should the plaintiff be remediless? At the outset it is worthy of remark that the mortgage so to have priority was made to secure money loaned to take up the *Taylor* mortgage which had priority over the defendant's mortgage, that in point of fact defendant was giving up nothing, but in effect simply allowing plaintiff's mortgage to take the place of the *Taylor* mortgage. I think defendant had no right, either at law or in equity or good conscience, to do any act which would militate against his undertaking so made and on which plaintiff acted, and, in an equitable view of the case, still less to do an act by which the priority would not only be absolutely destroyed and plaintiff's mortgage cease to be postponed, but whereby he, the defendant, would in fact directly derive the benefit of the destruction of such priority, and that at the expense of the plaintiff who advanced his money on the strength of such undertaking, and thereby relieved the property from the *Taylor* mortgage; in other words, that the law will not permit the defendant to break his covenant and agreement without holding him responsible and liable for the loss his covenantee may sustain by reason of any such breach.

I am of opinion that no question of registration or non-registration arises in this case, as between plaintiff and defendant, but that the legal or equitable rights, or both, of the parties depend purely on matters of representation and agreement, and, pursuing the equitable view, I do not think defendant should be in a better position in relation to the property after his assignment than he was before, and that though, by virtue of the Registration Acts and want of notice of plaintiff's prior equity, the *Quebec Bank* may have obtained a priority,

1881

McDOUGALL v. CAMPBELL.

Ritchie, C.J.

such privilege should not enure to the benefit of the defendant and confer upon him a position he had resigned, and by resigning had induced plaintiff to act and advance his money. It is not, in my opinion, unjust or unreasonable to place the defendant, *James McDougall*, exactly in the position he undertook to assume when plaintiff advanced his money, and in which he would have been had he made no assignment; not to do so, would be, in my opinion, to do a gross wrong and injustice to plaintiff. The property, it is very clear from the evidence, is wholly insufficient to pay the mortgage in the bank's hands; it follows that if defendant gets the benefit of the whole proceeds of the property it must be at the expense of the plaintiff to the amount of his mortgage, $4,000. In what particular is defendant wronged in saying to him: "Your agreement was that out of the proceeds of the property plaintiff should first have his $4,000. As between you and him there is no right or equity, that because the bank, by reason of want of notice of plaintiff's priority, has secured by registration of your assignment, to the detriment of the plaintiff, a priority, you should reap the actual benefit thereof; that in the disposition of the proceeds you shall obtain the benefit of a priority you had by solemn deed surrendered and agreed plaintiff should have."

Had defendant retained the mortgage and under it realized the value of the land, he would have been obliged to account to plaintiff, out of the money so realized, for the amount of plaintiff's mortgage; in other words, plaintiff's mortgage must have been first paid. Why then, because he has transferred the mortgage to the bank, to be held by them for his benefit as a collateral security for certain bills of exchange on which he is liable to the bank as acceptor, should he be in any better or different position, whether he

realized directly as mortgagee, or through the bank as his assignee? In either case, it is for his benefit the proceeds of the land are to be realized. Why should he lose his priority in the one case, when he realizes himself, and maintain it in the other, when the bank realizes for him? In both cases the money secured by the mortgage enures alike to his benefit, in the one case directly, in the other indirectly, through the bank; why then should he not stand in the same relative position towards the plaintiff and the property in the one case as the other? I can see no wrong done to the defendant or hardship imposed on him that he did not himself assume; it is but carrying out his own agreement. All plaintiff asks leaves defendant exactly where he was if he had made no assignment It takes from him no rights; it burthens him with no new liabilities; the bank's rights are respected, but as between the plaintiff and defendant it leaves them just as they were if the bank had no right; it adds nothing to the rights of the one, it takes nothing from the other. I can see no principle of law or equity by which plaintiff can, with any propriety or justice, be allowed to claim by an act of his against the plaintiff the benefit of a priority he has surrendered and agreed that plaintiff should have, and on the strength of which plaintiff advanced his money; or be permitted by any act of his to repudiate his own solemn instrument under seal and his covenant and agreement therein contained; or to allege that plaintiff's mortgage shall not stand as a first charge, and that his mortgage shall not be postponed and shall not rank thereafter, notwithstanding priority of date of registration, when by such instrument he has declared and agreed the contrary shall be the case. The only case the defendant sets up in answer to plaintiff's claim is by way of

1881

McDOUGALL v. CAMPBELL.

Ritchie, C.J.

excuse for assigning, rather than any defence against the claim itself, or justification for the breach of his agreement occasioned by his assigning his mortgage. He seems to me rather to seek to relieve himself from any imputation of moral fraud in assigning the mortgage with a view of defeating his undertaking, and the priority of the plaintiff secured thereby, by alleging that he had no such intention, but that he forgot the instrument he had executed, and so made the assignment without reference thereto, though through his whole evidence he gives us very clearly to understand that when he assigned he was under the impression there was on the property a claim to the amount of plaintiff's mortgage prior to his, and therefore he could hardly in a court of equity claim that he had a right to be benefited by his own destruction of such prior claim. Assuming all defendant says, while it may relieve him from all charge of moral wrong or of any intentional desire to get the better of the plaintiff, does it in law or equity relieve him from the duty of standing in the same position he would have been in had he recollected it, and had not made the assignment at all, or had made it subject to plaintiff's right of priority? Why should he, still retaining his interest in the mortgage, and entitled to the benefit of the proceeds recoverable thereunder, and to a re-assignment thereof in the event of his paying the bill of exchange, as collateral security for which he made the assignment, benefit by his forgetfulness at the expense of the plaintiff? Or, in other words, what answer has he set up justifying a breach of his agreement?

In *Burrowes* v. *Lock* (1), the defendant's answer was that he had forgotten the circumstance complained of. Sir *Wm. Grant* held that this was no defence.

(1) 10 Ves. 470; mentioned in *Pike* v. *Viger*, 2 Dr. & W. 226.

1881

McDOUGALL v. CAMPBELL. Ritchie, C.J.

> The plaintiff cannot dive into the secret recesses of his [the defendant's] heart: so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it.

The mortgage was assigned to the bank as a collateral security, and defendant is still therefore the party beneficially interested in the amount secured thereby; and as the bank, if they had had notice, would have been in equity bound by it, so defendant himself must, I think, continue bound by his deed, and can neither claim nor receive any benefit under his mortgage which would militate against or destroy the priority of plaintiff's mortgage secured to him under such deed. In other words, I think defendant at law must be bound by his agreement, and in equity must be treated as the equitable owner of the mortgage, and so hold his interest in it subject to the priority he, by his deed, guaranteed to the plaintiff's security, and so neither at law or in equity be permitted by an act of bad faith, whether intentional or unintentional, as against the plaintiff, to reap the benefit of a priority he agreed plaintiff should have, and on the strength of which he was induced to advance his money.

No equitable doctrine is better established since the days of Lord *Hardwicke* than that enunciated by that learned judge, that the "taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser;" in other words, that a purchaser with notice of a right in another is in equity liable to the same extent and in the same manner as the person from whom he purchases, and therefore, notwithstanding the Registry Acts, there can be no doubt that it is well settled that when a purchaser, by deed duly registered, has notice of a prior unregistered conveyance he will be restrained in equity from availing himself of his purchase on the ground that though the Registry Acts provide that unregistered deeds should be void as against subsequent purchasers, the legislature never could have intended

1881

McDOUGALL v. CAMPBELL.

Ritchie, C.J.

to sanction such gross wrong and injustice as is implied in accepting a conveyance of an estate with a knowledge that it had previously been sold to another, and for the purpose of depriving him of the benefit of his purchase; and on a like principle it was held in *Kennedy* v. *Day* (1), that if a party conveys to a person who has no notice of a trust and then takes a re-conveyance, he having notice of the trust, it attaches to him.

In *Schutt* v. *Large* (2) it was decided that a conveyance to a *bonâ fide* purchaser by a purchaser with notice cannot cure the defect of the original purchase, although it may put the property beyond its reach, and that it will attach itself to the title upon a subsequent re-conveyance to the guilty party.

If these are governing principles, it appears to me "*a fortiori*" the present defendant cannot, by his own act, get rid of his agreement and the equity he himself created, and secure to himself a pecuniary gain, at a corresponding pecuniary loss to plaintiff, by destroying a priority established by himself, and so have his own mortgage which he had made a second charge substituted and made a first charge in lieu of that of the plaintiff. I am, therefore, of opinion that both at law and in equity plaintiff is entitled to indemnity. If, by the evidence it had appeared that there was any likelihood of the property not being sufficient to pay the first mortgage of $4,000, then the decree of the Court of Appeal might not be right, but it is clear that the property is much more than sufficient to satisfy the $4,000 security, but not sufficient to satisfy the defendant's mortgage. Therefore, as the bank stands in the shoes of the defendant, and as it is for its interest and therefore for the interest of the defendant, that the property should not now be sold, but held in

(1) 1 H. L. 379. (2) 6 Bar. 373.

view of an increased value, there is no reason that I can discover why the plaintiff should not, as against the defendant, realize his prior security, which, but for the transfer to the bank, he might now do as he would in such case be in the position of a first mortgagee and as such entitled to a sale.

It would possibly have simplified matters if the bank would have consented to a sale, but they may have good and substantial reasons for not doing so, particularly as the property is estimated much below in value the amount of the mortgage held by them. And as it very clearly appears there could be no surplus after paying that mortgage I can see no reason why plaintiff should not now have a decree against the defendant for his mortgage and interest. I had great doubts at the hearing as to the form of the decree. On further consideration, I am not prepared to dissent from the decree adjudged by the Court of App al. The decree proposed by V. C. *Blake* would commend itself more to my mind if a sale could be ordered, but as this cannot be done, and as from the evidence it is clear that in the ultimate result any decree the court might make with a view of indemnifying the plaintiff would practically resolve itself into that made by the court of Appeal, I am not prepared to say that that decree ought to be altered, much less reversed. I think, therefore, the appeal should be dismissed with costs.

STRONG, J.:—

The facts of this case, so far as they are material to the present appeal, may be stated as follows: On the 24th of October, 1863, the late *William McDougall*, now represented in this cause by the trustees and executors of his will, *David McDougall* and *John Ludgate*, mortgaged the lands in question to the appellant, *James McDougall*, to secure the payment of the sum of

1881

McDOUGALL v. CAMPBELL.

Strong, J.

$20,000 and interest. There were at this date two antecedent mortgages on the property, one to a person named *Carpenter*, and the other to Dr. *Taylor*. On the 25th January, 1866, *William McDougall* executed another mortgage to the respondent, *David Campbell*, the plaintiff in the court below, on a portion of the property comprised in the mortgage to the appellant, to secure payment of £1,000 and interest in three years. The mortgage to the appellant was registered on the day it bears date, and that to the respondent, *Campbell*, on the 15th February, 1866. On the 7th February, 1866, the appellant executed an instrument under seal, or deed poll, in the words following:

> Know all men by these presents, that I, *James McDougall*, of the city of *Montreal*, miller, hereby declare and agree that a certain mortgage now being made by my brother, *William McDougall*, of *Baltimore*, in the county of *Northumberland*, miller, unto and in favour of *David Campbell*, of *Cobourg*, Esquire, upon his milling and other property near *Baltimore*, as described in a mortgage prior to mine in favour of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* $4,000 with interest, shall stand as the first charge upon the property so described, and that my mortgage which I now hold on the same property shall be postponed thereto and shall rank thereafter, notwithstanding priority of date and registration.

This instrument was delivered to the respondent *David Campbell*, and upon the faith of it he advanced *to William McDougall* the £1,000 which the mortgage was given to secure. This deed poll was, however, never registered. No re-conveyance or statutory discharge was ever obtained from *Taylor*, and the legal estate was outstanding either in him or *Carpenter* when the bill was filed. On the 17th November, 1875, appellant, by an informal instrument, transferred his mortgage to the *Quebec Bank* as collateral security for the payment of certain acceptances of his held by the bank, amounting in the aggregate to £20,000, and subsequently on the 17th March, 1876, he executed a formal deed of transfer for the same purpose. This last

mentioned deed was registered on the 24th April, 1876. It is alleged that the property is insufficient to pay off both the plaintiff and the *Quebec Bank*. The respondent *Campbell* filed his bill alleging notice of his mortgage to the *Quebec Bank* at the time they obtained their assignment, insisting that in case the plaintiff should fail to obtain priority over the bank the appellant was bound to indemnify him, and praying that he might be declared entitled to priority in respect of his mortgage over the *Quebec Bank*, and that the property might be sold and the encumbrances paid off in due order of priority. The *Quebec Bank* by its answer denied the notice alleged. At the hearing of the cause before the Chancellor of *Ontario* the plaintiff failed to prove notice to the *Quebec Bank*, and as the plaintiff had not by his bill offered and did not at the hearing submit to redeem the bank, the bill was dismissed with costs, the Chancellor holding that the appellant was not liable to indemnify the respondent against the consequences of his loss of priority caused by his omission to register the instrument of the 7th February, 1866. From this decree the respondent *Campbell* appealed to the Court of Appeal for *Ontario*, and that court affirmed the decree so far as related to the question of priority between the respondent *Campbell* and the *Quebec Bank*, but directed that the appeal should be allowed as against the present appellant, *James McDougall*, and that the decree should be varied by ordering him forthwith to pay off the amount due for principal and interest on the mortgage to the present respondent *Campbell*, together with his costs of the original suit and of the appeal. From that order, the appellant, *James McDougall*, has appealed to this court.

No question of evidence arises before this court, but the case as here presented is purely one of law as to the

1881
McDOUGALL
v.
CAMPBELL.
Strong, J.

equitable rights of the appellant and the respondent, *David Campbell*, upon the facts already stated. The grounds on which the Court of Appeal seems to have proceeded were, that the loss of priority by the respondent is attributable to the act of the appellant in assigning his mortgage to the bank without notice of the respondent's rights, and at all events that the priority acquired by the bank having made their security more beneficial, this was an indirect advantage to the appellant, and that therefore it was just and reasonable that he should be ordered to pay off *Campbell's* mortgage.

I am unable to see that there is any foundation in law for either of these propositions. The appellant has, so far as I can see, done nothing which makes him liable to the respondent *Campbell*, either *ex contractu* or *ex delicto*. The effect of his transfer of the mortgage of 1863 to the *Quebec Bank* was innocuous as regards the plaintiff. The priority gained by the bank was not through any act of the appellant, for the assignment of the mortgage only operated to pass to the bank such title and right of priority as the appellant himself had. The bank upon the execution of the assignment stood exactly in the position of the appellant,—they acquired no priority or advantage over *Campbell* by reason of the absence of notice to them of the deed of 1866, giving *Campbell* priority over the appellant, and until the registration of their assignment they were as much bound by that deed as the appellant had been. In short, the transfer to the bank, though without notice, had no greater effect on the respondent's rights than it would have had if it had been made expressly subject to the priority which had previously been conceded by the appellant to the respondent. That this is a correct view to take of the effect of the assignment by itself, apart from the subsequent operation of the registry laws, is, I think, clear

1881

McDOUGALL v. CAMPBELL.

Strong, J.

when it is considered that the legal estate was outstanding in *Taylor* or *Carpenter*, whose mortgages preceded the appellant's, and therefore a mere equitable estate passed to the bank under the transfer, so that between the respondent, *Campbell*, and the bank, both being equitable encumbrancers, the precedence of their encumbrances depended on the arrangement which had been effected by the deed of February, 1866, just as it had previously depended as between *Campbell* and the appellant, whose rights, and whose rights only, the bank, as the purchasers of an equitable estate, acquired under the assignment.

The priority which the bank subsequently obtained by registration of their assignment whilst the instrument of February, 1866, remained unregistered in the hands of the respondent, *Campbell*, cannot be imputed to any act or conduct of the appellant, but resulted exclusively from the operation of the Registry Act upon the neglect of the respondent to register a deed which formed an important part of his title as mortgagee. That the deed of February, 1866, granting priority to the respondent was a deed affecting lands, and as such requiring registration under the Con. Stats. of *U. C.*, cap. 80, sec. 17, the statute in force at the date of its execution, as well as under the statute of *Ontario*, 31 *Vic.*, cap. 20, the Registry Act, under which the assignment to the bank was registered, and so liable to become fraudulent and void under either of these acts by the prior registration of a subsequent deed affecting the same lands, is a proposition too plain to be disputed. Neither can it be contended that the deed of February, 1866, was one not susceptible of registration in consequence of the omission to set out the parcels to which it related in the body of the instrument itself, for it is clear that a deed referring to lands described in another deed, as in the present case, could have been

1881

McDOUGALL v. CAMPBELL.

Strong, J.

registered in a memorial properly framed under the first mentioned act, and can now be registered at full length under the later statute.

If, however, this deed had not been a deed requiring registration within the Registry Acts, it would have made no difference as regards the present appellant; the consequence would have been that the bank would have gained no priority, and the respondent, *Campbell*, would have been entitled to be first paid off out of the proceeds of the sale, and would have had no occasion to seek indemnity from the appellant, who in that case would have been equally entitled to relief against the order appealed from as he is in the view which I take.

For these reasons, I am of opinion that the loss which the respondent has sustained of the preference which had been given to his mortgage, and in respect of which I concede he was a purchaser for value, is not to be imputed to any breach of contract, or to any wrongful or inequitable act or omission on the part of the appellant, but entirely to the provisions of an Act of Parliament operating on the respondent's own negligence. That any obligation rested on the appellant to obviate the possible consequences of the respondent's omission to register, would be equivalent to saying that it was incumbent on every grantor to register the deed, a proposition surely not to be sustained, more especially since it would interfere with the right of the grantee to retain his conveyance unregistered if he thinks fit to do so.

Then, if the appellant cannot be said to have broken any covenant or agreement, or to have been guilty of any illegal misrepresentation or concealment, upon what principle can he be said to be liable, merely because he has accidentally acquired an advantage under the provisions of a statute? I concede, of course,

that if the estate was a sufficient instead of a scanty security, and the derivative mortgage to the *Quebec Bank* did not absorb the whole amount of the original mortgage, as between the appellant and respondent, the latter would be entitled to priority of payment out of the proceeds of a sale. This, however, does not depend on any personal liability of the appellant, but results from the deed of February, 1866, by which the appellant postponed his interest, and which is still binding on the appellant as regards the estate, though as between the respondent and the *Quebec Bank* it has been avoided by the Registry Act.

I can see no ground upon which the appellant can be made responsible to the respondent for the loss which he has sustained by the operation of the registry laws which would not apply with very much greater force to a voluntary settlor who avoids the settlement by a subsequent conveyance to a purchaser for value In that case it has been held that the grantee claiming under the voluntary deed has not only no right against the settlor personally, but cannot even claim a lien on the purchase money. And the reason given for this is, that to hold otherwise would defeat the policy of the law, the statute of 27 *Elizabeth* having enacted that the prior voluntary deed is to be deemed fraudulent and void in favour of the second purchaser

Then, is not the same reasoning *a fortiori* applicable here? The Registry Acts have avoided unregistered deeds against later registered deeds in order to carry out the policy of the act, which is that all deeds should be registered, and surely it would tend to defeat that policy if a purchaser unwilling to register could obtain indemnity agains the penalty imposed by the statute from one who derived an advantage to be ascribed entirely to the effect of the statute, apart from any act or omission of his own.

1881

McDOUGALL v. CAMPBELL.

Strong, J.

In short, I think the argument, which seems to me a conclusive answer to the second position taken by the Court of Appeal, may be summed up by saying that any benefit which has accrued to the appellant, having been given to him by the law, and by the law alone, no court of justice ought to take from him that which he has so acquired.

Even if I had come to the same conclusion as the Court of Appeal, I should still have thought their order premature. It does not appear to me that the evidence is sufficient to warrant the conclusion that there can be possibly nothing left available for the respondent. I think the proper decree in that point of view would have been to have directed all accounts to be taken and a sale, leaving the ultimate liability of the appellant to be dealt with on further directions.

I am of opinion that the order of the Court of Appeal should be reversed, and the Chancellor's decree restored, with costs to the appellant both here and in the Court of Appeal.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J. :—

From the evidence in this case, it appears that *William McDougall*, a brother of the appellant, was, in 1866, the owner of a mill and other real estate near *Baltimore*, in the county of *Northumberland*, upon which he had executed a mortgage to a Dr. *Taylor* for four thousand dollars, which was duly registered. Subsequent to the making and registry of that mortgage he executed a second one to the appellant (*McDougall*) on the 24th of October, 1868, which was registered on the same day.

In 1866, the mortgagor applied to the respondent for the loan of four thousand dollars to pay off the first mortgage to Dr. *Taylor*, which he agreed to give on a mortgage to himself, provided the appellant would

undertake to admit that mortgage when executed to hold the same relative position to his mortgage as Dr. *Taylor's* then occupied. To this the appellant agreed, and before the advance of the four thousand dollars by the respondent and the delivery of the mortgage to him executed under his hand and seal, an agreement and covenant to and with the respondent, that the mortgage being made by his brother (*William McDougall*) unto and in favor of the respondent "upon his milling and other property near *Baltimore*, as described in a mortgage prior to 'his,' in favor of Dr. *Taylor*, which is registered, for securing to the said *David Campbell* four thousand dollars, with interest, shall stand as first charge upon the property so described," and that his mortgage, which he then held on the same property, should "be postponed thereto, and rank thereafter, notwithstanding priority of date and registration."

With the respondent's money the mortgage to Dr. *Taylor* was paid off and discharged.

The interest on the respondent's mortgage was paid up to the 25th January, 1877. The bill claims the four thousand dollars and three hundred and eighty-five dollars for interest due at the commencement of the suit.

The appellant, in 1876, assigned his mortgage to the *Quebec Bank*, in consideration of bills of exchange held by the bank for an amount equal to the mortgage he held, and for which bills he was liable, and the assignment was registered a few days afterwards. It is not alleged or shown that the bank had any knowledge of the appellant's agreement and covenant with the respondent. It is shown the mortgaged property is not more than sufficient to satisfy the mortgage assigned to the bank, and if the respondent has no recourse upon the appellant his claim will be probably lost. The money which is the foundation of that claim the

1881

McDOUGALL v. CAMPBELL.

Henry, J.

respondent was induced to advance solely on the faith of the appellant's covenant, and as between the parties we are asked to decide that it is worthless. By its true interpretation it is not only a warranty that the respondent's mortgage shall have priority to the appellant's, but that it should stand as a first charge on the property.

The appellant, in his answer, denies, for reasons given, that he was guilty of any moral fraud when he assigned the mortgage to the bank in not communicating the position he occupied with the respondent in regard to it. He committed no fraud, legal or moral, upon the bank, because he gave them a good conveyance, but he was guilty of a legal fraud upon the respondent by failing to make such communication. The substance and spirit of his covenant required him as far as he dealt with his mortgage to preserve the priority of the respondent's mortgage, and having failed in his duty to the respondent he claims an acquittance from his covenant, by resting the only defence he attempts to make in his answer on the failure of the respondent to register it. The registry of documents effecting interests in lands, besides other objects, is intended to operate as a notice to subsequent parties, and the statute makes no provision by which a failure to register would invalidate instruments between immediate parties to transfers or agreements. A mortgagor could not, as between himself and his first mortgagee, who, by neglecting to register his conveyance, had lost his lien through the means of a second mortgage executed to another, set up that negligence as a defence to his convenant in the first mortgage to repay the amount of it.

McDougall was bound to fulfil his convenant, and it would be no excuse to say that he had forgotten it when making the second conveyance. He testified that he

1881

McDOUGALL v. CAMPBELL.

Henry, J.

was not aware his covenant had been acted upon by the advance of the money by the respondent. He, however, executed it, knowing it was intended to be acted on. He knew, as the covenant shows, that the respondent had agreed to advance the money, and that the mortgage was being prepared, and he was bound at his legal peril to enquire and ascertain that it had not before putting it out of his power to fulfil it. With all deference to the learned Chancellor, I think the case of *Slim* v. *Croucher* (1) is in these particulars quite in point.

The covenant was at least a warranty against the acts of the covenantor himself, and how can he, by his own wrongful act in violation of it, claim exemption from it. He warranted that the respondent's mortgage should have priority over his own, and he does an act which prevented that priority. His answer to the respondent is: I acknowledge the breach of the warranty, but if you had registered the covenant I could not have broken it. Such a defence cannot, in my opinion, be for a moment considered. Suppose that the appellant, when he assigned the mortgage, was unable to pay the damages arising from the breach of his covenant, by that act his conduct would be justly called fraudulent By his covenant he had induced the respondent to advance his money, and by his subsequent act he nullifies the security upon which the money was given. If he did so wilfully it was a moral as well as a legal fraud. He received from the bank the consideration of $20,000, when he was bound to have known his interest in the mortgage, as against the respondent's claim, was but $16,000. He got, therefore, $4,000 of the respondent's money, having got that amount over and above his proper interest in the mortgage.

The respondent, under the pleadings and evidence,

(1) 2 Giff. 37.

1881
McDOUGALL
v.
CAMPBELL.
Henry, J.

is, in my opinion, entitled to a decree against the appellant for that amount with interest at the rate stated in the respondent's mortgage, from the date of the assignment, less the amount paid up to the 25th January, 1877, with costs.

The bank is entitled to our judgment. As the respondent's action is not to redeem, and the bank had no notice of the lien of the respondent, and paid the full consideration for the mortgage, the respondent, I think, can have no decree in his favor as to the bank. A second mortgagee can tender the amount of a first mortgage and enforce an assigment of the first to him, but I know of no law under which a second mortgagee by legal proceedings can force a first one to sell. The bank then, I think, is entitled to the costs of their defence. It is proved that under a covenant in the respondent's mortgage, the mortgagor was bound to keep $4,000 permanently insured on the mortgaged property. It appears that after his death the executors on one occasion failed to pay the premium which the respondent's agent paid on his own account. I think the respondent should also have a decree against the appellants *David McDougall* and *John Ludgate* the executors of *William McDougall*, for fifty dollars, the amount so paid, with costs

The decree should, I think, provide that on payment of the amount due on the mortgage, with the costs herein, the respondent shall be required to assign his mortgage to the appellant, *McDougall.*

GWYNNE, J.:—

During the argument, and for some time since, I was, I confess, much impressed by the argument of the learned counsel for the appellant.

Some passages in the judgments of some of the learned judges of the Court of Appeal who pronounced

1881

McDOUGALL v. CAMPBELL.

Gwynne, J.

the judgment against which the defendant *McDougall* has appealed, seemed to me to support the impression made upon my mind. The Chief Justice, at p 514 of Vol. 5 of the Appeal Reports, says:

> Putting the case on the highest grounds for the plaintiff, there was negligence on both sides, and I think that most persons would be inclined to designate that of the plaintiff as more gross and inexcusable than that of *James McDougall*.

Mr. Justice *Patterson*, at p. 513, says:

> Here there is no formal contract by *McDougall* to do anything. When he signed the paper he had done all that he was to do. The mischief to the plaintiff arose from his own neglect to register the instrument, and that neglect has been the occasion of the litigation.

And I confess, as it appeared to me, the occasion also of the damage sustained by the plaintiff, and regarding the case in that light I could not well see how a man who had done all he had contracted with another to do, could be made liable to reimburse that other damages sustained by his neglect to do something which, if done, would have prevented his sustaining the damage of which he complains. But upon a more careful consideration of the terms of the instrument executed under the hand and seal of *James McDougall*, which I agree in thinking, in view of the circumstances under which, and the purpose for which, it was executed, must be treated as the covenant of *James McDougall* to and with the plaintiff, I am of opinion that even if it were correct to say that the covenantor, by signing the paper, "had done all that he was to do," it is not correct to say that all was done that he covenanted should be done, or that he has kept his covenant and for this reason, as it appears to me, the defendant may be made answerable for the damage sustained by the plaintiff. The covenant so made with the plaintiff is "that a certain mortgage now being made by my brother, *Wm. McDougall*, in favor of *David Campbell*" (the plaintiff) "shall stand as first mortgage on the property" (mortgaged) "and that my mortgage, which

1881

McDOUGALL v. CAMPBELL.

Gwynne, J.

I now hold on the same property, shall be postponed thereto and shall rank thereafter, notwithstanding priority of date and registration."

Now, the only time when the priority here covenanted for could be asserted or given would be upon some proceedings being taken in court to obtain payment of the mortgages, or of either of them, out of the land mortgaged; and the covenant of *James McDougall* is not qualified by any condition that, upon that occasion arising, the mortgage then held by him should still be held by him; the covenant is absolute, that upon a question arising as to priority between the mortgages, whenever arising, the plaintiff's mortgage, although subsequent in date to that held by *James McDougall*, shall have priority over the latter, which shall be postponed to the plaintiff's. The occasion has now first arisen for calling for the fulfilment of that covenant, and *James McDougall*, by his own act of assigning his mortgage without securing to the plaintiff the priority covenanted for, has incapacitated himself from securing to the plaintiff that priority which *McDougall* contracted that he should have, and his assignee is, by *James McDougall's* act, in a position to refuse, and does refuse, to let the plaintiff have the benefit of *James McDougall's* covenant. This covenant is therefore broken, and it is immaterial whether the plaintiff could or could not have registered the covenant, or whether by so doing he could have secured himself. *James McDougall's* covenant is broken, and the damages awarded are the natural consequence of the breach of that covenant. Upon this ground I think the decree can be sustained, and that the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *Mowat, Maclennan & Downey.*

Solicitor for respondent: *Sydney Smith.*

JAMES McSORLEY.....APPELLANT; 1881

AND *Oct. 31.

1882

THE MAYOR, &c., OF THE CITY OF ST. JOHN AND WILLIAM SANDALL..... RESPONDENTS. *Mar. 28.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

False imprisonment—Arrest—Assessment—41 Vic., ch. 9, N.B.—Execution issued by Receiver of taxes for City of St. John—"Respondeat superior."

The 41 *Vic.*, ch. 9, entituled "An Act to widen and extend certain public streets in the city of *St. John*" authorized commissioners appointed by the Governor in Council to assess the owners of the land who would be benefited by the widening of the streets, and in their report on the extension of *Canterbury* street, the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant (*McS.*) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes, appointed by the city corporation, to issue execution and levy the same. *McS*, although assessed, was not the owner of the lot. *S.*, the receiver of taxes, in default, issued an execution, and for want of goods *McS*, was arrested and imprisoned, until he paid the amount at the Chamberlain's office in the city of *St. John*. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for *McS.* on the first count against both defendants.

Held (reversing the judgment of the Supreme Court of *New Brunswick*), that *S.*, who issued the warrant, founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of *respondeat superior* applied, and therefore the verdict in favor of *McS.* for

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

1881

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

$635.39 against both respondents on the first count should stand. (*Ritchie*, C. J., and *Taschereau*, J., dissenting.)

Per *Gwynne*, J.: That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing *McS.'s* discharge from custody only after such payment.

THIS was an appeal from a judgment of the Supreme Court of the Province of *New Brunswick* (1), whereby it was ordered that the verdict entered for the plaintiff at the trial of this cause be set aside and a new trial granted. The facts and pleadings sufficiently appear in the judgments hereinafter given.

Mr. *Weldon*, Q. C., for appellant:

It is clear a gross injustice has been done to the appellant; he has been compelled to pay under duress a large amount of money, which has come into the hands of the respondents, which he had no right to pay.

The jurisdiction of the commissioners was only a limited authority; they could only assess certain parties, or rather, a certain class, of which the appellant was not one. They had no jurisdiction over the appellant; he was not an owner, proprietor, lessee, or a party or person in any way interested, legally or equitably, in any lands or premises benefited by the widening and extension of the said street, and therefore a person over whom the commissioners could not exercise any jurisdiction or power.

They could not, by inserting the appellant's name in the report, or in the plan, give to themselves jurisdiction.

The report was only final and conclusive on an owner, etc., and the provisions of the eleventh section apply only to cases where the objector disputes the amount and correctness of the assessment, but not his

(1) 20 New Brunswick Reports (4 P. & B.) 479.

liability to pay. *Hesketh* v. *Local Board of Atherton* (1).

Taxing acts must be construed strictly (2). The chamberlain of the city was bound to see that the assessment against the appellant was properly made before he issued his execution. Where there is no jurisdiction the whole matter is void *ab initio*. *Burroughs* on Taxation (3).

I contend also that the execution in this case against the defendant was issued without lawful authority, even assuming the appellant liable to assessment, upon two grounds.

1st. That no proper demand was made on the appellant.

By the 14th section the parties liable were to pay on demand " to such person or persons as the said mayor, alderman and commonalty of the city of *St. John* shall appoint to receive the same."

By the evidence of Mr. *Peters*, the common clerk, page 13 of case, the respondent, *William Sandall*, was appointed to demand and receive the amount

Now the evidence shows that *William Sandall* made no demand. He could not delegate his authority to *Frederick Sandall*. When appointed, a statutory power was given to him, or to be exercised by him, and, being an official act rendering the party upon whom the demand was made liable both in person and property, he could not authorize another person to do that act. He was the agent of the other respondents, and alone was authorized to receive the amount. *Frederick Sandall* had no right to receive it.

2nd. The respondent *Sandall* was not authorized to issue an execution except upon the terms under which assessments are levied under the Assessment Acts of *St. John*. By those acts there must be some evidence of a

(1) L. R. 9 Q. B. 4.

(2) 3 App. Cases 473.

(3) P. 246.

1881

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

demand or notice. Here there was none properly shown.

In the special plea, it is alleged that the said *William Sandall* made the demand. This is a necessary averment, and is put in issue by the replication.

The receiver of taxes is the officer of the city, appointed and paid by the city, and their authorized agent to receive their moneys. Payment to him is payment to the other respondents, and he held it subject to their order, and they have adopted his act.

Dr. *Tuck*, Q.C., for respondents :

Neither the city nor the chamberlain were responsible for the legality of the assessment, the chamberlain only did that which the statute ordered him to do. The appellant's name being down on the list, the chamberlain could not act otherwise. It may, in the ordinary sense, seem hard that a person, not an owner, and having no interest in the lands on the line of *Canterbury* street, should be assessed and compelled to pay. But if any wrong has been done in this case, it was the fault of the commissioners, and not of the defendants, or either of them. It cannot be contended that the commissioners who were appointed by the Governor in Council were the officers of the corporation, and, if it is their fault, the maxim of *respondeat superior* cannot apply. Besides, it is pretty clear, as regards the plaintiff, that no wrong was done him, for he knew as early as the sixteenth of March, 1878, that he had been assessed, the land upon which the assessment had been made, and that, if the land was not registered in his own name, yet he knew all about it, and that, whilst the legal title was in his son, the property really belonged to himself.

The only count upon which the corporation could be held liable is on the money count, and the jury found for the city on that count.

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

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

RITCHIE, C. J.:—

This was an action commenced in the month of October, in the year 1878, for a wrongful arrest and false imprisonment, upon an execution issued by the defendant, *William Sandall*, Receiver of Taxes of the city of *Saint John*, on the fifth day of September, A. D., 1878, against the plaintiff. The declaration contains a count for false imprisonment, and also, by leave of a judge, a count for money had and received, and for interest.

To the first count of this declaration the defendants plead "not guilty;" and for a second plea to the same count they justify under an execution issued by the defendant, *William Sandall*, Receiver of Taxes of the city of *Saint John*

To the second and third counts the defendants plead "never indebted."

The plaintiff joins issue on the defendant's first, third, and fourth pleas; and to the second he replies specially, setting forth that he is not the owner of the land and premises in question.

Everything turns upon the second plea and the replication thereto.

The 41 *Vic.*, c. 9 authorizes the extension of *Canterbury* Street. Section 2 provides for the appointment by the Governor in Council of "three or more discreet and disinterested persons commissioners for the purpose of extending *Canterbury* street (from etc. to etc.) and for performing the duties in the said act in that respect mentioned and prescribed." Section 3 requires the commissioners to be sworn "faithfully to perform the trusts and duties severally required of them by the said act." Section 7 provides how *Canterbury* street shall be extended, and its width. Section 8 declares it

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

to be the duty of the commissioners to cause plans and surveys of the streets to be widened or extended and the several lots of land fronting on them respectively, to be made by the city engineer, and for that purpose power is given to the commissioners to enter upon the lands upon or near the said streets. Section 9, "as soon as plans are made the commissioners are to make a just and equitable estimate of the value of the lands, &c., required for widening and extending the streets, and to assess and apportion the amount of such estimated value," that is to say, for the extension of *Canterbury* street the Commissioners shall assess and apportion the whole estimated value of the lands, etc., required and taken for the extension and opening of said street upon the parties owning or interested in any lands etc., along the line of such extension, and in the discretion and opinion of the Commissioners benefited thereby in proportion to the benefit accruing to such parties respectively.

Section 10 requires the commissioners immediately upon completing any such estimate, assessment and apportionment, to file with the common clerk of the city, the said plan as and for a record of their doings in that respect, and shall forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council of the city, and in said report shall set forth the names of the respective owners, lessees, parties and persons entitled unto or interested in such lands, etc., as far forth as the same shall be ascertained by them, and an apt and sufficient description of the land required for extending the street and also of the lots fronting on the street assessed for said benefit, also the sums estimated and assessed for compensation to be made for land taken, and also sums assessed upon same for the benefit of the owners in fee or for compensation, and for the assess-

ment for the benefit of the owners of the leasehold estate or other interest separately, but in every case "where the owners and parties interested or their respective estates and interests are unknown or not fully known to the commissioners, it shall be sufficient for them to estimate and assess and to set forth in their report in general terms the respective sums to be allowed and paid to or by the owners generally and parties interested therein in respect of the whole estate and interest of whomsoever may be entitled to or interested in said lands without specifying the names or estates or interest of such owners and parties interested, and upon the coming in and filing of such report the same shall be final and conclusive as well upon the mayor, &c., of the city as upon the owners, lessees, parties or persons interested in and entitled, mentioned in said report, and the mayor, etc., shall be possessed of the lands so required for extending the street to be appropriated, converted and used for such purpose and none other, and the mayor, etc., may take possession without suit.

By section 11 the commissioners, after completing estimates and assessments, and fourteen days before making the report to the common council, shall deposit a true copy of such estimate and assessment in the office of the common clerk for the inspection of whom it may concern, and give notice in two newspapers of such deposit, and of the day on which it will be finally filed, as and for a record of their proceedings; and any persons whose rights may be affected thereby, or who shall object to the same or any part thereof, may, within ten days after first publication, state their objections in writing to the commissioners, and the commissioners shall reconsider their estimate or assessment, or part objected to, and in case the same shall appear to them to require correction, but not otherwise, shall and may

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

correct the same, but if they adhere to their original opinion and notify the party objecting, then the party interested objecting may nominate by writing, within five days, one arbitrator, the commissioners another, and the two a third, who shall arbitrate and determine the question, provided the award shall be filed in the office of the common clerk within ten days, and then the commissioners shall correct the estimated assessment agreeably to the award.

Section 12 requires the mayor, etc., within one month after assessment collected and received by them, to pay parties mentioned in report the sums estimated and reported in their favor, deducting any amount they may be declared liable to pay by reason of benefit, and in default, parties, after application first made, may sue the corporation, and the act, and the report of the commissioners, and proof of the right and title of the plaintiff to the sum demanded, shall be conclusive evidence in such suit.

Provision is made that sums reported to infants, persons *non compos mentis*, *feme covert*, or absent, or where the names are not set forth in the report, or where owners, after diligent enquiry, cannot be found, that the mayor, etc. may pay the sums mentioned in said report, into the equity side of the Supreme Court, and every such payment shall be a complete discharge of, and for, any liability under the act, and the report of the commissioners in the case in which such payment is made; and there is this proviso:

That when sums reported in favor of any person or persons whatever, whether named or not in said report, shall be paid to any person or persons whomsoever, when the same shall of right belong or ought to have been paid to some other person, it shall be lawful for the person or persons to whom the same ought to have been paid, to sue for and recover the same, with lawful interest and costs, as so much money had and received for his use, by the person to whom the same shall have been so paid.

Section 13 declares that sums directed to be paid, assessed and reported by the commissioners for the allowance to be made by the person or persons respectively in the said report as owners and proprietors of or parties interested in lands deemed to be benefitted by the extension, shall be borne and paid respectively to the mayor, etc., by the said persons respectively; and imposes on the corporation all the costs of opening, extending, making and finishing *Canterbury* street, and all the expenses incurred under the act, and authorized the city corporation to issue debentures for payment thereof.

Section 14 makes the several sums described to be paid to the mayor, etc., be a lien and charge upon the lands in the report mentioned, and the amounts assessed are made payable to such person or persons as the mayor, etc, shall appoint to receive the same; and in default of payment of the same, or any part thereof, it shall be lawful for, and it shall be the duty of, the receiver of taxes of the city of *St. John* to issue execution under his hand to levy the same with lawful interest thereon, and after thirty days from the filing of the said report of the commissioners, in the same manner and with the like effect, power and authority as upon an assessment of rates and taxes made by the assessors of rates in the said city; and the marshall to whom any such execution shall be delivered shall proceed to levy and collect the same in the same manner and with the like power, authority and effect as upon execution for rates and taxes under the law relating thereto.

Then follows this proviso:

Provided that if any money so to be assessed be paid by or collected or recovered from any person or persons when by agreement or by law the same ought to have been borne and paid by some other person or persons, it shall be lawful for the person or persons paying the same, or from whom the same shall be collected or recovered, to sue for and recover the money so paid by or recovered from him or

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

them, with interest and costs, as so much money paid for the use of the person or persons who ought to have paid the same; and the said report of the commissioners, with proof of payment, shall be conclusive evidence in the suit.

So far as the proceedings under this act are concerned, there is no dispute in fact, except as to plaintiff's being the owner of land for which he was assessed. The pleadings admit that the commissioners were duly appointed by the Governor in Council—that they were duly sworn and entered on the duties of their office—that they did cause surveys and plans of *Canterbury* street, and the several lots fronting thereon, to be made and prepared by the city engineer; that the city engineer did make and prepare such plans; that having received such plans, the commissioners did proceed to make a just and equitable estimate of the value of the lands required for extending the street; that they did assess and apportion the whole estimated value of the lands in their discretion and opinion benefited thereby in proportion to the benefit accruing to the parties respectively; that the commissioners did, fourteen days before making their report to the common council, deposit a copy of such estimate and assessment in the office of the common clerk, and did give notice in two public newspapers thereof and of the day on which it would be finally filed as and for a record of their proceedings, and the said commissioners did, at the time named, file with the common council of the city the said plan as and for a record of their doings in that respect, and did forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council, and in said report did set forth the names of the respective owners, etc., as far forth as the same was ascertained by them, and a sufficient description of the lots of land, etc, required for extending the street and

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

the lots fronting said street so assessed, as also the sums estimated and assessed for compensation; that defendant appeared in and by the said report as assessed for the purposes of said street on a lot of land along the line of extension of said *Canterbury* street and fronting thereon, for the benefit accruing to him of $419.46.

That after the filing of the plan and report the council appointed Mr. *Sandall*, chamberlain of the city, to receive from the plaintiff the said sum assessed by the commissioners and all other sums mentioned in the commissioners' report assessed by them; that the said *Wm. Sandall*, being also receiver of taxes in and for the city of *St. John*, duly demanded the said amount from plaintiff; and after due notice given and demand made and after the proper time had elapsed, defendant, *Sandall*, being the receiver of taxes in and for the city of *St. John*, duly issued an execution under his hand for the recovery of the amount for which plaintiff was assessed, and the same was duly delivered to one *Hancock*, then being a marshal of the city of *St. John*, to be executed; that the said marshal proceeded to levy and collect the said assessment in the manner pointed out in the statute, and that plaintiff neglecting and refusing to point out goods and chattels, although requested so to do, he, said marshal, for want of goods and chattels whereon to levy, took the plaintiff and delivered him to the keeper of the jail of the city and county of *St. John*, in obedience to the exigencies of the warrant to him directed.

For this imprisonment the present action is brought, as also for money received by defendants to the use of plaintiffs, as also for money payable by defendants to plaintiff for interest. In other words, it is not disputed in this action that all the proceedings were duly had and taken in strict accordance with the provisions of the statute, and that had plaintiff been the owner of or

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

interested in the lot of land for which he was assessed, he could have no cause of complaint. So that the only question on these pleadings is, does the fact of plaintiff not being the owner of this lot make the corporation of *St. John* responsible in damages for his name having been placed on the report of the commissioners, or for the act of the receiver of taxes in issuing the warrant, or for the arrest of the plaintiff under it by the marshal? In my opinion none of the parties acting under this statute were in any sense of the term the servants of the corporation, or in any way subject to their orders or control. The whole proceedings were purely statutory, and over which the corporation of *St. John* had no power, authority or supervision, corporate or otherwise. The commissioners were government officers, and for what they did or omitted to do they were not amenable to the corporation of *St. John*, and the corporation had no right to interfere with their proceedings, and when the report of the commissioners was filed of record the corporation had no right to alter, amend, take from, add to, or interfere with it in any way. The only duty in relation to their proceedings, or in connection with the assessment or collecting the amount assessed, was when the commissioners had filed their report and it had thus become of record to nominate who should receive the money assessed. They did nominate the chamberlain of the city, but they might quite as well, had they thought proper, have named any other individual. By virtue of such nomination the chamberlain did not become an officer of the corporation in relation to this matter, but a statutory officer under the act, and when he received the money he did not receive it as chamberlain, as an officer under the city charter, but as such officer by virtue of his nomination under the act. So with respect to the receivers of taxes, it so happened that *Sandall* was also

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

a receiver of taxes. In his character as such under his general appointment, he had no authority to collect those assessments, it was only by virtue of the special duty cast on him by the act that he had any right to intermeddle, and when he discharged the duty thus imposed on him he did so, not as an officer of the corporation or under corporate control, but as a statutory officer independent of the corporation altogether in respect to all acts in relation to this duty so expressly and specially cast on him by the statute; all the corporation could do was to obey the law, take the record as they found it, and act accordingly, without venturing to amend or alter it in any particular; so, too, the marshal, all he had to do was to execute the warrant delivered to him to be executed; the corporation, the appointee of the corporation, the receiver of taxes and the marshal, did just what the law declared they were to do and nothing more. How, then, can it be possible that, assuming the plaintiff to have been intentionally or inadvertently placed by the commissioners on the record as owner when he was not, the corporation can be made liable for the consequences of the act of government officers over whom they had no control and for an act with which they had nothing whatever to do, as they could neither direct who should be put on the commissioners record, nor could they direct any name or names to be taken off, and an act, too, of which they could have no knowledge, nor the means of knowledge, and an act wholly beyond and outside of their corporate functions, and in relation to a matter from which they, as a corporation, received no benefit whatever in their corporate capacity,—the same not being for the corporate advantage and the emolument of the city—the extending of the street may have been, and no doubt was, an improvement to the city generally, and therefore for the benefit of all the citizens and the public at large, but

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

all the duties discharged or acts done in performance of those duties, whether of omission or commission, by the commissioners, the defendant, as collector of taxes, *Sandall*, in receiving the money, or the marshal in executing the warrant of distress, were not corporate duties performed by servants of the corporation, but duties discharged and acts done by independent officers in the performance of specific duties enjoined on such officers by statute, and over the performance of which the corporation had no control, and therefore no act of the municipal corporation or its agents or servants, and for which the corporation are not responsible at common law nor made so by statute.

The statute gave the person named to receive the money, the person appointed to collect it, and the marshal directed to execute the warrant issued for its collection, nothing for their guidance but the report of record of the commissioners, which report they had no right to question but were bound to act on by virtue of the mandatory injunctions of the statute.

That a municipal corporation could, under such circumstances, be held liable I should not have thought possible, but for the opinions entertained by a majority of my learned brethren. Principle and authority seems to me alike opposed to the idea of making a municipal corporation liable for acts which are not the acts of the corporation, nor of its agents or servants, but which are the acts of independent officers, and consequently where no relation of principal and agent or master and servant exists, and without which the maxim *respondeat superior* cannot apply.

In *Wood's* law of master and servant (1) it is said:

> For the acts of an independent officer whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of *respondeat superior*, for the relation of master and servant

(1) Sec. 463.

does not exist. Such officers are quasi civil officers of the Government, even though appointed by the corporation. "Where," says *Folger*, J., in a very able, thoroughly and carefully considered opinion in a recent case heard before the Court of Appeals in *New York* (*Maxmilian* v. *New York*, 62 *N.Y.*, 165), "a municipal corporation elects or appoints an officer in obedience to an act of the legislature, to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him in pursuance of a duty laid upon him by the law for the general welfare of the inhabitants or of the community. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power is exhausted, he is not its agent. He is the agent of the public, for whom and for whose purposes he was selected."

In *Shearman and Redfield's* Law of Negligence it is said (1):

A municipal corporation is not answerable for the illegal and wrongful acts of the officers, though done *colore officii*, notwithstanding they were done by its specific directions or were afterwards approved of and ratified by it; for in directing the doing of such acts, or in ratifying them when done, the corporation acts *ultra vires*. But the corporation is liable for the irregular and illegal exercise, by its authorized agents, of a power which the corporation possesses, as when an officer levied and collected from the plaintiffs a sum imposed by a void assessment, the corporation having had authority to levy the assessment in a regular way, or where a common council, having authority to grade a street on obtaining the consent of two-thirds of the adjacent owners, failed to obtain such consent, but directed the work to be done nevertheless whereby the plaintiff was injured.

In *Wallace* v. *The City of Menasha* (2) it was held that

A city is not liable in tort for the act of its treasurer, acting in good faith in the execution of his tax warrant, in seizing and selling the chattels of one person for the delinquent taxes of another. In *Thayer* v. *City of Boston* (3) it is said that as a general rule a municipal corporation is not responsible for the unauthorized and unlawful

(1) 3rd Ed., 1874, § 140, p. 179. (2) 21 Albany L. J. 176.
(3) 19 Pick. 511.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bonâ fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that in either case the act was adopted and ratified by the corporation. The levy and collection of taxes are governmental rather than municipal functions, delegated to municipal officers for convenience. It may well be claimed that in the exercise of those functions such officers are public officers, discharging public and not municipal or corporate duties. If so, there seems to be no ground for holding the municipality liable for their torts committed in the exercise of those functions, no room for the application of the rule *respondeat superior* in such cases. A distinction is made in many cases between torts committed by municipal officers or agents in the discharge of such public duties, and those committed in the discharge of purely municipal or corporate duties by the officers or agents of the city or village, the municipality being held liable for the latter but not liable for the former class of torts.

In *Hayes* v. *The city of Oshkosh* (1) *Dixon*, C. J. says:

The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Haffard* v. *New Bedford* (2), and *Fisher* v. *Boston* (3), as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given, and hence the maxim *respondeat superior* has no application.

In *Wood's* Law of Master and Servant (4), it is said:

(1) 33 Wisconsin 318.
(2) 16 Gray 297.
(3) 104 Mass. 87.
(4) Sec. 458, p. 916.

1882

McSORLEY v. THE MAYOR, &C., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

But where the duties of an officer are prescribed by law and are independent in their character, and he is not subject to the direction and control of the corporation as to the time, place or manner of their discharge, he is a public officer, and in no sense a servant or agent of the corporation, and the corporation is not liable for the manner in which he discharges his duties. "Their powers," says *Foster*, J., in *Harvey* v. *Keen* (1) cannot be enlarged or abridged by any action of the town, and what they do, or omit to do, in the proper exercise of their authority, is done or omitted because the law enjoins and prescribes their duties independent entirely of municipal control or authority." In this case it was held that a highway surveyor is a public officer.

In *Oliver* v. *Worcester* (2), *Gray*, J., says :—

The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although enuring, of course, ultimately to the benefit of the public.

* * * * * * * *

In *Bailey* v. *New York* (3), Chief Justice *Nelson* clearly stated the distinction between acts done by a city or town as a municipal or public body, exclusively for public purposes, and those done for its own private advantage or emolument.

In *Walcott* v. *Inhabitants of Swampscott* (4), *Bigelow*, C. J., says :—

We cannot disitnguish this case from *Haffard vs. City of New Bedford* (5). * * *

After stating what was decided in that case, hereinbefore mentioned, by *Dixon*, C. J., he says :—

This is especially true in the case of surveyors of highways. They are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of government, and for the good order and welfare of the community.

(1) 52 N. H. 335.
(2) 102 Mass. 499.
(3) 3 Hill 531.
(4) 1 Allen's R. (Mass.) 101.
(5) 16 Gray 297.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust imposed in them by law; nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties, they are wholly independent of towns, and can in no sense be considered their servants or agents.

In *Dillon* on Corporations, it is said (1):

If the duty though devolved by law upon an officer elected or appointed by the corporation is not a corporate duty, the officers of the corporation in performing it do not act for the corporation, and hence the corporation is not responsible (unless expressly declared to be by statute) for the omission to perform it or for the manner in which it is performed.

In *Wood* on Master and Servant (2), it is said, under the heading, "Who are independent officers?"

Independent officers are those who are appointed or elected by the legislature or by the people, or whose duties are fixed and defined by law, and over whose official acts the corporation has no immediate or direct control.

The case of *Barnes* v. *District of Columbia* (3) has been said to be opposed to the doctrine of the cases cited. However that may be, I think that case clearly distinguishable from the present, as it was a decision on a statute in every respect different from the one we are considering; were it not so I should consider it but a questionable authority, which I should be loath to follow, opposed as it is to so many judicial decisions of so many States, and likewise, in my opinion, sound law as applicable to the case before us. And as it was decided by a bare majority of five to four I cannot look upon it as a decision in itself entitled to much weight outside of the court in which it was delivered.

(1) Sec. 165.

(2) Sec. 464.

(3) 91 U. S. 540.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

But it is now contended that the defendants are liable for false imprisonment on the ground of ratification Whether this question can be properly raised under the pleading it is unnecessary to discuss, because, in my opinion, there is not the slightest ground, either in law or fact, to justify the contention that defendants made themselves in any way liable or responsible for plaintiff's arrest and imprisonment, either by directing or authorizing or adopting or ratifying such arrest and imprisonment. After plaintiff was arrested and in custody he caused the amount of the assessment to be paid to a clerk in the chamberlain's office and obtained his discharge. This is his account of the transaction. He says in his direct examination :

It was in this gaol here I paid the deputy clerk $437 or $439 to get out.

Again :

I paid $437 and some cents.

Cross-examined : I did not say I paid the money to *Rankin*, [the gaoler.] I did not pay it at all. I did not see the money paid. I don't think I swore the money was paid in my presence. It was not paid in my presence.

James McSorley, son of plaintiff, says :

I recollect the day he was taken to gaol. Under your (Mr. *Thomson's*) directions, I paid the money in the chamberlain's office. I paid it to Mr. *Humbert*, a clerk in the office. He was not satisfied at first to give me a receipt.

This is *verbatim et literatum* every word as to the payment in plaintiff's case, and there is not another word on the subject in defendant's case. Mr. *Thomson* raised eight questions, but not one of them has any reference to the payment of the money to obtain release, or to any payment under protest, or to any receipt by the corporation, or to any ratification by the receipt of the money, but rests his right to recover on entirely distinct and different grounds. The learned Chief

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

Justice, in his charge, for the first time apparently, raises the question of ratification, but this he entirely abandons in the full court. I think it clear law that a party cannot be made liable as a trespasser by ratification unless the trespassing was originally done on his behalf and for his benefit. Nor can there be a ratification, unless the party who is sought to be made liable by means of the ratification is shown to have had at the time full knowledge of all the circumstances of the case.

There is not a tittle of evidence that this money ever went into the coffers of the corporation of *St. John*, or that as a corporate body the corporation ever knew that it had been so paid, and if it had it was not corporation money, but money to be held and distributed among the land owners injured by the extensions, and yet it is argued that such payment constituted a ratification and adoption—but of what? I cannot but confess myself at a loss to understand of what this payment was a ratification. Was it of the act of the commissioners? of the receiver of taxes in issuing the warrant and collecting the assessment? of the marshal in executing the warrant? or of the receipt of the money by the clerk of the chamberlain, who must have received it for the chamberlain? and he could only receive it as collector of taxes appointed under the statute, and who, after such receipt under the statute, would be bound to hand it over to the corporation, but of which there is not a particle of evidence that he ever did or that he even ever notified the corporation that it had been so received. There is no evidence whatever to show that the corporation had the slightest knowledge or notice that this plaintiff was not the owner of the land, nor that his name was wrongfully put in the commissioners record, nor that the receiver of taxes had issued the execution, nor that the marshal had executed it, nor that the plaintiff was imprisoned, nor that he had paid

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

the money to obtain his release. How this can be converted into a ratification, or make the corporation wrong doers and liable for false imprisonment, I am at a loss to conceive. Had the chamberlain, after having received the money, accounted for and paid over the amount to the corporation and they had received it, they would have only been doing what the law required they should do. How can the mere fact of the money having been paid into the office of the receiver of taxes — the party the statute required to collect, it and who in collecting it exercised legislative functions, because he happened to be chamberlain, and as such the party nominated under the statute to receive it—make the corporation wrong doers and trespassers, guilty of false imprisonment, and that, too, without it being in any way shown that the corporation ever knew of any illegality in the proceedings, or even that the money was so paid, or that if paid, it was received otherwise than as money legally paid and received under the statute, to be distributed as directed by the statute.

I can discover no act done by or on behalf of the corporation which they did or could ratify, nor can I discover any such question raised by the pleadings or on the trial in this case. It may be that if the plaintiff was wrongfully assessed and the money had been actually received by the corporation, and it had had notice that the plaintiff was not a property holder and that the money had been wrongfully levied and paid under protest, which it was not, and plaintiff had demanded repayment from the corporation and it had refused, an action for money had and received might possibly have lain at the instance of the plaintiff against the corporation, but this is not entirely clear; but no such question arises in this case, and therefore it would be neither profitable nor proper to discuss it.

The authorities in respect to ratification are, to my

1882

McSORLEY
v.
THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

mind, very clear, and I think sustain what I have said. I will cite a few of them.

In Scurry v. *Ray* (1), it was held that there could be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the party in whose favor it is made, unaware of the invalidity of the first transaction and has not at the time of the supposed ratification the means of forming an independent judgment.

In Eastern Counties Railway Company v. *Brown* (2), the servant of a railway company took the plaintiff as passenger upon the company's line into custody for an alleged breach of one of the company's by-laws, and carried him before a magistrate. The attorney of the company attended before the magistrate to conduct the charge. Held, this was no evidence that the company ratified the act of their servant.

A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards on demand refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use and benefit (3).

A corporation cannot be made liable for false imprisonment, unless the party complaining gives evidence justifying the jury in finding that the persons actually imprisoning him had authority from the corporation (4).

Where goods of a party are seized under a process which has issued in a suit in which such party is a defendant and the seizure takes place without the knowledge or authority, or in the name of the plaintiff in such suit, the circumstance that the goods afterwards came to his hands, and that he, knowing the

(1) 5 H. L. 627.
(2) 6 Exch. 314.
(3) *Wilson* v. *Baker*, 4 B. & Ad. 614.
(4) *Eastern Counties Railway Company* v. *Brown* 6 Exch. 314.

circumstances of the seizure, refuses to give them up, do not make him a trespasser (1).

A principal is not liable for the wrongful acts of his agents though he receives benefit from them, unless at the time of the receipt he has notice of the illegality (2). In this case it was held a principal is not liable on trespass for the act of his agent, unless he authorized it beforehand, or subsequently assented to it with knowledge of what had been done.

Therefore, when in an action of trespass against a landlord it appeared that he gave a broker a warrant to distrain for rent and the broker took away and sold a fixture and paid the proceeds to the defendant, who received them without enquiry, but without knowledge that anything irregular had been done, held, that no such authority or assent appeared as would sustain the action. In this case *Whiteman*, J., said:

> Where a man is made a trespasser by relation as having assented to it, it is always shown that he knew of the trespass.

But the statute evidently contemplated that assessments might be made on wrong persons, and that payments might be made to parties not legally entitled to receive the money, and for both of these contingencies the legislature has provided.

Thus section 14, which provides that the assets shall be a lien and charge upon the land, and establishes the personal liability of the owners, and authorizes the appointment by the corporation of a person to receive the amounts assessed, and imposes the duty on the receiver of taxes to issue executions, and directs the marshal to proceed to levy and collect, ends with this proviso:

> Provided, that if any money so to be assessed be paid by or collected or recovered from any person or persons when by agreement

(1) *Wilson* v. *Tumman*, 1 Dow. & L. 513; s. c. 12 L.J.C.P. 306.

(2) *Freeman* v. *Rosher*, 13 Q.B. 780.

1882

McSORLEY v. THE MAYOR, &C., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

or by law the same ought to have been borne and paid by some other person or persons, it shall be lawful for the person or persons paying the same, or from whom the same shall be collected or recovered, to sue for and recover the money so paid by or recovered from him or them with interest and costs, as so much money paid for the use of the person or persons who ought to have paid the same, and the said report of the commissioners, with proof of payment, shall be conclusive evidence of the suit.

And section 12, which provides that the mayor shall, within one calendar month after assessments are collected, pay to the respective persons mentioned in the report the sums estimated and reported in their favor, and giving authority to parties to sue the corporation, if not paid after application, and providing that if persons entitled are under age of twenty-one years, *non compos mentis*, *feme covert*, or absent from roll, or when the names of the owners or persons entitled shall not be set forth, or when persons named cannot be found, the amounts payable to such persons may be paid into the equity side of the Supreme Court, ends with this proviso:

Provided also, that in all and every case and cases whenever such sum or sums, or compensation, so to be reported by the said commissioners in favour of any person or persons whatsoever, whether named or not named in the said report, shall be paid to any person or persons whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons, it shall be lawful for the person or persons to whom the same ought to have been paid to sue for and recover the same, with legal interest as aforesaid, and costs of suit, as so much money had and received for his, her or their use, by the person or persons respectively to whom the same shall have been so paid.

These two clauses very clearly establishing, in my opinion, that if the provisions of the act were complied with and the corporation appointed a party to receive the money when it was received by the corporation, and paid as the report of the commissioners directed, the duty of the corporation was discharged and they were free from liability, and if a wrong party was

assessed and compelled to pay, or the amount was paid to a person when it belonged to another, then the aggrieved party was to look to the remedies provided by the statute.

The great hardship of this case on plaintiff which has been put forward strikes me as being to a large extent imaginary. The receiver of taxes, upon whom the duty of collecting was cast, as well as the marshal who executed the warrant, appear to have acted with the greatest forbearance and leniency. Plaintiff had ample notice that his name was put down as owner, and so, on the face of the record, was liable for the assessment, but he took no steps whatever to have the record corrected or his name removed; he took no steps to have the collection of the assessment against himself personally restrained, and the lien on the land enforced in lieu thereof; he does not even appear to have notified the commissioners, the receiver of taxes, or the marshal (according to his evidence, and the very contradictory character of plaintiff's evidence precludes his version being accepted), or even the corporation that his name was improperly inserted as owner; but, on the contrary, the evidence shows that by his words and actions he rather encouraged the idea that he was the proper person. He appears to have gone to gaol almost voluntarily, certainly without any necessity, and it would look much as if with the sole view of laying the foundation for an action such as this, for so soon as he is locked up he sends for his money and pays the amount, and that not even under protest; this he could just as well have done without going to gaol. To get the money back there was no necessity whatever for suing the corporation of *St. John*, equity would enforce the lien on the land in his favour, and the statute evidently contemplated, as we have seen, that mistakes

1882

McSORLEY v. THE MAYOR, &C., OF THE CITY OF ST. JOHN.

Ritchie, C.J.

might be made, and that parties not really liable be compelled to pay, and has provided for such a contingency by enacting as before mentioned, so that in truth and in fact the plaintiff could, had he chosen, by taking at the proper time the necessary proceedings, have had himself relieved from the payment of this assessment, and from the effect of having his name inadvertently placed on the record—(it is not suggested that it being so placed was more than an inadvertency; had it been done wilfully or maliciously by the commissioners, doubtless he would have had a remedy against them)—and could now recover the amount he has paid either from the owner of the land or from the land itself, and so really there is no reason whatever why he should proceed against the corporation of *St. John*, who in this matter have been guilty of no act of omission or commission morally or legally that I can discover, making them wrong-doers in relation to the plaintiff.

Under these circumstances, I think the judgment of the Supreme Court was right, and should be sustained, and this appeal dismissed with costs. The only objection that I think could be raised to the judgment of the court below is, that instead of ordering a new trial a judgment for defendants *non obstante veredicto* should have been entered, by reason of the insufficiency of the replication to the second plea.

STRONG, J.:—

I am of opinion that this appeal should be allowed. The appellant was not the owner, lessee, nor a party or person interested in any of the lands or premises mentioned in the report of the commissioners, or in any lands or premises in any way benefited by the extension and opening of *Canterbury* street. The commissioners had, therefore, no jurisdiction to assess the

appellant, and their assessment of him was consequently wholly void. The 10th sec of the act in question (1), it is true, declares that the report of the commissioners shall be final and conclusive, but the subsequent part of the clause expressly limits this conclusive effect to persons whom the commissioners had jurisdiction to assess.

The language of the act is :—

> And upon the coming in and filing of such report the same shall be final and conclusive as well upon the mayor, aldermen and commonalty of the city of *St. John*, as upon the owners, lessees, parties or persons interested in and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report.

There is nothing here warranting the respondents' contention that the report was conclusive as to all the world, upon strangers having no interest in the street as well as upon the property owners. The language is most explicit—it is to be final and conclusive only upon the city and the property owners. Had it been otherwise, and as the respondents contend, it would have been a most arbitrary and unjust enactment. Had the section stopped at the words "final and conclusive" I should have implied the limitation which follows, and, without the addition of the subsequent words, have been of opinion that the report was only made binding upon those over whom the commissioners had jurisdiction, the owners of property and persons benefited by the opening of the street. I think the decisions upon statutory provisions, taking away the writ of *certiorari*, and many decisions upon the *Ontario* Muncipal Act, would in that case have applied *a multo fortiori* to shew that the plaintiff was not bound by the report (2). The 14th section also shews very clearly that the legislature did not intend to give the report the

(1) 41 Vic., c. 9.

(2) See cases referred to in *Nickle* v. *Douglass*, 37 U. C. Q. B. 51.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

binding effect which the respondents insist upon, for it says :

> That the respective owners and proprietors of the lands and premises in the said report mentioned, or the parties interested therein, and also the occupant shall be liable to pay on demand the respective sums at which the respective lands so owned and occupied by him, her or them, or wherein he, she or they are so interested, or at which the owners and proprietors thereof shall be assessed, to such person or persons as the said mayor, aldermen and commonalty of the city of *St. John* shall appoint to receive the same.

What language could be clearer than this to show that the only persons bound by the report and liable to pay the amounts assessed against them were owners, occupants and persons interested ? The two English cases of *Hesketh* v. *Local Board of Atherton* (1) and *Cox* v. *Rabbitts* (2) are in point, and show that there is nothing in the act to debar the plaintiff from disputing his liability to assessment. The assessment must therefore be considered as wholly void.

Then a collecting officer who levies a distress or makes an arrest under a warrant, which, though good upon its face, is founded upon a void assessment, is clearly guilty of a trespass, and the same principle applies to the officer who issues the warrant, and thus directs the distress or arrest to be made.

The important question, however, in the present case is whether the rule of *respondeat superior* applies so as to make the corporation of *St. John* liable for the acts of the other defendant, *Sandall*, in issuing his warrant upon the commissioners' report, and thus causing the arrest and imprisonment of the plaintiff. The general rule by which this liability is to be tested is so well stated by a learned judge and text writer, whose authority on a question of this kind is pre-eminent, that I must be excused for extracting at some

(1) L. R. 9 Q. B. 4. (2) 3 App. Cases 473.

length what he says upon the subject. Mr. Justice *Dillon* thus states the rule:

It may be observed, in the next place, that where it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal enquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the Statute to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the Government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or statutory officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable. It will thus be seen that on general principles it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved upon him by law or by the direction or authority of the corporation.

Tested by this general rule it appears to me that the liability of the city for the act of *Sandall* is beyond question. He was an officer of the city specially appointed to receive the moneys to be collected and levied under the act in pursuance of the assessments of the commissioners. By the 14th section the parties liable were to pay the sums of money assessed by the commissioners "to such person or persons as the said mayor, aldermen and commonalty of the city of city of

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

St. John shall appoint to receive them," and it is then provided that in default of payment it should be lawful, and the duty of the receiver of taxes of the city of *St. John*, to issue execution under his hand, and to levy the amounts as prescribed by the section in question, namely, by distress or imprisonment. In exercise of this power the city appointed *William Sandall*, who was already their officer, being by appointment of the city its chamberlain and general receiver of taxes. The official character of *Sandall* was, therefore, a double one: 1st, he was, by the special appointment of the city under the act, the person to receive the moneys assessed by the commissioners under the statute, and as such it was his duty to make the demand of payment mentioned in the 14th section, and, secondly, he was the general receiver of taxes for the city, and in that character it was incumbent on him to issue execution and make levies for such of these special assessments as the commissioners should have legally imposed. It thus appears to me that *Sandall* was beyond all doubt an officer for whose acts in respect of the collection of these assessments the city was liable, upon the principles stated in the extract from Mr. Justice *Dillon's* note, which I have before given. He was an officer appointed by the city, in obedience to a statute, it is true, but in this respect his appointment in no way differs from that of the great majority of municipal officers whose appointments are prescribed by statute, he committed the wrongful act complained of in the discharge of a duty imposed by law, not for the benefit of the general public, but for the peculiar benefit of the corporate body whose servant he was, the mayor, aldermen and commonalty of the city of *St. John*, and the money which was exacted from the plaintiff, and which was the fruit of *Sandall's* illegal

act, was received and applied to the benefit of the city. Moreover, it was in his character of receiver of taxes, a general officer of the city, not appointed under the statute, that he committed the trespass complained of by causing the false imprisonment of the plaintiff.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

It being beyond question on the construction of the statute as before shewn that the assessment of the plaintiff was void, and that the warrant or execution was as a consequence also void, it is not material to inquire whether the commissioners were officers of the corporation for whose acts the city was responsible. If the assessment was void, the acts of *Sandall* were illegal, and the city was responsible for those acts, on the principle before stated, whether the commissioners were or were not persons for whose illegal conduct the city was also liable.

I think, however, that even if we had to go back to the assessment and show that the city was responsible for the illegal conduct of the commissioners, there would not be much difficulty in establishing the liability of the respondents and sustaining this appeal. The commissioners were, it is true, a body appointed not by the corporation, but by the Lieutenant-Governor under the statute. They were, however, appointed, not for the performance of a service for the benefit of the general public, but one of a peculiarly local and corporate character for the benefit of the corporation. This being so, it appears that although not elected by the commonalty or ratepayers, or appointed by the governing body of the city, but by the executive head of the province, they are just as much officers of the corporation as if they had been nominated by it or chosen by the corporators. Very high authorities in the *United States* warrant this conclusion. In the case of

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

Barnes v. *District of Columbia* (1), the Supreme Court of the *United States* held that the municipal corporation of the *District of Columbia* was liable for the wrongful acts of commissioners, constituting a board of public works to which was delegated the duty of keeping in repair the streets and avenues of the district, who were not appointed by the corporation, nor elected by the people or ratepayers, but were nominated by the President of the *United States*; it being considered that the duties of the board being of a local and corporate and not of a general public character, it was to be considered as forming a part of the municipal corporation of which its members were consequently the officers. The corporation was therefore held liable for an injury resulting from the neglect of the board in failing to keep a street in proper repair. In giving the judgment of the court, Mr. Justice *Hunt* says :

> The mayor of a city may be elected by the people, or he may be appointed by the Governor with the consent of the Senate, but the slightest reflection will shew that the power of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city, depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it, nor are these by any means conclusive considerations in any case.

In the case of *Bailey* v. *The Mayor* (2), the same doctrine had previously received the assent of the Supreme Court of *New York*. In that case the city of *New York* was held liable for the negligence of certain statutory commissioners appointed by the governor under the authority of an act of the legislature for supplying the city with water. *Nelson*, C. J., in giving the judg-

(1) 91 U. S. 540. (2) 3 Hill 531.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

ment of the court states the point raised by the defendants and upon which the case turned to have been that

The defendants were not chargeable with negligence or unskilfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners, not being their agents in the construction of the dam, the rule *respondeat superior* could not properly be applied.

And he then proceeds to give judgment for the plaintiff upon the ground that the commissioners, although appointed by the state and not by the city, were, by reason of the work which they were appointed to control being for the special and corporate benefit of the city and not for that of the general public, to be considered as the officers and servants of the city, which was therefore responsible for their acts. This case was subsequently affirmed in appeal (1).

In *Maximilian* v. *The Mayor* (2), decided in 1875, the whole of this doctrine is most ably reviewed by a very distinguished judge—*Folger, J.*, since Chief Justice of *New York*—in delivering the judgment of the *New York* Court of Appeals. The principle of *Bailey* v. *The Mayor* was in this late case affirmed, and the conclusion was arrived at that the corporation was liable where the acts complained of were to be done by officers whose powers and duties were given and taken for the benefit of the corporation and as a local and corporate body, but not so when the duties enjoined and powers granted were for the benefit of the general public as distinguished from the local public of the city, and are delegated as a convenient method of exercising a function of general government.

Taking these authorities, and the sound principles of law they enunciate, as guides, as from the high sanction which they have received we safely may, I am of opinion that if it were necessary here in order to entitle

(1) 2 Denio 433.

(2) 62 N. Y. 160.

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Strong, J.

the appellant to recover to hold that the city of *St. John* was liable for the acts of the commissioners appointed by the Lieutenant-Governor under the statute, in wrongfully and illegally assessing the appellant, we should be justified in doing so. For the reason, however, that it appears to me clear that *Sandall* was guilty of a trespass for which the city is liable for the reasons already stated, I prefer to rest the decision of the case on this latter ground. My judgment must therefore be that the judgment appealed against be reversed with costs, and the rule *nisi* for a new trial in the court below be discharged with costs.

FOURNIER J. :

Après le désastreux incendie qui réduisit en cendre la partie commerciale de la Cité de St. John, en 1877, la législature du Nouveau-Brunswick passa l'acte 41 Vic., ch. 9, autorisant l'élargissement de certaines rues, ainsi que l'extension de la rue Canterbury. Le mode indiqué par ce statut pour l'exécution des travaux à faire pour opérer ces changements ayant été longuement exposé par l'honorable juge-en-chef, il serait inutile pour moi d'y revenir. Il a aussi cité toutes les parties de cette loi qui peuvent lui donner le caractère d'une loi imposant à la Cité de St John, dans l'intérêt public, distinct de celui de la Cité, comme municipalité, l'obligation de faire les améliorations en question. Il conclut, comme la Cour Inférieure, du caractère impératif de ces dispositions que la Cité de St John, dans l'exécution de ces travaux n'a été que l'instrument de la loi, et qu'elle n'a pu non plus que ses officiers, encourir aucune responsabilité à cet égard. Pour décider la question qui s'élève en cette cause, il faut d'abord déterminer le véritable caractère de cette loi.

Malheureusement le préambule ne nous est d'aucun secours pour résoudre cette première question. Il y est

seulement dit que l'amélioration en question est désirable et il n'appert aucunement par qui elle est demandée. Bien qu'il soit assez raisonnable de présumer que cette loi a été demandée par la cité qui devait en bénéficier, il n'y en a cependant pas de preuve. Toutefois certaines parties de cette loi me paraissent faire voir clairement que la seule partie intéressée dans ces travaux est la Cité qui doit les faire exécuter. Ainsi, dans la 10e sec., après avoir statué que les commissaires chargés de l'évaluation des propriétés qu'il sera nécessaire d'exproprier remettront leur rapport au greffier de la Cité, il est déclaré que ce rapport sera final :

Shall be final and conclusive as well upon the Mayor, Aldermen and Commonalty of the City of St John as upon the owners, &c., &c., and the said Mayor, &c., shall become possessed of all the said lands, tenements, hereditaments and premises in the said report mentioned that shall or may be so required for the widening and extending of the said streets respectivelv, the sum to be appropriated, converted and used to and for such purpose accordingly and none others whatsoever.

La 12e section oblige la cité de St John à payer conjointement les sommes fixées par les commissaires. A défaut de paiement et après demande faite en la manière y spécifiée les intéressés pourront en poursuivre le recouvrement avec intérêt contre la cité.

May sue for and recover the same, with lawful interest at the rate of six per centum per annum, with costs of suit, in action of debt against the Mayor, Aldermen and Commonalty of St. John, in any Court having cognizance thereof.

La 13e section contient la déclaration suivante :

And the said Mayor, Aldermen and Commonalty of the City of St. John shall bear and pay the several amounts which the Commissioners shall determine as aforesaid are to be paid by said City Corporation for the widening of said streets as hereinbefore mentioned, to be certified to them, and also the costs of widening, making and finishing the said streets and parts of streets so to be widened, and also the costs of opening, extending and making and finishing the said Canterbury street, &c.

La 14e section statue que les sommes payables en

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Fournier, J.

vertu du rapport des commissaires seront payées à telle personne que la Cité nommera pour les recevoir. A défaut de paiement, le receveur des taxes de la Cité a le pouvoir d'en prélever le montant par warrant.

Par la 16e section la Cité doit payer les frais et les services des commissaires.

Par la 17e section les commissaires doivent aussi évaluer les sommes que la Cité sera tenue de payer pour les avantages qui pourront lui résulter des améliorations à faire aux rues Dorset et Wolf et partie des rues Lennox et Smythe. La Cité doit aussi payer le salaire des commissaires avec leurs dépenses et aussi la somme de $15,000, montant estimé pour finir les travaux à faire dans les dites rues.

La 18e section autorise la Cité à emprunter une somme suffisante pour couvrir toutes les dépenses, et les 19e et 20e sections indiquent le mode d'emprunter par débentures. Au cas de défaut dans le fonds d'amortissement qui doit être établi pour le remboursement de l'emprunt autorisé, la balance sera prélevée sur la partie de la Cité située du côté-est du Hâvre de St. John.

Quoique la plupart des dispositions ci-dessus citées s'appliquent à d'autres rues que celle de Canterbury, elles n'en font pas moins voir que tous les travaux ordonnés par cet acte sont d'un caractère municipal— et qu'ils ne sont ainsi ordonnés à la Cité de St. John que comme municipalité et dans son propre intérêt. Bien que les dispositions soient différentes pour les améliorations de la rue Canterbury elles sont cependant comme les autres d'un caractère municipal. L'acte concernant ces ouvrages n'a pas le double caractère d'un acte municipal et d'un acte concernant l'intérêt public de la province. De plus les législatures locales ayant par l'acte de l'Amérique Britannique du Nord un pouvoir illimité de législater sur les institutions municipales, il était au pouvoir de celle du Nouveau-Brunswick

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Fournier, J.

d'imposer, même directement, à la Cité de St. John, les améliorations mentionnées dans l'acte ci-dessus cité et d'en prescrire le mode de gouvernement. Il s'en suit que la municipalité ne peut éviter la responsabilité provenant soit de sa faute, soit de celle des officiers agissant pour elle dans la mise à exécution des dispositions de cette loi.

En donnant effet au rapport des commissaires et en nommant son receveur de taxes, pour recevoir le montant des évaluations, et au besoin en prélever le montant par warrant, la Cité n'a pu éviter la responsabilité des procédés des Commissaires et de son receveur de taxes.

Les commissaires ayant, sans droit quelconque, obligé l'appelant à payer comme propriétaire tandis qu'il ne l'était pas; de plus la corporation n'étant pas obligée d'exécuter ce rapport, quoique partie à l'instance décidée par eux, mais ayant jugé à propos d'y donner suite, elle doit en conséquence être tenue responsable. En outre cette somme ayant été payée dans le bureau du receveur des taxes en vertu du warrant d'emprisonnement qu'il avait fait émettre contre l'appelant, je suis d'avis que la Cité est responsable et que l'appel devait être alloué.

Ayant pris communication des notes de l'honorable juge Henry, je concours dans les raisonnements qui l'ont amené à la même conclusion.

HENRY, J.:—

This is an action for arrest and false imprisonment with a count for money had and received. The respondents justified under a warrant issued by the defendant *Sandall*, the receiver of taxes in the city of *St. John*, to collect an amount alleged to have been assessed upon the appellant under an act of the legislature of *New Brunswick* (41 *Vic.*, ch. 9) to provide for the widening,

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Henry, J.

extension and opening of certain streets in that city, among others, *Canterbury* street.

They also pleaded not guilty, and to the second count never indebted as alleged.

The jury, under the direction of the learned Chief Justice of *New Brunswick*, before whom the case was tried, found for the appellant on the pleas of justification, and "not guilty," and for the respondents on the plea of never indebted.

It was amongst other things alleged, in the second plea of the respondents, that the appellant by an estimate and appraisement, under the act before mentioned of commissioners duly authorized and appointed under that act and duly filed in the office of the common clerk of the city, was duly assessed as the owner of or interested in land fronting on *Canterbury* street, to the amount of four hundred and nineteen dollars and forty-six cents; that payment of the said sum was duly demanded of him by the defendant (*William Sandall*), who had been appointed by the mayor, aldermen and commonalty of the said city to receive and collect the same, and that he, the appellant, failed to pay the same; that subsequently the warrant under which he was arrested was duly issued by the defendant (*William Sandall*), and that the appellant was thereunder arrested and committed to jail. To this plea the appellant, in substance, replied that he never was—

At any time in any way directly or indirectly the owner of or otherwise in any way legally or equitably, or otherwise howsoever, interested in the lot of land and premises in the said second plea mentioned or any part thereof," nor was he ever "at any time whatever, the owner, occupier, or lessee of any lands and premises in the city of *St. John*, through which the said extension of *Canterbury* street passes, or which are or were affected by the said act of the general assembly, nor had he any interest of any kind whatsoever directly or indirectly, legally or equitably, in any of the lots of land or lands and premises of any kind affected by the said act.

Issue was joined upon the replication by the respondents.

The defence of the mayor, aldermen and commonalty, as well as that of the respondent *Sandall*, was therefore by them, in accepting the issue tendered by the appellant, to depend on their proving that he was liable under the provisions of the act to be assessed. That was the simple issue of fact to be tried. It is not too much to say that so far from any evidence having been given in that direction, it is admitted that the appellant had no land or property fronting on *Canterbury* street or any to be affected by the terms of the act.

That issue was, therefore, in my opinion, properly found in favor of the appellant.

It was not an immaterial but an important issue, as the act limits the right of the commissioners to the assessment of parties who were the owners of, or interested in, lands fronting on the extension of the streets mentioned in the act. The commissioners would, therefore, have no more right to assess a resident of *St. John* whose land was not such as referred to in the act, than they would to tax a resident of *Ottawa* who was not the owner, occupier, or interested in land in any part of *St John*.

It is clear from the evidence, and indeed it was fully admitted, that the assessment upon the appellant was wholly unjustified by the provisions of the statute.

Had the issue not been narrowed by the replication to the one point, by which other allegations in the second plea are to be taken as admitted, I should have been inclined to think the evidence of the notification and demand of payment of the assessment insufficient; and I am not at all satisfied but that previous to the issue of the warrant, evidence under oath of the demand and non-payment of the assessment should have been given to justify the issue of it. Those matters, however, are

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Henry, J.

not before us, either in the pleadings or otherwise, and I need give no opinion as to them.

I will now briefly refer to the defence under the plea of "Not Guilty."

None of the respondents were immediately connected with the arrest of the appellant, which was made by the city marshall under a warrant issued by the defendant *Sandall*. If, then, the arrest was illegal, and that the appellant had to pay over four hundred dollars to obtain his discharge from prison, is he entitled to any redress, and from whom?

In the first place, was *Sandall* justified in issuing the warrant? From the best consideration I have been enabled to give to the subject, I am of the opinion he was not. If the commissioners had the right to assess the appellant and did so, and the act provided that the person or persons to be appointed by the city authorities should have authority to demand payment of the assessments made by the commissioners, and issue warrants to collect them, there could be no question of the right of *Sandall* to issue the warrant in question; but the right to issue the warrant depends upon the right of the commissioners to assess the appellant. The legal act of the commissioners is, therefore, the foundation and source of the authority of *Sandall*. The act makes the report of the commissioners, where no objections are made, or provided by it, final and conclusive and binding on the mayor, aldermen, and commonalty, and "upon the *owners, lessees, parties or persons interested in and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report.*" The appellant in this case was assessed for a lot owned and occupied by another. The latter, and not the appellant, is the party to be bound by the act of the commissioners; and the statute provides that the assessment shall be a lien on the lands assessed.

By virtue of that provision the lot in question is now under a lien for the amount of the assessment, unless removed by irregularities or laches. The appellant was not in any way bound by the act of assessment, as the commissioners had no authority to assess him. Their act in that respect being wholly void, no one acting to the injury of another can justify under it. Every one who interferes with the liberty or property of another, either personally or by means of process issued, must shew a legal right to do so, and the responsibility cannot be shifted by alleging the wrongful act of another by which the party inflicting the injury is induced to do it. A party in the position of the respondent *Sandall* must act at his peril. If the commissioners had no right to assess the appellant, he (*Sandall*) was not bound to issue the warrant. It is alleged that the statute made it his duty to issue warrants in all cases where the assessments were not paid. That duty is, however, limited to assessments legally made. It may be said that the respondent *Sandall* was not to inquire as to the regularity of the assessments. That in some cases may be correct, but in this one the commissioners had a prescribed and limited jurisdiction, and it was the duty of the respondent *Sandall*, before issuing his warrant, to satisfy himself that in making the special assessments the commissioners had not exceeded their jurisdiction. The obligation may seem a hard one, but every one who accepts a public office of emolument has to assume responsibilities which are necessary for the safety and protection of the rights of others. I am of opinion that the respondent *Sandall* was not justified in issuing the warrant, and that the two issues were properly found against him.

The next and only remaining question is as to liability of the other defendants.

The report of the commissioners improperly and ille-

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Henry, J.

gally assessing the appellant was laid before the common council on the 18th of Dec., 1877, and that body appointed *Sandall* to collect the assessments (including that of the appellant) on the 27th of February following. The mayor, aldermen and commonalty, therefore, appointed him to collect from the appellant the illegal assessment, and upon failure to pay it, to issue the warrant under which he was arrested. Are they not responsible for that illegal act? Can they be excused when a wrong resulted by the allegation of the illegal act of the commissioners? They were equally bound as *Sandall* to consider the prescribed and limited powers of the commissioners, and were not only not bound to order the collection of the assessment from the appellant, but, on the contrary, to prevent, as they had the power, their own appointee making the collection. It cannot be successfully contended, that the mayor, aldermen and commonalty had not the power to order the name of the appellant to be struck out from the list of assessments. I have carefully considered the reasons for the judgments given in this case by the learned judges in the court below, and have considered also the case of *Hatheway* v. *Cummings* (1) referred to by two of them, but cannot agree with them as to the distinguishable features of the two cases.

In the one just cited, the plaintiff sued in trespass for the seizure of his horse and waggon under a warrant issued by the defendant, who was treasurer and collector of taxes at *Fredericton*, for non-payment of taxes. The court unanimously found that the taxes were illegally assessed, and sustained a verdict for the plaintiff. The court found that the assessors had illegally assessed the plaintiff, and the treasurer and collector was found to have acted illegally in issuing the warrant to enforce the assessment. They did not hold that the treasurer

(1) 6 Allen N. B. R. 162.

and collector was bound by the illegal act of the assessors and to give effect to it by the issue of his warrant. It might have been as well said in that case, as in this, that they were all acting under statutory powers—for, in the former the whole matter of the assessment was regulated by statute, and the duties of those to make the assessment and collect them were specially prescribed. The main, and, indeed, only difference that I can discover is, that in the one case the assessors were appointed by the civic authorities, while, in the other, the commissioners were appointed by the Governor in Council. Both were, however, city assessments, and when collected, were to be paid to the city treasurer. It matters little in the circumstances of this case who appointed the commissioners.

It is, however, contended that in this case the city authorities were nothing but conduit pipes to pass the amount of the assessments from those taxed to those who were entitled to it under the appraisement—that, in fact, the mayor, aldermen and commonalty were trustees of a naked trust without interest in the subject-matter; that no privity existed between them and their appointee, and that as to them the defendant *Sandall* was not in the relation of a servant. I have already shown that they appointed *Sandall* and authorized him to do the illegal act complained of. That, in my judgment, would be sufficient to bind them for his act in carrying out their requisition to him. When, however, we consider the object and purview of the act, it is plain that the city authorities, as representing the city, were interested as owners and principals throughout. By the act the commissioners were authorised to fix the proportion the mayor, aldermen and commonalty should pay of the appraisements for damages to persons whose lands were taken for the improvement of the streets. In reference to two

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Henry, J.

of the streets the liability of the city was limited to twenty thousand dollars. In reference to one there was no such limit; but in reference to another, the act provided the city was to pay one-half, and in the several clauses the liability of the city to pay such proportions was enacted because "of the public advantage accruing to the city of *St. John*" by the widening of the several streets. In reference to Canterbury street there is no such provision for requiring the city to pay any part of the appraisements, but on the filing of the report of the commissioners with the necessary plans, it was enacted in section 10, that all the lands taken for the widening and extension of the streets should vest in the mayor, aldermen and commonalty for the purpose of the said streets. Here, then, there was a direct interest from the time of the first proceeding after the act was passed. The city was to be benefited and advantaged, and it was to own the lands upon which the improvements were to be made. It was to pay thousands of dollars for the improvements, and the mayor, aldermen and commonalty were authorized to borrow money on city debentures to pay the sums before mentioned with the charges of the commissioners and other disbursements mentioned in section 16, and also fifteen thousand dollars for "cutting down, opening, making and finishing of said streets so widened, extended and opened under this act," as provided in section 17.

Although there is no evidence of the fact before us, we may fairly assume that the act was passed at the instance of the mayor, aldermen and commonalty, and that it was drafted and prepared under their direction. I could not imagine such a thing as the legislature dealing with the subject except on the application of the city authorities.

By the act they are authorized and undertake to have the contemplated improvements made. They are

the moving parties and the principals from beginning to end, and they, representing the city, have the power over the whole of the proceedings after the report of the commissioners was filed. They may not have been answerable for the illegal act of the commissioners, as they did not appoint them, but they had the power to stay proceedings and could refuse to adopt any illegality or irregularity previous to the authority given to the defendant *Sandall* to collect an illegal assessment. Unless they did so I think they are answerable for the consequences. I think, for the purposes of this suit, the mayor, aldermen and commonalty must, and should, be considered the principals, and *Sandall*, the other respondent, their agent; and if not originally answerable for his illegal issue of the warrant, they certainly made themselves answerable when adopting his wrongful act by receiving the proceeds of it.

It might be contended that the appellant could, under the latter clause of section 14, recover from the owner of the lot in question the amount assessed upon the lot if paid by the former, but even had he that recourse under the statute it would not justify the illegal assessment of a party not liable to it; nor do I think the provision was intended to cover any such case; nor do I think the legislature intended that money should be extracted from a person not in any way within the provisions of the act, and the only indemnity provided being the right of action against one between whom and the party so paying there was no privity in respect of the land for which he was assessed, and from whom he might never be able to recover it. I am of opinion that the mayor, aldermen and commonalty were primarily liable for the illegal act of the respondent *Sandall*, but their adoption of his wrongful issue of the warrant, by receiving and retaining the money recovered through the illegal arrest and imprisonment of the

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Henry, J.

appellant, is sufficient, in my opinion, to put the case beyond any reasonable doubt.

I think, for the reasons I have given, that the judgment of the court below should be reversed, the rule for setting aside the verdict for the appellant discharged, and judgment entered for him for the amount of the verdict in his favor, with costs.

TASCHEREAU, J.:—

For the reasons given by the Chief Justice, whose notes he has kindly given me an opportunity to see, I am of opinion that the corporation of *St. John* cannot be held liable for the trespass complained of by the plaintiff in this case. The rule *respondeat superior* cannot apply here, for the very good reason that the corporation was not *Sandall's superior* in the matter of the execution of the warrant against the plaintiff. *Sandall* was not acting for and in the name of the corporation, or for its benefit, or in its interest, when he executed this warrant. The corporation was only the channel through which this money had to pass, and had no control whatsoever over the proceedings. *Sandall* was bound to act—the statute ordered him to do so. The plaintiff has no right of action against the corporation, as I view the case.

GWYNNE, J.:—

That the defendant *Sandall* was liable to have rendered against him the verdict rendered by the jury upon the first count of the declaration does not, in my judgment, admit of a doubt, and I am of opinion also that the other defendants, the mayor and commonalty of the city of *St. John*, whom the jury have found to have adopted the act of the defendant *Sandall*, were also equally liable with him.

The plaintiff was arrested under a warrant signed by

the defendant *Sandall*, who was a servant of the corporation of the city of *St. John*, filling as such the offices of receiver of taxes and of chamberlain of the city. Under this warrant so signed the plaintiff was arrested and detained in custody in the common gaol until he was obliged to pay, and did pay, to the defendants, the corporation, in the office of the chamberlain of the city, the sum of $137, and until a clerk in the office of the chamberlain signed a paper acknowledging the receipt of the above sum, and authorizing the discharge of the plaintiff from custody.

To discharge himself from liability for issuing the warrant and causing the arrest of the plaintiff thereunder, it is plain that the defendant *Sandall* must plead and prove a legal justification. He attempts to do this under a provincial statute, 41st *Vic.*, ch. 9. This was an act passed for the purpose of widening certain streets in the city of *St. John*, and among others, *Canterbury* street. The act authorized the Lieutenant-Governor in Council to appoint three commissioners to cause a survey and plan of the proposed improvement, and of the several lots of land fronting on the street proposed to be widened or extended, to be made and prepared by the city engineer, and that so soon as such plan should be made the commissioners should assess and apportion the whole estimated value of the land required and taken for the extension and opening of *Canterbury* street, upon the parties owning or interested in any land along the line of such extension, and in the opinion of the commissioners benefited thereby, according to their best judgment, in proportion to the benefit accruing to such parties respectively from such extension and opening of *Canterbury* street

By sec. 10 it was enacted that the commissioners, upon completing such estimate, assessment and apportionment, should file with the common clerk of the city the

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

said plan, and should forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council of the city, and that in such report should be set forth the names of the respective owners, lessees, or persons entitled to, or interested in, the lands mentioned in the report so far as they could ascertain them; and a sufficient designation of the land required for widening and extending the street, and also of the lots fronting thereon so assessed for such benefit as aforesaid; and also the several sums assessed as compensation for the value of the land taken for the street; and also the sums assessed for the benefit of the respective owners of the fee in such lands, and of the respective owners of a leasehold estate, or other interest therein, and that upon such report being filed the same should be final and conclusive, as well upon the mayor, aldermen and commonalty of the city as upon the owners, lessees, parties or persons interested in and entitled unto the lands mentioned in the said report, and that the said mayor, aldermen and commonalty should become possessed of the lands mentioned in the report that should be required for the purpose of the widening and extending the street, to be appropriated and used for that purpose, and for none other.

By the 11th sec. it was enacted, that the commissioners, after completing their estimate, and at least fourteen days before they should make their report to the common council, should deposit a copy of such estimate and assessment in the office of the common clerk for the inspection of whomsoever it might concern, and should give notice by advertisement, to be published in at least two of the public newspapers printed in the city, of the deposit thereof, and of the day on which it could be finally filed. The section then made provision enabling any person whose rights might be affect-

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

ed thereby to state his objections to the commissioners, and in case they should be unable to agree making provision for an arbitration for the purpose of varying the amount estimated.

Now, the words in this section coming under the designations involved in the words, "for the inspection of whomsoever it might concern," and "any person whose rights might be affected thereby," plainly mean the persons before spoken of as the parties to be assessed as the owners of or interested in land benefited in the opinion of the commissioners, and the owners of land taken for the street who were entitled to receive compensation therefor: these were the only persons whose rights could, under the act, be affected by the commissioners' estimate; a person having no interest whatever in land taken, or in land fronting on the street, and which could derive benefit from the improvement, could have no possible object in inspecting the estimate made in the commissioners' report, and could have no possible right to dispute the amount of the estimate and assessment made in favor of the owners of land taken, as against the owners of land benefited, in the opinion of the commissioners.

By the 12th sec. it was enacted, that the mayor, aldermen and commonalty of the city, within one month after the several assessments, made as in the act is provided, for the purposes of the act, should be collected and received by them, should pay, to the respective parties mentioned or referred to in the report in whose favor any sum should be estimated, the respective sums so estimated as such sum, if any, as they might in like manner be declared liable to pay for any benefit to them respectively accruing from the widening and opening of the street; and that any person entitled to receive such sum might, at any time

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

after application first made to the corporation, sue for and recover the same.

From this section it appears that after the commissioners' report should become final, as well upon the corporation as upon the owners of, and persons interested, in lands taken or benefited, the collection of the amounts charged upon the owners of the lands benefited, and the duty of paying the owners of lands taken the amounts assessed in their favor, was by the statute left with the corporation, who became the owners of the lands so taken for the street; and by the 14th section of the act it was enacted, that the several and respective sums by the act directed to be paid to the corporation should be a lien and charge upon the lands in the report mentioned and upon the estate and interest of the respective owners and lessees of such lands for which such sums should be so assessed by the commissioners, and upon the owners thereof, or parties interested therein, and that as well the said owners and proprietors thereof and parties interested, and also the occupants, should be respectively liable to pay on demand the respective sums mentioned in the report at which the respective lands occupied by them, or in which they were interested, were assessed, to such person as the mayor, aldermen and commonalty should appoint to receive the same; and in default of payment of the same that it should be lawful for, and the duty of, the receiver of taxes of the city to issue execution under his hand to levy the same, with lawful interest thereon, from and after thirty days from the time of filing the said report, in the same manner and with the like effect, power and authority as upon any assessment of rates and taxes made by the assessors of rates in the said city.

Now, "the receiver of taxes" here named is an officer of the corporation, and is plainly assigned the duty here

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

mentioned of collecting by process of law the sums made recoverable by the act, because of the position held by him as such officer and as a duty annexed to his office as a servant of the corporation, in like manner as is imposed upon him the duty, in such his capacity, of collecting by process of law all assessments and rates made payable to the corporation, who have control of such their officer and are empowered by 22nd *Vic.*, ch. 37, sec. 29, to make by-laws for the government of the receiver of taxes (among other officers of the corporation) and to order and direct the mode in which he shall execute his duties, and to impose penalties for the enforcing thereof. The form of execution which the receiver of taxes is authorized to issue for enforcing payments of rates payable to the corporation is given in 24 *Vic.*, ch. 29, and it purports to authorize any marshal of the city

> To levy, by sale of the goods and chattels of *A B.* within the city, the sums which have been assessed upon him, and also for costs of execution and levying, the whole being and have that money at my office on the day of and for want of goods and chattels whereon to levy take the said *A. B.* and deliver him to the keeper of the goal of the city and county of *St. John*, who is hereby required to receive him and keep him safely days unless the same, with costs, be sooner paid and make return hereof at the day and place aforesaid.

Under a warrant in this form, signed by the defendant *Sandall* as receiver of taxes of the city of *St. John*, and filled up with a direction to levy of the goods and chattels of the plaintiff the sum of $437 and for want of goods and chattels, &c., to take and deliver him to the keeper of the gaol, who should keep him safely 360 days, unless the above amount, with costs,&c , be sooner paid, the plaintiff was arrested and detained in custody until he was obliged to pay the above sum to the city corporation through their chamberlain, which office, as well

1882

McSORLEY
v.
THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

as that of receiver of taxes, the defendant *Sandall* also filled.

In the report of the commissioners, filed in the office of the clerk of the common council, the name of *John McSorley* is erroneously entered as the owner of a lot on *Canterbury* street, which lot the commissioners assess as benefited by the proposed improvement to the above amount of $437, although on the plan accompanying the report one "*McSorley*," not giving any christian name, is set down as owner. It is now admitted that the plaintiff is not, and that he never was, the owner, or occupant of, or interested in, the lot in question, or of any land on the street, or mentioned in the report. Under these circumstances, it is impossible to contend that the act in question imposes upon the plaintiff any liability to pay the amount assessed as the benefit accruing to the lot in question, or any part of such sum; the act makes the amount assessed a lien and charge upon the lot, but the personal liability which the act imposes is only upon the owner or occupant, or party interested therein, and as the plaintiff fills none of these characters the act affords no justification for his arrest, and the defendant *Sandall* is therefore beyond all question liable on the count for false arrest.

The corporation are in my opinion, equally so. They do not plead separately from *Sandall*. They join with him in their pleas, one of which is a justification under authority of the act, and if the act does not justify him it cannot justify them, and the plaintiff is entitled to have the issue joined upon this plea decided in his favor. But the corporation have also pleaded not guilty, and although matters pleaded in one plea cannot be read as admissions upon an issue joined on another, still, matters given in evidence in relation to an issue joined on one plea, may, if applicable to an issue joined upon another, be applied to the determina-

tion of the latter. Now, it being established that the act in the particular case gave no authority to the receiver of taxes of the city to issue an execution authorizing the arrest of the plaintiff, we must regard the writ as issued by a servant of the corporation under their control without any legal authority to justify its issue; the question then is, was the act authorized by the corporation, or was it done by their servant in their interest, or for their benefit, and have they accepted and retained the benefit, or have they adopted the act of their officer as their own. These were questions wholly for the jury to pass upon.

As to this, then, we find that, in order to enable the receiver of taxes to issue any writ under the act, it was necessary that the corporation, who were to receive the money, should appoint some person to demand and receive it on their behalf. They accordingly, by resolution in council, appointed their chamberlain to demand and receive from the persons named in the commissioners' report the sums therein also mentioned (and among these from the plaintiff the amount of $437). The defendants themselves gave evidence of this appointment and of a demand made thereunder. The object of this evidence was plainly to rely upon it under the defendant's plea of justification, in which the corporation joined with their officer *Sandall*, as warranting the issue of the writ under which the plaintiff was arrested. We see, by the law relating to the duties of the officer who signed this writ, that he is under the control of the corporation, who have authority to order and direct the mode in which he shall execute his duties. It was proved also, that the corporation had in their possession the assessment roll of that same year, which, upon reference to it, shows that the plaintiff was not the owner, or occupant of, or assessed for, any property on *Canterbury* street. They had the means, therefore,

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

in their possession of knowing that the report of the commissioners, in setting down the plaintiff as the owner of the lot in question, which they estimated to be benefited by the opening of *Canterbury* street to the amount of $437, was erroneous We find also, that after the plaintiff's arrest, and while he was in custody, the above amount was paid under protest to the corporation, who not only received it, but to this day retain it under a claim of a right to receive and retain it under the statute relied upon in their plea of justification. We find also, that the plaintiff was detained in custody until the above sum was paid to the corporation, and until they, by their officer, in their chamberlain's office, gave a receipt therefor, and authorized thereupon the discharge of the plaintiff from custody. Under these circumstances, the jury was perfectly justified in rendering their verdict against the corporation jointly with the defendant *Sandall*, and the charge of the learned Chief Justice who tried the case to the jury upon the trespass count was unexceptionable. Indeed, it being established that the act relied upon as a justification of the plaintiff's arrest did not warrant his arrest, its having taken place is upon the evidence explicable only as the act of the corporation through their officer, who is under their control, and for the purpose of compelling thereby payment to the corporation by the plaintiff of the amount received from him, and which he was not legally liable to pay. The corporation have also, in effect, made their authority for, and consent to, the plaintiff's discharge conditional upon their receipt of the money levied from him by force of his illegal arrest; and this is the view which, it appears to me, the jury rightly and naturally took of the matter. The corporation, I can well believe, thought, as indeed was their main contention at the trial, that they were justified under the act in availing themselves of this extraordinary and

1882

McSORLEY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

Gwynne, J.

exceptional process to enforce payment to them of the amount which they received, but in this we are bound to say they mistook the law, and come within the scope of the maxim *ignorantia legis non excusat.*

Allow appeal with costs and order judgment to be entered in the court below upon the verdict *nunc pro tunc* if necessary—that is of the term in which the verdict was rendered before the death of *Sandall.*

Appeal allowed with costs.

Attorneys for appellant: *James Straton.*

Attorney for respondent: *W. H. Tuck.*

JOHN C. SCHULTZ.....APPELLANT;

AND

EDMUND BURKE WOOD .....RESPONDENT.

1881

*Mar. 10.

*Nov. 14.

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

Verbal agreement—Subsequent deed—Vendor and purchaser—Alleged fraudulent representation by vendor—Refusal of Judge to postpone hearing.

W. (the plaintiff) being desirous of securing a residence, entered into negotiations with *S.* (defendant) to purchase a house which defendant was then erecting. *W.* alleged that the agreement was, that he should take the land (2½ lots) at $400 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at $5,926. The mortgage was afterwards assigned to the *M.* and *N. W. L. Company.* *W.* alleged in his bill, that *S.*, in violation of good

*PRESENT—Sir William J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

1881

SCHULTZ v. WOOD.

faith, and taking advantage of *W.'s* ignorance of such matters, and the confidence he placed in *S.*, inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed that an account might be taken of the amount due.

S. repudiated the allegation of fraud, and alleged that *W.* had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at $2,000, and that in no way had he sought to take advantage of the plaintiff. *S.* was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in this state of health, to travel from *Ottawa* to *Winnipeg*.

Dubuc, J., refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing: and, as the result of the evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken.

The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of *Canada*, it being known that there were then only two judges on the bench in *Manitoba*, the plaintiff (Chief Justice) and *Dubuc*, J., from whose decree the appeal was brought.

Held, that under the circumstances, the case ought not to have been proceeded with in the absence of appellant, and without allowing him the opportunity of giving his evidence.

Per *Ritchie*, C.J., and *Strong* and *Gwynne*, JJ., that on the merits there was no ground shown to entitle the plaintiff to relief.

Per *Ritchie*, C.J., and *Strong*, J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable.

THIS was an appeal from a judgment pronounced and a decree made by Mr. Justice *Dubuc*, of the Court of Queen's Bench, in the Province of *Manitoba*, on the 12th day of April, 1879.

By an order made on the 13th day of September last,

1881

SCHULTZ v. WOOD.

by the Chief Justice of the Supreme Court of *Canada*, an appeal was permitted on behalf the defendant *Schultz* to the said Supreme Court of *Canada* without any appeal from the said judgment to any intermediate Court of Appeal in the Province of *Manitoba*. The facts and pleadings sufficiently appear in the judgments hereinafter given.

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

There was no completed contract until the 12th August, 1874, when the arrangement was reduced to writing in the shape of a deed and mortgage, the consideration being stated at $5,926 in both, that being the amount or balance due upon the accounts between the plaintiff and the defendant at the time the mortgage was executed.

Now, what we complain of is that the decree says in terms there has been no contract, and in fact, makes a new contract for the parties, and proceeds to enforce it upon the same principle as that on which the plaintiff recovers upon a *quantum meruit* in an action at law. In a case of the kind alleged by the plaintiff, the only possible course was to have set aside the contract *in toto*, but that could not have been done in this case, as the plaintiff had acted upon it for so long a time as to make it inequitable now to decree a cancellation of it.

Now, the ground taken for re-opening the accounts was, as alleged in the bill, that plaintiff was to pay the fair and reasonable value of the land, of the materials, and the work then done, and that the mortgage was executed by plaintiff, relying on the honesty and fairness of defendant, reposing confidence in him and being ignorant of the value of the matters; and that defendant had been guilty of fraud throughout the whole transaction. As to the land, the plaintiff says that he should take the land at $400 a lot of 50 feet

1881

SCHULTZ v. WOOD.

frontage, whilst the defendant says that the plaintiff agreed to pay him at the rate of $800 per lot. Now, the plaintiff states in one of his letters that "the land was valued at $800." This is precisely what the defendant says the land was to be per lot.

The question naturally arises, what put this amount of $800 into the plaintiff's mind at the time he was writing, and the natural answer is that that amount was mentioned in the negotiation, and it is impossible that it should have been mentioned in any other way than as $800 per lot.

When the mortgage was presented to the defendant for execution he saw the amount, and thought "it pretty large." He had then the building before him and all the material he had to pay for. If he thought it too high a valuation, then was his time to question it. He had asked *Corbett* what the building would cost and he told him about $6,000, and here was a mortgage presented to him for execution for $5,926, and he had paid $500 before, making $6,426; and the land, according to his story, was only to be $1,000, leaving $5,426 for the building, and only left $574 to complete the house, according to *Corbett's* estimate. Could he have thought that amount would complete the house? could he have been under the impression for about two months afterwards that the building was only going to cost him some $574 more or $6,000 in all; or could he have felt that he had not been taken in, taking his own figures as a basis? He also says he felt, as a result of this conversation with *Corbett* that he had been taken in.

On the other hand, the plaintiff undertakes to pledge his oath "that the arrangement with *MacArthur*, of the *Merchant's Bank*, was merely a collateral arrangement. It really had no substance, as the bank never took an assignment of the mortgage, and never advanced any

money on it. It was simply a contrivance of *Schultz*." The same may be said of this statement as the plaintiff says of the defendant's.

The judge who heard the case seems not to have looked upon the defendant's answer, which is under oath, as evidence, but merely as a statement of his case. The learned judge is clearly in error when he says the difference or amount charged for the land would be either $1,853.50 or $2,853.50.

The learned judge seems to have overlooked those portions of the plaintiff's evidence which were most strongly against him. He does not refer to that part of it which states that "I made an arrangement with you and Mr. *MacArthur* in good faith, supposing that he alone was the person to whom I was responsible, notwithstanding I was satisfied the mortgage was for double the sum it should be." "Whatever may have been my convictions on this point—a matter even now susceptible of demonstration—I intended to carry it out faithfully, but it seems circumstances have prevented me." It is altogether likely, if the learned judge had not overlooked the above quotation from the plaintiff's letter, he would not have come to the conclusion that the plaintiff had not any knowledge of the fraud which he says the defendant perpetrated upon him.

I contend, therefore, 1st. That the plaintiff's evidence is not entitled to prevail against the defendant's without corroboration, and that his evidence is not corroborated as to the agreement made, or as to the settlement or non-settlement of the account, at the time the mortgage was executed.

2nd. The evidence as to value of works and land cannot be considered corroborative, because it does not touch the question as to what the agreement was between the parties, and is only matter of opinion, so far as the lan

1881

SCHULTZ v. WOOD.

is concerned, and the same may be said of the material, as a great part of the building was burned before the valuation was made by *Blackmore* and *Woods*.

Counsel for the defendant *Schultz* applied before the hearing to have the hearing postponed until after said defendant's return from *Ottawa* in April or May then following, and read a doctor's certificate stating that in the then state of said defendant's health, it was not safe for him to make the journey from *Ottawa* (where he was then) to *Winnipeg*, and an affidavit of the defendant to the same effect, and that he was a necessary and material witness on his own behalf, and an affidavit of his solicitor that he was a necessary and material witness on his own behalf; but the plaintiff and his counsel pressed the presiding judge so strongly to proceed with the case in the defendant's absence that he decided to do so; and, even if this court was to hold that a *primâ facie* case is made, which the appellant denies, the cause ought now to be sent back to be re-heard, after the evidence of the appellant shall have been heard.

Another ground on which appellant relies is, that if there was any irregularity or fraud in making up the amount inserted in the mortgage, the plaintiff confirmed and acquiesced in the transaction after he had obtained knowledge of the facts and the value of the premises. In this connection see *Clanricade* v. *Henning* (1); *Patterson* v. *Osborne* (2).

The plaintiff thought, when he signed the mortgage, that it was for too large an amount; and yet, notwithstanding the plaintiff's knowledge of all this, he voluntarily prepared in his own handwriting the agreement and power of attorney, and executed them, intending, as he says he did, to carry out the arrangement in good faith. See *Villiers* v. *Beaumont* (3).

(1) 30 Beav. 180. (2) 5 Russell, 232.
(3) 1 Ves. 101.

1881

SCHULTZ v. WOOD.

The plaintiff in this case is known as a very clever man, not liable to be imposed upon or unfairly dealt with; but, if the portions of his evidence which he would have the court believe are to be believed, he is the most credulous man in the universe; but this cannot be believed by anyone who is acquainted with him or with his reputation. Anyone who believes that he is the credulous babe he pretends to be in his evidence believes an impossibility.

Mr. *Boyd*, Q. C., for respondent:

There is no appeal from the order of the judge at the trial to proceed with the evidence. All that we know of this refusal is what appears in the judgment. The counsel called his witnesses. He could have refused to continue, and the proper practice would have been to appeal from that order. If appellant had intended to appeal from this ruling, he should have printed in this case all the materials upon which the order was given. Not having seen them, I cannot argue this point.

The evidence substantiates all the allegations of the bill, most fully and explicitly, and the same evidence shows the untruth of all the material grounds of defence set up in the answer. The learned judge, who saw and heard the witnesses, has found upon the facts and law in favor of the respondent. It was said the learned judge did not take into account the sworn answer of the defendant, but this the learned judge has done. In his judgment, he specially refers to the sworn answer as follows:—"While the defendant, in his sworn answer, states, &c.," and comes to the conclusion that the defendant has failed to prove his assertion. The real point, however, in this case, is whether there was any deception practiced upon the respondent.

The representation of the appellant was in effect in this case that the market value of land was $800 per

1881

SCHULTZ v. WOOD.

lot, and it is impossible to think that he could have believed this upon the evidence given. He also, in effect, represented that what the building and materials cost him was $5,426, as he stated he did not want to make any profit on them, and this is also substantially the meaning of his answer. But in fact this was more than double their real value, as he must inevitably have known from the accounts kept by him and otherwise. Now, had such misrepresentations of value been made and their falsity discovered, while yet the contract was executory, it would have been a valid ground for resisting completion of the contract. *Wall* v. *Stubbs* (1); *Codman* v. *Horner* (2).

And such falsity of representation (even as to matters of value) would be ground for avoiding an executed contract or requiring the party to make good his representations. *Ingram* v. *Thorp* (3); *Story* Eq. Jur. (4); *Smith* v. *Gunteyman* (5).

The rule is that even when the parties deal at arm's length, the seller must do or say nothing to deceive or mislead, even a single word is enough to avoid a transaction. *Twiner* v. *Harvey* (6).

A multo fortiori is this the rule when, as in this case, the parties were not dealing at arm's length, but the purchaser relied upon the skill and judgment of the seller, accepted his statements and representations, and, as the appellant well knew, forbore to inform himself elsewhere. The very fact of there being no going into accounts and items and details as to the work done upon the building and the values thereof, in the strongest way indicates the reliance the respondent placed on the word of the appellant.

The defence of laches or acquiescence suggested by the answer herein (though not expressly pleaded) does

(1) 1 Madd. 18.
(2) 18 Ves. 10.
(3) 7 Hare 67, 72.
(4) S. 197.
(5) 3 Tiff 655 (30 N. Y. R.)
(6) Jac. 178.

1881

SCHULTZ v. WOOD.

not avail, because it appears that the respondent did not delay after being aware of the fraud committed on him, and such dealings as are mentioned in the answer without a competent knowledge of the facts which entitle to relief are no evidence of acquiescence (see *Lindsay Petroleum Co.* v. *Hurd*) (1), as compared with the same case before the privy council (2), where it is laid down that fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right.

The bill proceeds upon the theory of the accounts never having been gone into or settled; that apart from the formal execution of the mortgage there is no stated account, and that the specific error charged and proved in regard to the price of the land, justifies and demands the opening up of the whole sum claimed on the footing of that mortgage.

In this aspect of the case the authorities cited in the court below are sufficient to justify the decree. Reference may be made especially to the following:—

De Montmorency v. *Devereux* (3); *Davis* v. *Sparling* (4); *Allfray* v. *Allfray* (5); *Breckridge* v. *Walley* (6).

The case may also be viewed and supported in another aspect. The evidence shews misrepresentations or false statement of facts on the part of the appellant, which would justify a rescision of the contract. There is evidence of fraud which would have entitled the respondent to avoid the transaction had he not changed his position, before knowing of the imposition practised upon him. But by going on and completing the building, matters were so changed that it was not open to the respondent to avoid the whole transaction as the parties could not be placed in *statu quo*. But the rule

(1) 17 Grant 115.
(2) L. R. 5 P. C. 221.
(3) 1 Dr. & Walsh 119.
(4) 1 R. & M. 64.
(5) 1 Mac. & Gord 87.
(6) 12 W. R. 593.

1881

SCHULTZ v. WOOD.

of equity is that the person deceived can elect which course he will take: whether to set aside the transactions, or to recover compensation for the misrepresentations, or to require the person deceiving to make good his statements.

If the person deceived has not changed his position he can elect to disaffirm the whole contract. *Rawlins* v. *Wickham* (1). If his position has been changed he can claim reparation. *Mixers* case (2).

And in such a case as the present the person deceived has an equity to be placed in the same situation as if the matter represented was *bonâ fide* carried out, that is (in the present case) to retain the property on paying the fair and reasonable and market value thereof. *Blair* v. *Bromley* (3); *Burrows* v. *Lock* (4); *Ellis* v. *Coleman* (5); *Palsford* v. *Richards* (6); *Slim* v. *Croucher* (7).

RITCHIE, C. J.:—

In this case the bill was filed 20th December, 1879; answer, the 19th January, 1880; replication, the 10th February, 1880; hearing, 28th February, 1880.

It appears that counsel for the defendant *Schultz* applied, before the hearing, to have the hearing postponed until after said defendant's return from *Ottawa* in April or May then following, and read a doctor's certificate stating that in the then state of said defendant's health, it was not safe for him to make the journey from *Ottawa* (where he was then) to *Winnipeg*, and an affidavit of the defendant to the same effect, and that he was a necessary and material witness on his own behalf, and an affidavit of his solicitor that he was

(1) 3 DeG. & J. 323.
(2) 4 DeG. & J. 586.
(3) 2 Ph. 360, 361.
(4) 10 Ves. 475.
(5) 25 Beav. 673.
(6) 17 Beav. 87, 96.
(7) 1 DeG. F. & J. 518.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

a necessary and material witness on his own behalf; but the plaintiff and his counsel pressed the presiding judge so strongly to proceed with the case in the defendant's absence, that he decided to do so.

The learned judge thus states the matter:

At the hearing, before the merit of the case was gone into, Mr. *Monkman* applied, on behalf of defendant *Schultz*, to have the trial put off until May or June, on the ground that the said defendant is absent attending his parliamentary duties at *Ottawa*, and because he is in a delicate state of health. He read an affidavit from defendant *Schultz*, in support of said facts, and a certificate from Dr. *Grant*, of *Ottawa*.

Mr. *Howell* resisted the application, and said that defendant was served with the bill on the 20th December, and could have had the case tried before the session which commenced only the 12th February, had he filed his answer at once instead of on the 19th January, the last day allowed him for filing it. The principal fact of the case is admitted by plaintiff, viz: that the plaintiff has purchased the house and land, and that he was to pay a fair valuation for the same. They only differ as to the amount of the said valuation. An account was stated by defendant, but without plaintiff examining it. It can be ascertained now. The Court is only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which will be done by the master, if the court so decide. The defendant will have an opportunity of being present when the account will be taken. He is not necessarily wanted now.

The plaintiff is here with his witnesses ready to go on.

Mr. *Monkman* replies that the defendant is charged with fraud and should be here to contradict the charge.

I decided that as the merit of the case by the decree to be made, if it should be made, as it will only be to re-open the account stated in his mortgage, and as I intended to see that the defendant should have an opportunity of being present at the taking of the account, if necessary, the defendant could not be prejudiced, and as the plaintiff was ready with his witnesses, and was pressing his right to go on with the hearing, I did not see that according to the rules of practice, I could properly refuse to proceed with the taking of the evidence.

I think this cause was forced on with unjustifiable haste, and this is the more apparent when the untenable

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

reasons assigned by the learned judge for refusing delay are considered. The learned judge assumes and prejudges against the defendant the very point in issue between the parties, viz.: that the defendant is bound to account to plaintiff, and that, as he should have an opportunity of being present at the taking of the account, he concludes he could not be prejudiced by the hearing going on without his presence or testimony. The very point in controversy to be determined at the hearing being, not the amount in dispute, but whether plaintiff was entitled to any account, or to re-open the matter of the sale, or to have the mortgage in any way interfered with, and the learned judge seems entirely to have overlooked the fact that delay could only be injurious to defendant, the plaintiff having nothing to gain by a speedy adjudication. If plaintiff was ready to go on with his witnesses, and would have been damnified by not having them then examined (which does not appear to have been the case), I can see no possible reason why they should not have been examined and the further hearing postponed; but, independent of and in addition to this, a perusal of the proceedings on the hearing shows that the plaintiff was permitted, when being examined as a witness, to make most objectionable statements, and statements he knew not to be evidence, to use most intemperate language, and generally to give his evidence and act in a most unbecoming manner, wholly inconsistent with the due and proper administration of justice; and, therefore, if the plaintiff's bill disclosed a case entitling him to relief, and the facts proved made out a *primâ facie* case, I think, for the irregularities referred to, this court should, in the interest of justice, hold that there had been a mis-trial, and that the case should go down to another hearing, when the defendant would have an opportunity of being present and testifying, and when the proceeding should be

conducted in a manner more consistent with the usages and practice of British courts of justice.

But, as for the reasons I am about to give, I think the plaintiff has failed to set out or establish a case entitling him to the relief he claims, the case and the litigation must end here.

I think the bill in this case is clearly demurrable; admitting all the facts stated in the Bill to be true, the plaintiff is not entitled to the relief he seeks, and therefore the bill should have been dismissed at the hearing.

The transaction between the plaintiff and defendant as detailed in the bill appears to have been an extremely simple one.

The bill, after stating that plaintiff, on or about the month of June, 1874, went to the province of *Manitoba* to reside, having been previously appointed Chief Justice, sets forth that:

Prior to the plaintiff accepting the office he now holds, and removing to *Winnipeg*, he became acquainted with the defendant, *Schultz*, as a member of the House of Commons, of which the plaintiff was also a member, and the defendant, *Schultz*, and the plaintiff were on intimate and friendly terms, and on the plaintiff arriving in *Winnipeg* the defendant, *Schultz*, manifested kindness to the plaintiff in many ways and interested himself in looking up a dwelling place for the plaintiff and the plaintiff's family, which were to come up from *Ontario* in the month of August or September following, and in this way and by various other acts of kindness the defendant, *Schultz*, quite won the confidence of the plaintiff.

The bill then sets out the contract entered into between plaintiff and defendant in these words:

The defendant, *Schultz*, had commenced to erect a dwelling house in the city of *Winnipeg*, on the south side of *Notre Dame* street, and had the foundation thereof laid and had erected thereon the frame thereof, and had certain material on hand to go on with the completion of the same, and had workmen engaged thereat when it was arranged between the plaintiff and the defendant, *Schultz*, that the plaintiff should take the foundation and frame and other the promises as it then stood, and go on at his own expense and finish the same for a dwelling for himself, and should pay the defendant,

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

Schultz, the fair and reasonable value of the work then done, and of the material then on hand in respect of the said dwelling house, and the fair and reasonable value of the land to be taken therewith, and in pursuance of such arrangement the plaintiff went on and at his own expense completed the said dwelling house, into which he then moved with his family, and has ever since resided and now resides.

And the consummation of this agreement is set out in these words:

Shortly after the above arrangement, and on the twelfth day of August, 1874, it was proposed that the said arrangement should be consummated by the defendant, *Schultz*, giving to the plaintiff a deed of conveyance of the said property, and taking from the plaintiff a mortgage thereon to secure the defendant, *Schultz*, in the payment for the land and the fair and reasonable value of what he had done towards the construction of the said dwelling house as aforesaid, and a deed of conveyance of the lands consisting of what the defendant called two and one half lots of fifty feet frontage each, was executed by the defendant, *Schultz*, to the plaintiff, and contemporaneous therewith, the defendant, *Schultz*, presented to the plaintiff for execution on the same lands a mortgage to himself to secure the payment of the price of the said lands and of the balance due him for the reasonable and fair value of what he had done to the said dwelling house, which, together, he alleged to be the sum of five thousand nine hundred and twenty-six dollars, but he presented no account of items showing in what manner, or on what valuation, or how that sum was made up, and the plaintiff relying on the honesty and fairness of the defendant, *Schultz*, and reposing confidence in him for the reasons aforesaid, and being entirely ignorant and unacquainted with the value of said matters, executed the said mortgage.

And after stating that plaintiff has been informed and believes that the mortgage has been assigned to "*The Manitoba and North-West Land Company (Limited)*" who hold the same subject to any equities, &c., and after alleging that payments have been made from time to time "on account of the said indebtedness, but that the payments by the terms of the mortgage are in arrear and the said mortgage is in default," proceeds (paragraph 7) thus to set forth his charges on which he grounds his claim for relief:

The plaintiff charges that the defendant *Schultz* in violation of good faith and fraudulently made up and caused to be inserted in the said mortgage a much larger sum than was the balance due on the fair and reasonable market value of the said lands, and of what he had done to the said dwelling house and other the premises, and very recently the defendant *Schultz* in justification of that amount to the plaintiff has asserted that the price of the lots aforesaid was eight hundred dollars each, making two thousand dollars for the land alone, whereas in truth and in fact the defendant *Schultz* told the plaintiff at the time of the transaction that they were only four hundred dollars each, making a difference in the land alone of one thousand dollars, of which fact the plaintiff was ignorant until a few days ago, and since then the plaintiff has made the most careful inquiry into the residue of what must form the defendant *Schultz's* account, and he is informed and fully believes the charges for what the defendant *Schultz* did towards the construction of the said dwelling house is by its excess in estimate fraudulent, and that to require the plaintiff to pay the same, without investigation, would be contrary to justice and good conscience, the excess in these respects in the particulars thereof the plaintiff is unable to state with particularity having never seen or been furnished with an account or any particulars thereof.

The Bill then alleges that:

The plaintiff has demanded from the defendant *Schultz*, an account of the items which make up the amount inserted in the said mortgage, but the said *Schultz* has not furnished the plaintiff with the same, or offered any excuse for failing to do so, and the plaintiff submits that under the facts aforesaid he is entitled to have an account taken of what is the indebtedness now due for principal and interest so secured by the said mortgage as aforesaid, and that if any of the said indebtedness shall appear to be outstanding and unpaid, then upon payment by the plaintiff into this honorable court to the credit of this cause of what shall, on the taking of such account, be found due, the defendants may be decreed to discharge the said lands covered by the said mortgage from the said mortgage, free from all incumbrances done by them or either of them, and deliver up to the plaintiff the said mortgage and all deeds of assignment thereof and writings relating thereto, and the plaintiff prays

(1). That the defendants may be ordered to make a full discovery and disclosure of and concerning the matters hereinbefore stated.

(2). That an account may be ordered to be taken of what was the real indebtedness of the plaintiff to the defendant *Schultz* at the

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

date of the said mortgage, and of what is now due thereon for balance of principal and interest.

(3). That upon payment of the balance so found due for principal and interest, if any, into court to the credit of this cause the defendant may be ordered to discharge the said mortgage and deliver up the same with all deeds and writings relating thereto to the plaintiff.

(4). That the defendant *Schultz* may be ordered to pay the costs of this suit.

(5). That the plaintiff may have such further or other relief as the nature of the case may require.

Now, what does all this amount to, but that plaintiff and defendant, being on terms of friendship and intimacy, the one agreed to buy and the other agreed to sell certain properties, that is to say, as to the unfinished house, for "the fair and reasonable value of the work then done and the materials then on hand in respect of the said dwelling house," and as to the land, "the fair and reasonable value of the land to be taken therewith."

That shortly after this arrangement was entered into, it was consummated by defendant giving plaintiff a deed of the property, and plaintiff giving defendant a mortgage to secure the payment of the balance due him therefor, which was alleged by defendant to be $5,926, which amount the plaintiff accepted as the fair and reasonable value by executing and delivering to defendant a mortgage for that amount. No account of items (as the bill alleges) showing in what manner or on what valuation, or how that sum was made up, was presented, nor requested by plaintiff, nor does any information appear to have been sought by him from defendant as to how that amount was arrived at, or in reference thereto; on the contrary, the bill says, that the plaintiff relying, not on any false or fraudulent representation made by defendant to him, whereby he was deceived and fraudulently induced to sign the mortgage, but, relying on the honesty and fairness of

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

the defendant *Schultz*, and reposing confidence in him for the reasons aforesaid (viz., the intimate and friendly terms existing between them) and being entirely ignorant and unacquainted with the value of such matters, executed the said mortgage.

Now, it is too clear to admit of a moment's argument, that this, as set forth in the bill, was an ordinary business transaction of bargain and sale between parties dealing upon equal terms, that there was between this Chief Justice and this Member of Parliament no peculiar financial, fiduciary or other relationship or confidence recognized by law as imposing special duties or obligations. There was no confidence existing that enabled the defendant to exert influence over the plaintiff, no relation existed which put the plaintiff in the power of the defendant; there was not, in other words, the existence between them of any relationship which withdrew the contract between them from the considerations affecting contracts between strangers, or to adopt language used in course of the argument in *Pike* v. *Vigers* (1),

> The present is a case in which the parties stand in no situation of confidence; a case in which the law imposes no duty or obligation; a case, in which the law, so far from imposing mutual duties, places by its maxims the parties at arm's length, telling each they are to act upon their own judgment, and to exercise their own power of enquiry.

The price then to be paid being, as alleged in the bill, the fair and reasonable value, this was in every sense of the term purely a matter of opinion, and as to which the means of information were equally open to both parties, each could make enquiries, each could get estimates, each could have had the property valued; in fact each could have done what I think it may be presumed every prudent reasonable man would have done before

(1) 2 Dr. & W. 232.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

either selling or buying a property, viz: satisfy his own judgment that in the one case as vendor he was not selling his property below its value, or in the other as purchaser, that he was not paying more for the property than its value, unless indeed in an exceptional case, either might think it for his interest to do one or the other.

The only breach set out is that defendant in violation of good faith fraudulently made up and inserted in the mortgage a much larger sum than was the balance due on the fair and reasonable market value of said lands, and of what he had done to the said dwelling house and other premises, and the only allegation of misrepresentation, if misrepresentation it can be called, is that "very recently *Schultz* (defendant), in justification of that amount (amount in mortgage), has asserted that the price of the lots aforesaid was $800 each, making $2,000 for the land alone, whereas in truth and in fact defendant told plaintiff at the time of the transaction that they were only $400 each, making a difference in the land alone of $1,000, of which fact the plaintiff was ignorant until a few days ago," and then simply alleges as the grounds of his charge "that defendant falsely and fraudulently caused to be inserted in the mortgage a much larger sum than was the balance due on the fair and reasonable market value of the said lands, and of what he had done to the said dwelling house," and that he is informed and believes the charges for what defendant did towards the construction of the dwelling house is by its excess in estimate fraudulent, and that to require plaintiff to pay same without investigation, would be contrary to justice and good conscience."

The fair and reasonable market value was matter of opinion as to which each party had a perfect right to put forward their own view, and which, when agreed

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

on by both parties and inserted in the deed and mortgage, was, as between the vendor and purchaser, the fair value; supposing defendant did assert as alleged, and did, in the course of the negotiations, tell plaintiff the value of the lots was only $400, how can that possibly affect the case? It was plaintiff's duty to have ascertained what the fair value was and to have seen that no more than the fair value was inserted in the mortgage before executing it; and as to what defendant may have expended, under the contract set out in the bill, it matters not, the then fair market value of the building according to the bill was to be the price. But the bill simply says that he is informed that charges for what defendant had done to the house were, by their excess, fraudulent, and that to pay the sum without investigation, would be contrary to justice, which simply amounts to this: having chosen to assent to this amount as the fair value without investigation, but having, years after, heard that it is in excess of such value, he has desired an investigation; but as to excess in estimate the bill says there was no account, and the contract as set out was based on no estimate but on the fair value, so that I think it may be safely affirmed that on this record, in this bill, there is no allegation of any false and fraudulent representation, misrepresentation or concealment, on which the contract was founded on the part of the defendant, establishing any ground for rescinding or altering the contract as indicated by the deed and mortgage, still less to justify any court in making an entirely new contract, even if this court had power to do so, which it clearly has not; nor is there any allegation of any undertaking, obligation or duty unperformed on the part of the defendant, nor any allegation whatever that I can discover, which the defendant was bound to answer.

Supposing, however, that this bill is not demurrable,

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

and that we ought to look at the evidence and so from it establish a case against defendant, we are met at the outset with the fact that the whole case, as set out in the bill, is departed from, and the claim put forward on the trial is based on a contract entirely different from that set out in the bill, instead of a contract, the consideration of which was to be the fair and reasonable value of the improvements and of the land. The plaintiff says in his evidence that "the arrangement which amounts to a contract, was simply a very fair and reasonable proposition that I should have the place at the value of the work and material, and *that I should pay him* $400 *a lot.*" Then again we have it put forward that the price of the improvements was to be the actual amount expended by defendant, and that that was to be and was established by defendant and *Corbett*, and that defendant misrepresented the amount, or falsely represented that the amount had been established by himself and *Corbett*, when such was not the case, and that in signing the mortgage plaintiff relied on the honesty of defendant and *Corbett*, and on plaintiff's representation, and that as to the land, the price was not its fair and reasonable value, but was absolutely fixed at $400 a lot. On the contrary, while the bill alleges no misrepresentation or concealment, it sets out that no account of items showing in what manner or on what valuation or how that sum was made up, was presented by defendant, and as to the land no such contract as an absolute sale for $400 a lot. Surely the plaintiff should not have been permitted to depart from his bill, and defendant condemned on a case and on evidence of which the bill gave him no notice, and which he was never called on to answer. But supposing it possible that plaintiff could have a right thus to change his base, it seems to me, the evidence on the new case

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

entirely fails to establish a right to the relief claimed, if it was true that plaintiff signed the deeds on the representation that *Corbett* had been a party to the establishment of the fair value of the improvements. Six weeks after, plaintiff had, if his statement is correct, undeniable evidence from the mouth of *Corbett* himself that such was not the case, and surely this was the time at which he should have complained and sought redress, if he thought he had been imposed on or wronged; but his conduct indicates the exact opposite of any such idea, asking no explanation and uttering no complaint or remonstrance whatever from that time till the 27th June, 1875, when, instead of complaining, he writes plaintiff:

MEMO. FOR DR. *SCHULTZ.*

I am trying to make arrangements in *Ontario* to meet the first payment and hope to succeed, but may not. I need not say, contrary to my expectation, I can only make out with difficulty to pay debts incurred on the building and live. What discount will you make on the whole mortgage, for cash down? As money is needed in *Manitoba*, it should be considerable.

E. B. WOOD.

June 27th, 1875.

And plaintiff again writes:

Winnipeg, 31st July, 1876.

DEAR DOCTOR,—At your request, I repeat the substance of my private note to you of some days ago, which, by-the-way, I have no objection you should show Mr. *Macarthur*.

Since writing that note, and after conversation with you, I have thought over the whole matter again and again. In fact, it has seldom been from my mind. I really do not see how I can, in so far as I am concerned, with a reasonable hope of carrying it out, change or modify what I in that note proposed. But what I there proposed, I think I can carry out, and I will do my best to accomplish it. Angels can do no more. My proposition was to enter into an arrangement to pay $100, to be taken out of my salary every month until the mortgage is paid. The principal outstanding to bear interest at 8 per cent. To secure this I would give an irrevocable power of attorney so to draw and apply the $100. First payment to be made on the 1st of September.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

Or I would leave the premises and surrender them to you at once, your paying what any disinterested person or persons might say, under all the circumstances, was fair and right.

Mr. *Macarthur* will from this understand what this asset is, and in any arrangement or calculation he may make with you, he may count upon my being ready to enter into the necessary writings giving effect to my proposition in either form.

Most sincerely yours,

E. B. WOOD.

On the 3rd of August a statement is made up of the

Assignment of mortgage of Hon. *E. B. Wood*, dated 3rd August, 1876.

JOHN C. SCHULTZ, Assignor.

To *DUNCAN MACARTHUR*, Assignee.

Now owing principal money, $5,926, and interest at the rate of 12 per cent. amounting to the sum of $7,326.84, and also the sum of $55.25, paid by the said assignor for insurance.

Consideration, $7,382 09.

(Signed) *John SCHULTZ.*

Witnessed by *J. T. Bain.*

Memo. interest at 12 per cent. on $5,926 for 2 years	$1,422 24
Less 11 days	21 40
	1,400 84
Principal	5,926 00
	7,326 84
Insurance	55 25
	$7,382 09

Here then, plaintiff, with full knowledge from *Corbett* as to his not having made any estimate of the value of the improvements, negotiates for a new arrangement, and on the 19th September, 1876, a memorandum of agreement, plaintiff says written by himself, is executed by the parties to it, (plaintiff, defendant and *Macarthur*,) and is in these words:

AGREEMENT BETWEEN *WOOD, SCHULTZ* AND *MACARTHUR.*

Memorandum of agreement made this 19th day of September, 1876, between *Edmund Burke Wood* of the first part, and *John C. Schultz* of the second part, and *Duncan Macarthur* of the third part:

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

Whereas, the said *Schultz* is the mortgagee, and the said *Wood* is the mortgagor of certain premises in the city of *Winnipeg*, whereby by a certain mortgage, dated on or about the fourth day of August, 1874, the said *Wood* covenanted to pay the said *Schultz* $5,926 and interest on the outstanding principal at twelve per cent. per annum at the time and in the manner therein mentioned, which said mortgage is registered in the registry office for the county of *Selkirk*, on or about the fourteenth day of August, 1874, at 12.10 o'clock in the afternoon; and whereas, the said *Wood* has made default in the payment of said mortgage, and the said *Schultz* has assigned the said mortgage, to the said *Macarthur*, who now holds the same; and whereas, it has been agreed by the parties hereto, that for and notwithstanding anything in the said mortgage contained, the said *Wood* shall pay the same, and the same shall bear interest as follows: One hundred dollars to be taken out of the salary of the said *Wood* every month until the said mortgage is paid, the principal outstanding to bear interest at eight per cent. per annum, instead of twelve per cent. per annum, as provided in said mortgage, and to secure such payment the said *Wood* agrees to give an irrevocable power of attorney to the said *Macarthur*, to draw and apply the said one hundred dollars per month out of his salary as Chief Justice of *Manitoba*, the first payment to be made on the first day of October, 1876. Now, therefore, this indenture witnesseth, that for and in consideration of the premises it is mutually and irrevocably agreed by and between the parties to these presents, their respective heirs, executors, administrators and assigns, as follows: The said *Wood* shall pay to the said *Macarthur* one hundred dollars per month, to be taken out of the salary of the said *Wood*, payable to him as Chief Justice of *Manitoba* until the said mortgage is paid,—the principal of the said mortgage outstanding to bear and be computed at eight per cent. per annum instead of twelve per cent. per annum, as provided in said mortgage.

The said payment of one hundred dollars to be made on or before the first day of every month.

2. The said *Wood* shall forthwith give and execute to the said *Macarthur* an irrevocable power of attorney to draw out of the said salary of said *Wood* the said sum of one hundred dollars per month, in the manner aforesaid, to be applied on the said mortgage as aforesaid.

3. When and as soon as the said mortgage is paid in the manner aforesaid, the said *Schultz* and *Macarthur* shall discharge the said mortgage according to law.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signed), *E. B. WOOD*, [S.]
(Signed), *J. C. SCHULTZ*, [S.]
(Signed), *D. MACARTHUR*, [S.]

On the same day plaintiff executed a power of attorney in these words:—

POWER OF ATTORNEY—*WOOD* TO *MACARTHUR*.

Know all men by these presents, that I, *Edmund Burke Wood*, of the city of *Winnipeg*, in the province of *Manitoba*, the Chief Justice of *Manitoba*, constituted and appointed, and by these presents do nominate, constitute and appoint *Duncan Macarthur*, of the said city of *Winnipeg*, the agent and manager of the Merchant's Bank of *Canada* at *Winnipeg* aforesaid, my true and lawful attorney, irrevocable for me and in my name, place and stead, to demand, take and receive one hundred dollars every month from the Receiver General of *Canada*, and from and out of the salary payable to me by *Canada* as Chief Justice of *Manitoba*, and to apply the same on a certain mortgage, of which the said *Duncan Macarthur* is assignee, made by me to one *John Christian Schultz*, and mentioned in a memorandum of agreement this day made between myself and the said *John C. Schultz* and *Duncan Macarthur*, until the said mortgage according to the terms of the said agreement is fully paid and satisfied.

In witness whereof, I, the said *Edmund Burke Wood*, have hereunto set my hand and seal this nineteenth day of September, 1876.

Signed, sealed and delivered in the presence of (Signed) *C. B. Daly.* } (Signed) *E. B. WOOD.* [S]

Thus giving an entirely different character to the whole transaction, and this agreement was made, as we shall see, by his letter of 22nd November, 1879:- "Notwithstanding I was satisfied the mortgage was for double the sum it should be," and he adds, whatever his convictions were on this point, he "intended to carry it out faithfully." And on 2nd December, 1879, plaintiff wrote to the party representing the holders of the mortgage, as follows:

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

Winnipeg, 2nd Dec., 1879.

G. A. Muttlebury, Esq.

DEAR SIR,—Enclosed find cheque for $100 payment on account of the *Schultz–Macarthur* mortgage.

Yours truly,

(Signed) *E. B. WOOD.*

Plaintiff also says :

After the defendant had transferred the mortgage to the loan society, or about that time, he wrote me a note asking for the payment of some arrears under the arrangement made in the assignment to *Macarthur*, and was rather pressing. The note was in pressing terms. In reply I wrote him on the 22nd November, 1879:

Winnipeg, Saturday,
Nov. 22, 1879.

DEAR SIR,—As I presume you know, I was not at home yesterday, but was absent holding the court at *White Horse Plains.*

Your note came in my absence, and it was handed me on my return in the evening.

I must say its contents surprise me. I made an arrangement with you and Mr *Macarthur* in good faith, supposing he alone was the person to whom I was responsible, notwithstanding I was satisfied the mortgage was for double the sum it should be. Whatever may have been my convictions on this point—a matter even now susceptible of demonstration—I intended to carry it out faithfully, but it seems circumstances have prevented me.

I mentioned in this connection that I hoped to be able to overtake the arrears. You told me not to think of it.

It seems now you have thought fit to assign this mortgage to some company of which one *Muttlebury* is manager. To this, of course, I could have no objection; but I did object to giving a new mortgage for the sum claimed, as under the terms of the arrangement I made with you and Mr. *Macarthur*, it was simply monstrous—quite in keeping with the making up of the original sum.

If my refusal to give a new mortgage for such a sum as he said you claimed has occasioned your note, so unlike the tenor of your conversation, I have only to say, I regret it.

I shall pay no insurance in the past or for the future. I shall pay only eight per cent. on the principal from the date of the mortgage; but I shall endeavor to overtake the arrears as speedily as I can.

If this will not suit you, I have but one course to pursue, and that is to surrender up to you your property.

The land was valued at $800, your building charges were $5,126;

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

making the mortgage $5,926. I paid in building, etc., upwards of $5,000.

I propose, in giving the property up, you should give me what, under the circumstances, is fair. If on this score there should be any difficulty, it can be arranged by arbitration. If it should be thought I am not entitled to anything, so be it. I shall at all events be freed from a most disagreeable and humiliating position.

I speak plainly, as I always do when I have anything to say. I think I am underst od.

Before you leave be good enough to let me know distinctly what you claim as a balance on the mortgage, bearing in mind what I have said about rate of interest and insurance; also your views on the other parts of this note.

Yours truly,

(Signed) *E. B. WOOD.*

Dr. SCHULTZ,
Winnipeg.

Therefore, it is obvious that plaintiff had notice that *Corbett* had taken no part in making up any estimate, long before he drew up with his own hands the new arrangement, by which he secured such a modification of the original agreement as not only extended the time of payment, but reduced 33⅓ the rate of interest, that is, from 12 to 8 per cent. Surely, having obtained knowledge of all of which he now complains, if he wished to take advantage of any misrepresentation as to *Corbett*, he should not have drawn up and signed the new contract and induced plaintiff to accept it in lieu of the original.

Lord *Brougham*, in *Irvine* v. *Kirkpatrick* (1), says:

In order that the misrepresentation or the concealment, I care not which, may be of any avail whatever, it must be to the *dolus clarus locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly to another, with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, notwithstanding the concealment gets at the fact concealed, before he signs the contract, the misrepresentation and the concealment go for just absolutely nothing, because it must be

(1) 17 H. L. 32.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

dolus clarus locum contractui. It is of no avail if the party has, in whatever way, become acquainted with the truth at the time.

The Master of the Rolls in *Marquis of Clanricarde* v. *Henning* (1):

Until the fraud is discovered, the term does not operate; but the fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured, as to make it his duty if he intends to seek redress, to make inquiry, and to ascertain the circumstances of the case.

Campbell v. *Fleming* (2) establishes:

If a party induced to purchase an article by fraudulent misrepresentations of the title respecting it, and after discovering the fraud, continue to deal with the article as his own, he cannot recover back the money from the seller.

Per Lord *Denman*,, C.J., *Littledale*, J., and *Patteson*, J., the right to repudiate the contract is not afterwards revived by the discovery of another *incident in the same fraud.*

Littledale, J.:

It seems to me that this non-suit was right. No doubt there was, at the first, a gross fraud on the plaintiff. But after he had learned that an imposition had been practiced on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares; and, in fact, disposes of some of them. Supposing him not to have had, at that time, so full a knowledge of the fraud as he afterwards obtained, he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.

Parke, J.:

I am entirely of the same opinion. After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind.

Patteson, J.:

No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud, may be resisted. In this case the plaintiff has paid the money, and now demands it back on the ground of the money having been paid on a

(1) 30 Beav. 180.

(2) 1 Ad. & E. 40.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

void transaction. To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived.

Lord *Denman*, C J.:

I acted upon the principle which has been so clearly put by the rest of the court. There is no authority for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding.

Then as to the lands, in letter of the 22nd November, 1879, he says: "The land was valued at $800, your building charges were $5,126, making the mortgage $5,926."

In reply to this, defendant, on 22nd November, 1879, writes plaintiff, and *inter alia*, says:

The $5,926 for which you gave the mortgage was made up, you say, of land, $800, and the building charges, $5,126. Your memory is faulty in this. The land was to be $800 per lot, the lots being four of the present ones, or 50 feet front each. You got two and a-half of these or ten (?) of the present, and the land came to twice and a-half as much as you state it.

It was this statement, the plaintiff gives us to understand, was what induced him to institute the present suit. Now, it is obvious, from his own showing, if the statement in his letter is correct, that the amount of the mortgage, $5,926, was not made up of the land valued at $800 and the building charges at $5,126; his idea that he was only to pay $400 a lot, being $1,000 for two and a-half lots, must be wrong, because a month before the mortgage was executed, according to his own statement, he "gave *Schultz* a cheque for what (he says) I supposed to be the land I wanted for $500 on the Merchants' bank here. Have the cheque endorsed by *Schultz*. It seems it was not dated, but that it was

filled in by the bank when deposited by *Schultz*, and that was the 7th July. I produce the cheque."

1881

SCHULTZ v. WOOD.

Paid 7 July.

No.——

Winnipeg ——— 1874. Ritchie, C.J.
Manitoba.

To the Merchants' Bank of Canada,
Pay to *John C. Schultz* or order Five Hundred Dollars.
$500

E. B. WOOD.

(Endorsed) *John Schultz.*

Therefore, by his own showing he was to pay $1,300, $500 by the cheque and $800 included in the mortgage, a state of facts entirely inconsistent with his present contention. This shows how loose and unsatisfactory and wholly irreconcilable is his bill with his evidence, and both with the claim now put forward. Taking the whole case together the difficulty would seem to me to have arisen in plaintiff's mind, in respect to the land, rather to the quantity taken being more than he originally contemplated, than to a misunderstanding as to the price.

When a party comes before a court to seek to set aside a deed duly and solemnly executed, and to have substituted therefor another, and a different contract, the case he puts forward should be clearly and distinctly stated and should show, if sustained by evidence, undoubted right to the relief claimed, and to support such a claim and justify a court in ignoring a solemn instrument, and rescinding a contract under seal and substituting another therefor, the evidence should be unequivocal and conclusive, for no court would rescind a contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as to show that the contract was founded upon them. Lord Justice *Turner*, in delivering the judgment of the Privy Council in *Osborne* v. *Eccles* (1), says:

(1) 2 Moo. P.C.N.S. 158.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

A court of equity ought not, as we think, to interfere with a legal right upon the assertion of a mere doubtful equity. It ought, we think, before it interferes in such a case to be satisfied that there is an equity calling for its interference as clear as the legal right which it is called upon to control.

No attempt is made to repudiate this mortgage until the 16th December, 1879—five years and four months after its date, and three years and two months after an entirely new arrangement had been entered into, whereby plaintiff sought and obtained such, to him, favorable modifications of the original terms, both as to the mode of payment and rate of interest. To rescind this mortgage on such meagre and unsatisfactory evidence as has been produced, would, in my opinion, be nothing less than a perversion of law and justice.

It is a delusion on the part of the plaintiff to suppose that any relationship or confidence existed between himself and the defendant which the policy of the law specially protects, or to justify him in assuming, as he does in his evidence, that they were not acting in this matter as vendor and purchaser at arms' length, each bound to look after his own interests, failing to do so, neither having any claims to invoke the interposition of a court of equity.

It may be that the land was over-valued, and, in the opinion of the witnesses called by the plaintiff, it no doubt was, but its value was mere matter of opinion; if so, can the plaintiff blame any person but himself? Called upon to settle the business, lest, as he says, death should intervene, he names his own son to draw up the papers, accepts the amount inserted, if his statement is correct, without inquiry, without discussion, where the materials were at hand and information could be had for the asking, apparently making not the slightest attempt to obtain any materials whatever to enable him to form even an approximated estimate or opinion of the correctness of the indebtedness he was about to

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

assume, if the bargain he has made is a bad one could he reasonably expect it to be otherwise? It is not easy to understand how a man who describes himself as "entirely ignorant and unacquainted with the value of such matters" should undertake (without assistance from persons acting in his interest, or at any rate from disinterested parties) the negotiating and concluding such a large purchase, or that he should accept from his vendor an amount as the value of the property without having even the curiosity to ask how that amount was made up or on what it was based. If parties will so act and not attempt to protect themselves when they can so easily do so, it is impossible for courts to relieve them from the effect of their own negligence, recklessness or folly. Is it possible that a man, who has been engaged in the active business of life for any length of time, can be ignorant of the fact that as a general rule sellers put a high estimate on the value of their estates, and can any buyer in dealing with the owner of property be so simple minded and innocent at this day as to believe that it is not the seller's aim to secure a good price, and the man who is not aware of his position towards his vendor in these respects must be a singular exception to the general run of mankind.

If the plaintiff has been as credulous, as confiding, as innocent, as inexperienced, or as ignorant of everything connected with the value of property as he in his evidence so prominently puts forward, or so careless, negligent and regardless of his interests as his evidence might lead some to conclude, it may be his misfortune or his fault. The law, however, provides no special protection for such cases.

In deciding this case in the court below, the doctrine of *caveat emptor*, as applicable to affirmations and representations in regard to sales of real estate, has been entirely ignored, as is the idea that it is a man's own

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

folly not to use his own sense and discretion in matters of this sort, that it is his own folly and laches not to use the means of information within his reach, and that any loss or injury, as is said in the books in such a case, is to be attributed to his own negligence and indiscretion from which it is not the province of the courts of equity to relieve parties who neglect or refuse to exercise a reasonable diligence and discretion.

Defendant in his evidence says:

The building was there and the material, and I could have inquired what the cost would be.

In *Pike* v. *Vigers* (1), the Lord Chancellor says:

Now the very able counsel for the defendant felt that they could not press for a reference to the master to inquire into the fair value. If I had directed such an inquiry, it would have been a false issue; it would have implied that a report of inadequate value would have justified an inference of fraud. But mere inadequacy of value, even in a case capable of an exact measure, in an ascertained subject, would not justify such an inference. The principles (unless in extravagant cases, which are to be judged of rather by uplifted hands and exclamations of astonishment at the disproportion between price and value) are well established as applicable to cases at law, and equally so, where the contracts have been executed, to cases in equity; but I cannot better illustrate the doctrine as applicable to the principles of a court of equity, than by reference to the observations of Lord *Lyndhurst* in the case of *Small* v. *Attwood* (2), when the case came before him in the Court of Exchequer. He there says: "I have seen so much of its flexible character, and of its means of adapting itself to the interest of the party on whose behalf the evidence is given, that I confess I place very little reliance on evidence of this nature. But if it were otherwise, and I was compelled to decide between the evidence, I should come to the conclusion that the value of the mine is greatly indeed below the sum that was stipulated to be given for it, namely, £600,000. But that alone is not a ground on which the contract could be set aside, although it is some evidence to show that the representations made with respect to the productive power and character of the mine were fallacious."

* * * * * * *

In *Walker* v. *Symonds* (3) there was concealment by the defendant

(1) 2 Dr. & W. 251. (2) 1 Younge, 491.
(3) 3 Swanst. 1.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

of a material fact; and that, too, accompanied by their having given information, but not the whole information. The information they gave was true, that *Donnithorne* had been guilty of a breach of trust, but it was imperfect, inasmuch as the fact, that they themselves had been guilty of a breach of trust, was concealed; and yet there, though the plaintiff was helpless and without the advice of any friend, and under the influence of a hard pressure from her father, and her whole fortune was involved in it, it was held that the imperfectness of the communication did not constitute fraud; and Lord *Eldon* rested his judgment on the character of the defendants as trustees, and the duty of trustees, as I have already stated. That case, therefore, as far as the question of concealment or imperfect information is concerned, is rather an authority for the plaintiff here; for Lord *Eldon* expressly negatives the inference of fraud arising from the imperfection of the information, and rests his decree solely on the confidential relation of the parties. Here Lord *Audley* stood in the situation of the vendor, desirous of getting the best price he could for his property, and the vendee in the ordinary situation of purchasers, anxious to give the lowest price that the vendor may be prevailed on to take. What are the respective rights and duties of parties so circumstanced? If, on either part, they enter into covenants, they are bound by them to that extent and no further. The vendor is at liberty to state, in the strongest terms, his opinion of the high value of the thing to be sold, and the purchaser to state equally the opinion of the worthlessness of it. If the vendor is so giddy as to trust to these representations, and to sell his property at a gross undervalue, and executes a deed for the purpose, and hands over the possession to the purchaser, he has no claim either at law or in equity to be restored to his former rights; neither has the purchaser, if the price is excessive, any ground to be relieved from his bargain, or to be compensated for his loss. If the purchasers had been in possession of important facts, calculated to increase the value of the mine, they would not have been bound to disclose them nor could Lord *Audley*, on the subsequent discovery of such increased value, have any ground to be relieved from his contract.

As to misrepresentation *Story* says (1):

It must not be of a mere matter of opinion equally open to both parties for examination and inquiry, when neither party is presumed to trust to the other, but to rely on his own judgment.

And again:

(1) Eq., sec. 197.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

But ordinary matters of opinion between parties dealing upon equal terms though falsely stated are not relieved against because they are not presumed to mislead or influence the other party where each has equal means of information. Thus a false opinion expressed intentionally by the buyer to the seller of the value of the property offered for sale, where there is no special confidence, or relation, or influence between the parties and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale; in such a case the maxim seems to apply *scientia enim utrinque par pares contrahentes facit.*

And again, sec. 195:

Nor is it every wilful misrepresentation even of a fact which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it and it was his own folly to give credence to it, for courts of equity like courts of law do not aid parties who will not use their own sense and discretion upon matters of this sort.

Again, as to false and fraudulent representations on a treaty of sale of property such as would induce a court of equity to rescind the contract entered into upon such treaty, Mr. *Story* says:

But then in all such cases the court will not rescind the contract without the clearest proof of the fraudulent misrepresentations and that they were made under such circumstances as show that the contract was founded upon them.

And continuing, sec. 200:

On the other hand, if the purchaser choosing to judge for himself does not avail himself of the knowledge open to him or his agent he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule is *caveat emptor*. It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances who refuse to exercise a reasonable diligence or discretion.

From *Attwood* v. *Small* (1), the same principle is clearly deducible.

In *Sugden* on Vendors:

Our law adopts the rule of the civil law *simplex commendatio*

(1) 6 Cl. & F. 232.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

non obligat. If the seller merely made use of those expressions which are usual to sellers who praise at random the goods which they are desirous to sell, the buyer could not procure the sale to be dissolved; an action of deceit cannot be maintained against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the purchaser was thereby induced to purchase it and was deceived in the value * * * Neither can a purchaser obtain any relief against a vendor for false affirmation of value, for value consists in judgment and estimation in which many men differ.

In *Duke of Beaufort* v. *Nellds* (1) Lord *Campbell* says:

Equity will not interfere in favor of a man who wilfully was ignorant of that which he ought to have known, a man, who without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake in consequence of which alone the proceedings in court have arisen.

It is said American cases carry the doctrine still further as to representations, and further than is warranted by our law. The doctrine as held in the American courts will be found in *Medbury* v. *Watson* (2), before Chief Justice *Shaw*, and three other judges. This case was followed by *Hemmer* v. *Cooper* (3).

If I have not referred at all to the defendant's answer, parts of which were read by plaintiff, and which entirely and unequivocally contradicts the whole case as put forward by plaintiff in his evidence, but agrees with the case put forward in the bill in stating that the sale was for the fair value of the building and improvements and land, and explains the whole transaction and denies and rebuts all pretention of fraud on the defendant's part, claimed by plaintiff, it is not because I am not keenly alive to the very obvious result that would naturally flow from allowing a party to break down or reform his own solemn deed, under seal, and free himself from the obligations he has thereby imposed on himself on his own uncorroborated verbal testimony, directly, positively and unequivocally con-

(1) 2 Cl. & F. 248, 286. (2) 6 Metcalf, 246.
(3) 8 Allen (Mass.), 334.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

tradicted by his opponent, who claims, under such an instrument, viz.: to place in jeopardy, if not to destroy, all security in written, sealed instruments, but because I am of opinion that the plaintiff's bill sets out no case entitling plaintiff to any relief, and that his evidence, even assuming he should have been permitted to have gone into a case not put forward in his bill, makes out no sufficient case for re-opening the transaction, either as to the land or the improvements. But when this is taken in connection with the fact of plaintiff's uncorroborated evidence being directly contradicted by the oath of the defendant, how can he expect to obtain a decree, for the plaintiff declares in the strongest possible language that defendant's statements are false, it is only the plaintiff's oath against the defendant's.

In *Grant* v. *Grant* (1) the Master of the Rolls says:

In the first place there is a rule constantly acted on in Chambers in Equity, that the unsupported testimony of any person on his own behalf cannot be safely acted on. * * * The court cannot act on the mere unsupported testimony of a claimant. * * * In this case I could not act on the uncorroborated testimony of the wife, the alleged donor.

In *East India Company* v. *Donald* (2) Lord *Eldon* says:

If relief is prayed, the rule is laid down here (and it is much too late now to discuss the principle of it) that if there is nothing more than positive assertion, unqualified in the terms of it, by one witness, and a positive denial by the defendant, the plaintiff shall not have a decree, and this court giving relief beyond the law will not give it on such terms, and that has been laid down and acted upon.

Lord *Eldon* in *Evans* v. *Bicknell* (3) says:

A defendant in this court has the protection arising from his own conscience in a degree, in which the law does not effect to give him protection. If he positively, plainly and precisely denies the assertion, and one witness only proves it as positively, clearly and precisely, as it is denied, and there is no circumstance attaching credit to the assertion over-balancing the credit due to the denial, as a positive denial, a court of equity will not act upon the testimony of that witness.

(1) 34 Beav. 623.

(2) 9 Ves. Jr. 283.

(3) 6 Ves. 183*a*.

1881

SCHULTZ v. WOOD.

Ritchie, C.J.

The Master of the Rolls in *Pilling* v. *Armitage* (1) says :

> As far as the testimony of one witness can go, this witness distinctly proves all the allegations of the bill as to the agreement. But it is objected that this is but the evidence of one witness; and the agreement is denied by the answer, and, therefore, according to the established rule of the court, a decree cannot obtained.

In my opinion the appeal should be allowed

STRONG, J. :—

With two exceptions I concur in the judgment of the Chief Justice. I am not able, however, to agree that the rule which formerly prevailed in courts of equity requiring two witnesses to outweigh a positive denial of the defendant in his answer is in force where the evidence is taken, as it is under the practice existing in *Manitoba*, *vivâ voce* in open court. Further, I am of opinion that misrepresentation by a vendor as to the price which he himself paid for the property, which is the subject of the contract of sale, invalidates the contract. There are, I am aware, American authorities to the contrary, but the case of *Lindsay Petroleum Co.* v. *Hurd* (2) is, I think, conclusive the other way. I have nothing further to add, for in all other respects my opinion accords with that just pronounced by the Chief Justice.

FOURNIER, J. :—

Was also of opinion that the case ought not to have been proceeded with in the absence of appellant, and without allowing him the opportunity of giving his evidence.

HENRY, J. :—

The respondent, who is the plaintiff in this suit, alleges substantially that the appellant in July, 1874,

(1) 12 Ves. 79. (2) L. R. 5. P. C. 22.

1881

SCHULTZ v. WOOD.

Henry, J.

sold him a lot of land at *Winnipeg*, together with a house in course of construction upon it, and some materials provided on the ground for it. That the respondent was, by a parol agreement entered into between them, to pay the appellant the fair and reasonable value of the work then done to the house, and of certain materials which he provided for it, and also the fair and reasonable value of the land to be taken therewith. That in August (about six weeks afterwards) the appellant requested that the negotiations for the property should be completed by written documents, to which the respondent agreed. It was agreed further that the appellant should convey the land to the respondent in fee simple, and that the respondent should give a mortgage on the property to the appellant for the balance due, after deducting a payment of $500, for which the respondent had given the appellant a cheque on the *Merchant's Bank*, and which was paid to the appellant on the 7th July previous. At the suggestion of the respondent, his son was selected to make out the deed and mortgage, and the amount of the consideration in both to be furnished by the appellant.

The respondent alleges that the deed and mortgage were brought to him by his son, and that trusting to the good fath he had in the appellant, he executed the mortgage, believing that the amount of the consideration had been correctly stated in it. That, at the time, he thought the amount high, but nevertheless executed the mortgage, trusting in the correctness of the amount furnished by the appellant. That, previous thereto, he had never in any way ascertained what the correct amount should have been; nor had he got from the appellant or otherwise any statement of the amount he had expended towards the erection of the house, nor had he any means of knowing what proportion of the

1881

SCHULTZ v. WOOD.

Henry, J.

consideration money was made up for the house, or what amount was included for the land. That some short time thereafter, from information received from the appellant's foreman *Corbett*, he became suspicious that all was not right, and that he had been overcharged, but that until very shortly before the commencement of the suit he had nothing sufficiently definite to enable him to seek legal redress. That until the receipt of a letter from the appellant, dated the 22nd November, 1879, he never knew or had reason to suspect that the consideration of the mortgage covered more than $1,000 for the land, but when he found by that letter that he had been charged $2,000, he felt that he had been charged at least double what he should have been.

The answer to the respondent's bill admits the original contract as stated in it—denies anything like fraud, misrepresentation, concealment, error or mistake on the part of the appellant as to the amount he caused to be inserted as the consideration money of the mortgage. It denies the allegations contained in the seventh clause of the bill amongst which is a statement that the lots (two and a-half) were not worth more or to have been higher in price than at the rate of four hundred dollars each, but that, on the contrary, the land was to be two thousand dollars, or at the rate of $800 each lot; and that the appellant based the estimate of that value "on the selling value of such land."

In the sixth paragraph of the answer the appellant admits the contract as stated in the bill, and that the respondent was, by it, to pay the value of the work done on the house so far as it had progressed and of the material on the ground. The appellant alleges that the value of the work and materials was ascertained in the presence and with the co-operation of the respondent. When the work was being carried on. He says:

We had the plan in our hands to refer to and compare with what

1881

SCHULTZ v. WOOD.

Henry, J.

had been done on the ground in carrying it out, and by these means and by reference from time to time to the foreman and otherwise, the calculations were made and placed on sheets of paper as data on which our agreement was to be based, which papers, I believe, are now in the plaintiff's possession as he retained the same.

The defence rests largely on the proof of those allegations. The respondent positively denies that he had ever seen the sheets of paper alluded to before the execution of the mortgage or afterwards, or, indeed, any other statement, paper or estimate. There is no evidence outside the allegation in the answer that he did. The only witness who spoke about them was the appellant's book-keeper (*Fulthorpe*), who says that it was he that made them out, and says he made them "from time-books and other data in the office at the time." In his direct testimony, he says:

I was told to make them out for the Chief Justice, and to the best of my knowledge and belief they were given to the Chief Justice.

In his cross-examination, he says:—

I suppose the other account referring to the one just mentioned, was given to the Chief Justice at the time, but do not know this.

Again:

I did not deliver these papers or a copy of them to the Chief Justice, and do not recollect of any one delivering them. I have no means of recollecting the circumstances at all, except the sight of these papers. I remember only that I made copies for the Chief Justice, but do not know whether he got them. The Chief Justice himself never came to me that I recollect to make any remark about these items.

The allegations of the respondent in his bill and his sworn statements on this point are not contradicted or affected by any evidence adduced by the appellant, and they must be taken as sustained.

But if the statement contained in the four sheets put in evidence (exhibit 2) just referred to was correct, and that the value of the land was really $2,000 as claimed by the appellant, the aggregate would only amount to

1881

SCHULTZ v. WOOD.

Henry, J.

$6,172.50, from which to deduct the $500 paid by cheque would leave a balance of, but $5,672.50 while the mortgage was taken for $5,926, or for the sum of $253.50 more than was due. By the most favorable view of the evidence on the part of the appellant the mortgage was taken for that amount in excess of what it should have been. But there are fundamental objections to the statement in question as evidence of the value of the work and materials. It was prepared merely, as I understand it, as a basis, upon, or as one of the means by, which an estimate of the value was to have been subsequently made and agreed upon. There is nothing in the evidence to connect the work and materials stated in it with the work done and materials provided for the house. It was made by a book-keeper from data that might have been largely inaccurate. Without such connection being shown it proves nothing. The agreement was not to reimburse the amount expended, but to pay the then value of the work which might or might not have been an advantage to the appellant. If he had got some of the work done for half value he would, *pro tanto*, be the gainer, or, if he had paid over the value for the work or materials, he would be the loser, when the value was ascertained. At all events, we have only to give effect to the contract as we find it entered into.

The appellant admits that the selling value of the land was to be the criterion to fix the amount to be paid for it, and in the ninth paragraph of his answer he, as I before quoted it, says he based his estimate of $2,000 on the selling value of the land. If that was the contract it seems to be shown by nine apparently competent and disinterested witnesses that the value of the land was not over $1,000. The appellant admitting the contract was bound to show that the sum of $2,000 was the fair selling value of the land, which has not been

1881

SCHULTZ v. WOOD.

Henry, J.

attempted. No court or jury under the evidence would be justified in rejecting the evidence of value put on it by the evidence of so many competent witnesses, and unless other reasons can be found to deny it, the respondent is, in my opinion, entitled to have that view entertained. As far as I can see the respondent is not estopped by anything shown to have been done by him previous to the execution of the mortgage. I will hereafter consider the effect of what he did afterwards.

As to the contract about the house and materials, the appellant was to be paid for their value; and when evidence of value was given by several competent witnesses of the respondent, the appellant could not expect any court to reject their sworn estimates, unless, indeed, those estimates were impeached by substantial and reliable evidence. None such was, however, given. The necessary conclusion is, therefore, that the estimates of the respondent's witnesses are reliable. One of them (*Blackmore*, a contractor for buildings, who had been 18 or 20 years in that business—eight years of the time at *Winnipeg*) states the value of the work at the house and materials to be $2,351.15, for which he made a detailed written statement.

Another (*Woods*, a carpenter for 26 years, the last seven years of which he worked at his business in *Winnipeg*) estimates, by a detailed statement, the value of the work and materials at $2,452.69, or about $100 above the estimate of *Blackmore*. *Corbett*, the foreman, proved that he compared and verified the estimate of *Blackmore* in which he found one or two unimportant errors which operated both ways, but that it was substantially correct, and that he knew it to be so from his own personal knowledge of the work when being done, and of the materials on the ground. If such uncontradicted evidence is not to be entirely ignored, the value of

1881

SCHULTZ v. WOOD.

Henry, J.

the building and materials was not over $2,452 according to the higher of the two estimates, while it is charged at $4,426, an excess of $1,972. This may be all wrong and the estimates may be far too low, but the appellant has not impeached them, and so far they must be taken to be correct. According to the evidence on the trial, which is our only guide, the land should be $1,000, on account of which the respondent paid $500, leaving a balance due of $500. To this add the value of the building and materials $2,452, which makes due, when the mortgage was taken, $2,952. The mortgage for $5,926 would therefore be in excess of the value of the land, building and materials to the extent of $2,974. If the case were here for a final judgment, I think we, under the evidence, would be justified in deciding that the appellant should pay that amount to the respondent, or cause it to be deducted from the amount due on the mortgage, but as the question is merely one of a reference to a master we have only to ascertain whether the decree for that purpose can be sustained. The other matters of defence to the bill as set up are contained in allegations in the answer. 1st. That the respondent made payments on the mortgage, and the appellant claims that such payments are evidence of a ratification and adoption of the consideration money in the mortgage. That defence cannot, however, be available unless it be both alleged and proved that they were made after the knowledge of the respondent of the alleged fraud for which he now seeks redress. In this case there is neither such allegation or proof.

In the fourth paragraph of the answer an agreement is alleged to have been entered into on the 19th Sept., 1876, between the respondent, the appellant and *Duncan MacArthur*, who became the assignee of the mortgage, by which arrangements were made for the payment to

1881

SCHULTZ v. WOOD.

Henry, J.

MacArthur of the balance due on the mortgage. The object of setting it out does not plainly appear. There is no allegation of any knowledge by the respondent of the alleged fraud at that time, and the only object for setting it out as stated in the introductory part of the paragraph appears to have been to show the leniency of the appellant in regard to the payment due on the mortgage. In that way it is no bar to the respondent's right to an account. If a case of fraud were shown it would vitiate the mortgage, but the respondent does not seek relief in that way, but to obtain a proper account from the appellant. The mortgage being in the hands of the loan company and held as a collateral security for the appellant, the latter is the real and only party interested as a defendant in the action. Under all the circumstances hereinbefore referred to and shown by the allegations and proof of the parties, I am of opinion that as to them the decree was right.

But another objection was taken to it of a much more serious character. From the judge's minutes it appears that the bill herein was served on the appellant on the 20th of December, 1879, and the answer filed on the 19th of January following. The learned judge reports that "at the hearing, before the merits of the case were gone into, Mr. *Monkman* applied on behalf of the defendant (*Schultz*) to have the trial put off till May or June on the ground that the defendant is absent attending to his parliamentary duties at *Ottawa*, and because he is in a delicate state of health. He read an affidavit from defendant (*Schultz*) in support of said facts and a certificate from Dr. *Grant* of *Ottawa*." The hearing took place on the 28th of February, being about 40 days after the filing of the answer, and 18 days after the cause was at issue by the filing of the replication. The report does show when the appellant left *Winnipeg* for *Ottawa*, nor if the notice of the

hearing was served before he left *Winnipeg*. If it were not, a reasonable continuance should have been granted. The learned judge, however, thought it unnecessary that his evidence should be heard on the merits at the hearing, and refused the motion for a continuance, and in the concluding paragraph of his judgment says, that

> If it is thought necessary by the defence that the defendant (*Schultz*) should be present when the account will be taken sufficient time will be given him to come from *Ottawa* and appear before the master when the account will be taken.

From the bill and answer and the evidence of the respondent and others at the hearing the conclusion is irresistible that, not only in respect of the matter of taking the account before the master, but also as to the main facts of the case upon which rest the respondent's claim that an account should be taken, the evidence of the appellant under the peculiar circumstances in evidence was most important; and before a decree against him to account was passed, he should have had reasonable opportunity of being heard in his defence. Absence at a great distance from the place of hearing and detention by sickness at *Ottawa* were legitimate and sufficient reasons for the postponement of the hearing. It would be contrary to natural justice that a man should have a judgment against him during his temporary absence when he desired to be heard and showed himself unable to be present.

From the respondent's own evidence and otherwise he appears to have acted in the most careless and negligent manner as regards his own interests, and allowed a long time to elapse before taking any action towards obtaining redress. Still, if there was no express or implied ratification after knowledge of what he complains of, and no actual acquiescence, the matter of the effluxion of time short of the statutory period will not bar his remedy. I cannot find in any

1881

SCHULTZ v. WOOD.

Henry, J.

of his subsequent dealings or conduct, as shown by the evidence, any such ratification or acquiescence. There are cases wherein a party, to avoid a contract *in toto*, must, on notice or knowledge of fraud, take measures at once to avoid it, but in such cases he must remit the other party to the position he had previously occupied. Here, however, the rights and positions of the parties had materially changed at the time the respondent alleges he first discovered the fraud he complains of. His bill is not to avoid the contract but to reform the mistake or fraud as to the amount of the consideration money stated in the mortgage. He prays for adjudication as to that matter and for the necessary relief. I think the evidence shows him entitled to it, but for the objection I have last considered.

I think the decree cannot be upheld under the circumstances and for the reasons I have stated, and that our judgment should be to allow the appeal with costs and remit back the case to the position it occupied before the hearing. At a second hearing the appellant's evidence will be heard as well as that of the respondent, and the important facts more fully investigated to the end that justice may be done between the parties.

GWYNNE, J. :—

In his bill the plaintiff alleges that the verbal agreement which was made between him and the defendant, and which was made in the month of June or July, 1874, was that the plaintiff should purchase the foundation and frame of the house the defendant was then erecting, as it then stood, and go on and finish the same at his own expense for a dwelling for himself, and should pay the defendant the fair and reasonable value of the work then done and of the material then on hand in respect of the said dwelling house, and the fair and reasonable value of the land to be taken

1881

SCHULTZ v. WOOD.

Gwynne, J.

therewith, and that in pursuance of such agreement that plaintiff went on and at his own expense completed the house. In one part of his evidence he says that on the 4th July he gave the defendant a cheque for $500, which he says was to pay for the land he required; in another that the price of the land was agreed to be $400 per lot, which for two and a-half lots taken would make the price of the land to be $1,000. In a letter dated November 22nd, 1879, addressed to the defendant, he says: "the land was valued at $800, your building charges were $5,126, making the mortgage $5,926."

Now the contract, whatever it was, remained verbal until the 12th August, 1874, when the defendant executed to the plaintiff, who accepted, a deed in fee simple of the property agreed to be sold, and executed to the defendant a mortgage on the property so conveyed, securing the payment of the sum of $5,926 with interest thereon at 12 per cent. per annum, as the amount due to the defendant for the land and building thereon with the material so agreed to be sold, and so sold and conveyed to the plaintiff. The plaintiff, in his evidence, says that at the time of the conveyance to him, and the mortgage by him being executed, he thought the amount pretty large, but that he signed the mortgage supposing it was all right. It is to be observed here that the relation then existing between the plaintiff and the defendant was that of vendor and vendee; there was no relationship of trustee and *cestuique trust*; nor is it alleged that the defendant by any device or contrivance prevented the plaintiff from exercising his judgment in determining what was the amount which, under the verbal agreement, should have been inserted in the mortgage. When he gave the mortgage for $5,926, that must be taken to be his own act determining the price to be paid by him, and, upon the completion of the deed to him and the execution of

1881

SCHULTZ v. WOOD.

Gwynne, J.

the mortgage by him, the contract, which had up to that time been *in fieri*, was wholly completed and executed; and if the plaintiff was then willing to accept, as he says he did, the defendant's statement of the value as the amount for which the mortgage should be executed, that was his own act, and if that was imprudently done, or was not done with sufficient deliberation, the plaintiff had only himself to blame. Then two years afterwards, and after the plaintiff had, as he says in his evidence he had, discovered that he had made a bad bargain, and after he had reason to suspect, from information given to him by *Corbet*, that the defendant had taken an unfair advantage of the confidence reposed in him by the plaintiff, the latter executes the agreement of the 19th September, 1876, whereby, after reciting the mortgage, and that it bore interest at 12 per cent., he accepts a reduction of the interest to 8 per cent., and he agreed to pay the principal secured by the mortgage, with interest at 8 per cent., by monthly instalments of $100, and he agreed to give an irrevocable power of attorney to one *Duncan McArthur*, assignee of the mortgage, securing such payment. The indenture witnesseth that in consideration of the premises, it is mutually and irrevocably agreed between the parties thereto, namely, the plaintiff, the defendant and *McArthur*, as follows:

> The said *Wood* shall pay to the said *McArthur* $100 per month to be taken out of the salary of the said *Wood*, payable to him as Chief Justice of *Manitoba*, until the said mortgage is paid, the interest on the said mortgage to be computed at 8 per cent. per annum instead of 12 per cent., as provided in said mortgage.

In the above letter of the 22nd November, 1879, the plaintiff says that he made this agreement of September, 1876 "notwithstanding that he was satisfied the mortgage was for double the sum it should be." Now, up to this re-affirmation of the correctness of the

amount secured by the mortgage, there is no allegation of any contrivance of the defendant to prevent the plaintiff ascertaining what should have been the amount for which the mortgage should have been given in accordance with the plaintiff's view of the verbal agreement; nor was there any fiduciary relation whatever existing between the plaintiff and defendant. If therefore it be true, as the plaintiff now wishes to establish, that his confidence in the defendant was misplaced when he accepted, as he says he did, his representation of the value of the premises to be inserted in the mortgage, the plaintiff has only himself to blame, and he cannot expect that any court shall now assist him to set aside the contract completed and ratified with such circumstances of formality, upon the allegation that—for this is really what the equity stated by him in his bill, and his evidence amounts to—he was altogether too confiding and acted very foolishly in adopting the defendant's representation of the value of his property as the amount which the plaintiff was willing to pay for it. The plaintiff has, with his eyes open, abstained from making inquiries which he might have as readily made prior to the execution of the mortgage as now, and it is not the province of a court of equity to interfere to set aside contracts completely executed, and indeed, as here, deliberately ratified and confirmed, long after (as the plaintiff alleges) his suspicions were aroused, simply because the vendee, who was not entitled to regard the vendor as in fiduciary relation with him, has placed more confidence in the statements of the vendor as to the value of the property he was selling than the vendee now finds to have been prudent.

Vigilantibus non dormientibus leges subserviunt is a maxim recognized in courts of equity as well as in courts of law, and under the circumstances of this case, as detailed by the plaintiff himself, he must abide the

1881

SCHULTZ v. WOOD.

Gwynne, J.

consequences of his own imprudence. A court of equity cannot set aside his own completed contract and make a new and more favorable one for him. I agree, therefore, that the appeal must be allowed, with costs, and the bill in the court below be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *A. Monkman.*

Solicitor for respondent: *H. M. Howell.*

1879

*June 14, 16.

*Dec. 13.

KATE DOUGLAS MOORE.....APPELLANT;

AND

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life Insurance—Power of Court to set aside verdict and enter another—37 Vic., ch. 7, secs. 32 & 33 Ont.—secs. 264, 283, ch. 50 Rev. Stats. Ont.—38 Vic. ch. 11, secs. 20, 22—New trial.

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 *Vic.*, ch. 7, sec. 32, *Ont.*, the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favor of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule *nisi* to show cause why this verdict should not be set aside and a non-suit or a verdict entered for defendants, pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench made

---

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

the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for *Ontario*, and the court being equally divided, the appeal was dismissed.

Held 1. (*Taschereau*, J., dissenting), that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue.

2. That the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act, or in not acting, on this ground; and therefore no appeal to the Supreme Court of *Canada* would lie on such ground, under sec. 22, 38 *Vic.*, ch. 11 (1).

3. That if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court has no power to consider the case as if the amendment had in effect been made (2).

Per *Gwynne*, J., That the plaintiff never could have been non-suited in virtue of 37 *Vic.*, ch. 7, sec. 33 *Ont.*, as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favor of the plaintiff (3).

(1) "When the application for a "new trial is upon a matter of "discretion only, as on the "ground that the verdict is "against the weight of evi- "dence, or otherwise, no ap- "peal to the Supreme Court "shall be allowed."

Amended by Supreme and Exchequer Court Amendment Act, 1880, sec. 5:

"Section twenty-two of the Su- "preme and Exchequer Court "Act is hereby repealed, and "the following section is sub- "stituted therefor:

"22. In all cases of appeal the "court may, in its discretion, "order a new trial, if the ends "of justice may seem to re- "quire it, although such trial "may be deemed necessary "upon the ground that the "verdict is against the weight "of evidence."

(2) Now by the Supreme and Exchequer Court Amendment Act, 1880, it is provided that:

"At any time during the pend- "ing of any appeal before the "Supreme Court, the court "may, upon the application of "any of the parties, or without "any such application, make "all such amendments as may "be necessary for the purpose "of determining the existing "appeal, or the real question "or controversy between the "parties as disclosed by the "pleadings, evidence or pro- "ceedings."

(3) This case was appealed and the Lords of the Judicial Committee of the Privy Council

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

APPEAL from a judgment of the Court of Appeal for *Ontario*, dismissing an appeal to that court from a judgment of the Court of Queen's Bench for *Ontario*.

The action, which was brought by one of the children of the late *Charles Moore*, on a life policy issued by the respondent company, was tried before *Moss*, C.J., and a jury at the *Toronto* Assizes, on the 23rd of April, 1877, when a verdict was entered for the plaintiff which, in the learned judge's opinion, the answers of the jury to the questions put to them, required to be entered. A rule *nisi* was afterwards obtained to set aside the verdict for plaintiff and to enter a non-suit or verdict for the defendants, pursuant to the Law Reform Act, or for a new trial, which was made absolute to set aside the verdict for plaintiff and enter a verdict for defendants.

The appellants then appealed to the Court of Appeal for *Ontario*, and that Court being equally divided, the appeal was dismissed.

The facts and pleadings are fully stated in the judgments hereinafter given (1).

Mr. *James Bethune*, Q.C., and Mr. *Rose*, with him, for appellant:—

The warranty in the application and policy was

affirmed the first holding of the Supreme Court. As to the second holding it was held that the Supreme and Exchequer Court Act, sec. 38, gives the Supreme Court power to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power was not taken away by sec. 22 in this case in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.

See Report of Case, 6 App. Cases, 644. The judgment of the Judicial Committee will also be found printed as an appendix to the Supreme Court Report.

(1) See also Report of Case in 41 U. C. Q. B. 497, and in 3 Ont. Appeal Rep. 331.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

merely "that the applicant's answers were fair and true." Whether these answers were fair and true was a question of fact for the jury.

The respondents did not object to the questions being put to the jury, and if the Court of Queen's Bench have done what they had no right to do, we are entitled to have our verdict restored. We contend that there was evidence to be left to the jury, and the *Ontario* stat., 37 *Vic.* c. 7, did not give the Court of Queen's Bench the power to substitute their verdict for that of the jury.

Then all that respondents can now argue is that no questions should have been put to the jury. Now, if the questions were improperly put, the respondents should have objected to them. This was not done and they have no right to do so now. Appellants further contend that the questions were properly put to the jury, and that although it is for the court to construe a contract, it was for the jury to say whether the injury received was such as to be material to the risk.

[The learned counsel then argued that the statements in the application were not warranties but merely representations. That in any case the insured only warranted that the answers were "fair and true," and the jury having found that he had given "fair and true" answers, it could not be said he had received any personal injury which he might fairly have been expected to communicate to the insurers.]

Mr. *Robinson*, Q.C., and Dr. *McMichael*, Q.C., for respondents:

[The learned counsel, after having argued that the evidence showed beyond all doubt that the breaches of warranty alleged in the pleas were proved, therefore the plaintiff could not recover on the policy, continued:] The motion we made was to set aside the verdict, and

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

to have a non-suit or verdict entered for the defendants, pursuant to the Law Reform Act, or a new trial had between the parties; also that we were entitled to a verdict under the answer of the jury to the seventh question. Now, when the judge proposes to leave certain questions to the jury, he does not necessarily leave the whole case, and the verdict which is entered is in the form of a general verdict.

Respondents contend that in this case, the questions put were partly relevant and partly irrelevant, and the the answers given to the relevant part, viz., to the fact of the insured having received a blow on the head and the consequent injury to the skull, and whether he had been attended by other medical aid, were in our favor. Moreover, if, as a matter of fact, all questions answered were irrelevant, the answers so given would not exclude the operation of sec. 283, of ch. 50 of the Revised Statutes, which declares that every verdict shall be considered by the court on all motions affecting the same as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose.

At the trial also respondent's counsel submitted that there was no question for the jury, the warranty being that the statement is true.

It will not be denied that the judge in this case did not leave to the jury the fact that a personal injury had been received, and this fact being proved, it is a breach of a warranty, and on this finding the respondents are entitled to succeed. The qualifications put to these questions by the judge were not warranted by the contract.

THE CHIEF JUSTICE:—

The state of the pleadings, the issue raised, the finding

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Ritchie, C.J.

of the jury, and the action of the court below, in setting aside the verdict for the plaintiff and ordering a verdict to be entered for the defendants, prevents our dealing with the case in any other manner, in the view we take of the case, than by ordering the restoration of the original verdict. We have no power to amend, or right to interfere with the record in the court below, and we are precluded by the Supreme Court Act from granting a new trial on the ground of the verdict being against the weight of evidence.

The most important question in this case was, in my opinion, as to the answer given by the applicant to the eighth group of questions:—

"Have you had any other illness, local disease or *personal injury?* And if so of what nature? How long since? And what effect on general health?" Answer: "No."

Here are four distinct questions put, each requiring a separate and distinct answer, if the first is answered in the affirmative; the three last would seem most important to enable the medical officer of the company to advise, and the company to determine, how far such illness, disease or personal injury, as the case may be, ought to affect the proposed risk. With reference to the first it cannot be that the illness or disease referred to was intended to apply to any slight, trivial indisposition of a temporary character, which no one in the ordinary intercourse of life would treat or speak of as an illness in the sense that term is ordinarily used in the common parlance of life, and as distinguishable from indisposition, or that by personal injury was intended every trifling injury, such as a simple cut, or burn of a slight character, producing, perhaps, a little temporary pain, possibly a little inconvenience, but no serious consequences, nor effects of a character likely to cause the injury to be remembered; but injuries

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Ritchie, C.J.

of a substantial character, such as impair the body, or health, or as would be considered serious at the time, or which in their immediate effect might possibly jeopardize life, or tend, in their ulterior consequences, to affect longevity, or leave the person injured more open to the effect of subsequent disease, though not proceeding necessarily, immediately, or directly, from the wound or injury itself; in other words, leaving what might be considered a weak spot in the system, which might be productive, in the future, of consequences detrimental to longevity, either proceeding from the injury itself, or in connection with disease or injury to which the person may become subject from other causes, all of which it would be the proper province of the medical adviser of the company to determine when he should know the nature of the personal injury, how long since it occurred, and what the subsequent effect had been on the general health. Though it is certainly not necessary that such injury should contribute to the death of the assured, it is sufficient if it is such an injury as he should have disclosed in his answer, so that the insurers should have been placed in a position to institute any necessary enquiries in reference thereto, and on the result accept or reject the risk, the object of these questions being to obtain such information as to any personal injuries of a substantial or serious character as will enable the insurers, not the assured, to judge of its effect on the proposed risk, and, as Mr. Justice *Patterson* says, it may not be easy to define the limits between mere hurts and ailments and injuries or diseases; but in this case the injury is of so decided a character, and so clearly, to my mind, a personal injury within the policy, that a critical definition is unnecessary to be attempted.

It is difficult for me to understand how this could have escaped the recollection of the assured, and so been

overlooked by him, when it is clear from the evidence that the injury must have been present to his eye every time he looked in the glass, and he could not pass his hand over that part of his head without feeling the indentation. But whether it affected his general health, or was present to his mind at the time he answered the question, or was overlooked by him, in my view, is wholly immaterial. A personal injury, such as a fracture or depression of the skull, with loss or exfoliation of a part of the bone of the skull, is, I think, a personal injury of the most severe and serious character, and was a personal injury within the meaning of the policy which the assured was bound to have communicated, whether resulting from accident or disease, and not having done so, and not having truly answered the question, there was a breach of his warranty, and, as a consequence, a forfeiture of the policy would be the necessary result, if defendants chose properly to raise the question by their pleadings. But for what has taken place on the trial, and the finding of the jury, I should not have supposed it possible that any ordinary reasonable man of common understanding could be found to say that an injury, which left comparatively exposed such a vital part as the brain, which nature has in a sound man so strongly and carefully guarded, was not a personal injury within the terms of the application. Can it be said that a person who had received such an injury as to fracture his skull and remove a piece of it, or that accident or disease had caused exfoliation, so as to produce an indentation and absence of a piece of the skull, whether it apparently affects his general health or not, has not received a very serious injury, or had such an illness as left him less sound and more liable to serious consequences in the event of receiving other injuries on, or affections of, his head than a person whose head had never been

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Ritchie, C.J.

fractured or exfoliated, and was in a perfect state to fulfil its functions and protect the brain? I think the company stipulated for and were entitled to information with respect to the injury, to enable them to judge whether it might or might not affect the health, strength, or longevity of the assured, or whether, though of itself not affecting the general health, it might not, in connection with other diseases or injuries which might occur, possibly have an ulterior injurious effect, whether, in other words, it might not affect the risk. Was he not rendered by that injury practically unsound, in that his skull was broken or defective, and the brain was therefore not covered and protected as nature provided it should be?

In view of the purposes for which these questions are asked, to say he was not, and to treat this as a slight or trifling injury and class it in the category of simple bruises, sprains, cut fingers and such like, would be, in my opinion, a most unreasonable construction to put on the language of this question. In view, however, of the doubt raised by the evidence, which I cannot help saying I think very unsatisfactory, as to whether the injury resulted from disease or accident (for I cannot think there was any reasonable ground for supposing under the evidence it resulted from natural causes), if the question was a proper one to be submitted to the jury, then in view of the only issue raised, and the finding of the jury on that issue, a verdict should not have been entered for defendants, but a new trial ordered.

Had the pleadings raised properly the question as to disease as well as to accident, I think the verdict must have been in favor of the defendants, inasmuch as the serious injuries on applicant's head, whether resulting from disease or accident, not having been communicated, would have invalidated the policy, but the jury having

found on the issues as raised, in favor of the plaintiff, and having been matter proper to be submitted to them, and the question as to whether or not the verdict was against the weight of evidence not being open to us, we have no power to deal with the case otherwise than to say that the Court of Queen's Bench should not have ordered a verdict for the plaintiff on the findings of the jury to be converted into a verdict for the defendants. If the pleadings did not properly raise the substantial points on which the case should turn the record should have been amended, or if the court below were dissatisfied with the finding of the jury on the issues as raised as being against the weight of evidence, a new trial should have been ordered.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Ritchie, C.J.

STRONG, J., concurred in the judgment delivered by *Gwynne*, J.

FOURNIER, J. concurred.

HENRY, J. :—

This is an appeal from a decision of the Appeal Court in *Ontario*. It is an action on a life insurance policy which was tried before the learned Chief Justice of *Ontario*, and a verdict for the plaintiff entered by him for the present appellant on answers to certain questions submitted to the jury. A rule *nisi* was granted to set aside the verdict and to enter a non-suit or verdict for the defendants, or to grant a new trial. On argument the rule *nisi* was made absolute to enter a verdict for the defendants.

The plaintiff appealed from that judgment and after argument before the Appeal Court it was ordered that the appeal should be dismissed without costs. From the latter judgment the plaintiff appealed to this court, and it was fully and ably argued in June last.

The policy is fully set out in the declaration, and to it

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

the pleas raising the only issues necessary to be considered, are the second and fourth. It appears that on the trial an amendment of the fourth plea was conditionally allowed, but whether an amendment was really made appears to have been doubted by one or more of the judges of the Appeal Court, and I think there is no evidence that it was finally allowed. A difference of opinion, too, existed as to the power of either that court or the Court of Queen's Bench, where the verdict was entered by the presiding judge, as in this case, upon special findings of a jury, to order a verdict to be entered for the defendants, or a non-suit, some of the judges holding, correctly as I think, that the court could only, in such a case, order a new trial. Entertaining the views I do, on the issues otherwise raised, it is not necessary, in my opinion, to consider either the matter of the amendment referred to or the power of the courts to order the entering of a verdict for the defendants; but if my judgment were to rest solely on one or both of the two points named I would decide them in favor of the appellant.

The second plea, to which I have referred, alleges that the negative answer to the question in the application; "Have you had any other illness, local disease or personal injury, and, if so, what nature? How long since? And what effect on your general health?" was untrue.

That the said Charles Moore had some twelve years before the time when he signed the said application and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused some degree of inflammation of the brain. That the said blow was a personal injury within the meaning of the said question, and that the answer "No" given to the said question was untrue and was a breach of the warranty contained in the said application, and that by reason of

such untrue answer and breach of warranty the said policy was forfeited.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

In view of the law and the principles governing such cases, I feel no difficulty in asserting that if the plea had been sustained by sufficient evidence, and that the injury was of the description stated in it, the plaintiff's case would have been met, and the verdict should have been for the defendants. It would then have been, I think, such an injury as the applicant was bound to disclose in his answer. There is no doubt in my mind of the law, that the company had the right to propound the question, and to require thereto a truthful answer on pain of the forfeiture of the policy. The general proposition of law to warrant this decision is well established, and the authorities need not be cited in favor of it. A material misrepresentation avoids a policy as well as a warranty. In case of the former the materiality is generally essential, but in the latter it is not an element to be considered. We have not here the necessity of deciding as to the materiality of the subject-matter, as I have no doubt there was, in this case, a warranty of the truthfulness of the answers in question. The court is to judge of the sufficiency of the plea, but it is for the jury to decide upon the facts proved in support of it. The province and duty of the presiding judge is to expound the law to the jury, and it is for the jury in view of the law so expounded to find their verdict upon the facts. In the case of a general verdict it is final between the parties, if the rulings and charge are unexceptionable, unless the verdict is against the evidence or the weight of it. In the former case courts do not hesitate to set aside a verdict; but in the latter it is done only in cases where the preponderance is very great. Judges should not usurp the functions of a jury any more than a jury those of the court. In an argument for a new trial on the ground that it is against

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

evidence or the weight of evidence, a judge is not to consider himself a juryman, or to inquire what his verdict, as a juryman, would have been. The law in such cases calls upon him to review the finding with a due appreciation of the prerogatives of the jury, but not to take their place. This distinction is sometimes forgotten, and I am inclined to the opinion that the present case is not an exception.

Without going into unnecessary prolix detail, I may say that after much reflection I have arrived at the conclusion that the charge to the jury in this case contained a full and correct view of the law bearing on the issues. The answers to the questions were held to be warranties and not mere representations, and the attention of the jury was properly directed to the nature of the issues and the law applicable to them. The only question open for discussion is therefore, in my opinion, as to the nature and extent of the finding of the jury upon the questions submitted to them. Objection has, however, been taken to the wording of some of the questions put to the jury. It may be that in one or two of them, taken separately, there were terms used which were not critically exact as defining legal propositions, but taken together with the other questions, and in view of the law expounded to the jury, they, in my judgment, fairly covered the necessary ground; and the answers, I think, were sufficient, as a whole, to amount to a general verdict for the plaintiff. The several questions were obviously put to the jury, so that the answers—not to any one or more, but to them all—might enable the judge to find his verdict. They contained no proposition of law by which the jury would be perplexed, or by which their finding on one question would be affected by their answers to others. Some of them were, to my mind, unnecessary; but in putting them, in the way adopted, no injury

could have resulted to the defendants. The very first question was unnecessary, as other questions made the same inquiry, only in a different form; for it differed, in legal effect, from the others referred to, in no respect; and otherwise only as to the question of a false statement wilfully made. A negligent misrepresentation would be as fatal as a wilful one. The answer in the negative to that question was not, however, taken by the learned Chief Justice as sufficient; for the second question is propounded to further the inquiry in another aspect. He, therefore, in the second question, asked the jury "Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" to which the jury replied in the negative. These two answers, then, find that no misrepresentation, either intentionally, or through forgetfulness, or inadvertence, was made. Instead of the two, one general question might have included both propositions, but there was nothing wrong in dividing the inquiry. They then substantially found that up to the time of the application the insured had received no serious or personal injury.

Looking, too, at the third question put to the jury, with the law, as I hold, properly explained, what do we find? That third question asks, "Had he any personal injury, which he might have been fairly expected to communicate for the information of the defendants?" With the law before them the jury answer "No."

In the absence of any proof to the contrary, we must conclude the jury accepted the law so laid down for their government; and kept it in view when answering the questions. The answer to the fourth question being in the negative is unimportant, as the substance of it is otherwise found. It was, however, for the interest of the defendants that it was put, as, if the question had been affirmatively answered, it would have

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

negatived some of the other findings. Lastly, as to the eighth question, which is the only other one which refers to the issue on the second plea, it is a general one, which again covers the whole ground. "Did he give fair and true answers to the question 'Have you had any other illness, local disease or personal injury?' The jury answer 'Yes.'" With the law before them, as I before stated, the answer to that question settles the whole issue; and, even if some of the other questions could be accepted to, the answers to them are not important, unless, from the putting of them, we felt the jury were misled as to the law, of which there is no evidence whatever.

Before referring to the evidence, I think it right to say that, in my opinion, the learned Chief Justice expounded the law properly on the trial. He very properly excluded the consideration of slight injuries and attacks of illness. Where questions are asked by companies as to specific diseases, they are likely to cause reflection and the exercise of memory on the part of the applicant; but when a man is asked generally whether he ever had a personal injury, no company can reasonably require (what in most cases would be impossible) that a man or woman of forty or fifty years of age should report every time they fell off of a horse, or were upset from a carriage, or in their younger days had been upset or tumbled down and were slightly hurt. The company no doubt had the right to ask the question in any form they thought proper; but having asked it in such general terms and to cover a whole lifetime it is not for them to construe it and the answers to it. That duty devolves on the courts who have, under the circumstances, to say what is reasonably included in and covered by the questions, and whether the answers were fairly and truly given. That every slight injury or attack should be notified is not

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

only preposterous, but would in the great majority of cases be impossible. A line must, therefore, be drawn somewhere, but the crossing point has been found difficult to determine. In fact none has yet been drawn of general applicability, and I am of opinion that none such can be drawn. Each case must, to a large extent, be governed by the facts peculiar to it. It has been contended that the company should get every information that would enable it to judge of the probable effects of any sickness, disease, or accident that might subsequently by any possibility affect the life of the applicant. This is, however, in view of medical knowledge or want of knowledge, too sweeping a proposition. There is in many cases a difficulty of correctly ascertaining the exact connection between a previous illness or injury and the immediate cause of death. Because a person meets with accidents which at the time and up to the time of his application do little or no injury, that the mere possibility that, from some one or other of them, injurious effects might result in after life, should make it necessary that he should report them, is, to my mind, most unreasonable, and not such as any company expects or could reasonable expect. If, however, an applicant has received an injury calculated according to medical evidence to affect his general health or the length of his life, he, I think, who fails to report it does so at the risk of forfeiting his policy. The question then is has it been clearly proved that the applicant in this case had received, and failed to notify the company of, such an injury as set out in the plea. Did he, in the words of that plea, receive a blow "which produced a fracture or depression of his skull, and which was followed by exfoliation of the bone of the skull," and which was of so aggravated an injury as to cause "some degree of inflammation of the brain." The defendants substantially say to the

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

plaintiff: "The applicant through whom you claim had sustained that specific injury which he did not report, and we will prove it and so avoid the policy." On reading that plea—so specific as it is—one would reasonably expect to receive positive evidence—first of the blow, next the fracture, then the exfoliation of the bone of the skull, and, lastly, the inflammation of the brain.

Having given my view of the law, I must now consider the evidence in relation to the findings of the jury. The onus of proving the issue, it must not be forgotten, was on the defendants. I have read over the evidence carefully and fully considered it, and I must say it falls far short of what in my opinion was necessary.

In the first place, as to the fracture or depression caused, as alleged, by a blow, in the technical meaning of the word, no "blow" was proved; but it is alleged the applicant was once thrown off his horse when hunting, and on another occasion was thrown out of a sleigh. Here the direct evidence as to the injury ceases as far as the *fracture* is concerned. None is given of any fracture. It appears, from the evidence, that after one or other of those falls he spoke to a doctor, but the latter could find nothing wrong with him and did not prescribe for him. Would it not, therefore, be unwarrantable to conclude his skull was then fractured? Besides, we have the evidence of Dr. *Nicholl*, who says that when at the time of his last and fatal injury, having heard that he had had one or more falls, one of which had injured his head, he concluded from the appearance of the skull, after the trephining operation had been performed, that the missing bone had been removed by an operation. That no such operation had been performed is abundantly shown; for it is proved by more than one witness that the injury was

so slight that he attended to his business as usual and never complained of any injury. What then does the absence of part of the bone prove? Simply that it was a defect from his birth, or from disease, and if from the latter what disease? Was it the result of an external injury or not? If it was it has not been traced or proved. To say, without further evidence, the disease was the result of an injury would be the wildest guessing. The doctors substantially admit that they could not account for the absence of part of the bone. They say there are many such cases known without any external injury; that such cases are often found to have existed from birth, and others as the result of disease producing necrosis, exfoliation or wasting of the bone. How then could a jury reasonably be expected, from the evidence, to jump at the unreasonable conclusion that the absence of the bone must have been from the fracture alleged. Had there been a fracture and exfoliation of the bone, the subject must necessarily have felt it for a long time, and the soreness and pain must have been severe, and known to his brother and those around him, and to the doctor, and to have necessitated medical treatment. A fracture of a man's finger would be known to his whole household, and that of a leg would likely be the subject of a newspaper paragraph, but the fracture of a man's skull, of the extent to result as before mentioned, is asked to be presumed, without any medical man of the place (one of whom was spoken to at the time it is alleged to have taken place) or any one else hearing or knowing of it, and in the face of his brothers and the doctor's testimony, that the fall did not injure him. The medical men all say, the absence of the bone may have been from malformation, or the result of disease, and is no sufficient proof of any fracture. Without information as to a previous injury

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

they would, without doubt, have attributed it to malformation or disease; and even with the "rumors" they had heard, with the addition of what one of them thinks the applicant told him, none of them ventured to decide whether it was from malformation, or was the result of disease, or of an external injury. None of them said, that, from all he saw and heard, he was of opinion the loss of bone was caused by an external injury. The onus to prove the fact was on the defendants, and I maintain the evidence wholly failed to establish it. The medical men may have erred in their views, but they were the witnesses of the respondents, and if they failed to establish their defence they must bear the consequences. The verdict must be founded on evidence, and a jury cannot set up their crude ideas against scientific evidence. From the evidence of the medical men, I am justified in the conclusion that, had they, when considering the case, before them the evidence of *Edward Moore* and Doctor *Valentine*, they would have concluded the absence of the bone was from malformation or the result of disease. I have already referred to the testimony of the former, but will now quote what the latter says:

> And the injury to the head—the contusion—there was nothing done at all in that case. He was simply directed to call and keep himself under observation in case anything did occur. It was simply a contusion of the skin. He was kept under observation, and no cerebral symptoms arose. This was in 1865, I think; it was not earlier than 1864 or later than 1866.

In another place, he says no injury to the bone was discoverable.

That was, no doubt, the time referred to in the plea, and the very identical injury referred to in it. That taken with *Moore's* evidence, apart from the improbabilities from other known facts, establishes beyond all reasonable doubt, that there was, at that time (as

positively above stated) no fracture of the bone, but "simply a contusion of the skin," without any "cerebral symptoms;" and, I presume this was the contusion which left the marks of the cross-cuts spoken of by one of the witnesses. I cannot conceive how, with such evidence before them, any jury could be expected to presume that a fracture of the bone had taken place, or how any one could expect the court to set aside a verdict in accordance with that evidence, or, what would be worse, to order a verdict for the defendants. Juries are permitted, and sometimes required, to found their verdicts on presumptions of certain facts: and the law distinguishes as to the nature of them. Juries are not, however, permitted to act upon them in the face of reliable evidence that rebuts them. Such, I hold, is the case here; and I go the length of saying that had the verdict been otherwise it ought to be set aside.

The judgment delivered by the late learned and lamented Chief Justice of the Queen's Bench as to this issue, was founded wholly on the, I think, mistaken assumption that the plea was proved. While agreeing with his statement of the law, I differ with him entirely as to the evidence. If it had been necessary to submit the matter to the jury to presume a certain fact from the circumstantial evidence adduced, it was their province alone to do so or not; but if they do not we cannot control them. If they do, and the presumption was at all justified by the evidence, the court has, in my opinion, no right to interfere. I feel bound to say that the judgment was erroneous, for it is not only contrary to the evidence but an invasion of the prerogative of the jury.

Before concluding my observations on this part of the case, I consider it proper to remark upon one part of the evidence of Dr. *Wright*, the consulting physician

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

of the company, upon which I think improper stress has been laid. Speaking of the insured at the time of the application, he says:

> After he had signed the paper he passed it back again, rose from his chair and was about leaving, when he spoke of a fall he had had upon his head; he said he was not injured by it. The question was repeated to him, and he again asserted that he had had a fall upon his head, and that it had not injured him.

It is possible I may be wrong, but, if so, I have been under an hallucination during all my professional life, if you can take against a man an admission made against his interest, and discard what he adds to qualify and control it. A man may admit that at one time he was indebted to another, but, at the same time, alleges that he had paid the debt. Such a statement would not be evidence of present indebtedness, and would not be received as such. A man could not be convicted of an attempt to commit murder who admits the administration of deadly poison to another, but adds that he did so with the intention of immediately giving a sufficient antidote—that he did administer also the antidote, and no harm was done by the poison. The party might be blamed for unnecessarily tampering with human life, but the presumption of malice, from the admission of the administration of the poison, would be rebutted by taking the whole, and not a mere part, of his statement So in this case, the addition of the words "that he was not injured by it" (the "fall") must be taken with the admission of having had a fall. Even if the fact of the fall were otherwise shown, the admission, as I take it, could not be received, even as corroborative evidence, except by taking the result of the whole statement. The admission in question was adopted by one of the judges of the Court of Appeal contrary to the principle I have stated, and I think his doing so was an error.

Taking the whole statement there is no evidence whatever from it that the applicant was guilty of any misrepresentation or concealment which would legally avoid the contract.

The defence on the ground that the applicant had suffered from dyspepsia has been, I think, very properly found by all the judges as not proved.

I will now give my opinion as to the remaining issue which is on the amended fourth plea, but which I think is not regularly a part of the record.

"That the answer given to the question, 'How long since you were attended by a physician?' Namely: 'about thirty years ago,' was untrue *to the knowledge of the said Charles Moore*. That the said *Charles Moore*, previous to the making of the said application and a much shorter period than thirty years had been attended by and had consulted and availed himself of the skill of other medical men, to wit, Dr. *Lizars*, Dr. *Nichol*, Dr. *Barrick*, Dr. *Russell*, and Dr. *Valentine*, and that he had concealed the said fact. That he had consulted the said medical men and gave no reference to the said medical men, and that the answer given to the said question was untrue, and was a breach of the warranty contained in the said application."

This plea charges an untruthful answer to the knowledge of the applicant. It therefore includes not only a false representation, but a fraudulent one. Had the plea founded a defence on a false representation not amounting to a warranty, the onus on the defendants would include proof of the knowledge that the answer, when given, was false. The evidence in that case would have been here wholly insufficient. This plea was put in on the trial and raised an issue wholly different from that in the original plea; and if the amendment was forced on the plaintiff without further time given to permit rebutting evidence and the ques-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

tion of that amendment were open, I would feel inclined to reject it. The defence on the original plea was what the plaintiff came prepared to meet, and we are, I think, at all events, permitted if necessary to consider the amended plea under the circumstances in which it was admitted. It does not, however, appear to me there is any necessity for doing so.

I will commence the consideration of this part of the case by saying that as regards this issue I adopt the views of the learned Judges *Burton* and *Galt*, of the Court of Appeal. I concur with them in their ruling that the questions having been prepared by the company they must take the consequences of any ambiguity in them. Their questions should be plainly put, and the whole difficulty has arisen in this case from the absence of one of two words, "first" or "last" "How long since you were (first or last) attended by a physician?" The company may very properly say we meant the applicant to read the question as if it contained the word "last." Still it is open to the charge of ambiguity, calculated to mislead. The indefinite question might, not without some reason, be understood by many as intended to inquire as to the time the applicant first required medical treatment. In my opinion that inquiry would in many cases be quite as important as one in reference to the last preceding employment of a medical man. In his early days many a man has had injurious complaints and diseases which have so far passed away which a physician more recently employed might never have known about, but about which it would be desirable for the company to be informed. By a reference to his first doctor information might be obtained that a later one could not furnish. I mention this not to prove that such a construction would be the correct one; but to show how ambiguous the question was and how likely to mislead,

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

and when we know that uneducated persons and others not accustomed to such inquiries, are called upon, very often without much time for reflection, we should not too readily decide that the answer, by mistaking the term, was necessarily untrue to the extent of avoiding the policy. A mistake as to the meaning of the question does not necessarily make the statement in answer untrue. If it be not untrue, there is no breach of warranty, and consequently no defence. To prove there was not any untruth, as ordinarily understood in the answer, let me suppose it had been "How long since you were *first* attended by a physician?" The answer, "about 30 years ago," would have been strictly correct. That, it is patent, is the way the question was understood; but the defendants say he should have understood it to mean "last," instead of "first"—but that does not negative the truth of the answer he gave to what he supposed the question asked. The proper conclusion, I think, is that he answered a question he supposed to have been put; but did not answer at all the question as understood or intended by the company. The mere failure to answer the question as intended by the company, when done in good faith, and in the belief the answer he gave was what was asked for, would not, in my judgment, be a breach of the warranty under the circumstances.

Besides, the other questions and answers were such as to notify the company of the construction put on the question by the applicant. After stating in his answers that his complaint was "lake fever" and giving the name of Dr. *Sampson*, who attended him at *Kingston*, then dead, and being asked for the name and residence of his medical attendant, he replied, "Dr. *Barick* of *Toronto*, who attends my family—he has known me for seven years." He thus pointed out Dr. *Barick* as his physician, with an intimation or sugges-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Henry, J.

tion from which it might reasonably be presumed he had been such for seven years previously. If, therefore, the company wished information as to how long since he was *last* attended by a physician, they got it fully in the answer to that question. They were told who his first physician was, and they were referred to Dr. *Barick* as the one then attending him. If Dr. *Barick* was then, at the time of the application, his medical attendant, was not the answer sufficient to start any necessary inquiry? The mistake, if any, as to the question to which "about 30 years ago" was given as the answer, must have been patent to the company if they at all considered the answers, for that answer, as alleged to have been intended by them, was wholly inconsistent with that which notified the company that Dr. *Barick* was then his medical attendant. The discrepancy as to the first question was therefore fairly notified to the company before they issued the policy, and as the error, if any, was largely the result of their own ambiguous words, I don't think it lies with them now to seek shelter from their liability for that for which they have themselves to blame.

There is no ground for thinking that the question was framed intentionally ambiguous as a trap, but it certainly was one into which the uninitiated were not unlikely to fall, and was equally dangerous as if it had been. When it was so easy to have made the question plain to ordinary minds, such as generally had to answer it, there is no excuse for a company deliberately to frame and print such an ambiguous one, and one so much calculated to produce mistakes. According to the principles laid down by Lord *St. Leonards*, and quoted by Mr. Justice *Burton* in this case, and by *Willes*, J., as quoted by Mr. Justice *Galt*, I feel that the ambiguity which has caused the difficulty under the issue raised by the amended plea was the act of the de-

fendants, and that in consideration of the peculiar facts and circumstances of this case, it would be gross injustice to deprive the appellant of her rights under the policy.

The evidence, however, does not establish the fact that the applicant was attended by any of the physicians named in the plea or any other for any serious illness or injury. The same principles should be applicable to this plea as to the second, and when the question is asked: "How long since you were attended by a physician?" I think it was not intended to cover every unimportant ailment or injury, but something that, in the opinion of a medical man, might have some effect on general health, and I am helped to this construction by the concluding part of question eight, which, in case any other illness (besides those enumerated in question seven), local disease, or personal injury, is reported "and what effect on general health?", which shows, to my mind, that the attendance of a physician inquired about was only in cases more serious than any which the doctors say they attended him for, and for one of which (occasional indigestion) one of the doctors recommended "a ride on horseback." Another doctor on one occasion attended him for a slight attack of the liver and bowels, which he supposed was from the heat of the weather. He says: "Of course it was nothing serious." Dr. *Valentine* stated that he had treated him for a local disease of a temporary character, of which he was cured in 1865, or the end of 1864, from which no permanent constitutional disturbances remained; and for slight derangements of the stomach. If then the answer had been that the last attendance upon him of a physician for anything more than trifling causes not at all affecting his general health, or probable longevity, it might not improperly be said when he replied, "Dr. *Chapman*, 30 years ago,"

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

HENRY, J.

was strictly true. The evidence shows him to have been particularly healthy and active, and it would, I think, be straining words from their true bearing and meaning to say that the attendances last referred to were such as were contemplated or required by the questions. Because differences of opinion have been expressed in the lower courts and here, I have considered it proper to be thus minute in dealing with the issues involved.

For the reasons given by Mr. Justice *Burton* and Mr. Justice *Galt* before referred to, and for those I have myself given, I think, that on the fourth issue also our judgment should be for the appellant. I have not failed to consider the effect of the statute under which the questions were propounded to the jury, and I think I am justified in saying, as I now take occasion to do, that in a case like the present the court could not enter a verdict for the defendant or a non-suit, and that the power in such cases is limited to making an order for a new trial. As therefore the order was not justifiable all we can do in that respect is to reverse the judgment.

I am of opinion that the judgments of the Court of Appeal and the Queen's Bench should be reversed, the appeal allowed and judgment entered for the plaintiff on the verdict, with costs up to and since the rendering of the verdict.

TASCHEREAU, J. :—

Upon the fourth plea, I am of opinion that the question, "How long since were you attended by a physician?" was not clear and may have been understood by *Moore* as meaning, "How long since you were first attended by a physician?"

Why did not the company, if they meant to know who attended him last, ask him plainly, "When were you last attended by a physician?" I am inclined to

think with the Court of Appeal, that the applicant misunderstood the question put to him, and that his answer is not then untrue, and I would be for the the plaintiff on this part of the case.

I come now to the consideration of the questions raised on the second plea. This part of the case is not free from difficulty. This plea is as follows :—

And for a second plea the defendants say, that the answer given in the negative by the said *Charles Moore*, as in the declaration mentioned, to the question, "Have you had any other illness, local disease, or personal injury? and, if so, what nature? how long since? and what effect on general health?" was untrue. That the said *Charles Moore* had some twelve years before the time when he signed the said application and answered the said question in the negative received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain. That the said blow was a personal injury within the meaning of the said question, and that the answer, "No," given to the said question was untrue and was a breach of the warranty contained in the said application, and that by reason of such untrue answer and breach of warranty the said policy was forfeited.

At the trial, the learned judge presiding, instead of taking a general verdict, directed the jury to answer certain questions. It is, perhaps, better to give here those questions with the remarks and directions of the learned judge.

The first four questions that I shall put to you relate to the personal injury which it is alleged by these defendants that the applicant, *Charles Moore*, sustained, and the existence of which was not disclosed to them on his application. The defendants' contention is that they put to the applicant this question, 'Have you had any other illness, local disease, or personal injury, and if so, of what nature, how long since, and what was the effect of it on your general health;' that he answered in the negative, as in fact he did; that that answer was untrue, and vitiated the policy, because he had received, many years before, a severe injury to his head, amounting to a fracture; and which they say in the plea—although there is no evidence upon that point—was succeeded by exfoliation. It is to that question and answer, and to the circumstances which actually

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Taschereau, J.

existed, as far as you can make them out from the evidence in connection with this injury, that I direct your attention. (The learned judge here referred in detail to the evidence.)

Bearing that evidence in mind, I ask you to reply to the following questions:—

"1. Had Mr. *Moore* any personal injury which must have been present to his own mind as something coming fairly within the term "personal injury," and which he did not communicate to the defendants?"

You will perceive from the terms of this question the idea present to my mind in framing it. It appeared to me that it might possibly be held that any "personal injury" must be one that would be fairly present to the mind of a person making such an application as something that an ordinary man would understand as a personal injury that he ought to communicate to the Company; and if you think that, you will of course answer this question "Yes." In other words, if you think that this injury to his head, whatever its extent and origin, did fairly come within the term "personal injury," and was present to Mr. *Moore's* mind, then the answer should be "Yes." If you think it was so slight, and made so little impression upon himself and his own mind that he could not accept it as coming fairly within the term, then you will answer "No."

2. "Had he had any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the Company?"

I have already pointed out to you that in my construction of these questions in this application the applicant must at his own peril answer the questions correctly, and that forgetfulness or inadvertence will not excuse him. If he makes a slip the Company can, if found consistent with fair dealing or necessary for the protection of its own interests, set it up; but I want to get your answer to this question.

3. "Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants?"

That is almost another form of one of the preceding questions, but raises a point slightly different.

4. "Had he any personal injury which had any effect on his general health?"

It is contended by the learned counsel for the plaintiff that that is the fair meaning of the question put in the application with reference to any other personal injury, illness, or local disease. The words must have some limitation: and it may be that the propor limitation is that they should be confined to injuries that affect the general health. In considering this question you will bear in mind

what all the witnesses said as to the state of health Mr. *Moore* had after the accident, and consider the medical evidence as to the effect which it might have. Although the medical men would be no doubt the first themselves to admit that, it is not comparable with evidence of the actual state of health which he did enjoy. That is the last question in relation to the personal injury.

To these four questions the jury answered "No."

To another question, as follows:—

Did he give fair and true answers to the questions, "Have you had any other illness, local disease, or personal injury? And if so, of what nature? How long since? And what effect on general health?

the jury answered "Yes."

Now, as to the evidence on this part of the case, the following is a correct synopsis of it, as given by Mr. Vice-Chancellor *Blake* in the Court of Appeal.

Dr. *Nicol* says: When I was first called in to see him in his last illness, he was apparently suffering from a species of low fever with some head affection; then, I think on the night following the day he was attacked, he was attacked with paralysis of the left side, and then after that he became semi-comatose.

Q. Did you find on examination any evidence of personal injury?

A. Yes; just on the parietal bone on the right side of the head there was a depression that I could just put my little finger into.

Q. What examination was made to enable you to judge of the injury to the skull?

A. Trephining. There was a deficiency in the bone, perhaps the space of my little finger, perhaps a little more. It was not a very recent injury . . . . . The depression I mentioned was easily discoverable to any person who had reason to suspect its presence, or who searched the head carefully; the depth was slight, not more than a tenth or an eighth of an inch; you would hardly have noticed it . . . . . I think that one day I had some conversation with him in reference to this injury to the head . . . . . It was on one of these two occasions, 1869 or 1870 . . . . . I do not remember what he said about it, except that it was from a fall from a horse, or from his horse falling on a furrow. I had not seen the injury to his head at that time. I have some idea that I put my finger in the place where he told me, but I could not say positively. I think there was something said about a piece of bone being lost, but whether he volunteered it, or whether it was in answer to a question from me, I cannot say. There was a loss of bone. I cannot say positively, but

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Taschereau, J.

I think there was; when I put my finger in, as I think I did, I found the depression. He spoke of that as a fall from a horse.

Q. Then he was under the impression that that kind of injury caused it? A. Yes; but if the bone perished and exfoliated, it would be equally from this injury as if he had the bone fractured, and the surgeon removed the bone at the time. I supposed at that time he had had the skull fractured, and that some surgeon or another had removed the piece of bone. If an examining physician had passed his fingers at all carefully over Mr. *Moore's* head he would have detected the depression in the skull; if he merely passed his hand over it he would not have discovered it.

Dr. *Aikens*, in answer to the question, "What was the condition of the skull before you commenced the operation? says: There was a depression there. Mr. *C. Moore* had for years past kept his hair very short, and, as far as I can remember, the depression could be seen, but there was no difficulty whatever in feeling it; the point of the little finger could be easily buried in the depression; perhaps the index finger, just the point of it. This was the first time I had attended Mr. *Moore*, but I was in the habit of seeing him often. If I had been aware of the depression before that evening I had forgotten it; there was a piece of bone absent then, there was a part of the skull gone; no matter what had happened to it, whether it never was there, or was the result of disease or injury, the piece was gone, and we planted the trephine so that the edge of the instrument just came over the edge of this deficiency. I would not expect to find an opening there, although I have seen children born with an opening in the bone where no opening ought to be, but I would come to the conclusion, from looking at his head, that he had lost a piece of bone, either from fracture or disease; of course some diseases would kill bone; I have seen men with no fracture who have lost a part of their skull. I could hardly suppose that the absence of the portion of skull was natural; it is only just possible.

Q As a physician you formed an opinion?—A. I perhaps was guided by the information that was given to me at the time, that he had some injury previously. My opinion at that time was that he had had a fracture of the skull, and lost part of the bone . . . . . The bone had either been removed by the surgeon, if it had not been knocked out by the cause of injury, or had necrosed, died. Exfoliation is throwing off in thin scales or leaves. I do not think there had been anything of that sort; it is not at all likely . . . . . That is a sort of wasting away . . . . . I received information then and there about a past injury. The skull has inner and outer densities, and a spongy structure between the two. It is my belief that the

whole had disappeared, the entire thickness of bone had gone. In such a case the bone fills in a little from the edges, but leaves a little deficiency in the centre; then the centre will fill with dense tissue resembling sclerotic tissue covered with scalp; that was the case here.

Q. Was he as well prepared to resist the effects of another blow over this spot?—A. No, he was not.

Dr. *Barrick* says: I first saw him, I think, about ten days before his death; he was then complaining of a pain in his head, at some distance from the old depression; that was the burden of his complaint. I was aware of the depression in the head before that time. I took notice of it before anything was said about it, because his hair was thin and cut short, but I could not tell how long that was before. He said that he had had several tumbles and accidents, and from some of them he led me to believe that this depression arose.

Q. Did you speak to Mr. *Moore* at all about that injury before you called in the other doctors to consult?—A. He mentioned that to me, I think, when he was attacked last time; he complained of pain in the head about an inch and a half from this old place; he then commenced and related to me again that he had received an injury and that his impression was that the depression had arisen from that injury. That is what he told me in his last illness. He told the other medical men that the object in taking in part of the old injury was to see the condition of the bone at that part. We were anxious to include part of the old depression to see what the nature of that part was.

Edward Moore, the brother of the deceased, says: I felt his head after the last accident in the store, the hurt was about two inches from the old injury, on the same side of the head. I saw the old injury then. You could not help but see it. I had been aware of it before. It had been cut and healed up. I felt the new injury to see if the skull was broken.

From the evidence of Drs. *Nicol* and *Aikins*, there can be no doubt that by some means a piece of the bone of the skull of the deceased had been removed. As to the manner in which this was lost, Dr. *Nicol* says: "I supposed at that time that he had had the skull fractured, and that some surgeon or another had removed the piece of bone;" and Dr. *Aikins* says: "I would come to the conclusion, from looking at his head, that he had lost a piece of bone either from fracture or disease."

That the conclusion arrived at by these medical gentlemen is correct, is evident from the family physician of the deceased, Dr. *Barrick*, who says that—

His patient informed him that he had had several tumbles and

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Taschereau, J.

accidents, and that from some of them he led him to believe that this depression arose; and at another time he says: He then commenced and related to me again that he had received an injury, and that his impression was that that depression had arisen from that injury. That was what he told me in his last illness.

In my opinion this evidence establishes clearly that *Moore* had, some years before he made his application to the company, received an injury on the head. The plaintiff contends that this depression of the skull may have been caused by disease or may have been natural. Now, I can't see how we can attribute it to disease. 1st. Because if it was so the plaintiff could have easily proved it; 2nd. Because the doctors examined do not think it was caused by disease; 3rd. Because *Moore* himself, in his application to the company, stated that he never had any other disease than the lake fever. As to the possibility of this depression in the skull being natural, I can't see my way to support the plaintiff's contention in this respect. 1st. Because the doctors examined say this was most unlikely. 2nd. Because the plaintiff would have been able to prove it, if it had been natural; 3rd. Because *Moore* himself said it was caused by a fall on the head; and all the witnesses, including *Moore's* brother, speak of it as "the old injury." It is impossible, in my opinion, after reading the evidence adduced, to doubt that *Moore* had, at some time or another, before he made the application to the company, received an injury by which he had lost a portion of his skull. It appears to me to be proved beyond a doubt, and, as said by the late Chief Justice of the Court of Queen's Bench, the question in its naked form as to this fact, was not submitted to the jury, for the reason that there was no dispute about it. The jury have not found that *Moore* had received no personal injury; but that he had received no personal injury which must have been present to his mind as something coming fairly within the term "personal injury";

that he had no serious or severe personal injury, which through forgetfulness or inadvertence he did not communicate; that he had no personal injury which he might fairly be expected to communicate for the information of the defendants, and that he had not any personal injury which had any effect on his general health. They never found, and they could not find in face of the evidence, that he never received any personal injury whatever. By finding that he had not received any personal injury which had any effect on his general health, they have not found for the plaintiff. On the contrary, as the case was given to them, all parties at the trial, judge, jury and counsel (as said by *Burton*, J., and *Patterson*, J, in the Court of Appeal) assuming that there had been a personal injury, this answer of the jury seems to me to mean "Yes," he had received a personal injury, but it did not affect his general health. Now, his statement to the company was that he had never received a personal injury. This was, it seems to me, untrue. The jury also answered "No" to the third question put to them, as follows: "Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants?" But that is not finding that he never had any personal injury whatsoever. It seems to me, that it was for the court to decide whether any injury received should have been communicated to the defendants. The second question to them speaks of a serious or severe personal injury. Now, what he stated to the company was, not that he had never received any serious or severe injury, but that he had never received any personal injury. The answer of the jury to the first question put to them does not either say that *Moore* never received any personal injury whatsoever, so that, without disregarding the answers of the jury to the questions submitted to them, it seems to me,

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Taschereau, J.

that, as a matter of law, the plaintiff is not entitled to recover. The basis of *Moore's* contract with the company was that each and every one of his answers to their questions was strictly true. It being established that one of them was not true, the company is freed from all obligations under this contract, whether this untrue answer was given to them fraudulently or not(1), and whether this untrue answer was on a material fact or not (2). I fully admit this proposition that the words "illness, local disease or personal injury," do not include such trifling ailments as influenza, or toothache, or a black eye, but I cannot avoid the conclusion that a fracture in the skull, by which that vital portion of the human frame, the brain, is not as well protected as it otherwise would have been, is a personal injury, and, in *Moore's* case, should, as such, have been communicated to the company.

I am of opinion to dismiss this appeal with costs.

GWYNNE, J. :—

The position in which this case at present stands, is certainly not satisfactory. The learned judge before whom the case was tried, entered a verdict for the plaintiff, as the verdict which, in his judgment, the answers of the jury to the questions put to them required to be entered. The Court of Queen's Bench reversed that verdict and has ordered one to be entered for the defendants upon the issues joined on the second and fourth pleas.

In rendering this judgment the Court of Queen's Bench seems to me to have arrived at the result which they did arrive at, by reading the evidence rather in connection with the questions and answers endorsed on the application for insurance than with regard to

(1) *Macdonald v. Law Union Insurance Co.* L. R. 9 Q. B. 328.

(2) *Anderson v. Fitzgerald*, 4 H. L. C. 484.

the issues joined between the parties which they went down to try, and this is the more unfortunate, as much of the evidence relied upon by the late learned Chief Justice of that court in his judgment was irrelevant to those issues, and consequently inadmissible. This is pointed out by Mr. Justice *Patterson* in the Court of Appeal, who, while concurring in the judgment of the Court of Queen's Bench upon the second plea, was of opinion that the fourth plea was by no means so clearly proved as to warrant interference with the verdict entered thereon for the plaintiff, even if the plea had followed the language of the question on the application with respect to which it was framed, which, in his opinion, it did not. He therefore was not disposed to disturb the verdict for the plaintiff upon that issue. Two of the other learned judges of the Court of Appeal were of opinion that the plaintiff was entitled to judgment upon all the issues, and the fourth was of opinion that a new trial should be granted, but as the other members of the court did not consent to this, and thinking the plaintiff not entitled to succeed, he concurred with Mr. Justice *Patterson*, and the court being divided, no rule followed on the appeal, and so the case comes before this court.

Much of this difference of opinion has arisen, I think, from the want of sufficient attention to the issues joined. The declaration alleged that the policy of insurance declared upon was issued and accepted upon certain express conditions and agreements which are set out in the declaration, containing among others the following:—

1st. That the answers, statements, representations and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made part of this contract, are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be abso-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

lutely null and void; and, further, that no answer, statement, representation or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made to, or brought to the notice or knowledge of this company, and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation or declaration, and the said application, a copy of which is hereto annexed, shall be taken and held to be, and to contain the only answers, statements, representations or declarations made to this company on behalf of this insurance.

The application so referred to was for a policy of insurance for $25,000 upon the life of *Charles Moore*, aged 50. Upon this application, which was in one of the company's printed forms, were endorsed certain questions to be answered by the applicant, among which were the following, which are the only material ones to be set out, namely:

7th. Have you ever had any of the following diseases? Answer, Yes or No, opposite each. Here follow thirty-six particular diseases enumerated, and among them dyspepsia, and the question concludes as follows: "If you have a rupture, state whether you habitually wear a truss?"

"State the number of attacks, character and duration of all the diseases which you have had?"

To this question the applicant answered by inserting "*No*," after each particular disease mentioned in the question.

This question was immediately followed by the 8th, namely: "Have you had any other illness, local disease or personal injury? and if so, of what nature? How long since? And what effect on general health?" To which the applicant also answered "*No.*"

14th. "How long since you were attended by a physician? For what diseases? Give name and residence of such physician?"

"Name and residence of usual medical attendant? Name and residence of an intimate friend."

This question the applicant answered as follows:

To 1st part. About 30 years ago, Lake fever. Dr. *Sampson*, of *Kingston*, who is now dead.

To 2nd. Dr. *Barrick*, of *Toronto*, who attends my family; has known me some years.

To 3rd. Mr. *Dunbar*; has known me some years.

Upon this application and the answers to the questions thereon endorsed the policy sued upon was issued by the defendants upon the 27th March, 1875, and in August, 1876, after having paid two premiums, amounting together to $2,347.00, *Moore*, the insured, died from the effects of a blow then recently received upon his head.

The plaintiff, as one of the children of *Moore* for whose benefit, among others, the policy was effected, brings this action, to which the defendants plead in bar:

1st. That they did not make that policy in the declaration mentioned.

2nd. And for second plea the defendants say that the answer given in the negative by the said *Charles Moore* as in the declaration mentioned to the question "Have you had any other illness, local disease or personal injury? and if so, of what nature? How long since? And what effect on general health?" was untrue. That the said *Charles Moore* had, some twelve years before the time when he signed the said application and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain. That the said blow was a personal injury within the meaning of the said question, and that the answer "No,"

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

given to the said question was untrue and was a breach of the warranty contained in the said application, and that by reason of such untrue answer and breach of warranty the said policy was forfeited.

3rd. And for the third plea to the said declaration the defendants say that the said *Charles Moore* had before the time when he made the said application been afflicted with "dyspepsia," and that the answer "No" given by the said *Charles Moore* to the question, "Have you ever had any of the following diseases, among others dyspepsia?" was untrue and a breach of the warranty contained in the said application, and was untrue to the knowledge of the said *Charles Moore*.

4th. And for fourth plea the defendants say that the answer given to the question, "How long since you were attended by a physician? namely, about 30 years ago" was untrue to the knowledge of the said *Charles Moore*; that the said *Charles Moore* had, previous to the making of the said application, and at a much shorter period than 30 years, received a severe blow on the head, the effects of which remained until his death, and that while he was suffering under such injury he consulted and availed himself of the skill of a medical man, one Dr. *Lizars*, and that he concealed the said fact that he had so consulted the said medical man, and gave no reference to the said medical man, and that the answer given to the said question was untrue and was a breach of the warranty contained in the said application.

The plaintiff joined issue upon these pleas.

A motion was made by the defendants, and leave was given to them at the trial to amend this fourth plea, subject, however, to a special reservation to the court in which the action was pending to the question whether, under all the circumstances, the amendment should be allowed.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

If we were now considering the question whether the amendment in the terms proposed should be allowed, I confess that the propriety of allowing it seems to me to be more than doubtful. When we consider the extremely rigorous and partial terms in the interest of the defendants in which this policy is framed, terms which, if construed literally, would seem to be open to a construction that it would be impossible for the most honest insurer to comply with them; and which would leave it in the power of the defendants, upon the discovery after diligent enquiry, of some old forgotten disease or injury which the applicant had had and which had passed away years previously without leaving a trace behind, to avoid the policy when called upon to fulfil their undertaking, while retaining, nevertheless, the premiums which they may have been receiving punctually for many years; and when we consider that the effect of the amendment (although this was not the object at all in view when it was authorized) would be to enable the defendants to set up as a defence in avoidance of the policy the non-communication by the applicant of a private disease which he had had in a mild form (not being one of the thirty-six diseases particularly inquired after) and which had been cured more than eleven years previously, leaving no trace or effect whatever behind,—I do not think that the indulgence of permitting the defendants to make an amendment which would open to them a road for avoiding the policy by proof of the existence of such a disease, the fact of the existence of which was otherwise inadmissible, should be granted. However, we are not called upon to consider that question, because as matter of fact it appears by the judgments of the learned judges in the court below that the amendment, although authorized, subject to the above reservation, was never actually made; and we must

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

consider the case as it was considered and dealt with in the court below as it stood upon the original pleadings; indeed I must do the defendants the justice to say that in the argument before us, I did not understand them to urge at all or rely upon the fact of the existence of this disease as avoiding that policy, but that they rested upon what they insisted upon as a good and meritorious defence, namely, the injury to the applicant's head relied upon both in the second and fourth pleas. But however that may be, we must deal with the record upon the original pleas as without any amendment having been actually made.

At the trial the plaintiff produced the policy which, upon production, was admitted.

Upon this record then, whatever opinion a judge trying the case might form of the sufficiency of the evidence offered by the defendants in support of their pleas, it seems to me to be very plain that the plaintiff never could have been nonsuited either in virtue of anything contained in the *Ontario* stat, 37 *Vic.*, ch. 7, s. 33 or otherwise. That statute only authorizes the court to enter a nonsuit upon a motion after verdict without leave reserved under the circumstances and in a case where a nonsuit might properly have been entered under the old practice, upon leave reserved with the plaintiff's consent, and the rule as laid down in *Campbell* v. *Hill* (1), (referred to by the late learned C. J. of the Queen's Bench in his judgment) and in the cases upon which *Campbell* v. *Hill* proceeds, has only been applied to cases wherein the plaintiff fails to adduce such legal evidence in support of his case as entitles him to have his case given to the jury, or, which seems to me but another expression for the same thing, to cases in support of which the plaintiff

(1) 22 U. C. C. P. 526.

has given no evidence sufficient to warrant a verdict in his favor, or which the defendant would not be entitled *ex debito justitiæ* to set aside. It is only where it can be truly said that there is not *any* evidence in support of the plaintiff's case that a nonsuit can be entered. When the question is as to the value or weight of the evidence it must be submitted to the jury. Here, as it seems to me, the question was wholly as to the value or weight of the evidence as bearing upon the issues joined, and was in fact, eminently one for the jury, but in a case like the present, or in any case where issues are joined upon pleas the onus of proving which lies on the defendants, I do not think it has ever been held or suggested that the court would be justified in withdrawing the issues joined from the jury and in entering a non-suit because, in their opinion, the defendant has proved his pleas beyond all rational controversy. The only way therefore in which the case can be constitutionally disposed of is by a verdict determining the issues joined upon the pleas, either in favor of the plaintiff or of the defendants.

The learned judge before whom these issues were tried availed himself, as it was competent for him to do, of the *Ontario Act*, 37 *Vic.*, ch. 7, sec. 32, being sec. 264 of ch. 50 of the revised statutes, which enacts that—

> Upon a trial by jury in any case, except an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, the judge, instead of directing the jury to give either a general or special verdict, may direct the jury to answer any questions of fact stated to them by the judge for that purpose; and in such case the jury shall answer the questions, and shall not give any verdict, and on the finding of the jury upon the questions which they answer, the judge shall enter the verdict, and the verdict so entered, unless moved against shall stand, and be effectual as if the same had been the verdict of the jury.

Now, under this act, the judge is not invested with

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

the character and responsibility of a juror to find facts himself in any respect. He has no power to do anything of the kind—his plain and simple duty is as a judge to enter the verdict in the manner in which the law requires that it should be entered upon the answers of the jury and upon nothing else. The questions put to the jury ought therefore to be such as expressly, or by implication, to involve all the points necessary to be determined in order to enter a verdict upon all the issues joined upon the record. I say expressly or by implication to meet the case suggested by Mr. Justice *Patterson*, in his judgment, wherein he says:

> Take for an example an action on a deed in which the pleas are *non est factum*, and special pleas such as fraud or duress or release. The deed is produced at the trial, and its execution admitted or proved by the attesting witness and not denied. No judge would think it necessary under sec. 264 to go through the form of directing the jury to answer the question: Did the defendant make the deed?

In this case it is obvious that questions as to whether the deed was obtained to be executed by fraud, or under circumstances of duress, involve an admission of the existence in fact of the deed; so likewise a question as to whether a release was executed as pleaded involves an admission of the existence of the deed as good and valid in law unless the release was executed, so that it might perhaps be competent for a judge upon answers being given to questions relating to the circumstances attending its execution, or to the question as to its having been released after execution, to record the verdict upon the issue of *non est factum* as well as upon the other issues. But unless in such a case, and indeed in that case and in all cases, unless there be the consent of parties that the verdict be entered one way or the other upon issues as to which the evidence is admitted to be conclusive, the proper course to be pursued as it

appears to me in submitting questions to the jury under this clause, in order to enable the court to dispose of all the issues by the verdict to be entered, is to submit to the jury all such questions that their answers thereto will cover all the issues, although, in order to arrive at the points really in contest, it may be necessary to put questions which upon the evidence, or by admission, can only be answered in one way. This is the course which I have always pursued when acting under this clause, and for the reason that it has always appeared to me to be very clear that in acting under this section a judge has no power whatever to do more than to enter the verdict in the manner in which, in his judgment, the law requires that it should be entered, upon the answers given by the jury and upon nothing else. The learned judge who tried this case appears to have taken this view, and in consequence to have submitted all such questions as appeared to him sufficient to elicit answers which alone would enable him to enter the verdict required by law. I omit for the present to enquire whether any of these questions were well or ill framed, or whether they were accompanied with proper directions to enable the jury to arrive at a just conclusion in answering them. My present purpose is merely to enquire whether the proper verdict which the law requires to be entered upon those answers as they stand, is one in favor of the defendants? as has been ordered by the Court of Queen's Bench, setting aside the verdict which, upon the same answers, the learned judge who tried the cause had entered for the plaintiff. If a verdict for the defendants is not that which the law requires to be entered upon those answers as they stand, treating them as undoubtedly true in every particular, for their truth cannot upon this enquiry be called in question, then it is plain the

1897

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

verdict as recorded by the Court of Queen's Bench cannot stand.

The answers then of the jury upon the questions submitted to them are, that the applicant for insurance had had no "personal injury" which must have been present to his mind as something coming fairly within the term "personal injury," which he did not communicate to the defendants; that he had had no serious or severe personal injury which, through forgetfulness or inadvertence he did not communicate; that, in fact, he had had no personal injury which he might have been fairly expected to communicate, or which had any effect upon his general health; that he had not been afflicted with any of the diseases enumerated in the seventh question endorsed upon the application, nor, in particular, with dyspepsia; that he had not been attended by any physician for any of the diseases detailed on the application, nor for any disease whatever by any physician whatever other than Dr. *Sampson*, nor for anything other than a trifling ailment not amounting to a disease, and that in fact he gave fair and true answers to all the questions involved in the issues joined.

It must be admitted that the declaration at the foot of the answers endorsed upon the application does, in the terms of the policy, constitute a warranty, and the warranty is stated expressly to be that the answers are fair and true answers to the questions put.

The only breaches of warranty alleged in the pleas (and it is only with these and the issues joined in respect of them, that the jury had to deal) are—

1st. That the applicant had committed a breach of warranty as to the truth of the answer that he had had no personal injury, for that he had had a blow on the head which produced a fracture or depression of the skull which was attended with exfoliation of a part of the bone of the skull, and which caused also, to some

degree, inflammation of the brain; and that so he had had a personal injury within the meaning of the question in that behalf, and that the answer "No" to that question was therefore untrue.

2nd. That the applicant had had one of the diseases enumerated in the seventh question endorsed on the application, namely, "dyspepsia," and that therefore the answer "No" set after "dyspepsia" one of the diseases there enumerated, was untrue, and a breach of warranty; and

3rd. That the applicant had committed a breach of warranty in his answer to the following question, namely: "How long since you were attended by a physician? For what disease? Give name and residence of such physician." For that within a much shorter period than 30 years he had received a severe blow on the head, the effects of which remained until his death, and that while he was suffering under such injury he had consulted, and availed himself of the skill of a medical man (one Dr. *Lizars*), and had concealed such fact, and gave no reference to such medical man. This issue, it will be observed, is, in substance, the same as that joined upon the second plea, with this difference, that the same injury, for there is no warrant for regarding them as being different, is relied upon as constituting a breach of the warranty of the truth of the answers to both the eighth and the fourteenth questions endorsed on the application.

Now, upon the question of breach of warranty, the sole enquiry before the jury was whether those pleas or any and which of them were proved to be true, for, if not, there was nothing else alleged, and therefore nothing else legally before the jury raising any question which could be enquired into by them, impeaching the fairness and truth of the answers.

As I have already said, it is of no importance upon

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

the question I am now considering, whether the questions submitted to the jury were or were not proper questions to elicit answers upon which the court could give proper directions as to the entry of the verdict thereupon; nor whether the evidence supports the finding of the jury. The point to be determined simply is, whether upon the facts as found by the answers, assuming those answers for the present to be true, the verdict which the law requires to be entered is one in favor of the defendants? And to this question the only answer which can be given, as it appears to me, must plainly be: that upon those answers as they stand a verdict cannot be entered for the defendants without doing open violence to the facts found by the jury, which facts upon the present enquiry must be taken to be incontrovertibly true. Trial by jury, to use an expression of the late Lord *Denman*, would be a mockery, a delusion and a snare, if upon such finding of a jury upon the facts involved in the issues joined, it should be competent for a court to enter a verdict for the defendants.

The answers in the plainest language possible controvert the breaches of warranty alleged in the pleas, and these are all with which we have to deal. The warranty is that the answers were fair and true. The finding of the jury is expressly that they were so. The meaning of the jury, as plainly as that meaning can be expressed in words, is that in fact the answers were fair and true in every particular, in the judgment of the jury. No other meaning can be put upon their finding, they most distinctly say that the applicant had never received any personal injury whatever, whether of a serious or severe nature, or having any effect upon his general health, or which he might fairly have been expected to communicate; that he had never been afflicted with dyspepsia, or with any of the diseases enumerated

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

in the seventh question, endorsed on the application; that he had never been attended by any physician for any disease other than by Dr. *Sampson* for lake fever, as stated in the answer endorsed on the application, although he may have been for a trifling ailment not amounting to a disease, and that in fact, in the words of his warranty, all his answers to the questions put were fair and true.

I confess that I cannot understand how it can be contended for a moment that upon these answers a verdict should be entered for the defendants, which would involve the entering of a judgment upon record that the answers which the jury expressly find to have been fair and true, were untrue. It is said that the answer of the jury to the seventh question put to them—namely, "Had he been attended by any physician but Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to disease?" requires a verdict for the defendants. So to hold would, in my opinion, be to strain and pervert the plain and manifestly expressed sense in which the jury have answered the questions put to them, and to do open violence to the language of the answers as a whole which wind up with an express finding which is incapable of this construction—that the answers to all the questions answered on the application which were involved in the issue joined were, in the terms of the applicant's warranty, "fair and true;" but, further, the amendment, which was provisionally authorized to be made to the fourth plea, not having been actually made, there is no plea upon the record upon which a verdict in favor of the defendants could be entered upon the answer of the jury to this seventh question submitted to them, assuming that answer to be one clearly in favor of the defendants.

The question was most probably framed to meet the event of the court approving, in case it should approve,

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

of the amendment authorized to be made to the fourth plea, but which turns out now not to have been actually made, and the contention urged by the defendants, upon the evidence given bearing upon the plea, assuming it to be amended. The object of that amendment was for the express purpose of the defendants getting in evidence of the attendance of different medical men upon the applicant at divers times. At that time the private disease to which I have alluded had not been heard of—it came out quite accidentally and unexpectedly afterwards in the evidence of Dr. *Valentine*. After it did come out it does not appear to have been relied upon—the learned judge never drew the attention of the jury to it when submitting the questions to them, nor did counsel make any complaint of his not having done so. While the defendants appear to have laid no stress upon this piece of evidence, they did rely strongly upon evidence which, in virtue of the provisionally authorized amendment, they offered for the purpose of establishing that the applicant had upon different occasions been prescribed medicine for trifling ailments to which no specific name was given, and which the learned judge designated in his question as trifling ailments not amounting to a disease; and the contention of the defendants appears to have been, as appears by the frame of the fourth plea, that the gist of the fourteenth question lay in its first paragraph, "How long since you were attended by a physician?", insisting that it was wholly immaterial for what purpose the physician attended, if he attended at all, and that therefore, in proof of the breach of warranty contained in the answer to that question, they could rely upon these casual prescriptions The learned judge who tried the cause does not seem to have concurred in this view, and therefore he submitted this seventh question, putting an interpretation upon the

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

fourteenth question endorsed on the application which I confess appears to me the most correct and natural construction to put upon the question, although the applicant seems to have understood it as enquiring after his earliest and latest medical attendant, to which construction I understand, Mr. Justice *Patterson* to concur in thinking it may be open. The learned judge, however, who tried the case, plainly, and as I think correctly, drew a distinction between the case of a disease for which the applicant might have been attended by a physician and the case of casual advice occasionally given by his medical attendant when in attendance upon other members of his family, or otherwise, to take horse exercise, or some opening medicine, of which there was evidence given which was relied upon; and specially to meet this contention of the defendants, and to provide for the contingency of the amendment being approved by the court, the learned judge, as it appears to me, and for no other purpose, framed this seventh question thus: "Had he been attended by any physician but Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to a disease?" rightly, as I think, construing the fourteenth question on the application. The rule for interpreting these questions on the application is, that the language used by the company is to be construed in the sense in which it would be reasonably understood by the applicant, and that if there be any ambiguity, the language must be construed most strongly against the company who prepared the questions. The language also is to have a reasonable construction in view of the purpose for which the questions are asked, and these are fairly to be construed in the light of their immediate context. Now, the fourteenth question is complete in its parts, and all these parts must, as it appears to me, be regarded together in order to put such a construction upon

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

the question as a whole as the person to whom it was addressed might reasonably have put upon it.—"How long since you have been attended by a physician; for what disease; give the name and residence of such physician; name and residence of your usual medical attendant?" This question, appearing in a long string of questions, pointing to every conceivable matter requiring medical or surgical skill (recognizing the distinction between the professions of physician and surgeon, as appears by question 4, paragraph E) almost immediately after question 12 enquiring specially after certain diseases that are termed hereditary, might well, I think, be understood to mean, "How long since you were attended by a physician for any and what disease? Give the name and residence of such physician and of your usual medical attendant." The question seems more naturally to point to, and to draw the attention of the person to whom it was addressed to, some disease for which he was attended by a physician, rather than to the case of his having been occasionally and casually, as he appears to have been, advised by his usual medical attendant, to take horse exercise, or to his having been attended for an ingrowing nail, or to his having been occasionally prescribed a little opening medicine; the learned judge taking this view, distinguished, in the question submitted by him to the jury, between a disease for which *Moore* may have been attended by a physician and what might be called casual advice in relation to something which could not, in the opinion of the learned judge, be termed a "disease," and for which he could find no better term than "a trifling ailment," not amounting to a disease; and when the jury in answer to a question so framed by the judge, expressly find that the applicant never was attended for any disease, nor for anything amounting to a disease, by any other phy-

sician than Dr. *Sampson*, although he may have been for some trifling ailment not amounting to a disease, their clear intention by this answer is to convey their finding to be, as plainly and as emphatically as they do in answer to the next question, that the applicant gave a fair and true answer to the question. This is the true intent and meaning of their answer to the seventh question, whether that answer be taken alone or in connection with, as I think it must be, their answer to the eighth question, but the amendment to the fourth plea never having been actually made, there is in truth, as I have already said, no plea upon which a verdict for the defendants could be entered upon the answer of the jury to this seventh question, assuming such answer to be clearly in favor of the defendants.

It is said, however, that upon the authority of a passage in the judgment of *Mellor*, J., in *Hollins* v. *Fowler* (1), it was competent for the Court of Queen's Bench to read the finding of the jury in connection with other matters which the court considered to be established facts, and upon these materials combined that the verdict should be entered for the defendants. Assuming for the present the duty of the court under sec. 264 of ch. 50 of the revised statutes to be identical with their duty under a reservation similar to that in *Hollins* v. *Fowler*, a proposition which I do not think it necessary at present to admit or to deny, still a careful perusal of *Hollins* v. *Fowler* has conveyed to my mind the conviction that there is nothing in that case analogous to the present one, nor is there anything in the observations of Mr. Justice *Mellor* therein which warrants a verdict in favor of the defendants in the case before us.

He says there distinctly that :—

The answers of the jury embodying the inferences which they

(1) 7 H. L. 772.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

have drawn are to bind the parties as being the true inferences to be drawn from the facts involved in the questions and thus control the court in considering how the verdict should be ultimately entered.

Here there is no ambiguity whatever, no doubt as to what the jury by their answers to the questions put to them intend to convey. There the question arose upon a doubt as to the proper construction to be put upon their answers—a doubt as to what the jury by their answers were to be taken as having intended to convey —and in order to arrive at their intention Mr. Justice *Mellor* was of opinion that undisputed facts not expressly stated in the answers, but which appeared in the case, might be looked at. In the case before us nothing can be more clear or explicit than the answers of the jury. They leave no doubt as to what they intended to convey; and no verdict can be entered for the defendants without laying them aside altogether, and acting upon a state of facts diametrically opposed to the finding.

What was done in *Hollins* v. *Fowler* was merely to read the answers of the jury in the light of undisputed surrounding circumstances, with the view of arriving at what the jury intended to convey by doubtful answers. Here nothing of the kind is necessary for, as I think I have already shown, the answers of the jury negative in the most explicit terms all the matters alleged by the defendants in their pleas, and upon which alone were issues joined.

Whether or not the questions were such as to elicit answers which would authorize a verdict to be entered in favor of the plaintiff upon the issues joined? or, whether the answers which have been given were or not justified by the evidence? are wholly different questions, and were the only questions which, in my judgment, were of sufficient weight upon which to raise a doubt; and these came up for consideration under that branch of the rule *nisi* in the Court of Queen's Bench which

asked that the verdict might be set aside and a new trial had between the parties, upon the ground that the verdict entered for the plaintiff was contrary to law and evidence, and for misdirection of the learned judge who tried the cause.

Whether the finding of the jury upon the questions submitted to them was or not against the weight of evidence, is a question not open to us upon this appeal.

The statute constituting this court, in its twentieth section, provides that an appeal shall lie from the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law; and in its twenty-second section that when the application for a new trial is upon a matter of discretion only, as on the ground that the verdict is against the weight of evidence, or otherwise, no appeal to the Supreme Court shall be allowed.

Now the plain and literal meaning of these sections, as it appears to me, is that, whatever may be the action of the court below upon a motion for a new trial, in so far as the judgment of the court was rested upon the ground of the verdict being against the weight of evidence only, not involving any point of law, there can be no appeal to this court. If the Court of Queen's Bench had granted a new trial solely upon that ground it is plain there could be no appeal; but they equally exercise their discretion in declining to act, or in not acting, upon that ground, and we are equally excluded from all jurisdiction to interfere with such exercise of their discretion; and the reason of the thing coincides, as it appears to me, with the literal construction of these clauses of the statute. The power and functions of juries as the constitutional tribunal for the determination of questions of fact are well settled in our system, so likewise are the functions of courts of law as *judices juris*; and those of courts of original jurisdic-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

diction differ from those of appellate tribunals, and it is contrary to all our well settled ideas of the functions of an appellate court that in cases of trial by jury it should assume to weigh (it might be sometimes in over-nice scales) the proper weight which the constitutional *judices facti* should attribute to the evidence laid before them. Not that I consider very nice scales would be necessary to weigh the evidence in this case, but it is much better, and more in conformity with our constitution and with our system of trial by jury, that juries should sometimes render verdicts against the weight of evidence as estimated by trained judicial minds, than that their verdicts should too readily be set aside by the judgment of judicial minds, who in matters of fact are subject to the same infirmity as jurors are and not less liable to differ among themselves; but that an appellate court constituted as this is should interfere with the verdict of a jury as against the weight of evidence upon a case decided in the court below upon another ground (upon that judgment coming up in appeal), where it could not entertain an appeal from the judgment of the inferior tribunal upon the point as to the weight of evidence, would, as it appears to me, amount to a usurpation of jurisdiction. Although it appears to me that the Court of Queen's Bench would have done better if they had granted a new trial upon the ground that the findings of the jury were against the weight of evidence than to have ordered the verdict rendered for the plaintiff upon these findings to be entered for the defendants, which, I think, they had no right to do, still I must confess that the vague and uncertain manner in which the scientific testimony laid before them was given affords some cause for the jury finding the facts to be as they have found them.

That the plaintiff was entitled to a verdict upon the first and third pleas is not disputed; the only ques-

tions arise in respect of the issues joined upon the second and fourth pleas.

What then is the sense in which the applicant for insurance might reasonably have understood the eighth question on the application, the answer to which the second plea, for the reason therein stated, alleges to have been untrue?

The question coming after one which enumerates thirty-six diseases is: "Have you had any other illness, local disease or personal injury; if so of what nature; how long since and what effect on general health?"

What we have to deal with is only the term "personal injury" as here used. Now, it seems to me the that applicant might reasonably have understood this question as not intending to enquire, for example, as to an abrasion of the skin of the face, or an unseemly scar which might be disfiguring to the personal appearance, but not otherwise injurious; nor as to a black eye, a sprained wrist or ankle, a broken finger, or such like injuries, which might have been received years ago, but the ill-effects of which had long since passed away leaving no trace behind. He might not unreasonably think that, as the question was asked solely with reference to his application for insurance, all that was enquired after were such injuries only as from their nature or their continuing character might fairly be considered as affecting the health or strength of the applicant, or the insurable character of his life, or as affecting the rate of insurance to be demanded, so that in the language of *Cockburn*, C.J., in *Fowkes* v. *Assurance Association* (1), upon a question arising as to the truth of the answer, the materiality of the matter not communicated should fairly form the subject of enquiry by a jury. It was for the judge to construe the contract as meaning that

(1) 3 B. & S. 924.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

whatever the person to whom the question was addressed should reasonably understand as coming within the term "personal injury," was enquired after, but it is for the jury in each particular case to say whether or not the matter relied upon as a personal injury was such, having regard to its effects, that a reasonable man should have understood it to come within the term. In *Broom's* legal maxims (1), citing *Startup* v. *Macdonald* (2), and *Burton* v. *Griffiths* (3), it is said that all questions of reasonableness, reasonable cause, reasonable time and the like are, strictly speaking, matters of fact for a jury to determine. But in the case before us it is unnecessary to enquire what things the person to whom the question was addressed might reasonably understand to come within, and what not to come within, the term "personal injury," in the sense in which that term is used in the question, for the defendants have undertaken to dispense with that enquiry, and to narrow the issue by averring that the injury which they rely upon as establishing the untruth of the answer was of a particular nature, and upon the matter so averred they stake their defence, in so far at least as that plea is concerned, and if it should appear that the applicant had received other injuries, however serious they might be, if different from that relied upon in the plea, evidence of such injuries would be inadmissible under this plea. They say that the personal injury which they rely upon as having been suffered by the applicant was a blow on the head; and not a blow on the head simply, without more, for even a blow on the head might be so insignificant as to be attended with no injury whatever, but a blow on the head attended with certain specific injurious consequences, namely: which produced a fracture or depression of the skull,

(1) P. 82.

(2) 7 Scott N. R. 280.

(3) 11 M. & W. 817.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

and which was followed, that is as a consequence of the blow, by exfoliation of the bone of the skull, and also to some degree by inflammation of the brain. Now upon the trial of the issue joined on this plea, it must be admitted, I think, it would be the duty of a judge to say to a jury, that if the applicant for insurance had received a blow on the head which produced the consequences in the plea stated, they, as reasonable men, should find that he should reasonably have understood such a blow to come within the term "personal injury" in the sense in which that term is used in the question, but that it would be for them to say whether or not it was proved to their satisfaction that the applicant had received a blow which was attended with the consequences alleged; and if the evidence left a reasonable doubt in the minds of the jury as to the proof of the allegations in the plea, they would be justified in rendering a verdict for the plaintiff upon the issue, or rather they should not render a verdict for the defendants. It must be admitted also, I think, that from the evidence offered upon this issue the jury might properly have drawn the inference that *Moore's* skull had been fractured as alleged in the plea, and that the loss of the piece of the bone of the skull and the depression of the skull were attributable to the blow which there was evidence that the applicant acknowledged he had received by a fall some years before, and not to disease or natural causes; but I cannot say that the evidence upon this point was so clear and satisfactory that a jury might not have entertained conscientious doubts as to the sufficiency of the proof.

All the witnesses spoke of the insured as a vigorous, strong, healthy man, all agreed that the old injury, whatever caused it, or whatever its nature, had no connection whatever with the cause of death, nor had it any effect upon *Moore's* general health; under these

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

circumstances, in connection with the very rigid terms in which the company prepare their policies, so as to place them apparently in a position, while pocketing the premiums from year to year, to contest the most perfectly honest insurance, it is not surprising that a jury should hold defendants to the strictest proof of the allegations in their plea, or that if there should be any defect in such proof, or if the jury should entertain any conscientious doubt as to its sufficiency, that they should decide in favor of the plaintiff.

However, the Court of Queen's Bench have not thought fit to grant a new trial upon the ground that the finding of the jury was against the weight of evidence. If they had we could not as a Court of Appeal have interfered with such exercise of their discretion. So having exercised their discretion in not ordering a new trial upon the ground that the finding of the jury was against the weight of evidence, we have no jurisdiction now to interfere upon that ground.

But misdirection upon the part of the learned judge who tried the issues is also made a ground of complaint. Now, the rule as to misdirection is that a party shall not be heard to complain upon that ground unless he made the point at the trial. Here no objection was made at the trial as for any misdirection. The learned counsel for the defendants did, it is true, contend that there was no case to go the jury, for the reason that, as he contended, he had shewn two breaches of the warranty, in the untruth of the answers to two of the questions on the application for insurance. This was the assertion of a right to have a non-suit entered, not an objection for misdirection, and with that point I have already dealt. Upon the learned judge refusing to non-suit and proceeding to submit questions to the jury, no objection whatever to the frame of those questions was made. It was, I think, the

duty of the defendants then to have objected, if he had any objection to make to the frame of the questions, or to the directions of the learned judge to the jury accompanying them. None was made. Some or one of the questions should, perhaps, have been put in a slightly different shape, but on the whole, it must I think be admitted that substantially they were sufficient to elicit answers to enable the court to enter a verdict. All parties seem to have thought them sufficient for that purpose. The defendants probably expected them to be answered in a sense favorable to the defence; but having made no objection to their frame, or their sufficiency, I do not think they could now be heard to make any upon that ground, more especially when we find the answers to the questions to contain everything necessary to determine the issues joined; but, in truth, the point made is not one of objection to the sufficiency of the questions, nor is it one of misdirection. The real ground of complaint is that, as the defendants contend, the answers are not warranted by the evidence, and the precise objection taken by the rule is one of non-direction, not of misdirection—it is simply a renewal of the assertion of a right to nonsuit the plaintiff. It is that the learned judge did not direct the jury that upon the evidence of the untruth of the answers to the eighth and fourteenth questions endorsed on the application, they should find for the defendants. From what I have already said it will be seen that in my judgment if the learned judge had so directed the jury he would have laid himself fairly open to the charge, not only of having misdirected them, but of having wholly arrogated to himself their functions by pronouncing upon matters of fact it was the exclusive province of the jury to pronounce upon, namely: that the defendants had proved the matters alleged in their pleas.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Gwynne, J.

I can see no pretence for entertaining a motion for a new trial upon the ground of misdirection.

Then, as to the fourth plea, I entirely concur with the opinion expressed by Mr. Justice *Patterson*, that there is no good reason for disturbing the verdict for the plaintiff upon that plea.

The single point, therefore, upon which our judgment must proceed being that the Court of Queen's Bench erred when they ordered the verdict which was entered for the plaintiff upon the finding of the jury to be converted into a verdict for the defendants, the appeal should, in my opinion, be allowed with costs, and the rules of the Court of Queen's Bench discharged with costs. The amount recovered by the plaintiff is but a small part of the whole amount of the policy—little more than the premiums received by the company and interest thereon. The only course open to us, I think, is to let this verdict stand, and to leave the defendants to take the opinion of other juries upon their defence to the other actions which, as appears, have still to be brought for the residue of the amount of the policy. They had made no objection to the frame of the present action, if they could, as to which I express no opinion, the point not having been raised.

Appeal allowed with costs.

Attorneys for appellants: *Rose, McDonald, Merritt & Blackstock.*

Attorneys for respondents: *McMichael, Hoskin & Ogden.*

The Respondents, *The Connecticut Mutual Life Insurance Company of Hartford, Connecticut*, appealed from the judgment of the Supreme Court of *Canada* to the Privy

Council, and the following judgment was delivered by the Lords of the Judicial Committee (1):

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, v. Kate Douglas Moore, from the Supreme Court of Canada; delivered July 7th, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is a suit by one of the children of Mr. *Charles Moore*, deceased, against the *Connecticut Mutual Life Insurance Company*, upon a policy of insurance on the life of *Charles Moore*, the plaintiff claiming the share to which she is entitled under that policy. The declaration set out the policy, together with the questions and the answers that were made to them, and concluded with a general statement that all things had happened which were necessary to entitle the plaintiff to recover. The defendants pleaded several pleas, of which the most material are the second and the fourth. The second plea is in these terms:

The defendants say that the answer given in the negative by the said *Charles Moore*, as in the declaration mentioned, to the question "Have you had any other illness, local disease, or personal injury; and if so, what nature, how long since, and what effect on general health?" was untrue,—that the said *Charles Moore* had, some 12 years before the time when he signed the said declaration and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and

(1) The case will be found reported in 6 App. Cases 644.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

which also caused, to some degree, inflammation of the brain,—that the blow was a personal injury within the meaning of the said question,—and that the answer "No," given to the said question, was untrue and was a breach of the warranty contained in the said application; and that by reason of such untrue answer and breach of warranty, the said policy was forfeited.

The third plea, which relates to dyspepsia, was disposed of in the court below, and need not be here referred to. The fourth plea was to this effect:

The defendants say that the answer given to the question "How long since you were attended by a physician?" namely, "About 30 years ago," was untrue to the knowledge of the said *Charles Moore*,—that the said *Charles Moore* had, previous to the making of the said application, and a much shorter period than 30 years, received a severe blow on the head, the effects of which remained until his death, and that whilst he was suffering under such injury, he consulted and availed himself of the skill of a medical man, one Dr. *Lizars*, and that he concealed the said fact that he had so consulted the said medical man.

This plea is said to have been amended at the trial, and there has been some controversy as to whether that amendment was actually made or only taken to have been made; but their lordships will assume it to have been made. It runs thus:

The defendants say that the answer given to the question "How long since you were attended by a physician?" namely, "About 30 years ago," was untrue, to the knowledge of the said *Charles Moore*,—that the said *Charles Moore*, previous to the making of the said application, and at a much shorter period than 30 years, had been attended by, and had consulted and availed himself of, the skill of other medical men,

whose names are mentioned. Those were the pleas.

The policy is very much in the usual form of such policies, the material part of it being this:

This policy is issued and accepted upon the following express conditions and agreements: First, that the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted by the assured to be true in all respects.

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

The form of application contains a number of questions relating to a variety of diseases, such as apoplexy, diphtheria, fistula—and a number of others. The eighth question, which is material, is this:—"Have you had any other illness, local disease, or personal injury? and if so, of what nature, how long since, and what effect upon general health," to which the answer was "No." Their lordships agree with the remarks which have been made by some of the Judges of the Courts in *Canada* that this is a question of a somewhat embarrassing character, and one which the company could hardly reasonably have expected to be answered with strict and literal truth. They could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury, consisting of a contusion or a cut or a blow, which he might have suffered in the course of his life. It is manifest that this question must be read with some limitation and qualification to render it reasonable; and that personal injury must be interpreted as one of a somewhat serious or severe character. Their lordships may observe, in passing, that the next question but one, "Are you, or have you ever been, addicted to the use" (not to the abuse or excessive use) "of alcoholic beverages, opium or other stimulants," could be answered in the negative with literal truth only by a person who was never in the habit of drinking wine, or beer, or tea, or coffee (tea and coffee being stimulants), that is to say, by very few persons in *Canada*.

The next material question is, "How long since you were attended by a physician; for what disease? Give name and residence of such physician." The answer is, "About 30 years ago; lake fever; Dr. *Sampson*, of *Kingston*, who is now dead." Then: "Name and residence of your usual medical attendant?" "Dr. *Barrick*, of *Toronto*, who attends my family, has known me

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

some years." These answers would seem to distinguish between attendance by a physician for a serious disease and an ordinary medical attendant for trifling ailments.

Such being the answers, it is now necessary to refer shortly to the evidence, in order to make the summing up of the learned judge, the questions which he put to the jury and their answers to them, intelligible. The task of analysing it completely has been ably performed by some of the judges of the courts below. It is enough for the present purpose to say that Mr. *Moore* died of an injury to the head caused by striking against an iron bolt. The blow did not produce fracture of the skull, but inflammation attended by suppuration and extravasation of blood; the suppurated matter and extravasated blood pressing on the brain caused paralysis, from which death resulted. The medical men in examining this injury, and trephining, discovered that in the immediate proximity of their operation a portion of the bone of the skull was missing, that the brain in that point was covered only by skin and membrane, and that there was a slight depression into which the tip of the finger could be introduced. The great contention on the part of the company was to prove that the absence of this piece of bone resulted from a blow which Mr. *Moore* had received some ten or twelve years before, on falling from his horse or being thrown from a carriage; that his skull had then been fractured; that an operation was performed by a medical man whereby the missing portion of the bone was removed.

Although evidence was adduced which was well worthy of the consideration of the jury, and on which they might properly have found, if they had been so minded, that this case on the part of the defendants was proved, that evidence was by no means of a conclusive character. The medical man, Dr. *Lizars*,

who is said to have attended Mr. *Moore* at the time of the accident, was dead. His assistant or partner was called, who spoke of a fall of Mr. *Moore* from his horse about 12 years before, when he said that Dr. *Lizars* attended him; but he also said that at that time Mr. *Moore* was only suffering from a contusion, and that no injury to the bone was discoverable. He spoke of no other accident to Mr. *Moore*. There was the evidence of other medical men to the effect that it was probable that the injury might have been caused in the manner suggested by the defendants, but that evidence fell far short of direct proof, and indeed some portion of it was not irreconcilable with the hypothesis that the loss of the piece of bone might have resulted from causes other than external violence—indeed, from congenital malformation. On the other hand, there was the evidence of a brother of Mr. *Moore* that neither on the occasion in question, nor indeed on any other occasion, was he ever so seriously injured as not to be able to attend to his business as usual. If that evidence was believed by the jury, it would go far to disprove the possibility of any surgical operation having been performed whereby a portion of the bone of his skull was removed.

The learned judge, in summing up, commenting on the questions put by the company, observes:

They have stipulated that his answers shall form part of the contract which he is about to enter into. They say to him in effect: "You must answer these questions correctly; if from forgetfulness or inadvertence you answer a question incorrectly, we hold the policy void." They have a right to make that stipulation; but it is, in my judgment, a stipulation that should be construed with great strictness. When they put a very general question under a stipulation of that kind, it is only reasonable and just to put on that general question a fair construction; for instance, take the question they put with reference to any other illness, local disease or personal injury; I think that question must be read in a fair and common-sense way. If the applicant had had a headache the very day be-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

fore, and had not stated it in his application, it could not be said that this policy was good for nothing simply because he had not stated that; and yet a doctor would tell you that a headache was an illness, and that it came, strictly speaking, within that term. Subject to that limitation, that the questions are to be read in a fair and common-sense way, having regard to all the circumstances surrounding the man, and all the information that the company may reasonably expect to receive, I tell you that, in my view, the company have required the applicant to give correct answers to the questions they put.

After some further remarks, the learned judge put these questions to the jury:

1st. Had Mr. *Moore* any personal injury which must have been present to his own mind as something coming fairly within the term "personal injury," and which he did not communicate to the defendants? 2ndly. "Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" 3rdly. "Had he any personal injury which he might been fairly have expected to have communicated for the information of the defendants?" 4thly. "Had he any personal injury which had any effect upon his general health?"

Then he refers to those questions which relate to attendance by medical men, with reference to which the evidence was but slight. There was some evidence that Dr. *Lizars* had attended Mr. *Moore*, but the partner of Dr. *Lizars* said that attendance was for a contusion and bruises; and there was evidence of other attendance, but not for serious illnesses. With reference to that evidence the learned judge observes:

Now the term "attended," in a policy of this kind must also be read in a reasonable manner. The mere circumstance that a man had gone to a physician for some trifling ailment, and had received some care or attention from him, would not, it appears to me, render him the attendant of the applicant in such a sense that it would be necessary to state that he had been his last medical man, or that he had last attended him. It appears to me that the attendance meant is an attendance for something that deserves consideration, and might be expected to be present to the mind of a man when he was making an application of this kind. The object of the question, I presume, is to enable the company to communicate with the last

medical man of the applicant, so that if he pleases to give them information they may get it. At any rate they would know who he is, then, and have an opportunity of seeking him; but they would not require that, if the applicant had got from him a piece of sticking-plaster for a cut finger, his name should be in the application. There are a number of diseases named in the application. I ask you, then, in the first place:—Had Mr. *Moore* been attended by a physician for any of the diseases detailed in the application? They were all gone through by Dr. *Valentine*, and dyspepsia is the only one he named; this you have dealt with in the previous question. The next question is a more serious one:—Had he been attended by any physician but Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to a disease?

The learned judge proceeds:

Then I put to you, to cover the ground as far as possible, these two questions: "Did he give fair and true answers to the questions:—Have you had any other illness, local disease, or personal injury? and if so, of what nature, how long since, and what effect on general health?" Did he give fair and true answers to the questions:—"How long since you were attended by a physician; for what disease? Give name and residence of such physician."

The answers of the jury may be thus described:—They answer every question in favour of the plaintiff. With respect to question 7,—"Had he been attended by any physician except Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to a disease,' they say: "No; only for some trifling ailment," thereby negativing that he had been attended for a disease.

Such were the questions, and such the finding of the jury. Their lordships observe that the learned judge makes this remark:—"There have been no other questions suggested to me." That certainly would indicate that the learned judge was open to any suggestion from either side as to any further question to be put; and neither side appears to have suggested any other question. The judge upon these findings directed a verdict for the plaintiff. It was indeed objected at the trial that he ought to have told the jury

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

that they were bound to find for the defendant; but, assuming that the question was one proper to be left to the jury, no objection was made to the manner in which he left it.

A rule was obtained in the Court of Queen's Bench to this effect:

Judgment of J. C. of Privy Council.

It is ordered that the plaintiff, upon notice to be given to her attorney or agent, do show cause why the verdict obtained in this case should not be set aside, and a non-suit or verdict entered for the defendants pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and under the answer of the jury to the 7th question, that he had been attended by other physicians than the one he named, though only for trifling ailments, was virtually a finding for the defendants; and for misdirection of the learned judge in not directing the jury that, on the evidence of the untruth of the answers to the eighth and fourteenth questions, they should find for the defendants."

The only objection on the ground of misdirection is that the judge ought to have directed the jury to find for the defendants.

Upon the case coming before the Court of Queen's Bench, that court set aside the verdict for the plaintiff and directed a verdict to be entered for the defendants. From that judgment there was an appeal to the Appeal Court of *Ontario*. That court was equally divided; therefore the appeal failed, and the judgment of the Queen's Bench stood. Thereupon there was a further appeal to the Supreme Court of *Canada*. The Supreme Court reversed the judgment of the Appellate Court of *Ontario* and of the Court of Queen's Bench and directed the original verdict for the plaintiff to stand, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.

The first question is whether or not the Court of Queen's Bench were right in setting aside the verdict for the plaintiff, and directing a verdict for the defen-

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

dants. Their lordships have no doubt that the Court of Queen's Bench were wrong. In the Law Reform Act of *Canada* there is a provision that a judge may direct the jury to make special findings, and himself enter the verdict; and section 33 directs that:

> Every verdict shall be considered by the court in all motions affecting the same as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose.

It was under that power that the Court of Queen's Bench acted. Undoubtedly, that court had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, coupled it may be with other facts which were taken as admitted or were so clearly proved that no controversy could arise about them. But it is not in the power of a court to enter a verdict in direct opposition to the finding of the jury upon a material issue; and that is what the Court of Queen's Bench have done. Putting aside for the moment the other questions, their lordships refer to one question only:—"Had he any serious or severe personal injury, which, through forgetfulness or inadvertence, he did not communicate to the company?" The jury answer that question: "No;" that is to say, they find that the assured had no serious or severe personal injury. The Court of Queen's Bench, in direct contradiction to the finding of the jury, in effect find that he had had a serious or severe personal injury. So again, with respect to the other issue; the jury find that he had not been attended by any physician other than Dr. *Sampson*, the person mentioned, for any disease, but only for trifling ailments as distinguished from diseases; and they further state that he answered the question relative to his attendance by medical men truly. The Court of Queen's Bench in effect say that he had been

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

attended for disease, and that he did not answer the questions truly; again a finding in opposition to the finding of the jury. Their lordships are clearly of opinion that the Supreme Court of *Canada* was right in reversing the judgment.

The question of a new trial remains; and a new trial has been contended for upon two grounds—misdirection, and the verdict being against the weight of evidence. With respect to misdirection, it has been already observed that the counsel for the defendants, although he did insist that the learned judge ought to have taken the case upon himself out of the hands of the jury, did not make any objection to the direction to the jury, assuming it to be a case for them; and it has been further observed that the rule does not point to any misdirection, except the not withdrawing the case from the jury. It seems to their lordships, therefore, somewhat late for this objection to be taken; but assuming it to be open to the defendants, their lordships, after carefully considering the summing up of the learned judge, and the questions which he put to the jury,—although, no doubt, those questions may be open to some criticism, and some form of words may be suggested which might, on the whole, be more apt,—are unable to see that the jury were in any way misdirected or misled. They are, therefore, of opinion that a new trial on that ground should not be granted.

The last question is, whether a new trial should be granted on the ground of the verdict being against the weight of evidence; and this is one of more difficulty. The Supreme Court of *Canada* were of opinion that they had no power to direct a new trial upon this ground, that power being taken away from them by section 22 of the act of the 8th April, 1875, being "An Act to establish a Supreme Court and a Court of Exchequer in

the Dominion of *Canada*." That section is in these terms:

When the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal to the Supreme Court shall be allowed.

It is necessary to refer to two other sections. Section 17 runs thus:

An appeal shall lie to the Supreme Court from all final judgments of the highest court of final resort, whether such court be a court of appeal or of original jurisdiction.

Section 38 is in these terms:

The Supreme Court shall have power to dismiss an appeal or to give the judgment, and to award the process or other proceedings which the court whose decision is appealed against ought to have awarded.

If the last two sections had stood alone, the Supreme Court of appeal in *Canada* undoubtedly would have been entitled to make any order or to give any judgment which the court below might or ought to have given, and among other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence. Their lordships have to consider whether this power, conferred by those two sections, is taken away by the 22nd section, or, in other words, whether the 22nd section applies to a case of this kind. It is true that an application was made to the court below for a new trial, but not only for a new trial; it was also an application, and this was the main point of the application, to enter a verdict for the defendants. The Court of Queen's Bench were of opinion that the defendants were entitled in point of law to have a verdict entered for them, and did not apply their minds to the question of the granting or withholding of a new trial, nor did they exercise their discretion upon that subject. No appeal is brought in this case against the exercise or non-exercise of the discretion of the inferior

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

court. It seem to their lordships that section 22 applies only where an appeal is brought from a judgment of the court below in which they have exercised a discretion; and that as no such judgment was given, and no appeal on that subject has been brought in the present case, the power of the court was the same as if no application had originally been made for a new trial, and that the Supreme Court could have ordered a new trial on the ground of the verdict being against evidence, if the Court of Queen's Bench ought to have done so. However, this question ceases to be of any general importance, an act recently passed enabling the court to exercise this very power. Their lordships may observe that there is a section in the local act, not precisely in the same terms, but to the same effect, limiting the jurisdiction of the appellate court of *Ontario*, with respect to which they take the same view, in accordance, as they understand, with the view of the appellate court of *Ontario*. Be this as it may, it has not been disputed that their lordships have the right, if they think fit, to order a new trial on any ground. It has been a question requiring serious consideration whether or not that power should be exercised in this case. Undoubtedly the verdict is not altogether satisfactory. If the only question for their lordships were whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a court for the jury. In order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand

1879

MOORE v. THE CONNECTICUT MUTUAL LIFE INS. CO. OF HARTFORD.

Judgment of J. C. of Privy Council.

and appreciate it. Their lordships are unable to say in this case that the evidence is so clear and strong in favour of the defendants as to lead them to this conclusion. Taking into consideration, moreover, that the company have all along contended, not for a new trial, for which they appear to have insisted almost for the first time here, but that they were entitled in point of law to have a verdict entered in their favour, their lordships do not deem it their duty to send the case to a new jury, and thus probably recommence a long litigation.

Under these circumstances, their lordships will humbly advise Her Majesty that the judgment of the Supreme Court of *Canada* be affirmed, and that this appeal be dismissed with costs.

1881

*May 4.

*Mar. 28.

ROBERT T. HOLMAN *et al* .....APPELLANTS;

AND

CHARLES GREEN.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Letters Patent, under Great Seal P. E. I. of foreshore in Summerside Harbor, void—B. N. A. Act, sec. 108—*Public Harbor—* 25 *Vic., ch.* 19., *P. E. I.*

G. (defendant) was in possession of a part of the foreshore of the harbor of *Summerside,* and had erected thereon a wharf or block at which vessels might unload. *H. et al* (plaintiffs) brought an action of ejectment to recover possession of the said foreshore.

H. et al's title consisted of letters patent under the Great Seal of *Prince Edward Island,* dated 30th August, 1877, by which the

* PRESENT—Sir William J. Ritchie, Kt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

1881

HOLMAN v. GREEN.

crown in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, 25 *Vic.*, ch. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action.

Held, that under sec. 108 *B. N. A. Act*, the soil and bed of the foreshore in the harbor of *Summerside* belongs to the crown, as representing the Dominion of *Canada*, and therefore the grant under the great seal of *P. E. Island* to *H. et al* is void and inoperative.

APPEAL from a judgment of the Supreme Court of Judicature of *Prince Edward Island*, making absolute a rule for judgment of non-suit in the cause.

This was an action of ejectment brought by the appellants (plaintiffs below) against the respondent (defendant below) to recover possession of a piece of land, being part of the foreshore, between high and low water mark of the town of *Summerside*, lying outside of and to the westward of *Queen's* wharf.

The writ was issued on the thirty-first day of August, A.D., 1877. The defendant limited his defence to that part of the premises described in the writ, situate on the western side of *Queen's* wharf. The cause was heard before the Chief Justice and a jury in October, 1878.

The appellants (plaintiffs below) claimed title to the *locus* under a grant to them from the crown in fee, under the Great Seal of *Prince Edward Island.*

The local statute 25 *Vic.* c. 19, enabled the Lieut.-Governor in Council to issue grants of certain parts of the seashore of *Prince Edward Island*

The respondent offered no evidence of any title to the *locus.*

The jury found a verdict for the appellants (plaintiffs below) for all the lands in issue. The respondent afterwards, pursuant to leave reserved by the Chief Justice at the trial, obtained a rule *nisi* for a new trial or non-suit on the following, among other grounds :—

"3. Because said grant is void on the ground that at

1881

HOLMAN v. GREEN.

the time it was made the plaintiffs were not in possession of the whole of the land in front of which the *locus* lies, part of the same being a public street, another part being in possession of *I. L. Steeves*, and another part in possession of *Thomas Brehaut* tenants of the plaintiffs.

"4. Because said grant is void on the ground that the *locus* is in front of and abuts the railway, which is vested in the Dominion of *Canada*, and it was admitted that no consent from the Dominion Government had been obtained.

"5. Because said grant is void on the ground that the *locus* abuts on the public wharf under the control of the corporation of *Summerside* and no consent was obtained from such corporation.

"8. Because said grant is void on the ground that by the *British North America Act* all public harbors are vested in *Canada*, and *Summerside* is a public harbor."

This rule *nisi*, after argument, was made absolute for a non-suit on the above 3rd, 4th and 5th grounds, and against this latter rule the appellants appealed to the Supreme Court of *Canada*.

The counsel were heard at length on the several grounds taken in the rule *nisi*, but as the judgment of the Supreme Court proceeded entirely on the ground that the grant was void because by the *British North America Act* all public harbors are vested in *Canada*, and *Summerside* is a public harbor, their arguments on these points are omitted.

Mr *Davies*, Q.C., for appellant:

As to the eighth ground taken for the rule *nisi* that the grant is void because public harbors are vested in the Dominion of *Canada* by the *B. N. A. Act*: the public harbors which became the property of the Dominion by the 108th section of the *B. N. A. Act*,

1881

HOLMAN v. GREEN.

must clearly be such public harbors (if any) as the local government as such had acquired an actual property in, *e g.*, artificial harbors constructed by the outlay of monies. This section contemplated public works of the province only, and not natural harbors in which the province had no special property. The words must be construed *ejusdem generis* with the class of words in the clause where they are used. This is not an artificial harbor. The only monies expended here were on the wharves by private individuals and provincial government.

Mr. *Peters* for respondent:

The wharf in question was built out of the funds of the government of *Prince Edward Island*, and has always been known as a government wharf. Putting aside the question that *Summerside* is a public harbor, and is vested in the government of *Canada* under sec. 108 *B. N. A. Act*, I contend the wharf in question is a public work and comes within the word "piers" mentioned in the third schedule of the act. It is not an answer to say that a pier should be built of stone. It is built on public property and advances into the harbor. Surely the Dominion parliament alone has control over public works necessary to carry on trade.

It is called the Queen's wharf, and was the largest wharf at *Summerside* until the railway wharf was built. I also contend that the whole soil of the harbor passed to the Dominion, and that the giving of grants is inconsistent with the rights of the Dominion government in the harbor. See *B. N. A. Act*, 1867, sec. 108, schedule 3.

If it is necessay for the purposes of carrying on trade that the Dominion government should have the property of artificial harbors, why should they not also have the control of natural harbors, and it cannot be denied that *Summerside* harbor is one of the natural harbors of the island.

1881

HOLMAN v. GREEN.

Ritchie, C.J.

RITCHIE, C. J.:

One of the points raised, on which I think the case must turn, was that the harbor of *Summerside* is a public harbor and is vested in the government of *Canada* under the *British North America Act*, 1867, sec. 108 and 3rd schedule, and that the making of grants of the foreshore, or land between high and low water, by the Lieutenant-Governor of *Prince Edward Island*, is inconsistent with the rights of the Dominion government in the harbor, and therefore the grant under which plaintiff claims is void.

The *locus in quo* in this case is situate between high and low water mark in the harbor of *Summerside*, *P.E.I*, which is a public harbor and port for ships where customable goods may be laden and unladen. By section 108 of the *B. N. A. Act*, 1867, headed: "Transfer of property in schedule," the provincial public works and property enumerated in the third schedule to be the property of *Canada* are: 1. Canals with lands and water power connected therewith. 2. Public harbors. 3. Lighthouses and piers and *Sable Island;* and other descriptions of properties, among which are military roads, property transferred by the Imperial government and known as ordnance property, lands set apart for general public purposes. The property in public harbors being thus vested in the dominion, the soil ungranted at the time of confederation between high and low water mark, and being within the limits of public harbors, by the express unqualified words of the enactment, became vested in the dominion as part and parcel of the harbors which belonged as property to the provinces, as distinct from the franchise of a port, it being clear from Lord *Hale*:

That the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another.

1881

HOLMAN v. GREEN.

Ritchie, C.J.

Thus Lord *Hatherley* in *Foreman* vs. *Free Fishers and Dredgers of Whitstable* (1):

> However commodious a place may be for vessels, it will not, therefore become a port, the establishment of which must be by the authority of the crown.

And in the same case Lord *Chelmsford* says:

> It appears from Lord *Hale, de portibus maris*, chap. 6, that "though *A.* may have the property of a creek or harbor or navigable river, yet the king may grant there the liberty of a port to *B.*, and so the interest of property and the interest of franchise be several and divided."

The words of the *B. N. A. Act* are, in my opinion, too clear to admit of any doubt. But it was contended that the public harbors referred to in the *B. N. A. Act*, were only such public harbors (if any) as the local governments, as such, had acquired an actual property in, that is to say, artificial harbors constructed by the outlay of moneys and not natural harbors. But I can find nothing in the act to justify this restriction being placed on the clear words of the statute, and if we look to the general scope of the act in relation to matters with which harbors are connected, I think it is apparent that parliament intended the words to be construed in their full plain grammatical sense. In the first place, the exclusive legislative authority over the regulation of trade and commerce, beacons, buoys, lighthouses, and *Sable Island*, navigation and shipping, is vested in the parliament of *Canada*; then, secondly, property in canals, with lands and water power connected therewith, and lighthouses and piers, and *Sable Island*, is specifically transferred to the Dominion. It is but consistent with this that the property in public harbors, so intimately connected with and essential to trade and commerce, and shipping and navigation, lighthouses and piers, should likewise be vested in the Dominion for

(1) L. R. 4 E. & I. App. 281.

1881

HOLMAN v. GREEN.

Ritchie, C.J.

their more efficient management, control and regulation; a matter in which, not only the whole Dominion, but foreign shipping are likewise interested, and which could hardly be effectually managed and regulated if there were to be a divided control. Still less can it be supposed that having vested all matters connected with trade and commerce, and shipping and navigation, and matters pertaining thereto in the Dominion parliament, the property in and control of the public harbors should have been left to provincial authority. Such being the case with reference to the property in harbors in the provinces originally united under the *B. N. A. Act*, 1867, the same is now applicable to the harbors in the province of *Prince Edward Island*, it being one of the terms upon which *Prince Edward Island* was admitted into the union or Dominion of *Canada* "that the provisions in the *British North America Act*, 1867, shall, except those parts thereof which are in terms made or by reasonable intendment may be held to be especially applicable to and only to affect one and not the whole of the provinces now composing the Dominion, and except, so far as the same may be varied by these resolutions, be applicable to *Prince Edward Island* in the same way and to the same extent as they apply to the other provinces of the Dominion, and as if the colony of *Prince Edward Island* had been one of the provinces originally united by the said act."

As, therefore, this clause relating to public harbors is alike applicable to all the provinces, and was in no way varied by the resolutions referred to, the same became applicable to *Prince Edward Island* as if it had been one of the provinces originally united by the *British North America Act*, 1867, and therefore the executive government and legislature ceased to have any property in, or executive or legislative power over, the ungranted lands between high and low water mark

1881

HOLMAN v. GREEN.

Ritchie, C.J.

in such public harbors as that in question, and as a necessary consequence the grant under which plaintiff claimed, issued by the Lieutenant-Governor of *Prince Edward Island* under the Great Seal of that island, was of no force or effect, and therefore plaintiff had no right of action against defendant though a wrongdoer.

STRONG, J.:—

This is an appeal from a judgment of the Supreme Court of *Prince Edward Island* making absolute a rule for a non-suit in an action of ejectment brought to recover possession of a portion of the foreshore of *Summerside* Harbor. The plaintiff's title consisted of letters patent, under the great seal of *Prince Edward Island*, dated the 30th August, 1877, by which the Crown, in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, passed long before the island became a province of the Dominion, purported to grant to the plaintiffs, in fee simple, the land sought to be recovered in the action. The first question which arises is as to the title of the Crown in right of its government of *Prince Edward Island*, it having been contended, on the part of the defendants, that the land in dispute, upon the admission of the island as a province of the confederation, being part of the soil or bed of a public harbor, became vested in the Crown as representing the Dominion of *Canada*. If this contention is correct, it follows that the grant under the great seal of the island, which constitutes the plaintiff's title, was wholly void and inoperative.

There can be no doubt that by the common law of *England* the sea shore between high and low water mark, or as it is sometimes called the foreshore, is vested in the Crown. *Hale*, in the treatise *De Jure Maris* (1) says :—

(1) P. 12.

The shore is that ground that is between high and low water mark. This doth, *primâ facie* and of common right, belong to the king both in the shore of the sea and in the shore of the arms of the sea.

Chitty, on the Prerogatives of the Crown (1), lays it down that

The king is also by his prerogative the *primâ facie* owner of the shores; that is, the land which lies between high and low water mark in ordinary tides of the seas, and arms of the seas, within his dominions.

In the *Mayor of Penhym* v. *Holmes* (2) *Cleaseby*, B., says:

The *primâ facie* title to the foreshore everywhere is in the Crown.

And this general rule of law applies to ports and harbors as well as to the shore of the open sea. In *Coulson* and *Forbes*, Treatise on the law of Waters (3), it is said:

The ownership of the soil of all ports as well as of the sea shore between high and low water mark is vested *primâ facie* in the Crown, and the Crown might formerly have conveyed the soil to a subject by grant or royal charter, either apart from or in conjunction with the franchise.

And the books abound in authorities to the same effect (4).

Therefore at the date of the admission of *Prince Edward Island* "into the Union" pursuant to the provisions of the 146th section of the *British North America Act*, the land in question formed part of the demesne lands of the Crown belonging to that province. Then by the express provision of the 146th section of the *British North America Act*, upon the admission of *Prince Edward Island* all the provisions of that Act became applicable to the province, including the 109th section, which enacted that the public lands should

(1) P. 207.
(2) 2 Ex. Div. 332.
(3) P. 41.
(4) *Gann* v. *The Free Fishers of Whitstable*, 11 H. L. C. 192. (2) *Attorney-General* v. *Chambers*, 4 De G. McN. & G. 206; Hall on Sea Shores, 13.

1881

HOLMAN v. GREEN.

Strong, J.

belong to the provinces in which they were situated, and the 117th section, which provided that the several provinces should retain their public property not otherwise disposed of by the Act. These lands would therefore have remained the property of the province after confederation, unless by some particular enactment they were distinguished from the ordinary Crown lands and taken out of the operation of the 109th and 117th sections by being expressly vested in the Dominion. The only section which can have this effect is the 108th, which enacts that:

> The public works and property of each province enumerated in the third schedule to this Act shall be the property of *Canada*.

The second enumeration of the schedule referred to is "Public Harbors." The question for our decision is therefore narrowed to this:—Did the 108th section of the *British North America Act* transfer the property in the soil or bed of this harbor to the Crown in right of the Dominion?

The land in dispute is situate opposite the town of *Summerside* and forms part of the foreshore or the land between ordinary high and low water marks of *Bedeque* or *Summerside* harbor—a harbor of which the public have the common right of user, and which in that sense at least is therefore a public harbor. It does not appear that any public works have been erected or any public money expended for the improvement of, or in any way in connection with, this harbor, either by the Dominion Government since, or by the Provincial Government before or since, Confederation. I can, however, conceive no other meaning to be attached to the words: "Public Harbors" standing alone, than that of harbors which the public have the right to use, and consequently if a more restricted construction is to be put on those words it must arise from the context or from some other provision of the Act. I find no other pro-

vision of the Act conflicting with what thus appears to be the *primâ facie* construction of the terms in question.

It is said, however, on the part of the appellants, that the 108th clause itself, or at least the words of the third schedule, which may be read as incorporated with it, so exclusively refer to property consisting of public works and which has resulted from the expenditure of public money that it must be taken in the enumeration of public harbors to refer to harbors *ejusdem generis*, and is therefore confined to those harbors which at the time of confederation had been artificially constructed or improved at the public expense. I find nothing in the section and schedule combined to warrant such a construction, which, it seems to me, can only be based on conjecture. The words of the section are "public works and property," and in the schedules, though most of the properties enumerated have resulted from the expenditure of public money, this is not so as to all, for we find "*Sable Island*" "property transferred by the Imperial Government, and known as ordnance property," and "lands set apart for general public purposes," none of which descriptions imply, as they do not actually include, properties which had been improved at the general public expense.

This argument seems therefore wholly to fail, and we must conclude that there is nothing in the context which would warrant us in restricting the wide general description of "public harbors" to a meaning different from that which the words bear in their ordinary and primary signification.

Next arise the questions—Does the description "Public Harbors" include the bed or soil of the harbor? and if so, is the foreshore also comprised in it? I am of opinion that there is even less doubt on this head than on the first point. By the attri-

1881

HOLMAN v. GREEN.

Strong, J.

bution of the harbors to the Dominion it never could have been meant to transfer a mere franchise to the Dominion Government—that is, to the Crown in right of the Dominion—leaving the property in the soil vested in the Crown in the right of the province. Such a construction would be so arbitrary, unnatural and improbable as to be totally inadmissible. Who ever heard of such an anomaly as the Crown, as a body politic representing one Government, having a franchise in the property of the Crown itself as a body politic representing a distinct Government? Then the object of vesting the harbours in the Dominion was doubtless with the object of enabling that Government to carry out with more facility such measures as it might, under the power granted to it to legislate on the subject of navigation and shipping, from time to time think fit to enact. And for this purpose it was material that the right of property in the soil of harbors should be under the control of the Dominion, a result which would not be attained by conferring a mere franchise or the police power of regulating harbors and taking tolls in them. Further, the taking of tolls or harbor dues would have implied the duty of conservancy, which could not have been properly performed if the bed of the harbor had been vested in a different proprietor. Then there would have been no necessity for this special provision of the 108th section vesting harbors in the Dominion, unless it was intended to vest the property in the beds of harbors, for under the grant of legislative power relating to navigation and shipping, Parliament might have assumed all such powers as would have been comprised in the 108th section, if it were to be construed as a mere grant of a franchise, or police, or conservancy power, or of all these together. The fair inference is therefore that it was intended to transfer the harbors in the widest sense

1881

HOLMAN v. GREEN.

Strong, J.

of the word, including all proprietary as well as prerogative rights, to the Crown as representing the Dominion. And this construction is in accord with the presumption of law as laid down by Lord C. J. *Hale*, *De Jure Maris* (1), who says:

> That a subject having a port of the sea may have, and, indeed, in common experience and presumption hath, the very soil covered with water, for though it is true the franchise of a port is a different thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary usage and presumption they go together.

That the foreshore is comprised in and forms part of the harbor, and passed to the Dominion under that denomination, is too plain to need demonstration, for it is held by the crown by the same title and is part of the soil of the harbor, the harbor or port being held to include all below high water mark. The passage from the text writers already quoted (2) is also to this effect.

The conclusion is that nothing passed to the plaintiffs under the letters patent of 30th August, 1877, and this appeal must consequently be dismissed with costs.

FOURNIER, J.:

L'Intimé a été poursuivi en cette cause pour une voie de fait (*trespass*) consistant dans l'érection d'un quai dans la baie de *Summerside*, sur la devanture de la propriété des appelants, demandeurs en cour inférieure. Le procès a eu lieu devant un jury qui a rapporté un verdict en faveur des appelants. L'intimé, ayant fait motion pour *non suit* ou nouveau procès, la cour inférieure a admis le *non suit*. C'est de ce jugement qu'il y a appel.

Une loi de l'*Ile du Prince-Edouard* 25 *Vict.*, ch. 19, autorise le lieutenant-gouverneur en conseil à accorder, à certaines conditions, des lettres patentes sur les grèves

(1) P. 33. (2) Coulson & Forbes, 43.

1881

HOLMAN v. GREEN.

Fournier, J.

publiques. En vertu de cette loi, des lettres patentes ont été émises le 30 août 1877, sous le grand sceau de la province, accordant aux appelants l'étendue de terrain décrite dans les dites lettres patentes Ce terrain est en outre spécialement désigné comme faisant partie du rivage situé en front de la terre appartenant aux appelants (" being part of the shore situated in front of land owned by the said *Robert McCaul* and *Robert Tenson Holman.*") La validité de ces lettres patentes a été attaquée par les intimés sur le principe que la commission du lieutenant-gouverneur ne lui conférait pas expressément le pouvoir de faire une telle concession, et aussi comme n'étant pas faite en conformité des dispositions du statut ci-dessus cité, lequel par la sec. 3, exige pour la validité des lettres patentes le consentement de tous les propriétaires sur la devanture de la propriété desquels se trouve situé un lot de grève publique. Le chemin de fer de l'*Ile du Prince-Edouard*, maintenant la propriété du gouvernement du *Canada*, et un quai, appelé le quai de la Reine, construit par la province comme ouvrage public avant son annexion à la Puissance, séparent la terre des appelants de l'endroit où est construit le quai en question L'intimé prétend que d'après le statut le consentement du gouvernement du *Canada*, comme propriétaire du dit chemin de fer, était nécessaire pour la validité des lettres patentes. Il soutient aussi que le consentement de la corporation de *Summerside*, qui, en vertu de son acte d'incorporation, 40 *Vict.*, ch. 15, a le pouvoir de faire des règlements pour l'administration de quais, était aussi nécessaire pour la validité des dites lettres patentes. Il y a encore plusieurs autres objections invoquées à l'appui de la demande d'un *non suit* ou d'un nouveau procès, mais je ne crois pas qu'il soit nécessaire de s'en occuper pour arriver à la décision de cette cause, si la 8e objection est fondée. Cette objection est formulée comme suit : " Because said

1881

HOLMAN v. GREEN.

Fournier, J.

" grant is void on the ground that by the *British North* " *America* Act all public harbors are vested in *Canada*, " and *Summerside* is a public harbor."

Il est admis que la preuve constate que les lignes latérales de la propriété des appelants prolongées dans la baie jusqu'au delà du quai, comprendraient dans leurs limites le terrain cédé par les lettres patentes et particulièrement l'endroit sur lequel est construit le quai dont il s'agit; que *Summerside* est un havre formé par la nature, employé comme *Charlottetown*, *Pictou*, *Halifax* ou *St. John*, aux usages de la navigation. L'admission est en ces termes :

That Summerside harbour is a natural harbour, largely used for shipping purposes like *Charlottetown*, *Pictou*, *Halifax* or *St. John*.

Que le quai de la Reine, est un quai public, construit par le gouvernement local avec des deniers publics votés à mesure qu'il en était besoin, de la même manière que pour la plupart des autres quais de l'Ile. Ce quai fut construit vers l'année 1840, et a toujours été employé depuis comme quai public à l'usage des nombreux vaisseaux qui fréquentent le hâvre de *Summerside*.

Ces admissions constatent d'une manière certaine que le hâvre de *Summerside* est un hâvre public. En vertu de la sec. 108 de l'acte de l'*Amérique Britannique du Nord*, déclarant que les travaux et propriétés publics de chaque province, énumérés dans la troisième cédule annexée au dit acte, appartiendront au *Canada*, les hâvres publics étant compris dans l'énumération faite dans la dite cédule, la propriété du hâvre de *Summerside* appartient au gouvernement du *Canada*, depuis que l'*Ile du Prince-Edouard* en fait partie. A dater de cette époque le hâvre en question a été sous la juridiction du gouvernement du *Canada* qui y a nommé un maître du hâvre chargé de la police de ce hâvre etc., etc.

Du moment que la propriété du hâvre est devenue

1881

HOLMAN v. GREEN.

Fournier, J.

celle du gouvernement fédéral, le gouvernement de l'Ile a cessé d'y avoir aucun droit. En conséquence lors de l'émission des lettres patentes en question, le 30 août 1877, le gouvernement de l'*Ile du Prince-Edouard* n'avait plus dans les limites du hâvre en question aucun droit de propriété dans le sol formant ce hâvre. En conséquence ces lettres patentes sont nulles en autant qu'elles cèdent aux appelants une partie de ce hâvre qui était alors la propriété du gouvernement fédéral.

Je suis en conséquence d'avis que l'appel devrait être renvoyé avec dépens.

HENRY, J.:—

There is another difficulty, too, which presents itself to my mind, in addition to those mentioned by my learned colleagues, and that is that since confederation, even if the local legislature had the soil of the harbor, the public had an easement—that is, the whole public (not the public of *Prince Edward Island*, but the public everywhere) had a right to an easement of the wharves, and if the legislature of *Prince Edward Island* assumed the right of granting the land between low water mark and high water mark, they might carry that still further, and grant the soil so as to be injurious to the whole shipping interest. I think, therefore, that ever since confederation, even if the soil did belong to *Prince Edward Island*, and its legislature had the right to dispose of the soil, which I think it had not, there was an easement that the public had in it that the Local Government had no right to obstruct by granting the sole right to other parties to occupy the waters of the harbor by putting up buildings, erections, or in any other way impeding the passage of it. I concur in the views expressed by the learned Chief Justice and those who have preceded me.

GWYNNE, J.:—

To the real question which is involved in this suit,

the only answer which can be given is in the negative; that question is—is a deed executed by a lieutenant-governor of one of the provinces of this Dominion with the public seal of that province thereto annexed, competent and effectual to transfer to a person named in such deed as vendee, the legal estate in property which, by force of the provisions of the *B. N. A. Act*, is vested in Her Majesty for the public purposes of the Dominion, and is for that reason expressly placed under the exclusive control of the Dominion parliament.

Upon *Prince Edward Island* being admitted into the Dominion, an event which took place upon and from the 1st July, 1873, the legislative authority of the parliament of *Canada* (by force of sec. 91, item 1, and of sec 108 and item 2 of the schedule therein referred to of the *B. N. A. Act*) became absolute and exclusive over all public harbors situate in the island. Her Majesty remained seized of those harbors and of the land covered with the waters thereof, *jure regio*, for the public purposes of the Dominion and subject to the exclusive control of the parliament of *Canada*.

Under the provisions of the Dominion statute, 37 *Vic.*, c. 34, and the orders in council made in pursuance thereof, the Dominion government has assumed control over the piece of land situate in the harbor of *Summerside*, and which the plaintiffs claim to be their property under and in virtue of a deed dated the 30th August, 1877, purporting to be executed by *R. Hodgson*, Lieutenant-Governor, with the Great Seal of the province of *Prince Edward Island* attached. It is contended that this deed is valid and effectual to transfer to the vendee named therein the land therein described, by force of two statutes of the province passed before the passing of the *B. N. A. Act, viz.*, 15 *Vic.*, c. 7, and 25 *Vic.*, c. 19, but it is obvious that upon the province being admitted into the Dominion under the provisions

1881

HOLMAN v. GREEN.

Gwynne, J.

of the *B. N. A. Act*, the executive authorities of the province under its new constitution could have no power, statutory or otherwise, to sell property placed for Dominion purposes under the supreme control of the Dominion parliament, and that the property in question is such property cannot admit of a doubt. The deed, therefore, under which the plaintiff claims is inoperative and void, and the non-suit was, therefore, right, and the appeal must be dismissed with costs It is a matter of no importance that the defendant has no right either to the land in question, or that his acts at the place in question are punishable under the provisions of the Dominion statute 37 *Vic.*, c. 34 and the orders in council issued thereunder. For the purpose of the present action it is sufficient to say that the plaintiff has no title to the land in question.

Appeal dismissed with costs.

Attorneys for appellants: *Davies & Sutherland.*

Attorneys for respondent: *Peters & Peter*

INDEX.

CAPIAS—*Affidavit—Art.* 798 *C. C. P.—Want of reasonable and probable cause—Damages.*]—*S.*, a debtor resident in *Ontario*, being on the eve of departure for a trip to *Europe*, passed through the city of *Montreal*, and while there refused to make a settlement of an overdue debt with his creditors, *McK. et a'.*, who had instituted legal proceedings in *Ontario* to recover their debt, which proceedings were still pending. *McK. et al.* thereupon caused him to be arrested, and *S.* paid the debt. Subsequently *S.* claimed damages from *McK. et al.* for the malicious issue and execution of the writ of *capias*. *McK. et al*, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent *McK.*, one of the defendants, for his belief that the appellant was about to leave the Province of *Canada* were as follows :—"That Mr. *P.*, the deponent's partner, was informed last night in *Toronto* by one *H.*, a broker, that the said *W. J. S.* was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and defendant was himself informed, this day, by *J. R.*, broker, of the said *W. J. S's* departure for *Europe* and other places" The appellant *S.* was carrying on business as wholesale grocer at *Toronto*, and was leaving with his son for the *Paris* Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew that he was only leaving for a trip ; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by *McK.*, that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that *S.* would not pay him, that he might get his money the best way he could." *Held :* that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors : and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question. SHAW *v.* MCKENZIE — — — 181

COMPANY—*Action for calls—Misrepresentation—Contract—Repudiation—Acquiescence by receipt of dividend.*]—The Stadacona Insurance Company incorporated in 1874 employed local agents to obtain subscriptions for stock in the district of *Quebec*, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, *F. X. C.*, intending to subscribe for five paid-up shares, paid $500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without *F. X. C's.* consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to *Quebec* and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé*), and the plaintiff received a check for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and notwithstanding *F. X. C's* repeated endeavors to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of $100 each alleged to have been subscribed by *F. X. C.* in the capital stock of the company. *Held*, (Sir *W. J. Ritchie*, C.J., *dubitante*) reversing the judgment of the court below, that the evidence showed the appellant never entered into a contract to take 50 shares, that the receipt given for a dividend of ten per cent. on the amount actually paid (*montant versé*), was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company. COTE *v.* STADACONA INS. CO. — — — — — — 193

CONTRACTOR, *Negligence of*—41 *Vic., chs.* 6 *and* 7 (*N.B.*)—*By-law of city of St. John, Building erected in violation of—Negligence of Contractor—Liability of Employer—Several defendants appearing by same attorney—Separate counsel at trial—Cross-appeal—Rent, loss of—Damages.*] On the 26th September, 1877, *S.* contracted to erect a proper and legal building for *W.* on his (*W.'s*) land, in the city of *St. John*. Two days after, a by-law of the city of *St. John*, under the Act of the Legislature, 41 *Vic.*, c. 6, "The *St. John* Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, *W.* reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, &c, &c. By the contract it was also declared that *W.* had engaged *B.* as superintendent of the erection—his duty being to enforce the condi-

FISHERIES, REGULATION AND PROTECTION OF—*Petition of Right—Fisheries Act*, 31 *Vic., cap.* 60 (*D.*)—*British North America Act*, 1867, *secs.* 91, 92 *and* 109—*License to fish in that part of the Miramichi River above Price's Bend—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing*]. On January 1st, 1874, the Minister of Marine and Fisheries of *Canada*, purporting to act under the powers conferred upon him by sec. 2, ch. 60, 31 Vic., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the *South West Miramichi* River in *New Brunswick* for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties:—"*Price's Bend* is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater greater part from this point upward, is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow." Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of *New Brunswick* having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred. By special case certain questions (which are given below) were submitted for the decision of the court, and the Exchequer Court held *inter alia* that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under sec. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" held, that the Minister could not

FISHERIES, &c.,—*Continued.*

lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river. The appellant thereupon appealed to the Supreme Court of *Canada* on the main question: whether or not an exclusive right of fishing did so exist. *Held*,—(affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries under the *British North America Act*, 1867, sec. 91, is in the Parliament of *Canada*, but that the license granted by the Minister of Marine and Fisheries of the *locus in quo* was void because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the *Miramichi* River flows. 2nd, That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in *Canada*, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium filum aquæ*. 3rd. That the rights of fishing in a river, such as is that part of the *Marimichi* from *Price's Bend* to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the *B. N. A. Act*, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority. 4th. Per *Ritchie*, C. J., and *Strong*, *Fournier* and *Henry*, JJ.—(reversing the judgment of the Exchequer Court on the 8th question submitted) that the ungranted lands in the Province of *New Brunswick* being in the Crown for the benefit of the people of *New Brunswick*, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal. THE QUEEN *v.* ROBERTSON — — — — — — — 52

HARBOR, PUBLIC—*Letters Patent under the Great Seal P. E. I. of foreshore in Summerside Harbor, void—B. N. A. Act, sec.* 108—*Public Harbor*—25 *Vic., ch.* 19]—*G.* (defendant) was in possession of a part of the foreshore of the harbor of *Summerside*, and had erected thereon a wharf or block at which vessels might unload. *H. et al.* (plaintiffs) brought an action of ejectment to recover possession of the said foreshore. *H. et al.'s* title consisted of letters patent under the Great Seal of *Prince Edward Island*, dated 30th August, 1877, by which the crown in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, 25 *Vic.*, ch. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action. *Held*, that under sec. 108 *B. N. A. Act*,